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The significance of borders : why representative government and the rule of law require Nation States

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PART II

THE ASSAULT ON BORDERS

Supranationalism and Multiculturalism

*Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion too
Imagine all the people
Living life in peace*

From: John Lennon, *Imagine* (1971)

INTRODUCTION

Opposed to national sovereignty stand supranationalism and multiculturalism. The borders that have been constructed over a period of hundreds of years, to separate one jurisdiction from another, to settle the problem of political loyalty and avoid further civil wars, have been broken down. The idea of national sovereignty has been considered to belong to the past.

In a concerted assault on borders, Western European states in the second half of the twentieth century have adopted a policy of dilution both of national identities and of sovereignty. The nation state has been seriously undermined, by a policy of multiculturalism from the inside, and by supranationalism from the outside. It is the purpose of this part of the book to outline the extent to which those developments have infringed national sovereignty, by discussing them separately, commencing with supranationalism, followed by an examination of multiculturalism.

Supranationalism is entirely different from internationalism. The two are often muddled up, but while internationalism is an expression of sovereignty – and indeed only became possible, as discussed in chapter 1, with the rise of sovereign states –, supranationalism entails an inversion of classical international law and stands at odds with the very foundation of cooperation between states, which is sovereignty. As a synonym to supranationalism, the terms transnationalism or ‘transnational jurisdiction’ are sometimes used.¹

One explanation for the confusion over the meaning of international and supranational resides in the confusing use of the word ‘nation’ (as has been discussed in chapter 3). For what is meant by *supranationalism*² is in fact supratatism: the setting up of institutions that function *supra* the *state*: higher than the state. Supranational are those developments that create legal structures that stand *above* the state. Precisely because of this characteristic, supranationalism is something quite different from internationalism, which creates, as we will observe in more detail, legal affiliations *among* and *between* states. Internationalism is an expression of sovereignty, supranationalism *undermines* sovereignty, or, as John Laughland puts it:

One of the greatest intellectual faults is to confuse cooperation between States, with their political integration, and to defend the latter in the name of the former.³

¹ As it is used, for instance, by Scruton (2002) 144.

² Or, of course, by *transnationalism*.

³ John Laughland, *The Tainted Source. The undemocratic origins of the European Union* (Boston: Little Brown & Company, 1997) 299. The 1998 edition says: ‘It is dishonest for European federalists

Political integration occurs when the free choice to cooperate is taken from the member states, and having a choice to cooperate or not thus implies that no political integration has occurred. Cooperation and integration are mutually exclusive.

Nor does a supranational organization relate to the state as the state does to its provinces. Supranationalism is not an attempt at enlarging the scope of the state. It is not merely a continuation of the concept of sovereign statehood on a larger scale, like federalism. On the contrary: supranationalism is *an entirely different* approach. Let us first discuss the differences between supranationalism and internationalism, and then those between supranationalism and federalism.

States have never existed in a vacuum. As discussed in chapters 1 and 2, the autarkic state has never truly existed. States have always made agreements, alliances, have set up trade conferences and drawn up covenants, and will probably always continue to do so. That is 'internationalism' (or 'intergovernmentalism'), and is profoundly distinct from 'supranationalism'. While any interaction or any agreement between states is a form of internationalism, supranationalism is the establishment of an organization that may, by some form of non-consensual voting or internal judicial procedure:

- (a) amend the agreed provisions, or
- (b) execute these provisions, or
- (c) interpret these provisions,
thereby binding the member states to terms not formally agreed upon by their legislature (which is charged with ratifying treaties).

Perhaps the clearest way to illustrate the distinction between supranationalism and internationalism, is through an example that could easily be confused with supranationalism, but is in fact a model-example of internationalism: NATO. The North Atlantic Treaty Organization (NATO) was founded on April 4th, 1949, with the signing of the North Atlantic Treaty in Washington, DC. The member states agreed to regard an attack on one of them, as an attack on all, as article 5 of the treaty reads:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith,

to have peddled the idea of a single market – which could have united the peoples of Europe by means of free and spontaneous interaction – when what was in fact being hatched was not a free market at all. On the agenda instead is a self-contained and centrally directed economic space which is intended to serve as the basis for a political union. The one cannot be defended in the name of the other, any more than integration can be defended in the name of cooperation'. In: *Ibidem* (London: Warner Books, 1998) 326.

individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.⁴

This simple clause marks the essence of NATO, which is therefore in fact nothing more than an ordinary defense alliance, comparable to any other in history, from the defense alliance Germany had with Austria in the 1910s, to the one France had with Britain in the Crimean War of 1853-1856, and so on.

NATO does not have the power to amend, execute, or interpret elements of its charter by some form of majority vote, or by some form of court decision. If they no longer adhere to its principles, member states can withdraw (as, indeed, France partially did in 1966). As all its decisions necessarily have to be taken by consensus, article 10 concerning the extension of NATO membership reads:

The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty.

