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European Constitutional Identity?

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## **Abstract**

The language of common European constitutional identity is distinguishable from that of common European constitutional traditions in that the former does not focus so centrally on the past, and is independent of the legal doctrinal language of the EU law. When discussing constitutional identity, there are, in particular, the following four questions which deserve to be addressed: (1) What are we doing when we are “constructing” the European constitutional identity; what are the features of the interpretation leading to such a construction? (2) What values/ideals/principles are a part of our constitutional identity? (3) How does European constitutional identity relate to the specific constitutional identities of European nation-states? (4) What is the relationship between the discourse about political integration within the EU and the existence of European CI, as separate from, and paramount to, identities of member states? On that last issue it is submitted that there is no simple connection between ascertaining the dominant identity at a particular level and the implications for the division of authority between the European and national levels within the EU.

## **Keywords**

European identity; democracy; minorities; human rights; constitutionalism



# *European Constitutional Identity?*

Wojciech Sadurski\*

## **1. Introduction**

In his recent, monumental *Postwar* Tony Judt notes that the outer boundaries of Europe have been constituted not as frontiers but as indeterminate boundary-regions, and that for peoples inhabiting those regions the claim of belonging to Europe “[o]ver the centuries ... came increasingly to serve as a source of collective identity. Being a ‘border-state’, an exemplar and guardian of the core values of European civilization, was a source of vulnerability but also pride...”. Judt goes on: “Europe, then, is not so much about *absolute* geography – where a country or a people actually are – as *relative* geography: where they sit in relation to others”.<sup>1</sup>

I use Judt as my starting point: Europe’s identity is constituted by its “core values”, and these are formed in relations with others who, apparently, don’t share these values. Or so we (i.e. we who interpret the European identity) think. My concern, however, is not with the European identity as such but, more specifically, with its *constitutional* identity. What constitutional identity is, and how it is being constructed, will come through in this paper, I hope. But the reference to Judt, and his understanding of identity as constituted through shared values, immediately suggests that I understand the “constitutional” in “constitutional identity” broadly: not as emerging from the study of the actual textual constitutions being in force in European states but rather as the set of values, principles and guidelines which define “meta-politics”, that is, the actually observed and enforced constraints within which day-to-day politics must take place. It is a *politique politisante*, to use an old fashioned term, where this understanding of the constitution only partly overlaps with what can be read from, or into, the actual constitutional documents that are currently in place in various European states.

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<sup>1</sup> Tony Judt, *Postwar: A History of Europe Since 1945* (Penguin 2005) at 753.

Constitutionalism, in other words, is a set of norms and values which defines the framework within which collective actions of the society occur. It is therefore neither identical to the constitutional texts (for constitutionalism is about the actually respected and enforced frameworks for actions) nor with actual political opinions (because our opinions are not always identical with the views about the constraints upon those opinions; this is a distinction between first-order and second-order views, and constitutionalism is clearly about second-order political precepts).

This is a good starting point for discussions about European constitutional identity (CI). There are, in particular, the following four questions which deserve to be addressed: (1) What are we doing when we are “constructing” the European CI; what are the features of the interpretation leading to such a construction? (2) What values/ideals/principles are a part of our CI? (3) How does European CI relate to the specific constitutional identities of European nation-states? (4) What is the relationship between the discourse about political integration within the EU and the existence of European CI, as separate from, and paramount to, identities of member states. But first, the concept of constitutional identity needs to be clarified.

## **2. Constitutional *traditions* and constitutional *identities***

We may begin by referring to a concept which is contiguous to that of identity, namely, of European constitutional tradition(s). To begin with, it is necessary to note that this concept, or that of the “constitutional tradition common to the members states” of the European Union is a term of art, and has been included both in the foundational documents of the EU and in the jurisprudence of the ECJ, understood as one of the sources of law. In particular, Art. 6.2 of TEU states that “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Similarly, the EU Charter of Fundamental Rights reaffirms, in its Preamble, the rights that, in particular, result from “the constitutional traditions and international obligations common to the Member States”.

The main thrust of scholarly investigations of the concept of constitutional traditions is addressed to the question of a legal status of such traditions. The question raised in this context usually concerns whether these traditions can be properly considered a “source of law” in the EU legal system, and if so, in what sense they constitute such a source. One particularly serious and sophisticated example of such a reflection is provided by Alessandro Pizzorusso.<sup>2</sup> The main thesis of Pizzorusso is that these “traditions” are sources of the general principles of Community law, and that they have been recognized as such in particular by the ECJ. As Pizzorusso says: “the development of

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<sup>2</sup> Alessandro Pizzorusso, “Common Constitutional Traditions as Constitutional Law of Europe?”, paper presented at the conference “The Emerging Constitution of the European Union”, EUI, Florence, 19-20 April 2002 [referred to as Pizzorusso, “Common Constitutional Traditions”], and Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino: Bologna 2002) [referred to as Pizzorusso, *Il patrimonio*], especially chapters IV and IV.

the general principles of Community law achieved by the [Court of Justice] jurisprudence on the bases of common constitutional traditions seems to be able to operate independently of the parallel development of rights based on treaties”.<sup>3</sup>

It would, admittedly, be pedantic to query whether these common traditions are sources of the law themselves, or are only the bases of principles which are the proper sources of the law. What is important is that these tradition-based principles play an equivalent role to that of (unwritten) principles of any national constitutional system.

Through this perspective, it is clear that the inclusion of the notion of constitutional traditions into the Maastricht Treaty did not “create” it a new source of law but merely confirmed the pre-existent situation. For Pizzorusso, this recognition connects with the idea of a European constitution in the following way: the only part of the European law that does not stem directly from an agreement between the states [therefore, is not characterized by heteronomy] is the law developed by the ECJ.<sup>4</sup> In the jurisprudence of the ECJ the appeal to common constitutional traditions plays a particularly important role (the argument goes); hence, if we can talk about a European constitution today, then it can be done best by reference to common constitutional traditions of the member States. This renders the unwritten constitution of the EU somewhat analogical to the British unwritten constitution.<sup>5</sup>

This is an attractive argument which is not negated by the fact that the ECJ, upon which the argument just summarized relies so heavily, usually uses a more careful language about the status of common constitutional traditions; namely, it typically says that it “draws inspiration” from the constitutional traditions common to the Member States.<sup>6</sup> “To draw an inspiration from X” is not the same as to consider X as the source of law.

Be that as it may, my concern is with a somewhat different, and conceptually antecedent, question; namely: what is the nature of the very aspiration to identify constitutional traditions common to a certain group of countries? How do we go about it? How do we know whether something - an institution, a piece of constitutional design, a pattern of attitudes - does or does not belong to a common constitutional tradition? What are the unstated implications of a talk about common constitutional traditions? In sum, while the main thrust of scholarly discussion has concentrated on “the constitutional” in the concept of “Constitutional Traditions”, my focus here is on the word “tradition”, and on the adjective “common”. What is a “tradition”, and to whom is it “common”? – is the starting point of my analysis.

In going about addressing those questions, one should resist two opposite temptations. The first temptation is of a selective, stipulative description of the “tradition”. Such accounts, informed as they are by explicit normative considerations, are inevitably restrictive and result in evident under-inclusion. To be sure, no account of a “tradition” (as I will argue in a moment) can be value-free and devoid of normative considerations; if we, however, become too selective and restrictive in admitting an important pattern into the category of “traditions”, the descriptive value of using the term “common

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<sup>3</sup> Pizzorusso, “Common Constitutional Traditions” at 5.

