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

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CHAPTER SIX

MULTICULTURALISM

6.1. INTRODUCTION

In the previous two chapters, I have attempted to show, in a general overview, the extent to which supranational developments already dilute the sovereignty of European states. Supranational courts and organizations have, in their several ways, surreptitiously expanded their powers, taking over more and more elements of national policy and law. These supranational courts and organizations form a web of institutions that, even though each might still be limited in its powers, in their totality severely – and increasingly – limit national self-government.

Many present-day academics and politicians see no essential problem in these supranational tendencies – on the contrary, they are embraced, if not as a relief from ultimate national responsibility, then as ‘inevitable’. As the American commentator George F. Will remarked: ‘European elites believe that Europe’s nations are menaced by their own sovereignty.’¹ There are interesting intellectual roots to this idea. But before we take up this discussion and examine both the background and the merits of the supranational idea, we will discuss multiculturalism, because it is a manifestation of the same world-view, and an integral part of the assault on borders. Indeed: supranationalism and multiculturalism are not only consistent with one another, but in fact logically connected. It is impossible to defend supranationalism without supporting multiculturalism, while multiculturalism is perfectly compatible with supranationalism.

But it is important to define multiculturalism carefully, as it is to be distinguished from the *multicultural nationalism* that I defend in this book. Moreover, even more than supranationalism, multiculturalism has touched a raw nerve in our societies. Its supporters often brand those who question it as racist, because opposition to multiculturalism is confused with multiracialism. However, the accusation is itself genuinely racist, for it assumes that race and culture are coterminous.²

The modern world brings us all in contact with much cultural and ethnic diversity: globalized economic activity, migration, the liberty of differing life

¹ George F. Will, ‘The Slow undoing: the Assault on, and Underestimation of, Nationality’, in: Irwin Stelzer (ed.), *Neoconservatism. Edited with an introduction by Irwin Stelzer* (London: Atlantic Books, 2004) 132.

² Cf. Christopher Caldwell, *Reflections on the Revolution in Europe* (Allen Lane, Penguin Books, London, 2009) 267–268.

styles, and so on. To some extent, this diversity has always existed. As discussed in chapters 1 and 3, the socially cohesive nation state is a fairly recent phenomenon, and there is nothing intrinsic in its philosophy that opposes a pluralist society.

Differences between people in the countryside and the cities have always existed as well. And no doubt the gastronomic varieties within nation states have increased beyond imagination in the past decades. All this 'multiculturalism' – in the sense of diversity in a pluralist, modern society – is wonderful and not what is addressed in this chapter. The ideal of a *multicultural nationalism* that I support, also explicitly acknowledges this. As H.E. Baber writes:

Critics of multiculturalism get bad press because the common perception is that we object to these harmless customs and practices. That is not what is at issue. When it comes to the harmless, superficial features of culture – food, costume, music and dance, language, entertainment, and crafts – the more the better.³

Interesting societies are always to some extent a melting pot of cultures and practices, seeking to cherish 'the best that has been thought and said'.⁴ That is also why I propose a *multicultural nationalism* in the concluding chapters of this book – a diverse and pluralist society, held together nevertheless by a monocultural core.

Proponents of multiculturalism, on the contrary, do not seek to merely defend such pluralism. They make it clear that their philosophy is not simply the recognition of the empirical fact of diversity (in which case almost everyone would be a 'multiculturalist'), or the applauding of a greater choice in what to have for dinner. On the contrary, multiculturalism, its defenders explain, is a quite specific, and indeed novel thing.⁵

Multiculturalism, properly understood, denies that society has or should have a *Leitkultur*, a dominant culture – a set of core values, a shared common ground. Multiculturalists believe that 'the idea of national culture makes little sense, and the project of cultural unification on which many past societies and all modern states have relied for their stability and cohesion is no longer viable today'.⁶ It is the view of society that emphasizes the differences between people within a state, instead of their similarities.⁷ It tends towards legal pluralism

³ H.E. Baber, *The multicultural mystique. The liberal case against diversity* (New York: Prometheus Books, 2008) 43.

⁴ The phrase comes from Matthew Arnold, *Culture and Anarchy* (1882) (Oxford: Oxford University Press, 2006).

⁵ Charles Taylor, *Multiculturalism, examining the politics of recognition*, Edited and introduced by Amy Gutman (Princeton: Princeton University Press, 1994). Bikhu Parekh, *Rethinking Multiculturalism, Cultural Diversity and Political Theory* (Palgrave, 2006). Will Kymlicka, *Multicultural Citizenship, A liberal theory of minority rights* (Oxford: Oxford University Press, 1996), Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press 1991).

⁶ Parekh (2006) 8.

⁷ See on this for example: Baber (2008) 36-37: '... multiculturalists reject assimilation as an ideal, holding instead that multiethnic societies should support the persistence of cohesive ethnic

based on the presence of people of different cultural backgrounds and legal traditions, and applauds the efflorescence of different cultures at the expense of the shared national cohesion.

