
In defence of the status quo: Europe's constitutional *Sonderweg*

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Introduction: Europe's fateful choice

To judge by the renewed popularity of the idea of a Constitution for Europe one might get the impression that right now Europe is in some kind of constitutional desert. And now we have a European Philadelphia busy preparing yet another document in which the word 'constitution' is almost certain to figure. If a formal constitution is to be the European Promised Land, I think I will join Moses and stick to the desert. In this chapter I will explain this preference.

The idea of a constitution is presented as indispensably part and parcel of a legitimating reform package of an enlarged Europe. It is not, of course, an original idea and can be traced back at least to Spinelli's Draft Treaty for European Union. Whether one can have a Europe which would respect the current constitutional *acquis* and embed it in a formal constitution adopted through a *European constituent power* and, at the same time, not become a federal state in all but name is very doubtful.¹ I think it is a chimera. But the very idea of a formalized constitution requires some serious critical reflection. What appears to be progressive may in fact be regressive. This new fad of a new constitution for Europe may, in fact, be leading us away from the Promised Land into a familiar and boring desert.

Let us step back a minute to review our well-known history.

As a result of a combination of express Treaty provisions, such as those stipulating that certain types of Community legislation would be directly applicable;² of foundational principles of international law, such as

¹ If a 'constitution' by anything other than a European constituent power, it will be a treaty masquerading as a constitution.

² Originally Article 189 EEC (Treaty of Rome).

the general principle of supremacy of treaties over conflicting domestic law, even domestic constitutional law;³ and of the interpretations of the European Court of Justice,⁴ a set of constitutional norms regulating the relationship between the Union and its Member States, or the Member States and their Union, has emerged which is very much like similar sets of norms in most federal states. There is an allocation of powers, which (as has been the experience in most federal states) has often not been respected; there is the principle of the law of the land, in the EU called Direct Effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself.

Put differently, the constitutional discipline which Europe demands of its constitutional actors – the Union itself, the Member States and state organs, European citizens and others – is in most respects indistinguishable from that which you would find in advanced federal states.

But there remains one huge difference: Europe's constitutional principles, even if materially similar, are rooted in a framework which is altogether different. In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos', a single *pouvoir constituant* made up of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted. Thus, although the federal constitution seeks to guarantee state rights and although both constitutional doctrine and historical reality will instruct us that the federation may have been a creature of the constituent units and their respective peoples, the formal sovereignty and authority of the people coming together as a constituent power is greater than any other expression of sovereignty within the polity, and hence the supreme authority, of the Constitution – including its federal principles.

³ The general rule of international law does not allow, except in the narrowest of circumstances, for a state to use its own domestic law, including its own domestic constitutional law, as an excuse for non-performance of a treaty. That is part of the ABC of international law and is reflected in the Vienna Convention on the Law of Treaties, Article 27. *Oppenheim's International Law* is clear: 'It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law . . . contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement', *Vol. I: Peace*, 84–5 (Sir Robert Jennings and Sir Arthur Watts eds., 9th edn (Harlow, Essex: Longmans, 1992)).

⁴ See generally J. H. H. Weiler, 'The Transformation of Europe', in *The Constitution of Europe* (Cambridge and New York: Cambridge University Press, 1999).

Of course, one of the great fallacies in the art of 'federation building', as in nation building, is to confuse the juridical presupposition of a constitutional demos with political and social reality. In many instances, constitutional doctrine presupposes the existence of that which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional demos. Thus, the empirical legitimacy of the constitution may lag behind its formal authority – and it may take generations and civil wars to be fully internalized – as the history of the USA testifies. Likewise, the juridical presupposition of one demos may be contradicted by a *persistent social reality* of multiple ethnoi or demoi who do not share, or grow to share, the sense of mutual belongingness transcending political differences and factions and constituting a political community essential to a constitutional compact of the classical mould. The result will be an unstable compact, as the history of Canada and modern Spain will testify. But, as a matter of empirical observation, I am unaware of any federal state, old or new, which does not presuppose the supreme authority and sovereignty of its federal demos.