<sup>4</sup> Pizzorusso, *Il patrimonio* at 181-83.

<sup>5</sup> Pizzorusso, “Common Constitutional Traditions” at 15.

<sup>6</sup> See, e.g., *Nold* decision of the ECJ of 14 May 1974.

constitutional traditions” dramatically diminishes. A contrasting temptation to be resisted is that of an all-inclusive description which, by necessity, can be stated only so vaguely that it becomes a nearly meaningless platitude. If, for example, we take the formula used in Art. 6.1 of TEU: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” as a sufficient set of criteria of common constitutional traditions, then we deprive ourselves of the opportunity of using the concept in any discriminating fashion which might help us in draw some meaningful boundaries between the “traditions” which do, and those that do not, belong to the family of common constitutional traditions. To be sure, there will be still certain “traditions” which will find themselves beyond the pale of even so vaguely described set, but a number of traditions will be captured which are not part of the common constitutional traditions of member states of the Union. The problem therefore is: How to escape the Scilla of undue selectivity and the Charybdis of vague generality?

An important step toward addressing this question is by realizing what a “constitutional tradition” is, or more specifically, what sort of exercise we engage in when we are attempting to ascertain a particular “CT”. What is the *point* of identification of a tradition? “Tradition” belongs to the same category of concepts as “patrimony”, “heritage”, “legacy” or “inheritance”. It is, obviously, about the past, but not *merely* about the “past”. The very fact that a particular scheme, design or institution existed in the past does not make it a tradition; it might have disappeared without trace, or we may think of it as a matter regarding the past with no particular relevance to the present. Rather, a discourse about tradition is about the presence of the past today, or the hold of the past over the presence.

As Martin Krygier has helpfully suggested, we use the language of a (legal) tradition when we attempt to describe how legal past is relevant to the legal present.<sup>7</sup> It is about the power of the past-in-the-present. Krygier goes on by identifying three indicia of such past-in-the-present. First, a subject of tradition is drawn from a real or imagined past; and not just drawn in any context, but in a context in which the past is thought to be significant to the present; hence, a tradition requires an institutionalized past-maintenance. Second, the hold of the past over the present is authoritative: it is not a mere description of what elements of the past are incrustated into our modern world but in a presence-talk the past is treated as significant. It has a normative force. Institutionalized traditions, Krygier says, “give the past-in-the-present power over those who think and act in the present”.<sup>8</sup> Third, there is a factor of transmission of the past into the present: the past is not dug out from the profound layers of history but passed on to us from an immediate predecessor era; hence, there is a real or imagined continuity between past and present. There are various ways of handing-over traditions: some more institutionalized than others, but a degree of a (real or imagined) continuity is essential for the link between the past and present in any “tradition” properly so-

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<sup>7</sup> Martin Krygier, “Law as Tradition”, *Law and Philosophy* 5 (1986): 237-62. Krygier has developed this idea in a number of articles, including also in “Traditionality of Statutes”, *Ratio Juris* 1 (1988): 20-39; “Tipologia della tradizione”, *Intersezioni: Rivista di storia delle idee* 5 (1985): 221-49; and “Thinking Like a Lawyer”, in Wojciech Sadurski, ed., *Ethical Dimensions of Legal Theory* (Rodopi: Amsterdam 1991): 67-90.

<sup>8</sup> Martin Krygier, “Law as Tradition”, *Law and Philosophy* 5 (1986): 237-62 at 242.

called. Some traditions establish a highly exclusivist conventions about the transmissions of traditions and about the persons and institutions whose judgments as to what counts as a tradition are conclusive. But whatever the degree of institutionalization, traditions, as Krygier says (and, in particular, legal traditions) are characterized by “a dialectical interplay between inherited layers which pervade and – often unrecognized – mould the present, and the constant renewals and reshaping of these inheritances, in which authorized interpreters and guardians of the tradition as well as lay participants indulge, and must indulge”.<sup>9</sup>

This immediately indicates that ascertaining a tradition is always a matter of reconstruction (of what we make of the past), for, as Krygier emphasizes, “the past is not univocal in complex traditions”.<sup>10</sup> And we “reconstruct” it for some purposes. Hence, these purposes guide our efforts, and making them clear may help us avoid the twin dangers of selectivity and platitude. Using the language of tradition is necessarily a pragmatic exercise: it is done for some purposes, and these purposes inform the shape of a tradition that we are reconstructing.

EU constitutional law scholars have an implicit, and often made explicit, purpose guiding them in identifying the European constitutional tradition: it is the status of this concept as part of the construction of European constitutional norms. This is a characteristically legal purpose which replicates that of legal advisors and advocates: its ultimate pragmatic goal is of advising the authoritative institutions about what are the sources of law in a given constitutional system. Using a terminology recently, and helpfully, suggested by Ronald Dworkin, it is a “doctrinal” use of the legal concept: the use which is ultimately directed towards identifying what counts as a valid legal rule within a particular legal system, and what does not; it is “an account of the truth conditions of propositions of law”<sup>11</sup>. The “doctrinal” claims are about “what the law requires or prohibits or permits or creates”, and, Dworkin adds, “we share a great many assumptions about the kinds of argument that are relevant in defending such claims and also about the consequences that follow when such claims are true”.<sup>12</sup> The bottom-line is, of course, that such doctrinal claims or propositions “have implications for the exercise of power”.<sup>13</sup> The reason for fixing upon the concept is because, as I have indicated above, it has become a term of art, and plays a role in the EU law as one of the sources of law. Once we ascertain the purpose of reconstructing the tradition in this fashion, we should make it clear what the ambit (the scope) of this tradition is: the institutional purpose of ascertaining a tradition informs the institutional bounds of the tradition.

Incidentally, it should be added that, contrary to the “plain meaning” of the words, in the present context it is not really about the “European” tradition but rather about the EU-related tradition. We can naturally adopt the terminological convention whereby

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<sup>9</sup> Martin Krygier, “Thinking Like a Lawyer”, in Wojciech Sadurski, ed., *Ethical Dimensions of Legal Theory* (Rodopi: Amsterdam 1991): 67-90 at 68, emphasis in original.

<sup>10</sup> Krygier, “Law as Tradition”, *Law and Philosophy* 5 (1986): 237-62 at 242.

<sup>11</sup> Ronald Dworkin, *Justice in Robes* (Harvard University Press: Cambridge Mass. 2006) at 230.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 19.

“European” means “EU member states”.<sup>14</sup> This convention, to be sure, is justifiably irritating to non-EU member-states Europeans. It is, alas, quite well entrenched in the EU-centered discourse, and can be often found in EU documents (including in the Charter of Fundamental Rights preamble, where “the peoples of Europe” are used interchangeably with “the Member States”). Thus, for example, the extremely rich and complex Swiss legal tradition (think of the Swiss contribution to our constitutional thinking about federalism or about direct democracy) is simply not included as a European constitutional tradition! The point of this parenthesis is therefore to highlight that we should keep in mind what the “European” descriptor is a shorthand term for.

In addition, we must be conscious of the fact that ascertaining a constitutional tradition is, more often than not, an exercise in glorification and celebration of the constitutional past. When we talk about our constitutional tradition (no matter who the “we” is), we hasten to discard those ingredients of the “tradition” which we find useless, embarrassing or distasteful. When we talk, self-congratulatingly about the European constitutional tradition, we usually screen off the constitutional contribution of a Mussolini or a Salazar, regardless of the undoubted European pedigree of both. The past speaks to us in many voices but we select only those which resonate with our current values and preferences.