In his book *Culture and Equality*, Brian Barry concludes that for Bhikhu Parekh and other multiculturalists 'group identities and group loyalties have primacy over any broader, society-wide identity and loyalty'.⁸ On this definition, multiculturalism would be a new phenomenon, previously unknown to political science. As Bhikhu Parekh writes:

As a political movement [multiculturalism] is just over thirty years old, and as a theoretical exploration of it only half as old.⁹

Parekh however polemicizes with Brian Barry concerning the precise meaning of the doctrine:

Barry takes me to be an 'excellent example' of the preposterous view that 'group identities and group loyalties have primacy over any broader, society-wide identity and loyalty' (p. 301). He offers no evidence and there is none. I take this view to lie at the basis of the Ottoman millet system and its contemporary analogues, and explicitly reject it.¹⁰

Parekh then goes on to explain that rather than establishing *either* the primacy of group loyalties over a society-wide identity, *or* establishing the primacy of a single, society-wide identity over group loyalties (as Brian Barry proposes), multiculturalists take an all-inclusive approach, recognizing the importance of both. 'Multiculturalists cherish intercultural exchanges and fusions at all levels, propose policies and institutional structures conducive to them, and expect the state to play a judicious and supportive role.'¹¹ He continues:

Although political obligations generally override ethnic and religious obligations, this is not always the case.¹²

communities, which coexist peacefully and interact without coalescing. They hold immigrants and members of ethnic minorities should not be expected to assimilate to the dominant culture and reject the melting pot in favor of a salad bowl model of cultural diversity'.

⁸ Brian Barry, *Culture and Equality, An egalitarian critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2002) 301.

⁹ Parekh (2006) 349.

¹⁰ Parekh (2006) 352. The Millet system offered a dhimmi status to Christians and Jews in the Ottoman empire, who were then allowed to conduct their affairs and solve their legal issues through their own courts and representative organs.

¹¹ Parekh (2006) 350.

¹² Parekh (2006) 352. The whole quotation is as follows: 'What I maintain is that citizenship represents one of the individual's several identities, and does not automatically trump others. As human beings, we have moral obligations to people outside our political community, and these may modify, limit and in exceptional circumstances override our obligations as citizens. Although political obligations generally override ethnic and religious obligations, this is not always the case. If the state were to require me to betray my parents and friends, spy on or malign my ethnic or religious community, or convert to another religion, I would find its demands unacceptable. This

The trouble is that what Parekh precisely means by 'generally' and what by 'not always' remains unclear. And we are left in the dark as to the meaning and origins of 'ethnic' obligations (for what obligation could one possibly derive from one's 'ethnicity'?). Moreover, what Parekh is pointing at is something with which no one could really disagree. Clearly, this cannot mark the fundamental divide between advocates and critics of multiculturalism: for who would deny that political obligations can sometimes be overridden by other obligations?

According to Parekh, who seems to recognize this point, and goes on to admit that 'Barry and the multiculturalists then agree on many of the substantive issues thrown up by a multicultural society',¹³ the important 'theoretical difference' is, he says, that

Barry does not appreciate the value of cultural diversity and dialogue as I do. Nor does he see the importance of the right to cultural self-expression as Kymlicka, I and others do.¹⁴

Though Parekh suggests that this is a 'theoretical' difference, in fact it is clearly a 'practical' or gradual difference, and his definition of multiculturalism is therefore not very helpful in an attempt to understand multiculturalism conceptually.

If the extent to which one values 'cultural diversity and dialogue' is what distinguishes multiculturalists from non-multiculturalists, then Parekh speaks of 'multiculturalism' in a sense different from what is meant in this chapter. For if it is just a matter of valuing cultural diversity and enjoying cultural self-expression or 'dialogue', then we would all be 'multiculturalists' the moment we enjoy the Chinese restaurant around the corner, play the Persian game of chess, or 'dialogue' about rap music.

Certainly, multiculturalists take a favorable position towards diversity. But if Parekh acknowledges the need for shared, national political obligations too, then multiculturalism means little more than just a nuance. If multiculturalists are simply those people who are 'pro-diversity' and who tend to take a positive view towards manifestations of 'otherness', than it hardly needed to be discussed here.

Charles Taylor has given a different and much clearer definition to multiculturalism, with obvious policy implications. In his much praised essay *The politics of recognition* (1992), Taylor advocates 'the equal status of cultures and of genders'.¹⁵ Taylor also accepts that an opposing concept to multiculturalism

is a very different view to the one Barry ascribes to me'. But this is a problem of any government, always, and evades the particular questions of multiculturalism.

¹³ Parekh (2006) 355. It is typical for multiculturalists to confuse – or mix up – 'society' and 'state' all the time.

¹⁴ Parekh (2006) 355.

