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

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CHAPTER SEVEN

GOVERNMENT

7.1. INTRODUCTION

As pointed out in part II, national sovereignty has been undermined by supranationalism, and national identities have been weakened through the policy of multiculturalism. The ideal of political independence has been replaced by an ideal of political *interdependence*. Supranational policy-making has increased, at the cost of national self-government, and multiculturalism has promoted the idea that the societies of the future should not be united through a set of shared values, but – in the words of Charles Taylor – through ‘deep diversity’ and solely the acknowledgment of the ‘radical otherness’ of others.¹

We will now reconsider sovereignty and national loyalty as well as their opposites, supranationalism and multiculturalism, from the perspective of representative government and the rule of law. I will argue that representative government and the rule of law require centralized decision-making and social cohesion, i.e. sovereignty and nationality, and that therefore, supranationalism and multiculturalism are, in their very principle, irreconcilable with them.

7.2. REPRESENTATION

Every form of organization, including political organization, implies a mechanism of representation. The salesman who sells coffee machines represents his company when he makes a deal; the army commander who waves the white flag represents the soldiers under his command; the teacher represents the university when he grades an exam, and so on. Division of labor, a characteristic of every organization, requires an acknowledgement of the individual agent as a *pars pro toto*.

In this sense, a political leader is by definition a ‘representative’ of the people under his solicitude. An example S.E. Finer discusses is that of the emperor of China who ‘represented’ the people of China at the international scene: ‘Clearly’, Finer writes, ‘this view of “representation” does not require the representative to

¹ Taylor (1991) 53-76. This ultimately amounts to an attempt to move beyond thinking in terms of ‘us’ and ‘them’, the logical consequence of borders. Cf. Carl Schmitt, who saw it as the essential characteristic of ‘the political’, ‘Der Begriff des Politischen’, in: Carl Schmitt, *Frieden oder Pazifismus?* (Berlin: Ducker & Humblot, 2005).

be elected; anyone performing a function on behalf of a group is a representative of that group.²

To understand representation in this strictly formal sense tells us something about the representation with regards to *external* parties only. The salesman, the army commander, the teacher and the dictator are representatives of, respectively, their business, their army, their school or their country – but only for those outside their group: the business partner, the enemy's army, the student, or other states and international organizations.

What is therefore not included in this understanding of 'representation' is *internal* 'representativeness': the extent to which the conduct of the dictator may be viewed as representative of the desires or opinions of his people. In political affairs, representation must enable, as Finer puts it, a small group or a single individual to 'somehow *stand for* a larger collectivity'.³ Representation in this sense poses the question of legitimacy. An army commander may be the external representative of his army – and so bind his soldiers to decisions he makes on behalf of them –, but these decisions may not be 'representative' of the views of the soldiers nor even be experienced as legitimate by them. Ultimately, they may no longer feel 'represented' by him. The same goes for the dictator who may rule against the ideas of the people, making it obvious for some or many of them to say, as did *Nasawiya*, a group of feminist activists in Lebanon in February 2011, that the then first-lady of Egypt, Suzan Mubarak, 'does not represent Egyptian women'.⁴ When speaking of representative government in this sense, we mean *legitimate* government.

Theoretically, this could be entirely undemocratic,⁵ taking again the example of the army commander – this time a successful one: he is unelected, but may be experienced as an entirely legitimate 'representative' of the interests of the soldiers. When it comes to government, it is however quite unlikely that without the subjects having a say in the policies pursued, the politicians will durably be considered as representative and legitimate.⁶ This also brings us to what seems to be underlying in every conception of representation, which is the need for

² Finer (1997) vol. II, 1032. This is to be distinguished from Eric Voegelin's conception of 'existential representation', as explored in Volume IV of *Order and History: The Ecumenic Age* (Baton Rouge: Louisiana State University, 1974).

³ Finer (1997) vol. II, 1025. Finer adds that 'this is not a sufficient condition for what we would call "representative government" today, but it is a necessary one'.

⁴ Website of Epress.am, 23 February 2011. Available online at <http://www.epress.am/en/2011/02/23/suzan-mubarak-does-not-represent-egyptian-women-egypts-coalition-of-womens-ngos/>.

⁵ As David Apter analyzes, for instance, in: 'Notes for a theory of nondemocratic representation', in: J.R. Pennock and J.W. Chapman (eds.), *Representation. Yearbook of the American Society for Political and Legal Philosophy* (New York: Atherton Press, 1968) 278–317.