In Europe, that presupposition does not exist. Simply put, Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence, as a matter of both normative political principles and empirical social observation the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order. It is a constitution without some of the classic conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.

You would think that this would result in perennial instability. As we shall see, one of the virtues of the European construct is that it produces not only a surprisingly salutary normative effect but also a surprisingly stable political polity. Member States of the European Union accept their constitutional discipline with far more equanimity than, say, Quebec. There are, surely, many reasons for this, but one of them is the peculiar constitutional arrangement of Europe.

This distinct constitutional arrangement is not accidental. Originally, in a fateful and altogether welcome decision, Europe rejected the federal

state model. In the most fundamental statement of its political aspiration, indeed of its very telos, articulated in the first line of the Preamble of the Treaty of Rome, the gathering nations of Europe 'Determined to lay the foundations of an ever closer union among the peoples of Europe'. Thus, even in the eventual Promised Land of European integration, the distinct peoplehood of its components was to remain intact – in contrast with the theory of most, and the praxis of all, federal states which predicate the existence of one people. Likewise, with all the vicissitudes from Rome to Amsterdam, the Treaties have not departed from their original blueprint as found, for example, in Article 2 EC of the Treaty in force, of aspiring to achieve 'economic and social cohesion and solidarity among Member States'. Not one people, then, nor one state, federal or otherwise.

Europe was relaunched twice in recent times. In the mid-1980s the Single European Act introduced, almost by stealth, the most dramatic development in the institutional evolution of the Community achieved by a Treaty amendment: majority voting in most domains of the Single Market. Maastricht, in the 1990s, introduced the most important material development: Economic and Monetary Union. Architecturally, the combination of a 'confederal' institutional arrangement and a 'federal' legal arrangement seemed for a time to mark Europe's *Sonderweg* – its special way and identity. It appeared to enable Europe to square a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time – and in contrast with the experience of all such federations – powerful, some would argue strengthened,⁵ Member States.

At the turn of the new century, fuelled, primarily, by the Enlargement project, there is a renewed debate concerning the basic architecture of the Union. Very few dare call the child by its name and only a few stray voices are willing to suggest a fully fledged institutional overhaul and the reconstruction of a federal-type government enjoying direct legitimacy from an all-European electorate⁶. Instead, and evidently politically more

⁵ See three classics: A. S. Milward *et al.*, *The European Rescue of the Nation State* (Berkeley: University of California Press, 1992); Stanley Hoffmann, 'Reflections on the Nation-State in Western Europe Today', in Loukas Tsoukalis (ed.), *The European Community – Past, Present and Future* (Oxford: Basil Blackwell, 1983); A. Moravcsik, *The Choice for Europe* (Ithaca, NY: Cornell University Press, 1998).

⁶ See e.g. Giscard d'Estaing and Helmut Schmidt, *International Herald Tribune*, 11 April 2000. For a more honest discussion, admitting the statal implications of the new construct, see, for example, G. Federico Mancini, 'Europe: The Case for Statehood', 4 *European Law Journal* (1998), 29, and Harvard Jean Monnet Working Paper 6/98, and see, of course, Jürgen Habermas's suggestions in 'The European Nation-State and the Pressures of Globalization',

correct, there has been a swell of political and academic voices⁷ calling for a new constitutional settlement which would root the existing discipline in a 'veritable' European constitution to be adopted by a classical constitutional process and resulting in a classical constitutional document. The Charter of Human Rights is considered an important step in that direction. What is special about this discourse is that it is not confined to the federalist fringe of European activists, but has become respectable Euro-speak in both academic and political circles.