¹⁵ Taylor (1994) 27.

exists – very useful if not indispensable when it comes to defining things¹⁶ – which is ‘nonrecognition or misrecognition’, through a form of ‘homogenization’.¹⁷ With Taylor, we can say that the opposite of multiculturalism is some form of monoculturalism, which has also been described as the recognition of a *Leitkultur*:¹⁸ the attempt to define and defend not only shared values but also a shared culture, a shared political loyalty, and ideas of legitimacy shared by all members of society, despite whatever differences may exist between them. The question that multiculturalism poses is the extent to which it is desirable to share the same laws and customs within a single society (and not, as Parekh suggested, the extent to which we ‘enjoy’ or ‘value’ those different customs).

According to Taylor, and here he speaks for multiculturalism, ‘what is to be avoided at all costs is the existence of “first-class” and “second-class” citizens’ on the basis of different cultural practices or backgrounds.¹⁹ Taylor continues:

The politics of difference often redefines nondiscrimination as requiring that we make these distinctions the basis of differential treatment. So members of aboriginal bands will get certain rights and powers not enjoyed by other Canadians (...) and certain minorities will get the right to exclude others in order to preserve their cultural integrity, and so on.²⁰

The idea of equal citizenship of multiculturalists, then, is not to be understood as formal equality. On the contrary. Multiculturalism claims that no society has the right to impose cultural or social norms on other groups within its territory: and that the strength of future societies lies exactly in their lack of a shared culture or core values (except that a lack of core values itself is of course a value, if viewed as desirable). ‘Certain minorities will get the right to exclude others’, and ‘members of aboriginal bands will get certain rights and powers not enjoyed by other[s]’, as Taylor states.

Society: a community of communities. The sense of shared membership of the state comes from the tolerance of the other’s otherness, not from recognition of the other’s kinship with oneself.²¹ The official slogan of the European Union, ‘United in Diversity’, is multiculturalism distilled (and is, as mentioned before, in complete contrast to that of the United States, ‘E Pluribus Unum’, out

¹⁶ ‘Omnis determinatio negatio est’: it is only possible to define something when you are also prepared to say what it is *not*. It is a fundamental problem of the ‘all-inclusive’ approach that both supranationalists and multiculturalists take, that by its very nature, it is difficult if not impossible to clearly delineate what it means. I discuss this theme more extensively in chapter 9.

¹⁷ Taylor (1994) 25 and 71.

¹⁸ Cf. Bassam Tibi, *Europa ohne Identität? Leitkultur oder Wetteilieblichkeit* (München: Siedler, 1998); Bassam Tibi, *Euro-islam: Die Lösung eines Zivilisationskonfliktes* (Darmstadt: Primus Verlag, 2009).

¹⁹ Taylor (1994) 36.

²⁰ Taylor (1994) 40.

²¹ See on group rights: Caroline Fourest, *La dernière utopie: menaces sur l’universalisme* (Paris: Editions Grasset, 2009).

of many, one). Not 'united *despite* diversity', or 'united *on core issues*, diverse *on matters of secondary importance*'; the feeling is that of belonging to a society as a 'multicultural mosaic' or even kaleidoscope.²²

In 1991, Charles Taylor proposed that Canadians 'take the road of deep diversity together',²³ hoping that citizens 'might find it exciting and an object of pride' to work together to build a society *founded* on deep diversity.²⁴ In this view, diversity *is the basis* of society, not just a fact about it.

This entails tension between multiculturalism and constitutional rights. Taylor acknowledges this, when he writes: 'There would be no question of cultural differences determining the application of *habeas corpus*, for example. But [multiculturalists] distinguish these fundamental rights from the broad range of immunities and presumptions of uniform treatment that have sprung up in modern cultures of judicial review. [Multiculturalists] are willing to weigh the importance of cultural survival, and opt sometimes in favor of the latter.'²⁵

Politically, Taylor's type of multiculturalism has two main consequences for social policy. First, it grants different rights and obligations to people by virtue of their cultural background. This leads to legal pluralism. Second, multiculturalism entails state sponsorship or support for expressions of minority cultures. The state supports different groups according to their size or alleged needs, in order to reflect and preserve the variety of cultural identities within its territory.²⁶

²² Charles Taylor, 'Shared and Divergent Values', in: Ronald Watts and D. Brown (eds), *Options for a New Canada* (Toronto: University of Toronto Press, 1991), 53-76.

²³ Taylor (1991) 53-76.

²⁴ Taylor (1991) 53-76. Discussed by Kymlicka (1996) 190.

²⁵ Taylor (1994) 61. Taylor does not specify exactly why there would be no question of the principle of *habeas corpus* to be mitigated according to the cultural traditions of a certain group.