Therefore, membership of NATO does not affect any of the powers attributed to statehood of any of its members but, quite the contrary, it is an *expression* of those powers. The state remains in place and is only bound by duties explicitly agreed upon. Indeed, the NATO treaty does not even prescribe *the type of* assistance states are obliged to offer one another in case of armed attack. Once again article 5:

The Parties (...) agree that (...) each of them (...) will assist the Party or Parties so attacked by taking (...) such action as it deems necessary.

‘Such action as it deems necessary’: the decision is in the hands of the member state itself, *not* in the hands of NATO.⁵

For NATO to have supranational powers, a board would be required that, by majority vote or executive decision, could determine whether or not there has been an attack on any of its members; as well as what would be the appropriate assistance demanded from other members. This, in turn, would also imply that NATO would have instruments to enforce its decisions, for instance imposing fines or even the possibility of assuming direct control over a reluctant member state’s military forces. It is clear that this requires an amount of trust that NATO’s member states are not prepared to grant each other, and realizing this helps us anticipate the question of what it is, that makes us comfortable with our own

⁴ Available online at http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

⁵ As was shown in 2003, when Turkey asked for military support from its NATO allies, and France, Belgium and Germany opposed any such assistance, on the ground that providing it would seem to endorse an attack on Iraq. See on this Jeremy A. Rabkin, *The case for Sovereignty. Why the world should welcome American independence* (Washington, DC: AEI Press, 2004) 18off.

governments exercising these powers, but uneasy about the thought of other governments exercising them over us.

Two other organizations that can be described as *international* (or inter-governmental) instead of *supranational* are the United Nations (the Security Council not taken into account⁶) and the OECD, the Organization for Economic Co-operation and Development. What is typical for them as international and not supranational organizations, is the following.

The United Nations (not taking into account the Security Council), can only pass resolutions that *suggest* things or set up again new organizations or committees that make recommendations or organize conferences to enhance support for a certain cause. Even the payment of a contribution cannot be enforced by the General Assembly, and the only thing it can do when member states fail to pay, is suspend their right to vote. The UN – apart from the Security Council – is an instrument of international lobbying and policy making, of coordinating international development aid, and a facilitating device for diplomacy. Without the endorsement of the Security Council, the UN cannot enforce any of its decisions.

The same goes for the OECD: established in 1961, the Organization for Economic Co-operation and Development⁷ functions as an important means to achieve agreement on proposed international trade and entrepreneurial regulations: as an organization it cannot force its resolutions on its members should they, after extensive rounds of negotiations, not find their interests satisfactorily recognized by the forthcoming resolutions or recommendations.

So much for the difference between *supranationalism* and *internationalism*. Now let us have a look at the differences between supranationalism and the attempt to enlarge statehood in some federal form. As previously stated, the supranational organization does not relate to its member states as the state relates to its provinces. It is not the aim of any supranational organization to form a new state (neither on a European, nor on a global level). Supranational organizations undertake a replacement *of the entire concept* of statehood by something that in fact resembles more the medieval organization of power.

Whatever the different ways and forms in which states may have centralized or decentralized their government (which range from a centralized unitary state such as France, to a decentralized unitary state such as the Netherlands, to a federal state like the US, to name a few examples), there are always a number of unique attributes of the state that place it above its decentralized elements.

⁶ While other bodies of the UN can occasionally draft resolutions that demand direct action, these require affirmation by the Security Council to take effect.

⁷ The OECD is the successor to the Organization for European Economic Cooperation (OEEC) that was established in 1947 to coordinate the Marshall plan. In 1960, the United States and Canada joined, and the organization attained its new name and adjusted mission in 1961. Presently, the OECD has 34 member states, from all regions of the world.

As discussed in the first part, a state necessarily retains control over the army, the maintenance of foreign relations, and, correspondingly, the power of direct taxation.

Supranational organizations do not desire to take over all these attributes of the sovereignty of their member states: they merely desire to take over a *particular element* of it. 'Multilevel jurisdiction' is the key-word for supranational thinking.⁸ Indeed, supranationalism is an attempt to siphon off any claim for centralized decision-making the state could make. Supranationalism entails – as Jean Monnet put it when he spoke of European integration – 'the abnegation of sovereignty on a limited, but decisive field'.⁹

In the course of the past decades, six supranational institutions have been erected, namely, the International Criminal Court (ICC), the European Court of Human Rights (ECHR), the International Court of Justice (ICJ), the World Trade Organization (WTO), the United Nations Security Council (SC) and the European Union (EU). These institutions take over, in their several ways, a limited aspect of the sovereignty of their member states, binding them by rulings, compelling them to follow policies they might not have accepted or pursued had they retained veto power, or by interpreting existing rules through some form of executive or judicial process. We will examine them in turn, and map out how they take over elements of the self-government of states attached to them.

But before we do so, it may be useful to make two general comments on the supranational philosophy. We can discern in principle two arguments for supranationalism.