Four factors seem to drive the renewed interest in a formal constitution rather than the existing 'constitutional arrangement' based on the Treaties. The first factor is political. It is widely assumed, correctly it would seem, that the current institutional arrangements would become dysfunctional in an enlarged Union of, say, twenty-five. A major overhaul, seems to be called for. In the same vein, some believe, incorrectly in my view, that the current constitutional arrangements would not work. In particular, the absence of a formal constitution leaves all important constitutional precepts of the Union at the mercy of this or that Member State, threatening both the principle of uniformity of, and of equality before, the law as well as an orderly functionality of the polity. One is forever worried: 'What will the German/Italian/Spanish, or whatever, constitutional court say about this or that?' A formal constitution enjoying the legitimacy of an all-European *pouvoir constituant* would, once and for all, settle that issue.

The second factor is 'procedural' or 'processual'.⁸ The process of adopting a constitution – the debate it would generate, the alliances it would form, the opposition it would create – would, it is said, be healthy for the democratic and civic ethos and praxis of the polity.

The third factor is material. In one of its most celebrated cases in the early 1960s, the European Court of Justice described the Community as

New Left Review no. 235 (May 1999), 46, and *Die Einbeziehung des Anderen* (Frankfurt: Suhrkamp, 1996), ch. 3 'Hat der Nationalstaat eine Zukunft?', 128–91. There is an interesting political-legal paradox here. A 'flexible' Europe with a 'core' at its centre will actually enable that core to retain the present governance system dominated by the Council – the executive branch of the Member States – at the expense of national parliamentary democracy. Constitutionally, the statal structure would in fact enhance even further the democracy deficit.

⁷ In the political sphere see, for example, the over-discussed Berlin speeches of Joschka Fischer and Jacques Chirac. For text and comments on these interventions, see the special symposium on the Harvard Jean Monnet site: www.JeanMonnetProgram.org.

⁸ I am grateful to Professor Günther Frankenberg, University of Frankfurt, for sharing his idea.

a 'new legal order for the benefit of which the States have limited their sovereign rights, albeit in limited fields'. There is a widespread anxiety that these fields are limited no more. Indeed, not long ago a prominent European scholar and judge wrote that there 'simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'.⁹ A constitution is thought an appropriate means to place limits on the growth of Community competences.

Of greatest interest to me is the final normative and conceptual drive behind the discussion. Normatively, the disturbing absence of formal constitutional legitimization for a polity that makes heavy constitutional demands on its constituent Members is, it may be thought, problematic. If, as is the case, current European constitutional discipline demands constitutional obedience by and within all Member States, their organs and their peoples, even when these conflict with constitutional norms of the Member State, this, it is argued, should be legitimized by a constitution which has the explicit consent of its subjects instead of the current pastiche which, like Topsy, just 'grewed'.

Conceptually, the disquiet with the current European constitutional arrangement must be understood against a European constitutional discourse, which for years has been dominated by a strange combination of Kelsen¹⁰ and Schmitt.¹¹ It is Kelsenian in its attempts, under many guises, to describe, define and understand the European *Grundnorm* – the source whence the authority of European constitutional disciplines derives. The search for this Kelsenian holy grail, whether or not acknowledged explicitly, underscores the great bulk of the academic literature theorizing European constitutionalism. And this holy grail is, typically, understood in Schmittian terms: the search is for the ultimate source of authority, the one that counts in the case of extremity, of conflict.¹² That is the true criterion of the real *Grundnorm*.

⁹ Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990), 205 at 220. The Court, too, has modified its rhetoric: in its more recent Opinion 1/91 it refers to the Member States as having limited their sovereign rights 'in ever wider fields': [1991] ECR 6079, Recital 21.

¹⁰ Hans Kelsen, 'On the Pure Theory of Law', 1 *Israel Law Review* (1966), 3.

¹¹ See C. Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), at, for example, 35, 43ff.

¹² Whether the *Grundnorm* is internal to the legal order or outside it is a contested matter. For insight see Pavlos Eleftheriadis, 'Begging the Constitutional Question', 36 *Journal of Common Market Studies* (1998), 255; and 'Aspects of European Constitutionalism', 21 *European Law Review* (1996), 32.