⁶ Cf. Hamilton, Madison and Jay, *The Federalist Papers. With an introduction and commentary by Garry Wills* (New York: Bantam Classics, 1982).

social cohesion among those who are to be represented. But we will come to speak of that below.

R.H. Lord argues that 'the development of the representative system and of parliaments' was 'one of the greatest achievements of the Middle Ages'.⁷ According to most observers, the kind of political representation that we are familiar with today did not exist before Medieval times: the Greeks and the Romans are generally regarded to have known 'something like "delegated" or "vicarious" government' – enabling only direct agency for concrete purposes (and not the general kind of representation for all sorts of purposes known at present).⁸ Thomas Bisson writes that 'the uniqueness of the medieval evolution is not in doubt; historians agree that the circumstances and forms of European representation bear little resemblance to those known in antecedent or non-European societies'.⁹ Lord continues on the rise of the modern form of representation in the Middle Ages:

The hallmark of it is the fact that the power of the crown was then more or less extensively limited by that of assemblies, in part elective, whose members, though directly and immediately representing only the politically active classes, were also regarded as representing in a general way the whole population of the land.¹⁰

Finer argues that 'during the thirteenth and fourteenth centuries (...) there sprang up a multitude of conciliar bodies to give consent to but also – by the same token – to exert some control over their rulers'.¹¹ Their names differed from country to country,

some countries, like England, Ireland, Scotland, Sicily, the Papal States, and the great Kingdom of Naples called them parliaments or *parlamentii*. In the Iberian peninsula they were called *cortes* or *corts*. In France and the Lowlands they went under the name of Estates- or States-General. In Germany they were called *landtage*, in Denmark and Norway the assembly was the *Rigsdag*, in Sweden the *Riksdag*, and in Poland the *Sejm*.¹²

In his 1851 book entitled *Histoire des origines du gouvernement représentatif en Europe*, the French statesman and historian François Guizot wrote that 'almost everywhere [in Europe], the representative form of government is demanded, allowed, or established'. He connected this to the development of central power,

⁷ R.H. Lord, 'The Parliaments of the Middle Ages and the Early Modern Period', in: *The Catholic Historical Review*, Vol. 16, No. 2 (July, 1930) 125-144. Cf. P. Spufford, *The origins of the English Parliament: Readings* (Longman, London, 1967) 21.

⁸ Finer (1997) vol. I, 380-381. An exception is J.A.O. Larsen, *Representative government in Greek and Roman history, Sather classical lectures*, vol. 28 (Berkeley: University of California Press, 1955) 86ff.

⁹ T.N. Bisson (ed.), *Medieval representative institutions. Their Origins and Nature* (Illinois: The Dryden Press, 1973) 1.

¹⁰ Lord (July, 1930) 125-144.

¹¹ Finer (1997) vol. II, 1024.

¹² Finer (1997) vol. II, 1024.

as 'the first movement towards a representative government appear[ed] at the same time with the efforts of a central power which aims at becoming general and organized (...)'.¹³ Ample reflection shows that this is entirely in line with logic: for without organized, centralized power, it is impossible to conceive of political representation. If representative bodies do not possess sovereignty, they have nothing to be representative about.

But the analytical question remains what exactly is to be understood by 'representation'. We may further our understanding of this difficulty by distinguishing representation from two related concepts: that of delegation, and that of mandation.

Delegation is the – in principle temporary – transfer of concrete decision-making powers, authorizing the delegate 'to act only in accordance with specific instructions, or a specific ideology'.¹⁴ States send 'delegates' to the assemblies of the United Nations, for instance, to lobby in accordance with specific instructions from the minister of foreign affairs. Delegates also appear on behalf of interest groups at national legislative bodies to influence legislation or processes of decision-making. A delegate has less freedom of operation than a 'representative'. As Burke suggested:

A delegate merely mirrors and records the views of his constituents, whereas a representative is elected to judge according to his own conscience.¹⁵

It is an interesting discussion whether, due to modern party rule, members of parliaments may have come to resemble more the characteristics of a delegate (of their party), to the detriment of their representativeness of the people at large.¹⁶ Nevertheless, the idea of representative government is that parliaments consist of members with the individual capacity to make decisions, rendering their freedom of action wider than that of a delegate.

¹³ François Guizot, 'European History as the history of representative institutions', in: Bisson (1973) 9–12.

¹⁴ Scruton, *The Palgrave Macmillan dictionary of political thought*. 3rd Edition (London: Palgrave Macmillan 2007) 168 under 'delegation'.