The discussion of common constitutional traditions is helpful for elucidating the argument about European constitutional *identity*. It is helpful in two ways: both by allowing us to draw some positive lessons for the interpretation of constitutional identity, and also by showing why the concept of constitutional traditions is *not* useful in some context, and should be replaced by a concept such as identity. To begin with a negative point: there are two basic reasons why the concept of traditions is of a limited use, and should be used sparingly. First, and most important, as I have insisted before, the concept of European constitutional traditions (or traditions common for the EU member states) became a technical legal term: a term of art. It is used in the “doctrinal” context (in the Dworkinian sense of the word), as directly related to identifying the sources of valid law within the EU; and it became strictly related to the EU legal system. European traditions became identified, whether we like it or not, with the traditions common to the EU member states. But there are contexts in which we are not guided by any “doctrinal” purposes (that is, when we do not aim at identifying the valid law for practical purposes of knowing whether a particular action is or is not within the law) but rather by purely cognitive purposes: we want to *know*, not in conjunction with the process of applying, enforcing, obeying, advocating the law reform etc. Further, we may be interested in the European legal phenomena transcending the EU: we may wish to say something about the legal phenomena which (as we may claim) pertain also to the Swiss, or Norwegian, or Ukrainian, or Croatian etc law. We want therefore a concept which has not acquired any canonical meaning, as a technical legal notion, as the European legal traditions have definitely become.

Second, the understanding of legal traditions is strongly linked to the past. I have insisted earlier that one should not understand “tradition” simplistically, as belonging

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<sup>14</sup> This is explicitly admitted by Pizzorusso who states that, for the purposes of EU Treaty law, the term “common to the member states [of the EU]” is “grosso modo equivalente al termine ‘europeo’”, Pizzorusso, *Il patrimonio* at 31.

squarely in the past, but rather as the transmission of the past (imagined, interpreted, reconstructed, etc) into the presence. But one must not protest too much: the “pastness” is an essential, although not the only, ingredient of a tradition, including a legal tradition. This is nicely indicated, for example, by a statement of Alessandro Pizzorusso who, when discussing the status of the appeals to European constitutional traditions says: “in order to identify a meaning [of European constitutional traditions] that is fully acceptable for the adjective ‘constitutional’, it is necessary to go back to the history of constitutions and mainly to the development of this notion in relation to the matters that led to the formation of the ‘modern state’ and its development over the last four centuries”.<sup>15</sup> But we may like to pronounce generalizations about constitutional reality in Europe which does not necessarily send us back into the past. This is not to say, of course, that we can disregard the past: we cannot. But we may have a heuristic, cognitive intention which is relatively past-independent, and the use of the term “tradition” unhelpfully brings the past into the centre of our argument.

These are the *negative* arguments, suggesting dropping the notion of European constitutional tradition, in some contexts at least. But there are some *positive* arguments as well: there are the lessons to learn from dissecting the notion of European traditions, which we may usefully apply to our considerations of European constitutional identity. In other words, the usefulness of bringing up the concept of tradition in this paper so far is that it points us to the characteristics of “reconstructing” a tradition. They apply to reconstructing the identity as well.

So, echoing an earlier question: what exactly are we doing when we are constructing our collective identity? Two things can be retained from our discussion about common traditions. First, we are always and inescapably selective. We emphasize some common features and disregard others. Second, we are usually doing it with a self-congratulatory intention. This is not a matter of hypocrisy or self-deception (not necessarily, at least), but a normal attribute of any interpretation, and most specifically: self-interpretation, where interpretation is understood as the presentation of certain from of reality in the best possible light; making it the best it can be (in analogy to literary interpretation). Just as in identifying the tradition it is also the case of the common identity: it is an exercise in glorification/celebration of the constitutional past; hence we discard those ingredients of the “identity” which we find useless or dangerous.

There is also a third point which I wish to stress, and which has not been all that clear in the discussion of the common tradition, and that is that our collective identity is described by reference to *other* collective identities. In fact, it is created by contrast to them. We contrast the European Constitutional Identity with different identities. It is only when we are satisfied that, in confrontation with other constitutional identities, there is more commonality within the European Constitutional Identity than between some ingredients of European Constitutional Identity and other constitutional identities, only then can we meaningfully talk about European Constitutional Identity as a “*bloc de constitutionnalité*” of certain inner coherence.

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<sup>15</sup> Pizzorusso, “Common Constitutional Traditions” at 6.

In such an exercise, the choice of units which serve as a contrasting background – as the European constitutional identities by reference to which we test the coherence, or otherwise, of Constitutional Identity – is crucial. It is important that the comparison be *meaningful*, that we choose those constitutional identities which heavily interact with European Constitutional Identity, otherwise, the “confrontation” is purely academic. In this context it is useful to recall a distinction drawn by a recently deceased British philosopher Bernard Williams between “real” and “notional” confrontation: A confrontation is “real” rather than merely notional when an outlook of another group is a real option for us.<sup>16</sup> This means that becoming *like them* is reasonably plausible or feasible. It is not just comparing ourselves to a culture or an identity which we, in real life, cannot resemble anyway, but rather we are confronting a culture with a practical implication behind it. It is not unthinkable that we can become *like them*. We can, but do we want to? This way of putting the question presses upon us the practical nature of our comparison (or “confrontation”, in Williams’ words), as opposed to when our comparison is innocent of any practical possibilities. In this latter, purely notional, sense we may “compare” ourselves with, say, Japanese or African constitutionalism: these comparisons are interesting, no doubt, but at the academic (or heuristic) level not in any practically meaningful sense. The comparison with the US constitutionalism, in contrast, is “real” rather than merely “notional”. For historical reasons, European Constitutional Identity defines itself mainly by reference to the US. American model – social, political and constitutional model – is the most attractive and at the same time feasible model, alternative vis-à-vis the European one. When we define our identity by reference to another one, we choose the model which it is realistic to believe that we could adopt rather than the one which is most certainly unsuitable for such an adoption. Hence, the contrasting background by reference to which we construct our CI is the American constitutionalism. This is partly due to the attractiveness and vitality of the American model, and therefore the whole approach should not be seen as an instance of anti-Americanism. In addition, it should be added that this contrasting approach is taken on both sides of the Atlantic: Not only do many Europeans perceive their collective identity by reference to the US but also many Americans view the European identity from the perspective of contrasting these two models.

### **3. European constitutional identity: the universal and the particular ingredients**

When reflecting upon European Constitutional Identity it is important to try to distinguish between these values which, although originally European, are now considered universal and can be detected in a number of constitutional systems. Their “European-ness” only applies to their pedigree, not to their current sphere of influence and application. Indeed, the very idea of universal values may be considered a European idea in its origins: it is in Europe that the existence of some absolute, universal and incontrovertible values applying to any human society was born. And while we may disagree about a specific catalogue of such values, the aspiration of universalism is undoubtedly ascribable to specifically European thought, be it its religious, Judeo-Christian variations, or in its Enlightenment, rationalist project.

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<sup>16</sup> Bernard Williams, “The Truth in Relativism”, *Proceedings of the Aristotelian Society* 75 (1974-75): 215-28.