²⁶ It has been tempting for proponents of multiculturalism to suggest that the famous 'pillarization' of the Dutch society was in fact a form of multiculturalism as well. While to some extent there may be truth in this suggestions, Arend Lijphart, one of the most eminent scholars of this phenomenon, has nevertheless argued that despite the great differences and even animosity between the several 'pillars' of Dutch society during the second half of the twentieth century, there was consensus on core issues and a desire to preserve the authority of the central state, as well as a certain amount of shared nationalism between the several pillars. Arend Lijphart, *The politics of accommodation. Pluralism and democracy in the Netherlands* (Berkeley and Los Angeles: University of California Press, 1968) 78-79: 'The Netherlands cannot be called a consensual society, not even by the most generous stretch of the imagination. Consensus exists within each of the subcultures rather than among all four blocs. No state can exist without some degree of consensus on matters of fundamental concern, however, and Holland is no exception. (...) In the Netherlands, both the degree and extent of political consensus are very limited, but one vitally important element of consensus is present: the desire to preserve the existing system. Each bloc tries to defend and promote its own interests but only within the confines of the total system and without the threat of secession or civil war. (...) The most important factor behind this element of consensus is Dutch nationalism: the feeling of belonging to a common nation as well as to one's own bloc. The strength of this nationalism must not be exaggerated, but it certainly does exist. National independence was achieved at a relatively early date, and feelings of nationalism can be traced back to the early stage of the struggle for independence: the end of the sixteenth century. The separate Catholic, Calvinist, and secular subcultures also had their origin in this period, but

The first consequence of multiculturalism is the 'stronger' one, the second its 'weaker' one.²⁷ It is easier to take a categorical position on the question of legal plurality, whereas state support for minority expressions is perhaps more a question of nuance. The 'weak' form encompasses all sorts of appraisals for minorities' ways of life and values, often combined with disdain for and even suppression of national customs – a practice Roger Scruton denotes as 'oikophobia', or fear of what is one's own.²⁸ Hence the typical reproach to those who do not share enthusiasm for multiculturalism as being 'provincials', 'xenophobes', 'little Englanders' in the British case²⁹ or 'cheeseheads' in Holland. Official support for minority cultures encourages citizens to focus not on what they have in common, but on what they *do not* have in common.³⁰ Over time, this may clearly reinforce the demand for legal pluralism; for not only will groups that have been granted different rights continue to emphasize their distinctness from other groups or the majority of society; those who have been discouraged to integrate and so live separated from the rest of society, will come to think it only natural that they should have their own laws, too. Indeed, what does multiculturalism mean if it is not backed by a flexible law that can provide different remedies, in accordance with the different cultural backgrounds of those invoking it? Nevertheless, it is important to investigate the two elements of multiculturalism separately, as will be done below.

the blocs did not become thoroughly organized until the nineteenth century. In other words, nationalism and the nation state antedated by several centuries the outburst of organizational differentiation by the various subcultures.'

²⁷ Daniel I. O'Neill, 'Multicultural Liberals and the Rushdie Affair: A Critique of Kymlicka, Taylor, and Walzer', in: *The Review of Politics*, Vol. 61, No. 2 (Spring, 1999) 219–250, writes on 222: 'Of course, the very term multiculturalism is a vexed one, so it is important to define my use of it here. I want to distinguish two levels of commitment to multiculturalism. The first I call "strong" multiculturalism, and is the position I associate with Kymlicka, Taylor, and Walzer. Strong multiculturalists are committed, in certain circumstances, to the defense of differential (or special) citizenship rights for minority groups based on their culture. Put simply, strong multiculturalists are willing to defend cultural rights. The second level of multicultural argument I refer to (for lack of a better term) as "weak" multiculturalism. Weak multiculturalists do not argue for differential citizenship rights, but seek a range of different goals. In the United States, these have included, for example, expanding the academic curriculum to reflect more fully the contributions of minorities.'

²⁸ Cf. Roger Scruton, *A political philosophy. Arguments for Conservatism* (London: Continuum, 2006) 23ff, and Roger Scruton, *Green Philosophy. How to think seriously about the planet* (London: Atlantic Books, 2012) 247ff. An interesting organization that has taken up discussion on this phenomenon is the *Alliance Générale contre le Racisme et pour le respect de l'Identité Française et chrétienne* (AGRIF). AGRIF strives to curtail the anti-national and anti-French tendency in public debate, and objects to the extra protection that minorities' cultural values enjoy as compared to that of the majorities' values.

²⁹ Cf. Scruton (2006) 23ff.

³⁰ See on this: Arthur M. Schlesinger, Jr., *The Disuniting of America, reflections on a multicultural society*, Revised and enlarged ed. (New York: W.W. Norton & Company, 1998) 118.