¹⁵ Quoted in: Scruton (2007) 591 under 'Representation'.

¹⁶ Cf. Frank R. Ankersmit, 'De hedendaagse politieke partij, van representatie van de kiezer naar zelfrepresentatie', in: *Jaarboek DNPP 2000*; M. Gallagher et al., *Representative Government in Modern Europe*, 3rd edition (Boston: McGrall-Hill, 2001); Gerhard Leibholz, *Strukturprobleme der Modernen Demokratie* (Karlsruhe: Verlag C.F. Müller, 1958); Arend Lijphart, *Electoral Systems and Party Systems*, (Oxford: Oxford University Press, 1994); Arend Lijphart, *Democracy in the Twenty-First Century: can we be optimistic?*, (Wassenaar: NIAS, 2000); J. Steiner, *European Democracies*, (London & New York: Longman Inc., 1986); J.J.A. Thomassen, *Kiezers en gekozenen in een representatieve democratie* (Alphen aan den Rijn: Samsom, 1976); E. Witte, *Politiek en democratie, omtrent de werking van de westerse democratieën in de 19de en 20ste eeuw* (Brussel: VUB press, 1990). I have explored the subject in relation to the Dutch situation: Thierry Baudet, 'Tegen de partij-oligarchie', in: Joop Hazenberg, Farid Tabarki and Rens van Tilburg (eds.), *Dappere Nieuwe Wereld. 21 jonge denkers over de toekomst van Nederland* (Amsterdam: Van Gennep, 2011) 117–124.

A mandate, then – originating from the Latin *mandare*, i.e. to instruct – may mean two things. It may imply a concrete command to do something. For instance in a mandate to buy goods up to a certain amount at an auction; or, in the case of the army commander again, the mandate to use a certain type of weaponry. Yet the word is also used to denote the authority to act: as in a ‘mandate of an electorate’. Representatives need such a ‘mandate’ of their electorate for their actions to be perceived as legitimate.

To clarify this second understanding of representation – in the sense of a mandate from an electorate –, J. Roland Pennock distinguishes between a delegate and a trustee. ‘For a representative to act purely and simply as a delegate would be to make him functionless most, if not all, of the time, for it is seldom clear precisely what a constituency, or even its majority, wishes.’¹⁷ On the contrary, indeed, the representative is *entrusted* to make decisions on behalf of his constituents in their name but not necessarily with their consent. The mandate, then, pertains to the period of entrustment, but – and here arises difficulty – also to the content of the general concern of the representative. Surely, many would consider it a breach of the ‘mandate of the electorate’, if a politician was voted in office because of a strong opposition to, say, immigration or transfer of sovereignty, but then promoted the bringing about of either.

Another approach to this difficulty can be found in Edmund Burke’s famous speech delivered on November 3rd, 1774, when he had been elected as one of the representatives of Bristol in the British parliament. Burke contended that ‘to be a good member of parliament is (...) no easy task; (...) all [the] wide-spread interests must be considered; must be compared; must be reconciled, if possible,’¹⁸ and he went on to argue that:

It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own.¹⁹

Burke then continues:

But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They

¹⁷ J. Roland Pennock, ‘Political Representation: an overview’, in: R.J. Pennock and J.W. Chapman (eds.), *Representation. Yearbook of the American Society for Political and Legal Philosophy* (New York: Atherton Press, 1968) 3–27, there 15.

¹⁸ Edmund Burke, ‘Speech to the Electors of Bristol’, in: *Ibidem, Speeches and Letters on American affairs. Introduction by very rev. Canon Peter McKeivitt* (London: J.M. Dent & Sons LTD, 1908, reprinted in 1961) 74.

¹⁹ Burke (1961) 72.

are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. (...) Parliament is not a *congress* of ambassadors (...) but parliament is a *deliberative* assembly (...) you choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*.²⁰

Burke thus emphasizes the autonomous judgment a representative is entitled, indeed required, to make. Because the direct form of representation has become, in practice, impossible in modern times, this seems necessary for any form of democracy in advanced societies. Organization implies a hierarchy:²¹ this is what Robert Michels calls the 'iron law of oligarchy',²² 'Rule by the people' – the literal meaning of 'democracy' – is therefore necessarily dependent upon the Burkean idea of representation. But again this poses the problem of social cohesion in the relation between constituents and representatives.