Early 'Europeanists' liked to argue that the *Grundnorm*, typically expressed in, say, the principle of supremacy of European law over national law in case of conflict, had shifted to the 'central' or 'general' power: that is, to Europe. That view is less in fashion today and is contested by those who point out that, both in fact and in law, ultimate authority still rests in national constitutional orders which sanction supremacy, define its parameters, and typically place limitations on it.

According to this latter view, the statal *Grundnorm* would shift. Only if one were to take the existing constitutional precepts and enshrine them in a formal constitution adopted by a European 'constitutional demos' – the peoples of Europe acting on that occasion as one people – would constitutional authority in fact and in law shift to Europe. For the most part, both for friends and for foes of European constitutionalism the debate is conducted on this Kelsen-Schmittian turf.

I am far from certain whether the constitutional discussion will actually result in the adoption of a formal constitution and I am even more doubtful whether we will see in the near future a European state even of a most limited core. My interest in this debate is, thus, that of neither the international relations expert nor the social scientist trying to explain or predict the course that European integration has taken or will take. I am, instead, mostly interested in the normative values of which the constitutional and political discourse is an expression.

I want to explain why the unique brand of European constitutional federalism – the status quo – represents not only its most original political asset but also its deepest set of values. I also do not think that a formal constitution is a useful response to other concerns such as the issue of competences.

Authority, submission and emancipation: a parable

Before offering a normative reading of the European constitutional architecture, I want to tweak some of the assumptions on which the constitutional debate is typically premised. The following parable is offered with this purpose in mind.

There is an inevitable and scary moment in the growing up of an observant Jew and in the raising of religiously observant children. In a religion the constitutive and defining feature of which is *Nomos* – the Law – and which has no theology, there is no easy answer to the inevitable question: why observe this law? The Pauline antinomian revolution derives from a

failure to find a convincing justification for submission to Nomos. To the sceptical reader one may point out that a similar question may be asked regarding submission and loyalty to a constitution.

The simplest, and deepest, answer is rooted in covenant and in the authority – and the Author – whence Nomos derives. But submission and obedience to God surely do not exhaust the significance of a Nomos-based life. One intriguing reply, given by the polymath philosopher Isaiah Leibowitz,¹³ is relevant to our current discussions of European constitutionalism:

Take the core set of ritualistic observances: kosher laws, Sabbath laws and the laws of purity in sexual relations. They are the core set because they affect the three central features of our mundane existence: eating, working, loving. Living by Nomos means a submission to a set of constraints in all these areas. The constraints are designed in such a way that they cannot be explained in rational utilitarian terms. Kosher rules actually exclude some of the healthiest foods; the Sabbath rules have a niggardly quality to them that militates, in some respects, against a vision of rest and spirituality; and the ritualistic laws of purity, involving the messy subject of menstruation and sexual abstention, have arbitrary elements galore. It is, indeed, as if they were designed to force the observer into pure and mindless obedience and submission. One observes for no other reason than having been commanded. No wonder Paul¹⁴ shrugged off this yoke.

There is, however, an interesting paradox in this submission which orthodox Judaism as well as several strands of Islam share. Total obedience and submission are to a transcendent authority which is not of this world. In that very act of submission is encapsulated an emancipation and liberation from any authority of this world. By enslaving oneself to an authority outside of this world, one declares an independence of, and refusal to submit – in the ultimate sense – to, any authority of this world. By abstaining from eating everything that one fancies, one liberates oneself from that powerful part of our physical existence. By arranging life so as not to work on the Sabbath, one subjugates the even more powerful call of career and the workplace. And by refraining from sexual abandon, even if loving, even if within wedlock, one asserts a measure of independence

¹³ Y. Leibowitz, *Judaism, Human Values and the Jewish State* (Cambridge, MA: Harvard University Press, 1992), *passim*.