6.2. LEGAL PLURALITY

In a provisional decision in March 2007, a judge in Frankfurt rejected the petition for summary divorce of a woman who had been severely maltreated by her husband. According to German divorce law,³¹ such a summary divorce is possible only if there is 'Härtefall': hardship. The judge considered that the spouses came from 'the Moroccan cultural sphere', and that it was 'not unusual' for them, 'that the man exercises a right of corporal punishment against the woman'. She continued: 'the German born petitioner had to take this into account when she married the Moroccan-born respondent'.³²

When the attorney of the woman complained against this provisional decision, the judge further explained her point of view. In a letter dated 4 February 2007, the judge wrote that by concluding the marriage in Morocco, the spouses had accepted that they would be submitted to 'the provisions of the Quran (...) and thereby also to Quran [verse] 4.34. Quran [verse] 4.34 entails apart from the right of the man to discipline his disobedient wife also the recognition of the superiority of the husband over his wife'. She continued to say that to her mind, it followed from the Quran that:

The honor of the man, simply put, is connected to the chastity of the woman; this is to say that basically, for a man who was raised as a Muslim, the life of a woman according to Western cultural standards is already a loss of honor.³³

This judgment caused international outrage,³⁴ and the judge was replaced.³⁵

But it was not an isolated incident. Some of the reactions, such as those of Ali Kizilkaya, then president of the *Islamrat für die Bundesrepublik Deutschland*,

³¹ The disputed article was § 1565 of the Bürgerliches Gesetzbuch.

³² 'Dem marokkanischen Kulturkreis (...) nicht unüblich dass der Mann gegenüber der Frau ein Züchtigungsrecht ausübe'. (...) 'Hiermit musste die in Deutschland geborene Antragstellerin rechnen als sie den in Marokko aufgewachsenen Antragsgegner geheiratet hat'. Correspondence of judge Christa Datz-Winter, Richterin am Amtsgericht, Frankfurt am Main, to the attorney of the woman demanding divorce, Barbara Becker-Rojczyk, dated January 12th, 2007, Aktenzeichen 460 F 9405/06. I am grateful to Barbara Becker-Rojczyk for kindly placing the correspondence at my disposal.

³³ 'Den Vorschriften des Korans (...) und damit auch Koran 4.34. Koran 4.34 enthält neben dem Züchtigungsrecht des Mannes gegenüber der ungehorsamen Ehefrau auch die Feststellung zur Überlegenheit des Mannes gegenüber der Frau'. (...) '[Dass] die Ehre des Mannes, einfach ausgedrückten die Keuschheit der Frau angebunden ist, d.h. im Grunde genommen für einen islamisch erzogenen Mann, das Leben einer Frau nach westlichen Kulturregeln bereits diesen Tatbestand der Ehrverletzung erfüllt'. Correspondence of judge Christa Datz-Winter, dated February 4th, 2007.

³⁴ Following an article in *Der Spiegel*: Veit Medick and Anna Reimann, 'Justiz-Skandal. Deutsche Richterin rechtfertigt eheliche Gewalt mit Koran', in: *Der Spiegel*, 20 March 2007. Available online at <http://www.spiegel.de/politik/deutschland/o,1518,472849,00.html>.

³⁵ Because the judge, Christa Datz-Winter, was replaced, the whole procedure was delayed long enough for the ordinary divorce procedure to apply. Cf. Barbara Becker-Rojczyk, 'Der "Koran-fall" - Ein Erlebnisbericht', in: *Streit. Feministische Rechtszeitschrift*, vol. 23, no. 3 (3, 2007) 121-123.

the Islamic council of Germany, were telling. Kizilkaya declared that 'the physical disciplining of a woman by her husband is not supported by Islam'.³⁶ This was relevant because according to Kizilkaya, presumably, Islamic culture and religion now had a place in the German legal system. Not seeing the law as the expression of the shared national culture and therefore upholding it for every citizen in the same manner, the judge's challenge became to figure out what exactly was the cultural practice of those standing in court.

If it is not persons, but cultures, that are equal before the law, then the judges' role becomes that of an anthropologist, deciding what is or is not customary within cultures. A judge, then, will also have to consider what constitutes 'hardship' within different cultures (as the Frankfurt situation demonstrates), for the experience of hardship is dependent upon expectations, which themselves are cultural.

Multicultural ideas were also applied a few months later in a case in Amsterdam, on May 24th, 2007. A Muslim woman who wore a burqa had been living on welfare, as she had been unemployed from April 2006 onwards. In the Dutch welfare system, the benefit is conditional on the recipient searching actively for work and not declining suitable job offers, on pain of losing his or her benefit for a period of three months.

The woman concerned applied for several jobs, mostly in the field of telephonic sales. Two companies showed an interest in hiring her. One, however, demanded that she remove her burqa, as the garment made communication with her colleagues impossible and would prevent the management from identifying her in person. The other company, a telemarketeer, accepted the burqa, but demanded that she sell lottery tickets, which she considered to be against her faith.