For representative government presupposes two things. The first is the possibility of the people to be actively involved in the government through periodical, free elections among a wide franchise, and the possibility to partake in political decision making, to stand for election, and to have freedom of expression in political debate. I call these first presumptions of representative government its 'formal' prerequisites. Concerned only with the institutional reality, these could be installed on every level: municipal, national, European, global; or anything in between.

Yet representative government also presupposes something else, which I call its 'material' prerequisites. This is the *experience* of representation in governmental institutions, requiring not merely a right to vote as well as all the other formal institutions that allow political participation, but also a collective identity that can be represented as a whole. The term democracy may easily be understood as a formal, legalistic arrangement. However, to speak of 'representative government' leads to the question of what it is that can be represented. It poses the question of collective identity since it poses the question why a majority decision would be experienced as legitimate. This 'material' aspect of representation proves far more problematic than its formal aspect.

For it is self-evident that formal representation can exist in any central body where decisions can be made. As John Stuart Mill writes in his *Considerations on Representative Government*: 'the meaning of representative government is, that the whole people, or some numerous portion of them, exercise, through

²⁰ *Ibidem*.

²¹ Cf. the works of Moisey Ostrogorski, who has written about the depth of experienced loyalties among members of political parties.

²² Cf. James Burnham, *The Machiavellians* (Chicago: The John Day Company, Inc., 1943) esp. 180ff: 'The iron Law of Oligarchy'.

deputies periodically elected by themselves, the ultimate controlling power ...'. He continues: 'This ultimate power they must possess in all its completeness.'²³

The point Mill here makes is evident. If the national government is tied to all kinds of supranational entanglements, such as the ones described in the previous part of this book, there is no guarantee that the laws and policies it has to enforce are representative of its people's wishes or perceived interests. It must be clear where and by whom rules and decisions have been made or could be made for representative government to be able to exist.

But a deeper question related to representative government is: who *are* the people? Why could an elected supranational structure, such as the European Parliament, not attain the same level of representation? This leads to the material aspect of representative government: the *experience* or *perception* of representation. It refers not just to the institutional reality, but to the social reality. Ronald Dworkin presents an instructive thought-experiment on this subject in a chapter entitled 'Who are the People?', in his book *Justice for Hedgehogs* (2011). 'One day', he imagines, 'Japan grants equal voting rights to the citizens of Norway so that they can elect a small party of Norwegians to the Japanese Diet if they wish. Then the Diet by majority vote levies taxes on Norwegian oil and directs its transfer to Japanese refineries.' Obviously, this would not satisfy the criteria for representative government. Dworkin concludes:

If some form of majoritarian process is to provide genuine self-government, it must be government by a majority of the *right* people.²⁴

The question who are the *right* people comes down to a more simple one: who are 'the people'? Who fall in the group considering themselves represented, and who fall out of it? This question is of a sociological nature, and depends on the experience of membership: 'we' are the people, if we believe we share the same identity and the same loyalty. And it was this, that we identified as 'the nation' in the first part of this book.

When it comes to the experience of membership, the famous 1928 Thomas theorem applies: 'if men define situations as real, they are real in their consequences'²⁵ – meaning in this case that whatever subjective experience of membership exists, determines the reality of material representation.

Should the Scots regard their political representation threatened by governing together with the English, then that is a fact one has to deal with. This could change of course, depending on political climate, financial stability, economic

²³ John Stuart Mill, *Considerations on Representative Government* (New York: Prometheus Books, 1991) 97: Chapter V, 'Of the proper functions of representative bodies.'

²⁴ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011) 380.

²⁵ W.I. Thomas and D.S. Thomas, *The child in America: Behavior problems and programs* (New York: Knopf, 1928) 571-572.

and cultural factors, and so on. Defending representative government could therefore mean supporting a return to govern on a smaller scale than the scope of current nation states; equally, it could mean the rendering of full sovereignty to a federal United States of Europe: provided the material experience of membership is in place. For while representative government can well go hand in hand with a division between matters of regional importance and matters of national importance;²⁶ it can also mean moving on to an even larger scale (in this case to that of a European representative federation). Yet then again, the point becomes evident that a European-wide social cohesion – a continental collective identity – would be required. In both cases, therefore, the experience of membership provides the material ‘representativeness’ of the formal representation.

But as government encompasses more than merely parliamentary rule, there is also more to representative government than merely parliamentary representation. The entire political structure, with its balance of powers and several different branches, requires rootedness in a collective identity. This is especially problematic when it comes to judges, typically unelected officials of the state, as we will see in the next paragraph. For what is the role of judges in representative government? What is required of them to fit in the scheme of representative government? And what may it imply, to have a body of judges appointed by different national governments, as is the case in the ECHR?