Here is an attempt to draw a list of such fundamental values, originating from Europe but affecting constitutionalist ideas throughout the world. First, the recognition of a **fundamental role of the reason in public life**, and the associated ideas that social order is cognizable and alterable through deliberate, human action. The latter idea, more properly described as rationalist constructivism (which, as we remember, was a pejorative label used by Friedrich Hayek to describe and denounce those who attempt to transform social relations according to a preconceived plan) is indeed a necessary presupposition of the very idea of constitutionalism: of drawing up a set of rules which should regulate the interactions between the governing and the governed (and, in more ambitious versions labeled sometimes as horizontal constitutionalism, among the governed themselves). If we believe, on the contrary, that social relations are an expression of transcendental ideas, above and beyond the capacity of the human mind to ascertain and affect, no constitution is possible, unless it is a pale version of constitutions as we know them, limited to the registration of those transcendental conceptions in the language intelligible to simple humans. Constitutionalism is born from an audacious ambition to first understand and second affect and alter, in a rational fashion, social relations and in particular the relations of power.

This feature can be usefully illuminated, in the constitutional context, by the concept of “public reason”, and the way it is used to emphasize the rationalist-constructivist conception outlined in the previous paragraph. This is encapsulated in the oft-quoted principle formulated by John Rawls in his *Political Liberalism*: ‘Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason’<sup>17</sup> Another way of expressing the same thought, that is, the “endorseability by all” thesis, can be found in Habermas’s suggestion of how individual interests may appear in the public deliberations: “In practical discourses, only those interests ‘count’ for the outcome that are presented as intersubjectively recognized values and hence are *candidates* for inclusion in the semantic content of valid norms”. Habermas concludes: “Only *generalizable* value-orientations, which all participants (and all those affected) can accept with good reasons as appropriate for regulating the subject matter at hand ... pass this threshold”.<sup>18</sup> The implication is clear: some arguments, even if actually present in the minds of legislators or policy-makers, are not qualified to figure in the public defence of a law; the law must be defensible in terms that belong to a ‘forum of principle’ rather than an arena of political bargains and plays of naked interest.

It is worth noting, en passant, an important ambiguity in this principle. The conception of “public reason”, as developed by Rawls, has two distinct meanings. The first meaning is emphasized by the already quoted “equal endorseability by all” criterion; the second, can be read into Rawls’s distinction between political and comprehensive

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<sup>17</sup> John Rawls, *Political Liberalism* (Columbia University Press: New York, 1993) at 137. A broader wording of ‘the ideal expressed by the principle of legitimacy’ is: ‘to live politically with others in the light of reasons all might reasonably be expected to endorse’, *ibid* at 243. For yet another statement of the liberal principle of legitimacy see *ibid.* at 217.

<sup>18</sup> Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (MIT Press: Cambridge Mass. 1998) at 81, both emphases in original.

conceptions, with the proviso that public reason must safely place itself within the former. As to the first understanding, Ronald Dworkin has expressed doubts whether public reason, so understood (in Dworkin's interpretation it is characterized as the "doctrine of reciprocity"), *excludes* anything at all. As Dworkin argues: "If I believe that a particular controversial moral position is plainly right ... then how can I not believe that other people in my community can reasonably accept the same view, whether or not it is likely that they will accept it?"<sup>19</sup> But the effectiveness of this objection is not obvious. In fact, I may well believe that my moral position is plainly right, but *under an impartial observer's perspective* (which is crucial here, when making a judgment about the public reason status of a given position) my moral position may be fatally unqualified to being acceptable to all: if, for instance, my moral position (which I still believe plainly right) is based on the religious views not shared by all, or if it assumes unequal moral standing of all. In fact, Dworkin further concedes that moral positions based on religious convictions are such that not everybody has a reason to embrace them, and yet he maintains that "Rawls offers no reason to think that the test of reciprocity excludes any reasonable convictions *beyond religious convictions*".<sup>20</sup> Now *this*, in itself, would be a significant use of public reason (and a significant demonstration that public reason requirement does exclude many moral positions) but there is surely more to it, namely those positions which, under an impartial observer's test, deny some groups and categories equal moral standing at the outset.

The second formulation of public reason in Rawls is, however, more problematic. This is a requirement of locating public reason within the arguments that can be properly considered "political" (hence, capable of being positioned within an overlapping consensus) as opposed to comprehensive. I do not wish to rehearse the arguments objecting to the exclusion of comprehensive moral conceptions from the public discourse, and deploring the inevitable impoverishment of the public discourse resulting from such an exclusion, as well as the blatant lack of realism revealed by such a directive. What I do want to observe, however, is that there is no necessary equivalence between the first and the second formulations of public reason: it is not the case that only narrow, non-comprehensive moral conceptions can be reasonably acceptable to all. Public reason in its first formulation seems to be broader and more ecumenical than in the second, and the test of reasonable endorseability by all (the first formulation) need not go as far as to disqualify all arguments appealing to comprehensive moral views from the discourse about the legitimate law. To be sure, this broader or more ecumenical (and at the same time, more realistic) character of public reason is conditional upon our understanding that what matters is a hypothetical endorsement rather than the actual one, and the adoption of an impartial observer perspective. So in the end there is an inevitable tension, in the public reason conception, between the hypothetical and real endorsement by all citizens.

The second ingredient of European constitutional identity which acquired a universal status is the idea of **individual liberty** as the paramount substantive principle regulating the relationship between individuals. This translates into the principle that an adult and

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<sup>19</sup> Dworkin, *Justice in Robes*, supra note 11, at 252.

<sup>20</sup> *Id.* at 253, emphasis added.

mentally competent individual should be “sovereign” in this sphere which concern only or primarily her, and which do not affect anyone adversely in a way contrary to the third persons’ legitimate rights and expectations. European thought wrestled for centuries with the proper delimitation of this sphere left for the autonomous decisions of an individual – in its most prominent manifestations, trying to describe this sphere as the one within which the individual decisions do not harm anyone else, or when harm is at best (or, rather, at worst) only indirect and secondary – and with the identification of the criteria according to which the “externalities” (as we would today say) affect our legitimate interests and expectations and can justify an interference with the agent’s activities. But the harm principle is anything but clear. What constitutes “harm” is a matter of considerable controversy: should, for instance, and emotional harm to other persons count or should we try to restrict the operation of the harm principle to a tangible, physical or material harm only. If we choose the latter solution, are we not adopting, by a definitional fiat, an unduly restrictive notion of harm, as a result of which the scope for intervention in human action will become counter-intuitively narrow? If, however, we opt for a former solution, aren’t we undermining the very rationale of adopting the harm principle in the first place, which was to make an individual sphere of autonomy independent of the moral judgment of other persons about the appropriateness, or otherwise, of one’s behavior? No doubt, the dilemma reflects the deep internal complexities of the very idea of individual freedom within a political community, and a hope that we can draw the line for individual autonomy in a way which is “neutral” towards substantive conceptions of the good remains chimerical. Still, regardless of where, and what grounds, we decide to draw this line, the very idea that individuals should have an ample, and robustly protected, sphere of thought and action immune to interference from others is a powerful and immensely attractive European idea with universal scope.