¹⁴ St Paul needs no citation. But for a somewhat troubling latter-day reincarnation of this aspect of Pauline dogma, see R. M. Unger, *What Should Legal Analysis Become?* (London and New York: Verso, 1996), at 186ff.

even over that exquisite part of our lives too. Isaiah Berlin, a town mate, friend, and admirer of Isaiah Leibowitz, gives the secular equivalent to this insight in his discussion of rational liberty.

There are three relevant lessons for the constitutional and European discourse in this parable.

The first: an act of submission can often be simultaneously an act of emancipation and liberation.

The second: as Aristotle teaches us, virtue is a habit of the soul and habits are instilled by practice.

The third: the purpose of obeying the law is not co-terminous with the consequences of obeying the law. One may obey to submit to the author of the Command. A consequence, not a purpose, may be emancipation.

Let us see now how these play out in the normative understanding of European constitutionalism.

Neither Kelsen nor Schmitt: the principle of European constitutional tolerance – concept and praxis

The reason the question of ultimate authority and constitutional *Grundnorm* seems so important is that we consider the integrity of our national constitutional orders as a matter not simply of legal obedience and political power but of moral commitment and identity. Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a Community, as a Union. When we are proud and attached to our constitutions we are so for these very reasons. They are about restricting power, not enlarging it; they protect fundamental rights of the individual; and they define a collective identity which does not make us feel queasy the way some forms of ethnic identity might. Thus, in the endless and tiresome debates about the European Union constitutional order, national courts have become, in the last decade, far more aggressive in their constitutional self-understanding. The case law is well known. National courts are no longer at the vanguard of the 'new European legal order', bringing the rule of law to transnational relations and empowering, through EC law, individuals vis-à-vis Member State authority.

Instead they stand at the gate and defend national constitutions against illicit encroachment from Brussels. They have received a sympathetic hearing, since they are perceived as protecting fundamental human rights as well as protecting national identity. To protect national sovereignty is *passé*; to protect national identity by insisting on constitutional specificity is *à la mode*.

Thus, on this new reading, to submit to the constitutional disciplines of Europe without a proper Kelsenian constitution, which formally vests in Europe Schmittian ultimate authority, is something that not only contradicts an orderly understanding of legal hierarchy but also compromises deep values enshrined in the national constitution as well as a collective identity which is tied up with these values. Indeed, it is to challenge the idea of constitution itself.

Miguel Poiaras Maduro, one of the most brilliant of the new generation of European constitutional thinkers, gives eloquent expression to this concern:

European integration not only challenges national constitutions... it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution... European integration also challenges the legal monopoly of States and the hierarchical organisation of the law (in which constitutional law is still conceived of as the 'higher law').¹⁵

Is this challenge so threatening?

In part it is. Modern liberal constitutions are, indeed, about limiting the power of government vis-à-vis the individual; they do, too, articulate fundamental human rights in the best neo-Kantian tradition; and they reflect a notion of collective identity as a community of values which is far less threatening than more organic definitions of collective identity. They are a reflection of our better part.

But, like the moon, like much which is good in life, there is here a dark side too.

¹⁵ M. P. Maduro, *We, the Court, the European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998), at 175. Maduro himself does not advocate a European constitution. I cite him simply for his striking diagnosis of the issue. It is superior to my own clumsy attempt to formulate the dilemma as a 'constitution without constitutionalism', as 'doing before hearkening'. J. Weiler, '“We Will Do, and Hearken” – Reflections on a Common Constitutional Law for the European Union', in Roland Bieber and Pierre Widmer (eds.), *The European Constitutional Area* (Zurich: Schulthess, 1995).

It is, first, worth listening carefully to the rhetoric of the constitutional discourse. Even when voiced by the greatest humanists, the military overtones are present. We have been invited to develop a patriotism around our modern, liberal, constitutions. The constitutional patriot is invited to defend the constitution. In some states we have agencies designed to protect the constitution whose very name is similar to our border defences. In other countries, we are invited to swear allegiance to the constitution. In a constitutional democracy we have a doctrine of a fighting democracy, whereby democratic hospitality is not extended to those who would destroy constitutional democracy itself. To be a good constitutional liberal, it would seem from this idiom, is to be a constitutional nationalist and, it turns out, the constitutional stakes are not only about values and limitations of power but also about its opposite: the power which lurks beneath such values.