⁸ 'Multilevel jurisdiction' is also the well-chosen name of a research department of the faculty of law at Leiden University in the Netherlands, as the literature using this terminology is almost endless. Cf. I. Bache, *Europeanization and multilevel governance. Cohesion policy in the European Union and Britain* (Maryland: Rowman & Littlefield Publishers Inc., 2007); G. Baldacchino and D. Milne (eds.), *The Case for Non-sovereignty: Lessons from Sub-national Island Jurisdictions* (London: Routledge, 2008); A. Benz and C. Zimmer, 'The EU's competences: The "vertical" perspective on the multilevel system', in: *Living Reviews in European Governance*, Vol. 3 (2008) available online at: <http://www.livingreviews.org/lreg-2008-3>; O. Budzinski, *Mehr-Ebenen-Governance, Leitjurisdiktionskonzepte und globaler Wettbewerb* (April 14, 2009) available online at <http://ssrn.com/abstract=1379608>; G.B. Doern and R. Johnson (eds), *Rules, Rules, Rules, Rules: Multi-Level Regulatory Governance* (Toronto: University of Toronto Press, 2006); H. Yamamoto, 'Multi-level Governance and Public Private Partnership: Theoretical Basis of Public Management', in: *Interdisciplinary Information Sciences*, Vol. 13, No. 1 (2007) 65-88; A. van Hoek et al. (eds.), *Multilevel governance in enforcement and adjudication* (Antwerpen: Intersentia, 2006.); L. Hooghe and G. Marks, 'Unraveling the central state, but how? Types of Multi-Level Governance', in: *The American Political Science Review*, Vol. 97, No. 2 (May, 2003) 233-243; F.C. Mayer, 'Multilevel Constitutional Jurisdiction', in: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford and München: Hart Publishing and Verlag C.H. Beck, 2010); R. Münch, *European Governmentality. The Liberal Drift of Multilevel Governance* (London: Routledge, 2010).

⁹ Jean Monnet, *Mémoires* (Paris: Fayard, 1976) 316. The quote is discussed by Neill Nugent, *The Government and Politics of the European Community* (London: Macmillan, 1991) 35ff.

The first argument is that the decisions that are made on the supranational level are 'universal' or stem from a strict economic rationale, and that they are, therefore, 'nonpolitical'. Those who argue this often add that issues that require a political choice remain within the competence of the member states. An example of this is the European Court of Human Rights, which claims to administer only universal, nonpolitical standpoints. As clearly many of the Court's rulings and rules (such as the prohibition of the death penalty) go against the views of large minorities and even majorities in many European states, cursory observation already shows the tension this universal appearance brings about. We also see this idea of the supposed 'universality' of decisions in the policies of the EU's Economic and Monetary Union (EMU), establishing a common European currency, in which the interest rate would be set, and the inflation rate would be aimed for along 'nonpolitical' lines. It is thus widely assumed by those defending supranational developments that a large number of decisions that were formerly entrusted to the national political authorities, can now be made by application of universal laws of economics or ethics, and therefore that many economic or ethical questions are somehow non-political. As John Laughland puts it:

Above all, it is the economist or unpolitical assumptions underlying the European construction which threaten democracy and the rule of law. It is widely assumed in Europe (and not just at a European level) that politics is simply the administration of the economy, and that it is sufficient to do this well, even in the absence of democracy. (...) To holders of such views, statehood and the activity of politics appear messy and illogical. Far better, it seems, to organize the world rationally, to overcome division and squabbling, and to put in place politico-economic systems which encourage harmony rather than conflict.¹⁰

'The language of economics has displaced the language of politics', Larry Siedentop notes in his book *Democracy in Europe*.¹¹ This is as clear in the EU as it is in the World Trade Organization, as will be shown in depth below. The question that supranationalists avoid by presenting arrangements in such a 'universal' way is where the political authority for these arrangements comes from, because what is beyond the political obviously doesn't stand in need of political legitimation.

The second argument that is generally advanced to support supranational developments is made by those who, while acknowledging the political implications of these supranational developments, argue that the loss of sovereignty and (thereby of) political independence is somehow compensated by economic growth or other benefits. This is most clearly seen in defenses of the World Trade Organization, which is supposedly in the self-interest of all of its members, even though in individual cases it may nevertheless act against certain members'

¹⁰ Laughland (1997) 149.

¹¹ Larry Siedentop, *Democracy in Europe* (London: Penguin Press 2000) 102.

interests or wishes. The same argument is plain in discussions on the EU, the Euro currency, and the common market, which, as the proponents of the EU's current supranational direction continue to stress, are to the advantage of everyone, no allowance being made for the possibility of this being to the disadvantage of *some* of its member states.

Let us begin our examination of the workings of the six supranational institutions. For the purpose of clarity, I have divided them into two groups: supranational courts on the one hand, and supranational organizations on the other. Under the first fall the International Criminal Court, the International Court of Justice, and the European Court of Human Rights; under the second the WTO, the Security Council, and the European Union.

I will present the institutional structure and some emblematic examples of the workings of each of these institutions, not to provide an exhaustive account, but to give a flavor of their implications. What follows, thus, is a bird-eye's view of them. All these organizations have developed fairly recently and as yet, their powers are relatively limited. But altogether they form a network of decision making institutions, creating multilevel jurisdiction, constituting the first element of the two-pronged assault on borders.