Third, the idea of **toleration**, of respect for the Other and of not using moral disapproval with another person’s conceptions, lifestyle or ideas as a sufficient ground for suppression of these conceptions, lifestyles or ideas. This concretizes the idea of human autonomy by explaining that there must be a distinction between the ideas of the morally good or bad and of a legal right or wrong; that the very fact of disapproval is not a good reason to prohibit, and the very fact of moral approval not a sufficient reason to impose our conceptions on others. The rationale for such a dualism between the “good” and the “right” (to use Rawls’s language) are different for various philosophies of justice. They may have something to do with our epistemic limitations, with moral skepticism and with the recognition of individual dignity of “the Other”, with the epistemic or moral benefits of the circulation of a large variety of moral conceptions in the public domain, etc. In fact, much of the debate on the ideal of toleration in the European tradition has centered around the various rationales of the very idea of toleration. For, superficially, toleration is a difficult and perhaps a paradoxical virtue: it calls on us to abstain from restraining what we disapprove of. (It is *then* when the toleration enters the stage: there is no point to talk about tolerance of what we endorse). The path of referring to a form of moral agnosticism (such as, the perspective of moral relativism) has been singularly unsuccessful. After all, if all the values are relative, then this would also contaminate the very attitude of toleration itself. The strategy of connecting toleration with a person’s dignity, that we may not agree with but acknowledge that this person has a right to pursue her way of life and moral convictions,

has been much more popular, and taking into account the fact that, in European tradition, the natural home for the general idea of toleration was in the religious toleration, the links between toleration and dignity has been indisputable. Finally, there have been those who derived the idea of toleration from the moral and cognitive advantages of plurality of perspectives (necessitated by a generalized attitude of toleration) to the community as a whole, including those who are the agents asked to tolerate those whom they disapprove of. But whatever the rationale, the idea that our relations with those whom we disagree should be controlled by the principle of toleration (not an absolute principle, to be sure, but of reasonably high stringency) is a powerful and universally recognizable idea.

Fourth, the idea of **democracy** based on the sense that individual self-rule translates in the collective life of a society into the principle of majority rule. In the situation of the inevitable conflict of interests, values and preferences, the views of majority, as long as they are positioned within the constraints of respect for fundamental rights of those who disagree with the majority on a given issue, are to be taken as those of the community as a whole: when emerging from a constitutionally recognized procedures for the forming and articulating social preferences, the views of majority are seen as legitimate expression of the community's views with which the outvoted should comply and recognize them as their own. Of course, the tension indicated in this formulation immediately indicates a variety of democratic theories which try, in different ways to capture and solve the tension between the overall respect to majority rule and the observance of individual rights that no majority can breach. Three main versions of such theories may be distinguished in particular: a radical-majoritarian theory which identifies (with an obvious inspiration from Rousseau) the articulation of the common good by the majority as the best approximation of the "general will"; a liberal-constitutional theory where the strict limits upon the rule of the majority represent a sort of collective self-restraint (or pre-commitment) by the society; and a deliberative theory where the emphasis is on the dialogue and mutual persuasion by proponents of opposed views with an attempt to base common policies on the best reasons for action as emerging from the societal deliberation on the common good. But no matter which of these (or many other) interpretations of the democratic ideal are chosen, the very idea that ultimately it is the society as a whole (and, in the absence of consensus, its majority) rather than an elite, a ruler or a transcendental authority which defines authoritatively adopted rules of common action (or, at least, that those common rules must be derived, in a minimally credible way, from the majority of the adult population) is an unquestionably European idea of universal importance – indeed, of the effect so universal that even those regimes, both European and non-European, which blatantly violate democratic rules at the very least pay lip service to democracy in its official rhetoric. It is significant that virtually all the authoritarian or totalitarian systems after the 2<sup>nd</sup> World War, at least those belonging to the Soviet camp, defined themselves as "democracies" (with some adjectives, usually "popular" or "People's"; and as John Dunn has observed in his recent remarkable book on the history of the idea of democracy, "[w]hat made the term democracy so salient across the world was the long post-war struggle against the Soviet Union and its allies. ... [I]t came increasingly to be a quarrel ... over the political ownership of the term democracy".<sup>21</sup>

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<sup>21</sup> John Dunn, *Setting the People Free: The Story of Democracy* (Atlantic Books: London, 2005) at 158.

Naturally, each of these four European-universal ideas: of public reason, of individual liberty, of tolerance and of democracy, would now have to be subjected to all sorts of qualifications, caveats and concretizations in order to resemble anything like an ideal recognizable to us in its actual manifestations, and in particular, in its actual constitutional articulations. But this is not the point of the argument here, and it seems that, at least as articulated at that level of abstraction and generality, these four ideas can be recognized as broadly accepted, universal and with an unquestionable European pedigree. We cannot end at that, however: what is more interesting – and much more difficult – is to try to articulate such ideas which are specifically European and which have not reached anything like a universal standing. In other words, the real aim when trying to capture the syndrome which constitutes the European Constitutional Identity we should try to identify (in accordance with the earlier methodological suggestions) the set of constitutional values which distinguish the European identity from the others, and in particular from the American constitutional identity.

The first and foremost feature of European constitutional identity which distinguishes it from the American one is a much more favorable approach to **positive functions of the state**: the state is treated not only as the source of threats but also as a device for protecting citizens against various misfortunes and reducing the extreme inequalities resulting from the market. Hence, in so many European constitutions there are not merely the typically liberal, or ‘negative’, liberties but also socio-economic rights, either formulated as individual entitlements or as the mandatory goals of the governmental policies. By contrast the United States the Constitution is treated as a shield for protecting citizens against arbitrary state authority while in Europe it is treated also as a basis of claims from the citizens towards the state. One of the most famous, and most interesting, classical American books in constitutional theory was aptly entitled: *Democracy and Distrust*, by John Hart Ely.<sup>22</sup> This title accurately represents the main purpose which, according to the American tradition, the constitution was meant to serve, namely to check and control the government, and to make it exceedingly costly for the government to invade individual liberties. But distrust is a costly strategy in itself: if the main effort in constitutional processes is oriented towards disabling the government from violation of individual values, something can be lost in the implementation of strategies aimed at enabling the affirmative interventions of the government. And these affirmative interventions, aimed at providing equal educational and professional opportunities, or at eradicating various forms of discrimination, or at assistance to those finding themselves in utter poverty, have been at the center of the European approaches to the functions of the constitutional government, no less, and perhaps more, than the strategies of paralyzing the government before it loses control. These European traditions have deep historical roots: Hannah Arendt had famously contrasted the American political revolution to the French social revolution. Also Jürgen Habermas has wisely observed that while the main purpose of the US Revolution was to liberate spontaneous social forces, in accordance with a natural law, against the arbitrariness of colonial powers, the French Revolution was triggered by the motivation to cure a deeply sick, pathological society. Most characteristically, this difference in attitudes toward the state is reflected in the differing approaches to the place of socio-economic rights in constitutions on both sides

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<sup>22</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press: Cambridge, Massachusetts, 1980).

of the Atlantic. The drafters of the Western European constitutions, in contrast to the US model of constitutionalism, included these types of rights alongside civil and political ones. (The distinction is sometimes presented as that between positive and negative rights but it is not correct: some civil and political rights may require positive state action while some socio-economic rights may demand state non-interference with individual action). These constitutions, the majority of which originated in the post-World War Two wave of constitution-making (or, as was the case of Spain and Portugal, from the fall of authoritarian regimes well after the War), elevated the then dominant model of Welfare State into a constitutional structure. Hence, almost all of the Western European constitutions, with the partial exception of Scandinavian states<sup>23</sup> proclaimed the general principle of the Social State<sup>24</sup> or enumerated broad catalogues of socio-economic rights<sup>25</sup> or did both.<sup>26</sup> In addition, the predilection of European constitutionalism for dispensing broad socio-economic rights (often interspersed with descriptions of the goals of the state in the field of socio-economic policy) is visible in the most recent wave of constitution-making: in the constitutions of post-communist states of Central and Eastern Europe<sup>27</sup> and in the Charter of Fundamental Rights of the EU. The Charter proclaims a number of social rights, grouped mainly in Chapter IV (“Solidarity”), with a few listed in Chapter II (“Freedoms”) and III (“Equality”). Some of them are formulated in a categorical fashion suggesting that they impose strict conditions upon the lower laws, and that all EU and national laws must comply with them. These include rights to education (including to free compulsory education); rights of children to protection and care, to express their views freely, and to maintain contact with both parents; freedom to choose an occupation and the right to engage in work; maternity-related rights (against dismissal and to paid maternity and parental leave), etc. This approach contrasts starkly with the constitutional tradition of the United States where all attempts to read welfare rights into the Constitution have been consistently and emphatically resisted by the Supreme Court.<sup>28</sup> In the oft-quoted words of Judge Richard A. Posner the official interpretation of the Bill of Rights is of “a charter of negative rather than positive liberties” motivated not by the concern “that government might do too little for the people but that it might do too much to them.”<sup>29</sup> Decidedly, the concern that the governments “might do too little” featured prominently in the minds of the drafters of European constitutions.