Very few constitutionalists and practically no modern constitutional court will make an overt appeal to natural law. Thus, unlike the 'constitution' in the parable, the formal normative authority of the constitutions around which our patriotism must form and which we must defend is, from a legal point of view, mostly positivist. This means that it is as deep or as shallow as the last constitutional amendment: in some countries, like Switzerland or Germany, not a particularly onerous political process. Consequently, vesting so much in the constitutional integrity of the Member State is an astonishing feat of self-celebration and self-aggrandizement, of bestowing on ourselves, in our capacity of constituent power, a breathtaking normative authority. Just think of the near sacred nature we give today to the constitutions adopted by the morally corrupted societies of the Second World War generation in, say, Italy and Germany and elsewhere.

A similar doubt should dampen somewhat any enthusiasm towards the new constitutional posture of national courts, which hold themselves out as defending the core constitutional values of their polity, indeed its very identity. The limitation of power imposed on the political branches of government is, as has been widely noticed, accompanied by a huge dose of judicial self-empowerment and no small measure of sanctimonious moralizing. Human rights often provoke the most strident rhetoric. Yet constitutional texts in our different polities, especially when it comes to human rights, are remarkably similar. Defending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges voting against four. The banana saga, which has taxed the European Court of Justice,

the German Constitutional Court, the Appellate Body of the World Trade Organization, and endless lawyers and academics, is the perfect symbol of this farce.

Finally, there is also an exquisite irony in a constitutional ethos which, while appropriately suspicious of older notions of organic and ethnic identity, at the very same time implicitly celebrates a supposed unique moral identity, wisdom and, yes, superiority, of the authors of the constitution, the people, the constitutional demos, when it wears the hat of constituent power and, naturally, of those who interpret it.

It was Samuel Johnson who suggested that patriotism was the last refuge of a scoundrel. Dr Johnson was, of course, only partly right. Patriotism can also be noble. But it is an aphorism worth remembering when we celebrate constitutional patriotism, national or transnational, and rush to its defence from any challenges to it. How, then, do we both respect and uphold all that is good in our constitutional tradition and yet, at the same time, keep it and ourselves under sceptical check?

The advocacy for a European constitution is not what it purports to be. It is not a call for 'a' constitution. It is a call for a different form of European constitution from the constitutional architecture we already have. And yet the current constitutional architecture, which of course can be improved in many of its specifics, encapsulates one of Europe's most important constitutional innovations, the Principle of Constitutional Tolerance.

The Principle of Constitutional Tolerance, which is the normative hallmark of European federalism, must be examined both as a concept and as a praxis. First, then, the concept. European integration has been, historically, one of the principal means by which to consolidate democracy within and among several of the Member States, both old and new, with less than perfect historical democratic credentials. For many, thus, democracy is the objective, the end, of the European construct. This is fallacious. Democracy is not the end. Democracy, too, is a means, even if an indispensable means. The end is to try, and try again, to live a life of decency, to honour our creation in the image of God, or the secular equivalent. A democracy, when all is said and done, is as good or bad as the people who belong to it. The problem of Haider's Austria is not an absence of democracy. The problem is that Austria is a democracy, that Haider was elected democratically, and that even the people who did not vote for him are content to see him and his party share in government. A democracy of vile persons will be vile.

Europe was built on the ashes of the Second World War, which witnessed the most horrific alienation of those thought of as aliens, an alienation

which became annihilation. What we should be thinking about is not simply the prevention of another such carnage: that is the easy part and it is unlikely ever to happen again in Western Europe, though events in the Balkans remind us that those demons are still within the continent. More difficult is dealing at a deeper level with the source of these attitudes. In the realm of the social, in the public square, the relationship to the alien is at the core of such decency. It is difficult to imagine something normatively more important to the human condition and to our multicultural societies.