As a result of the rejection by her of these two job offers, the social service withdrew her unemployment benefit, upon which she filed a complaint in court. The judge considered, in accordance with the regulations, that the withdrawal of the benefit was justified, the woman having declined 'generally accepted work'. But the judge went on to consider that, since it was 'a matter of common knowledge' that 'it is not permitted for Muslims to gamble', it could not be expected of the petitioner, who was obviously a Muslim, 'to provide an occasion for gambling through the sale of lottery-tickets'.³⁷

³⁶ 'Die körperliche Züchtigung einer Ehefrau durch ihren Mann wird nicht vom Islam gedeckt'. 'Gewalt in der Ehe. Richterin bedauert Koran-Verweis', in: *Frankfurter Allgemeine Zeitung*, March 22nd, 2007. See also: Landler, Mark, 'Germany cites Koran in rejecting divorce', *New York Times*, March 22nd, 2007.

³⁷ LJN: BA6917, Rechtbank Amsterdam, AWB 07/1635 WWB, 24-05-2007. 'De rechter acht van algemene bekendheid dat het voor moslims niet is toegestaan om te gokken. Van verzoekster, die moslima is, kan daarom ook niet worden verwacht dat zij gelegenheid geeft tot gokken door het verkopen van loten voor een loterij.'

With regards to the other rejected job, in which it was demanded that the woman remove her burqa, the judge considered that it was 'disproportional' to punish the woman for declining this job, because the burqa was a 'direct expression' of the woman's faith. After only two job offers, both of them objected to by her on religious grounds, there was not enough justification for withdrawal of her welfare benefit.³⁸

This is another example of the multicultural approach to law and politics. The state now has to determine which religious or cultural practices are 'direct expressions' of faith or culture, and is then obliged to give legal weight or protection to them. The woman in this case was clearly understood as belonging to a culture, who can therefore claim a different set of rights and obligations from those who do not share her cultural (or religious) background. For non-Muslims, meanwhile, selling lottery-tickets is still considered 'generally accepted work'.

The question is what the precedent means. Would working in a non-halal butcher's-shop, in a shop that sells alcohol, or indeed, working in any situation that is in contradiction with sharia law, now also not be considered 'generally accepted work' for Muslims? The implication is there, and the problems that arise from it are potentially endless.

Even more interesting for our purpose is the remark that the burqa was a 'direct expression' of the woman's faith. It is generally held by Muslims that there is no official rule in Islam obliging women to wear a burqa. The fact that the judge acknowledged the burqa to be a 'direct expression' of the applicant's faith, implies that not only the 'official' rules of a religious group can be taken into consideration in deciding a case, but also traditions and customs that are peculiar to subcultures and branches or sects of religions. Indeed, the implementation of multiculturalism might lead to legal exceptions for almost any conduct, provided it was sanctioned by a 'culture'.

A third example of legal pluralism consequent upon multiculturalism is the permission given to Dutch civil servants to deny gay couples the execution of their right to marriage by appeal to their Christian faith. The *Algemene Wet Gelijke Behandeling*, the general law on equal treatment, provides the legal basis for this unequal treatment: civil servants can appeal to their 'conscience' and then do not have to contract the marriage. This does not mean that *any* civil

³⁸ In translation: 'Verweerders stelling dat verzoekster haar boerka zou kunnen afdoen om de bemiddeling naar arbeid (beter) te doen slagen, acht de rechter voorshands disproportioneel. Niet is gebleken dat de bemiddelingsmogelijkheden reeds in zoverre zijn uitgeput, dat van verzoekster kan worden gevraagd om afstand te doen van het kledingstuk dat voor haar een rechtstreekse uitdrukking is van haar godsdienstige overtuiging (vergelijk: Commissie Gelijke Behandeling 20 maart 2003, LJN: AN7464, m.nt. BPV). De rechter neemt hierbij tevens in aanmerking dat verzoekster haar boerka reeds droeg bij aanvang van het traject naar arbeid en dat dat gegeven haar destijds niet is tegengeworpen. De rechter acht het voorshands onredelijk om verzoekster dit nu – na slechts vier sollicitaties – te verwijten'.

servant is now allowed to reject marrying gay couples. Only when they can refer to a cultural or religious background may civil servants do so: and so here we see yet another example of legal pluralism.

Many more examples can be given, of course, and it is not necessary to go into that at this point. We could look at family and inheritance law (where debates are ongoing on accepting some aspects of sharia law), mortgage law (where debates are ongoing of allowing an interest free mortgage to Muslims), and even penal law (as proposals have been made to approach honor killings more mildly and female genital mutilation leniently).