It is important to emphasize that the reasons for the rejection of the idea of constitutional welfare rights are *not* necessarily grounded on a rejection of welfare policies. Some of the countries with the most developed and generous welfare policies have no constitutional social rights: the Scandinavian countries, and also Australia and New Zealand belong to this category. Practice around the world shows that there is no

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<sup>23</sup> With the partial exception of Scandinavian states.

<sup>24</sup> E.g. German Constitution, art. 20.

<sup>25</sup> See, e.g., Constitutions of Belgium, Ireland, Italy, Luxembourg, Netherlands, Greece, Spain and Portugal.

<sup>26</sup> See, e.g., Spain and Italy.

<sup>27</sup> See Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer: Dordrecht, 2005), chapter 7.

<sup>28</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (finding no fundamental right to public education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no fundamental right to adequate housing).

<sup>29</sup> *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

tight connection between how “generous” the social rights in a constitution are, and how generous social welfare policy actually is. Some opponents of *constitutional* welfare rights are concerned that, once a welfare right is written into a constitution, even if subject to various provisions relating to non-justiciability, there is nothing that will disable a constitutional court from scrutinizing a government policy or a new law in terms of its compatibility with the right in question. As Ulrich Preuss has noted: “Both social rights and state goals [when entrenched in constitutions] increase the power of the executive – which has the resources to design and to implement particular policies – and that of the courts – which make the final decision about the constitutional duties of the government – at the expense of the democratic authority of the parliament.”<sup>30</sup> Thus, the primary reason many scholars have for disapproving of constitutional welfare rights is that they produce an unfortunate institutional shift in the separation of powers and allow (indeed, require) constitutional judges to decide matters in which they have neither qualifications nor political authority – essentially, therefore, an institutional competence argument.<sup>31</sup> For this reason, some European constitutions attempt to reconcile socio-economic constitutional commitments with a clear separation of socio-economic rights and the objectives of the state in the field of socio-economic policy. The Spanish Constitution draws a distinction between “Rights and Freedoms” and “The Guiding Principles of Economic and Social Policy”. Similarly, the Constitution of Ireland distinguishes between “Fundamental Rights” and “Directive Principles of Social Policy”, with a provision in the latter to the effect that “they shall not be cognizable by any Court” (art. 45).

Second, European constitutionalism has traditionally been quite different from the American on the **protection of democracy against anti-democratic views** and forces. To the celebrated question asked by Saint Just: “How much freedom for the enemies of freedom?”, Americans and Europeans give quite different answers. Traditionally, the US constitutionalism has adopted a strongly civil-libertarian approach and has rejected the doctrine that democratic rights can be extensively limited for the same of preservation of democracy itself. Such restrictions have been viewed in the US as a democracy’s failure, and it has been considered that the best remedy for anti-democratic speech is “more speech”, for anti-democratic political forces, a more robust freedom of association, etc. Only in truly extreme examples (captured by the judicial formula of “clear and present danger”) has the restraint of democratic freedoms been authorized. In contrast, European constitutionalism has not been making the legislatures and law-enforcers wait until the extreme and immediate threat to democracy’s survival before they can enact and implement restrictions of the human rights of anti-democratic actors on grounds of the need to protect democracy itself. Various European constitutions (including German Basic Law) have explicitly mandated the authorities to regulate, including to prohibit, political movements and activities which threatened democratic

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<sup>30</sup> Ulrich K. Preuss, “Patterns of Constitutional Evolution and Change in Eastern Europe”, in Joachim Jens Hesse & Nevil Johnson, eds., *Constitutional Policy and Change in Europe* (Oxford University Press: Oxford, 1995): 95-126 at 101.

<sup>31</sup> Id.; Andrzej Rapaczynski, “Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament”, in A.E. Dick Howard, ed., *Constitution Making in Eastern Europe* (Woodrow Wilson Center Press: Washington 1993): 93-132 at 107-8.

order,<sup>32</sup> and the European Convention on Human Rights stipulates that it does not confer “on any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms” enshrined in the Convention.<sup>33</sup> In the European context, the call for so-called militant democracy has often been accompanied by an invocation of the most traumatic European experience of weak democracy unable to cope with anti-democratic enemies within – that of the fall of the Weimar Republic, and the emergence of an undemocratic system through the exploitation of democratic freedoms by parties and politicians committed to destroying democracy itself. However, the very idea of restricting the rights of those opposed to a democratic constitutional system, to protect the values and survival of democracy, is of course paradoxical and troubling. Democracy may be just as easily undermined by excessive use of the ‘antidemocratic’ label to ban the political opponents of those currently controlling the executive and/or legislature as by under-estimating dangers posed by the enemies of democracy.<sup>34</sup> If we assign to political rulers the authority to define ‘true’ democracy and consequently to deny those who depart from their criteria the right to exercise freedom of speech and association, are we not undermining the very premises of democracy we claim to protect? Further, in denying non-democratic parties the right to function freely in a democratic environment, are we not disregarding the potentially civilizing effect of democracy upon legal political parties who may be drawn away from extremism through participation in the democratic political game?<sup>35</sup>

Two issues manifest the dilemmas of militant democracy (MD) with particular salience, namely freedom of political speech and the right to political association (in particular, freedom of political parties). It should be noted that dangers posed by the MD concept are not necessarily equal in both these cases. One may well argue for differential standards of scrutinizing MD with respect to freedom of speech and freedom of political parties. One may, legitimately, be *more* suspicious of MD-motivated restrictions on freedom of speech than on freedom of political parties. This is because a prohibition on a party on the basis of its pursuit of a particular idea does not exclude other, non-party-related channels for the public expression of this ideal, hence the effect of such a ban on the free circulation of ideas may be less restrictive than limits on freedom of speech in general.<sup>36</sup> One may also say that ‘preventive restrictions’ on political parties, based on their programs, more closely resemble regulation of ‘conduct’ than of speech, and so warrant less stringent scrutiny than regulation of speech as such. Since ‘conduct’ may have a number of non-expressive effects that collide with other important social goals, its regulation is less objectionable according to the usual rationales applied to protection of political speech.<sup>37</sup>

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<sup>32</sup> See Patrick Macklem, “Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination”, *I.CON* 4 (2006): 488-516 at 491-95.

<sup>33</sup> Art. 17 of ECHR

<sup>34</sup> Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’, *E.L.Rev.* 29 (2004) 407-420, at 409.

<sup>35</sup> *Ibid.*, at 410.