There are, it seems to me, two basic human strategies for dealing with the alien and these two strategies have played a decisive role in Western civilization. One strategy is to remove the boundaries. It is the spirit of 'come, be one of us'. It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the 'be one of us', however well intentioned, is often an invitation to the alien to be one of us, by being us. Vis-à-vis the alien, it risks robbing him of his identity. Vis-à-vis oneself, it may be a subtle manifestation of both arrogance and belief in my superiority as well as intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. This is, of course, infinitely better than the opposite: exclusion, repression, and worse. But it is still a form of dangerous internal and external intolerance.

The alternative strategy of dealing with the alien is to acknowledge the validity of certain forms of non-ethnic bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference, and what is special and unique about ourselves as individuals and groups; and yet we reach across differences in recognition of our essential humanity. What is significant in this are the two elements I have mentioned. On the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, say, 'save him' by inviting him to be one of us. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and accept him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by learning humility and overcoming it.

The European current constitutional architecture represents this alternative, civilizing strategy of dealing with the 'other'. Constitutional Tolerance is encapsulated in that most basic articulation of its meta-political objective in the preamble to the EC Treaty mentioned earlier in this

chapter: 'Determined to lay the foundations of an ever closer union among the peoples of Europe.' No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, distinct political communities. An ever closer union could be achieved by an amalgam of distinct peoples into one which is both the ideal and/or the de facto experience of most federal and non-federal states. The rejection by Europe of that One Nation ideal or destiny is, as indicated above, usually understood as intended to preserve the rich diversity, cultural and other, of the distinct European peoples as well as to respect their political self-determination. But the European choice has an even deeper spiritual meaning.

An ever closer union is altogether more easy if differences between the components are eliminated, if they come to resemble each other, if they aspire to become one. The more identical the 'Other's' identity is to my own, the easier it is for me to identify with him and accept him. It demands less of me to accept another if he is very much like me. It is altogether more difficult to attain an ever closer Union if the components of that Union preserve their distinct identities, if they retain their 'otherness' vis-à-vis each other, if they do not become one flesh, politically speaking. Herein resides the Principle of Tolerance. Inevitably I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness. The call to bond with those very others in an ever closer union demands an internalization – individual and societal – of a very high degree of tolerance. Living the Kantian categorical imperative is most meaningful when it is extended to those who are unlike me.

In political terms, this Principle of Tolerance finds a remarkable expression in the political organization of the Community, which defies the normal premise of constitutionalism. Normally in a democracy, we demand democratic discipline, that is, accepting the authority of the majority over the minority only within a polity which understands itself as being constituted of one people, however defined. A majority demanding obedience from a minority, which does not regard itself as belonging to the same people, is usually regarded as subjugation. This is even more so in relation to constitutional discipline. And yet, 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 accept being bound by precepts articulated not by 'my people' but by a community composed of distinct political communities: a people, if you wish, of others. I compromise my

self-determination in this fashion as an expression of this kind of internal – towards myself – and external – towards others – tolerance.

Constitutionally, the Principle of Tolerance finds its expression in the very arrangement which has now come under discussion: a federal constitutional discipline which, however, is not rooted in a statist-type constitution.

This is where the first and third lessons of the parable come into play. Constitutional actors in the Member State accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of other wills, other political identities, other political communities. Of course, to do so creates in itself a different type of political community, one unique feature of which is that very willingness to accept a binding discipline which is rooted in and derives from a community of others. The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey. In both, constitutional obedience is demanded. When acceptance and subordination are voluntary, and repeatedly so, they constitute an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.

The Principle of Constitutional Tolerance is not a one-way concept: it applies to constitutional actors and constitutional transactions at the Member State level, at the Union level and among the Member States too. This dimension may be clarified by moving from concept to praxis, to an examination of Constitutional Tolerance as a political and social reality.