More individual rights are not always the result. Freedoms of citizens who happen to have a certain cultural background are frequently curtailed as a result of multiculturalism. In her essay *Is Multiculturalism bad for Women?*, Susan M. Okin provides several examples of women's individual rights and liberties being curtailed through the quiet permission of cultural practices that conflict with the law.³⁹ She discusses for instance the policy of the French state to allow multiple wives into the country, amounting to an estimated 200.000 *de facto* polygamous families now living in Paris – a situation the women in question 'regarded as an inescapable and barely tolerable institution in their African countries of origin, and an unbearable imposition in the French context'.⁴⁰

In the Netherlands, a young ex-Muslim was viewed with disdain (not only by people from his own community, but also, most remarkably, by the multiculturalist elites) when he spoke openly about his loss of belief in Islam.⁴¹ Many multiculturalists observed that one had to be more considerate with the sensitivity to apostasy in Islam, and implied that the 'right to freedom of religion' – which the ex-Muslim invoked –, did not apply unmitigated to immigrants.⁴²

The London-based Centre for Social Cohesion published a report in 2008 which described how all through Europe, people from immigrant backgrounds were threatened and intimidated when they spoke out critical of their communities. The report, entitled *Victims of Intimidation*, notes:

When many of these individuals began to receive threats from members of their own communities and their co-religionists, many governments began to treat them not as full citizens who deserved the full support of the law but as a people

³⁹ Susan Moller Okin, *Is Multiculturalism Bad for Women? With respondents* (Princeton: Princeton University Press, 1999).

⁴⁰ Okin (1999) 9-10.

⁴¹ Eshan Jami, *Het recht om ex moslim te zijn* (Amsterdam: Uitgeverij Ten Have, 2007); Ibn Warraq, *Weg uit de Islam: Getuigenissen van afvalligen*. Met een inleiding van Afshin Ellian (Amsterdam: J.M. Meulenhoff, 2008).

⁴² Douglas Murray and Johan Pieter Verwey, *Victims of Intimidation. Freedom of Speech within Europe's Muslim Communities* (London: Center for Social Cohesion, 2008).

apart; as people who are not expected to enjoy the same rights and freedoms as native Europeans ...⁴³

A curious shift has thus occurred as a result of the multicultural mindset. No longer do minorities receive the right to integrate, but, instead, the right to maintain their own culture. 'The era that began with the dream of integration,' as columnist Richard Rodriguez observed, 'ended up with scorn for assimilation.'⁴⁴

This shift in less than half a century from an ideal of emancipation to an ideal of segregation is very remarkable indeed. And it is quite unclear where the boundaries of the right to exercise one's culture lie. What if, at some point in the near future, two-thirds of the civil servants reject gay marriages by reference to their faith? Or what if homosexual civil servants will start, as a counter reaction, to reject marriages of Christian fundamentalists?

The complications are certainly endless. The legislative power having effectively been put aside, it is clear that the path of legal pluralism can easily go astray as claims to cultural traditions reign unchecked. As the Berlin-based attorney Seyran Ates has put the dilemma: 'We are at a crossroads, everywhere in Europe. Do we allow structures that lead straight into a parallel society, or do we demand assimilation into the democratic constitutional state?'⁴⁵

6.3. CULTURAL DIVERSITY

Legal pluralism is still rather an exception than a rule. Even though the extent to which sharia courts have already established *de facto* jurisdiction in certain areas and among certain parts of the population should not be underestimated,⁴⁶ legal plurality is still a marginal phenomenon and the national judges still hold, over all, a general authority for most of the European population. Most people believe that core constitutional values should be upheld for all, and that freedoms granted to native populations should not be withheld to immigrants.

The second element of multiculturalism, by contrast, though theoretically not entirely separable from the first, can count on general applause. The discourse of 'diversity', and the concomitant scorn for the national culture and traditions, has remained fashionable. Because of the inflow of substantial numbers of immigrants with a different cultural background into Europe over the past decades,

⁴³ Murray and Verwey (2008) 91.

⁴⁴ Quoted in: Schlesinger (1998) 118.

⁴⁵ Quoted in: Matthias Bartsch, Andrea Brandt, Simone Kaiser, Gunther Latsch, Cordula Meyer and Caroline Schmidt, 'German Justice Failures' (Translated from the German by Christopher Sultan), in: *Spiegel Online International*, 27 March 2007. Available online at <http://www.spiegel.de/international/germany/0,1518,474629-8,00.html>.

⁴⁶ Cf. Douglas Murray, 'To what extent is sharia already operating in Britain?', in: *The Times*, December 30th, 2009.

the question now stands high on the agenda whether or not the national culture should be defended, propagated and thereby generally be upheld against the parallel claims of those immigrants. We see this for instance in the debates over national festive days, language, modes of behavior and standards of social interaction, but also much more pertinently in whole areas or neighborhoods becoming predominantly Moroccan, Algerian, Turkish, and native populations moving out.⁴⁷

One way to avoid having to acknowledge this reality is to claim that no such thing as a 'national identity' existed in the first place, and therefore that immigration is not affecting any such thing as a national culture (because there is none). Though this point of view is not in itself an argument for multiculturalism, it may clearly support it (as will be discussed in chapter 8).