<sup>36</sup> See Andras Sajó, ‘Hate Speech for Hostile Hungarians’, *East Europ. Constit. Rev.* 3:2 (Spring 1994) 82-87, at 82.

<sup>37</sup> See Wojciech Sadurski, *Freedom of Speech and Its Limits* (1999), at 43-58.

This difference between the European and American approaches has its obvious historical roots: The United States territory has never been the stage for an extreme authoritarian regime; conversely Europe, due to its sad legacy of despotic governments, knows well that some forms of democracy may be painfully helpless in the face of those who dislike it and want to overturn it. In particular, the Weimar Republic remains a lesson that democracy must have built-in protections against the forces that would use democratic mechanisms to overturn democracy itself. It may be thought that, with the restrictions imposed in the United States in the so-called “war on terrorism” in the wake of the events of 11 September 2001, the distance between the European and American approaches in this regard is shortened, especially since the attitudes to “militant democracy” in Europe are not uniformly positive. Still, it is perhaps important to keep the *problematique* of militant democracy apart from that of terrorism-based restrictions on democracy. The latter are more akin to emergency powers; the former are more about the internal defense of democracy from its enemies within. Admittedly, in practical terms the consequences may be similar, and similarly troubling; still, it is worth noting that, in the European context, various militant-democracy measures (especially party closures) are only very rarely justified on the basis of anti-terrorism considerations.<sup>38</sup>

Third, the fundamental difference concerns **minority rights**. The main constitutional dilemma with regard to the protection of minorities is whether the best way of protecting members of (national, ethnic, religious etc) minorities is simply through strong protection of individual rights backed up by a robust non-discrimination principle, or whether there should be a special constitutional principle (or set of principles) that confers special rights upon minority members. The former (liberal-individualistic) approach dominates thinking on the protection of minorities in the United States: the idea is that if every citizen, irrespective of his/her (*inter alia*) national or ethnic group membership, benefits from the same strong civil and political rights, then any special group-based protection is redundant, and avoiding potential danger.<sup>39</sup> This may be called a “liberal-neutralist” (or individualistic) approach. In the continental European setting, however, this approach has been seen as largely ineffective and insufficient. In Europe there has been much less faith in the beneficial effects of the extension of individualistic liberal principles to a situation in which anti-minority prejudices and hostility are deeply engrained, and are also frequently displayed by those who are entrusted with the enforcement of general rules. In principle, the liberal-individual approach is considered well-suited to the particular situation of immigrant societies, where the dominant concern of new minorities is to enjoy the same rights as the older population and to integrate themselves into a larger society governed by

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<sup>38</sup> See Eva Brems, “Freedom of Political Association and the Question of Party Closures” in Wojciech Sadurski, ed., *Political Rights Under Stress in 21<sup>st</sup> Century Europe* (Oxford University Press, forthcoming).

<sup>39</sup> As with all other distinctions between European and American constitutionalism drawn in this section, there is a certain oversimplification in this description. Admittedly, the rejection of group rights is not absolute in United States law. For example, when the U.S. Supreme Court allowed Amish families to keep their children out of school up to a certain age (see *Wisconsin v. Yoder*, 406 U.S. 205 (1994)), or when it upheld Native American tribal law that imposed patrilineal kinship rules that limited women's marital choices (see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)), it clearly recognised the legal weight of group-based claims for treatment different to that accorded by universally-binding legal rules.

neutral rules. In contrast, when the claims for protection come from groups that have been present in a given territory for a long time, or that find themselves sharing the same nation-state due to changing borders or forced movements of population (hence, forced rather than voluntary migration) etc, the purely individualistic method appears much less capable of providing real and effective protection to minorities.<sup>40</sup>

Probably the main reason why the individualist-liberal approach to minority protection is more entrenched in Anglo-American constitutional systems (in particular, in the United States, and to a lesser degree in countries such as Canada, Australia and New Zealand) than in Europe is that in the former settings, but not in the latter, there is a problem that has traditionally given liberal theorists a headache: how to reconcile a universal commitment to individual human rights (including the right to autonomy) with a proper respect for the traditions of minorities that often do not practice autonomy in their internal life and are (by liberal standards) quite oppressive towards their members. This may be seen as the fundamental liberal dilemma when it comes to minority rights. On the one hand, a liberal is committed to extending some fundamental dignity-based rights to everyone. On the other hand, those minorities - often indigenous ones - that do not respect fundamental equality between men and women, that practice corporeal punishment, and that do not respect the individual's right to control his or her life to the degree deemed necessary by liberals, pose a threat to these fundamental values. Hence, the liberal theorist is concerned with the position of the most vulnerable members of those minorities - often women and children - who are threatened with deprivation of all those individual rights that non-minority citizens take for granted. Group rights aimed at the protection of the identity of the group as a whole give to that group a degree of immunity from interference by the wider community into its "internal affairs". As noted by Brian Barry: "[I]t seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of at any rate some of their members. To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrive at the conclusion that diversity is desirable to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members".<sup>41</sup>

The *prima facie* hostility of the American constitutionalism to minority rights can be seen as resulting largely from this dilemma. However, in the European setting, this dilemma is much less acute; the problem identified simply does not ring true in the context of European societies to the same degree as it does in the United States. The pattern of relations between an ethnic majority and minority (or minorities) does not easily<sup>42</sup> fit the description of "liberal majority versus oppressive minority". Therefore, the fundamental philosophical reason for distrusting the very idea of minority rights does not apply easily to the European situation. Obviously this does not negate the fact

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<sup>40</sup> See Dimitrina Petrova, "Racial Discrimination and the Rights of Minority Cultures", in Sandra Fredman, ed., *Discrimination and Human Rights: The Case of Racism* (Oxford University Press: Oxford 2001) at 65; Miriam J. Aukerman, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context", *Human Rights Quarterly* 22 (2000): 1011-1050 at 1029-30.

<sup>41</sup> Brian Barry, *Culture and Equality* (Polity: Cambridge, 2001) at 134.

<sup>42</sup> There are some exceptions, of course, such as that of Roma population in Europe.

that a “multicultural” solution, with an explicit recognition of separate minority rights, is often seen as a threat to the culture of the majority, and to state sovereignty. The problem, then, is not whether a liberal-neutralist model or a diversity-accommodating model (that is, a pluralist model) should be adopted; this dilemma seems to have been answered in Europe overwhelmingly in favor of the latter. As one Serbian legal scholar concludes, with respect to Central and Eastern Europe, but in a way which may be generalized to Europe as a whole: “[E]xperience ... has shown that ethnocultural neutrality and group-neutral regulation cannot accommodate cultural pluralism, and cannot guarantee stability and peace between ethnic majorities and minorities. Traditional liberal attitudes lack empathy towards maintaining diversity, and cannot provide solutions in traditionally multicultural environments where equality presumes an equal right to maintain one’s distinct identity.”<sup>43</sup> But these “traditional liberal attitudes” have clearly prevailed in the American constitutionalism.