It is, in my view, most present in the sphere of public administration, in the habits and practices it instils in the purveyors of public power in European polities, from the most mundane to the most august. At the most mundane administrative level, imagine immigration officials overturning practices of decades and centuries and learning to examine the passport of Community nationals in the same form, the same line, with the same scrutiny of their own nationals. And a similar discipline will be practised by customs officials, housing officers, educational officials and many more subject to the disciplines of the European constitutional order.

Likewise, a similar discipline will become routine in policy-setting forums. In myriad areas – whether a local council or a parliament itself – every norm will be subject to an unofficial European impact study. So many policies in the public realm can no longer be adopted without examining their consonance with the interest of others, the interest of Europe.

Think, too, of the judicial function, ranging from the neighbourhood *giudice conciliatore* to the highest jurisdictions: willy-nilly, European law, the interest of others, is part of the judicial normative matrix.

I have deliberately chosen examples which both occur daily and are commonplace but which also overturn what until recently would have been considered important constitutional distinctions. This process operates also at Community level. Think of the European judge or the European public official who must understand that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts, if executed faithfully by a national public official with whom he belongs to a national administration which claims from them a particularly strong form of loyalty and habit. This, too, will instil a measure of caution and tolerance.

It is at this level of praxis that the second and third lessons of the parable come into play. What defines the European constitutional architecture is not the exception, the extreme case which definitively will situate the *Grundnorm* here or there. It is the quotidian, the daily practices, even if done unthinkingly, even if executed because the new staff regulations require that it be done in such a new way. This praxis habituates its myriad practitioners at all levels of public administration to their concealed virtues.

What, then, of the non-Europeans? What of the inevitable boundary created by those within and those without? Does not Constitutional Tolerance implode as an ethos of public mores if it is restricted only to those chosen people with EU passports? Let us return to the examples mentioned above, such as the new immigration procedures which group all Community nationals together. What characterizes this situation is that, though national and Community citizens will be grouped together, they will still have distinct passports, with independent national identities, and still speak in their distinct tongues, or in that peculiar Eurospeak that sometimes passes itself off as English. This is critical, because in the daily practices which I am extolling, the public official is invited and habituated to deal with a very distinct 'other', but to treat him or her as if he/she was his own. One should not be starry-eyed or overly naïve; but the hope and

expectation is that there will be a spillover effect: a gradual habituation to various forms of tolerance and with it a gradual change in the ethos of public administration which can be extended to Europeans and non-Europeans alike. The boundary between European and 'non-European' is inevitable, dictated if by nothing else by the discipline of numbers. In too large a polity the specific gravity of the individual is so diminished that democracy, except in its most formal sense, becomes impossible. But just as at the level of high politics the Community experience has conditioned a different ethos of intergovernmental interaction, so it can condition a different ethos of public interaction with all aliens.

To extol the extant constitutional arrangement of Europe is not to suggest that many of its specifics cannot be vastly improved. The Treaty can be pared down considerably, competences can be better protected¹⁶ and vast changes can be introduced into its institutional arrangements. But when it is objected that there is nothing to prevent a European constitution from being drafted in a way which would fully recognize the very concepts and principles I have articulated, my answer is simple: Europe has now such a constitution. Europe has charted its own brand of constitutional federalism. It works. Why fix it?

¹⁶ The issue of competences is particularly acute since there has been a considerable weakening of constitutional guarantees to the limits of Community competences, undermining Constitutional Tolerance itself. See B. Simma, J. H. H. Weiler and M. Zöckler, *Kompetenzen und Grundrechte – Beschränkungen der Tabakwerbung aus der Sicht des Europarechts* (Berlin: Duncker & Humblot, 1999). History teaches that formal constitutions tend to strengthen the centre, whatever the good intentions of their authors. Any formulation designed to restore constitutional discipline on this issue can be part of a Treaty revision and would not require a constitution for it. For pragmatic proposals on this issue see J. H. H. Weiler *et al.*, 'Certain Rectangular Problems of European Integration' (<http://www.iue.it/AEL/EP/index.html>) (1996).

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