The tendency to move away from social cohesion and clear allegiance to the national state, towards a society that consists of multiple groups, not necessarily identifying themselves with one another, stands in any case at odds with the very idea of a national identity. Opposed to a common *Leitkultur* stands the image Theodore Roosevelt described in a speech in 1915: 'a tangle of squabbling nationalities, an intricate knot of German-Americans, Irish-Americans, English-Americans, French-Americans, Scandinavian-Americans, or Italian-Americans, each preserving its separate nationality'.

For Roosevelt, this was 'the one absolutely certain way of bringing this nation to ruin, or preventing all possibility of its continuing to be a nation at all'.⁴⁸ Arthur Schlesinger comments:

Three quarters of a century later we must add a few more nationalities to T.R.'s brew. This only strengthens his point. But what was a nightmare for T.R. is the dream of multicultural ideologues today. If that dream were fulfilled, if each of our manifold groups were huddled in its own enclave, holding itself apart from the rest in the sacred name of diversity, would this really be a more equable, peaceful, strong, unified, happy country?⁴⁹

As the chief rabbi of the British Commonwealth, Jonathan Sacks, puts it: 'Multiculturalism has led not to integration but to segregation. It has allowed groups to live separately, with no incentive to integrate and every incentive not to. It was intended to promote tolerance. Instead the result has been, in countries where it has been tried, societies more abrasive, fractured and intolerant than they once were'.⁵⁰

⁴⁷ This is what Martin Bosma calls the 'demographic turn-table', or 'demografische draaischijf', in: Martin Bosma, *De schijn-élite van de valse munters. Drees, extreem-rechts, nuttige idioten, Groep Wilders en ik* (Amsterdam: Bert Bakker, 2010) ii.

⁴⁸ Quoted in Schlesinger (1998) 124. A report of the speech is available online at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9901EoDD1239E333A25750C1A9669D946496D6CF.

⁴⁹ Schlesinger (1998) 124.

⁵⁰ Jonathan Sacks, *The home we build together. Recreating Society* (London: New York, 2007) 3.

The latest political developments suggest that Western politicians have abandoned the discourse of diversity. Over a period of a few months, several Western-European heads of government renounced multiculturalism. In 2004, then opposition leader and president of the CDU Angela Merkel had already said that 'multiculturalism has failed utterly', and she was heavily criticized for saying so by amongst others the then Chancellor of the German Federal Republic, Gerhard Schröder.⁵¹ But when she repeated this statement in October 2010,⁵² Merkel found wide response.

Former prime minister of Spain Jose Maria Aznar, British Prime Minister David Cameron, French president Nicolas Sarkozy, as well as Dutch vice-prime minister Maxime Verhagen all declared that multiculturalism had failed as well.⁵³

Nevertheless, the debate goes on. Support for multiculturalism and for the continuation of mass-immigration is still considerable in Europe. Nor is it certain that current leading politicians will not be outvoted in upcoming elections, rendering power again to those defending multiculturalism. For instance, when David Cameron spoke out against multiculturalism, he was openly criticized by a large number of public intellectuals, artists and politicians, amongst whom at least two MP's, declaring that 'We believe David Cameron's statement that multiculturalism has failed was a dangerous declaration of intent. (...) David Cameron is attempting to drive a wedge between different communities by linking Britain's multicultural society with terrorism and national security. (...) The prime minister is aping attacks by other European leaders like France's Nicolas Sarkozy, who passed legislation banning the veil, and Angela Merkel, who has also made statements denouncing multiculturalism in Germany. We believe our multicultural society and the respect and solidarity it is built on is a cause for pride, and reject any moves by this government to undermine and destroy it.'⁵⁴ Multiculturalism thus remains a major theme of political disagreement and is likely to continue to be so over years to come.

⁵¹ Cf. 'Integrationsdebatte. Schröder warnt vor Kampf der Kulturen', in: *Frankfurter Allgemeine Sonntagszeitung*, 21 November 2004. Available online at <http://www.faz.net/artikel/C30189/integrationsdebatte-schroeder-warnt-vor-kampf-der-kulturen-30198894.html>.

⁵² Matthew Weaver et al., 'Angela Merkel: German multiculturalism has 'utterly failed'. Chancellor's assertion that onus is on new arrivals to do more to integrate into German society stirs anti-immigration debate', in: *The Guardian*, 17 October 2010. Available online at <http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>.

⁵³ Cf. 'Nicolas Sarkozy declares multiculturalism had failed. French president Nicolas Sarkozy on Thursday declared that multiculturalism had failed, joining a growing number of world leaders or ex-leaders who have condemned it', in: *The Telegraph*, 11 February 2011; <http://www.telegraph.co.uk/news/worldnews/europe/france/8317497/Nicolas-Sarkozy-declares-multiculturalism-had-failed.html>.

⁵⁴ Available online at <http://www.guardian.co.uk/politics/2011/feb/09/more-division-over-multiculturalism>.