Fourth, there is an important difference between American and European constitutionalism with regard to the principle of **secularity of the state**. In the United States, the authoritative doctrine has been protective of a far-reaching separation of state and religion: to use the traditional constitutional idiom, it has been based on the principle of the neutrality of state towards religion and of the “wall of separation” between the State and the churches. Even if in the last decades this “wall” has somewhat crumbled, many practices of connections (“entanglements”, as Americans would call it) still exist between the state and the religious orders which are perfectly acceptable in Europe, would have been found unconstitutional under the Religion Clauses of the First Amendment of the US Constitution. This strict, formal separation is balanced off in the United States by a political custom which tolerates a much higher participation of religious references and observances in public life. In Europe (with some exceptions, most notably in France), the balance is opposite: while legal rules are less hostile to formal presence of religious organizations in state structures (consider, for instance, church taxes collected by the state administration in Germany and some other European states; religious instruction, offered as an ordinary subject in public schools; state funding for religious schools; special; status of churches such as the Church of Sweden, Evangelical Lutheran Church of Finland, the Church of Scotland and the Church of England, etc) political culture is certainly less tolerant of frequent references to God and religion in public discourse. This may explain why the proposed references to God (“*invocatio Dei*”) in the Constitutional Treaty of the EU was so decisively rejected.

The fifth important difference which I wish to mention concerns the view on the coverage of the constitutional rules: whether they apply to “vertical” relations between citizens and the government, or whether they also include the “**horizontal**” relations among private subjects. In American constitutionalism, the predominantly “vertical” approach is reflected in the doctrine of “state action”, namely, the doctrine that the constitutional Bill of Rights binds only the institutions of government and not private citizens. While ordinary laws and policies must respect constitutional provisions (including constitutionally enumerated rights), there is no equivalent constitutional

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<sup>43</sup> Tibor Várady, “On the Chances of Ethnocultural Justice in East Central Europe”, in Will Kymlicka and Magda Opalski, eds., *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press 2001): 135-49 at 147-48.

obligation upon private individuals. This does not affect the power of legislatures to enact laws that require private persons to act in accordance with general constitutional values. Because, in a constitutional democracy any law (insofar as it respects constitutional constraints) can be enacted by majority vote in accordance with the due process determined by the constitution. Such laws can, however, be just as easily repealed by majority vote. No such repeal is available for constitutional provisions. That is why the traditional constitutional doctrine in the United States is reluctant to allow constitution-makers to bind citizens in their relations with each other which removes the possibility of a normal, routine method to modify or revoke these obligations.<sup>44</sup>

This position has never been adopted in Europe wholeheartedly, and one can see why: a constitution has been seen as a code of social morals that bestows individual rights that no-one, governmental or non-governmental actors, can ever transgress without justification. Offhand, the moral arguments in favour of such “horizontal constitutionalism” are quite obvious: Individual liberty (and other individual interests, for that matter) may be adversely affected by other individuals’ (or other non-governmental entities, such as corporations’) behaviour to a similar or even a greater degree than by governmental conduct. In a society in which the free market occupies an important sphere of social life, “private” actors may acquire a great power over individuals. “Private” discrimination by a company or even by an individual in the areas of employment or accommodation, for example, may be much more harmful to a victimised individual than discrimination by the state. Vilification, on racial or religious grounds, may be more hurtful when uttered by a private individual than by a government agent acting in an official capacity. For all these reasons, in a large number of legal systems the horizontal operation of constitutional rights has become part of the authoritative constitutional doctrine in Europe, and elsewhere (in South Africa, for example).<sup>45</sup>

Clearly much more is at stake in the disagreement over “state action” versus “horizontal” constitutionalism than mere constitutional technique. As Mark Tushnet has shown in an important article, the horizontality of constitutions is dependent upon at least two important factors: The system of constitutional courts and the dominant ideological commitments of the constitutional system.<sup>46</sup> This, perhaps, is intuitively self-evident, but Tushnet provided important evidence, by drawing on comparative constitutionalism, that systems with strong social-democratic commitments are much less hostile towards recognising potential horizontal effects of constitutions. In contrast, the insistence upon “state action” (and, in consequence, upon the verticality of the constitution’s operation) reflects an adverse approach to social democratic, or welfarist, doctrines; as Tushnet summarises the conclusion of his and Professor Seidman’s study of US constitutionalism in this respect, “the state action issue became important in the

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<sup>44</sup> For an eloquent expression and endorsement of this position, see Maimon Schwarzschild, “Value Pluralism and the Constitution: In Defense of the State Action Doctrine”, *Supreme Court Review* (1998), pp. 129-161.

<sup>45</sup> For a recent important account and discussion of these developments, see Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights”, *Michigan Law Review* 103 (2003): 388-459.

<sup>46</sup> See Mark Tushnet, “The Issue of State Action/Horizontal Effect in Comparative Constitutional Law”, *I.CON [International Journal of Constitutional Law]* vol. 1, no. 1, 2003, pp. 79-98.

U.S. precisely at the point when the national government became committed, however weakly, to social democratic norms”.<sup>47</sup> This just goes to show that “horizontality”, more than perhaps any other issue, illustrates how deeply any constitutional system is embedded in fundamental choices about moral and ideological values to which constitutional norms respond.

### **Conclusions: European constitutional identity and European political integration**

The reflection about our collective identity is not a neutral academic task. Just as for our *individual* identity we do not normally reflect upon it unless we feel threatened or wish to assert our distinctiveness from others, for *collective* identity we have practical reasons for such reflections. Although the reasons are diverse it is useful to try to ascertain them. When we, the Europeans, engage in such collective self-reflections, we typically establish some ranking between the European and sub-European (national or sub-national) identity. These motivations are traditionally related to the (explicit or implicit) aim of supporting some practical conclusions on the proposed level of political integration within the EU. Generally, those who deny the priority of the European identity over the national ones tend to be “Euro-sceptical”, and, vice versa, those who claim that European identity prevails over the national ones tend to be “Euro-enthusiast”.

This, however, is a gross simplification in that it involves two serious errors. First, it is a mistake to identify the priority of one identity over the other. What are the standards of such priority especially when people do not face the conflicts of loyalty (as in the cases of war) and do not need to choose between one identity and the other? Various identities coexist peacefully, so to speak, and this multilevel structure of identities: local, regional, national and European – renders it unnecessary and fallacious to proclaim any ranking of identities.

Second, there is simply no connection between ascertaining the dominant identity at a particular level and the implications for the division of authority between the European and national levels within the EU. A discourse about the vertical allocation of powers within a federation (say, in the United States) does not proceed on the basis that the identification of a dominant focus of identity will trigger the attribution of dominant powers to this level of government. Neither should such a discourse proceed in this way in the European Union. It is a *non sequitur* to link the discourse of identity with the discourse of constitutional allocation of powers in such a simple, mechanistic way. The question about vertical allocation of powers is a matter which does not dissolve into the discourse about identity: we need to have a rather elaborate theory which will include a whole set of factors, both general-philosophical and purely pragmatic in a justification of a particular design of a vertical structure. Whether it is a language of federalism (with the idiom of “states rights”) or the language of subsidiarity (with the accompanied principle of locating a proper power at a lowest level at which the problem can be effectively handled), that of decentralization or any other conceptual paradigm within

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<sup>47</sup> Id., at 88.

which vertical allocation of powers is discussed, the idea of “identity” driving the allocation is a singularly inapposite one. And it would be bizarre if in the discourse about the division of competences between the member states and the EU institutions the argument about identity became the discussion-stopper.

Only once we rid ourselves of this confusion will we be able to see more clearly what the relevance of constitutional identity is, or rather, what goals it should *not* serve. Just as the talk of a “common constitutional tradition” or of European constitutional values, the notion of European constitutional identity has a rather limited use. Although it may help us deepen our all understanding of what we, as Europeans, have in common, and what constitutional structures prevail in our continent, we should be careful not to extend this discussion upon the constitutional debate about the level of integration within the EU. The two discourses should be kept separate because linking them is based on a faulty understanding of the practical implications of the construction of European constitutional identity