7.3. LAW

Rule of law is in place when at least three principles are applied to the government of a society:

1. In its actions, the state is bound by the law;
2. In passing laws or changing the law, the state is bound by procedural prerequisites;
3. There is an impartial judiciary applying the laws.

The first criterion ensures that state action is not arbitrary but that the law provides for the state’s competencies. It also implies that a subject, ‘however placed, [may] enforce that law’, even against the state itself.²⁷ In this way the state, however powerful or encompassing its rule may be, can be held accountable under the same laws as it applies to its citizens, in the same courts, by the same judges.

²⁶ Cf. John Stuart Mill, *Considerations on representative government* (New York: Prometheus Books, 1991) 286ff: Chapter XV, ‘Of local representative bodies’.

²⁷ Scruton, *The Palgrave Macmillan dictionary of political thought*. 3rd Edition (London: Palgrave Macmillan, 2007) 611 under ‘rule of law’.

The second principle forbids that arbitrary changes in the law be made; laws must be enacted before they become valid, and have to be debated in public and voted upon by a legislative assembly.

An important element in both these aspects of the rule of law is that it helps to realize 'legal certainty'. For it means that no judgment is binding unless based on a previously encoded law. In passing laws or changing the law, the state must be bound by certain procedural prerequisites, and legislation must not have retrospective effect.²⁸ But it is precisely at this point, however, that it becomes increasingly clear why the whole concept of the rule of law already implies a nation state. For in practice all legal certainty is dependent on the predictability of legal judgments, which in turn depends, to speak with Oliver Wendell Holmes, on 'the prophecies of what the courts will do'.²⁹

Without some degree of certainty about the judges that will administer the law, people grope in the dark as to the content of the law.³⁰ Therefore, legal certainty in reality implies being judged by judges who understand the often vague terms of the law in a foreseeable way. The rule of law for that reason does not merely mean the rule of previously issued rules (a merely formal meaning), but also some extent of uniformity and trust in how they may be understood (a material meaning).

This is partly realized through the third criterion: the impartial judiciary branch, which ensures that the courts reach their decisions autonomously. But the 'impartiality' or 'autonomy' of the judiciary is as much restrained by their connection to a shared sense of community. While the law that rules is, naturally, the law of society, the judges that administer it are for that reason supposed to be a part of that society.

In principle, one might say, there should be no reason why different judges should not come to the same conclusions in a given dispute; for what is 'legal' should be subject to the abstract and neutral logic of the profession. But in reality, the vaguer – or more 'fundamental' – the principles concerned, the more leeway judges have.

Take as an example the 'right to life'. Many people would say that this right is among the most fundamental principles of justice, and that respect for it should lie at the core of any sensible notion of the 'rule of law'. But what does it mean in practice? What are the boundaries of police action, for instance, when dealing with terrorists or armed criminals? Or what positive obligation to protect life

²⁸ See on this: Scruton, 'Rechtsgefühl and the Rule of Law', in: J.C. Nyiri and B. Smith (eds.), *Practical Knowledge: outlines of a Theory of Traditions and Skills* (London: Croom Helm, 1988) 61ff.

²⁹ Oliver Wendell Holmes, jr., 'The path of the law', in: *Harvard Law Review* vol. 10, no. 8 (1897) 457.

³⁰ Cf. Benjamin N. Cardozo, *The nature of the judicial process* (New York: Dover publications, 2005).

follows from the 'right to life'? What may this mean in the future concerning abortion and euthanasia? And concerning access to healthcare and medicines?

Indeed, if we take the 'right to life' seriously, should certain political measures curtailing the welfare state not be regarded as a violation of it? Leaving someone starving or freezing to death on the street without providing a remedy amounts to murder, a random collective of judges might say.

Or take the principle of non-discrimination. Again something that sounds 'fundamental' and important, but that can impossibly be neutrally administered. For consistent application of this principle should mean the prohibition of just about anything, for example the abolition of all hereditary monarchies, as well as the constitutional rule that to become American president, one has to be born in the US. The privileged position that many states – for a variety of social, cultural and historical reasons – preserve for a specific religious denomination, for instance the Anglican Church in Britain, or the Lutheran in Denmark, or clubs that discriminate on the basis of sex: all may theoretically be found to be in violation of this principle. Because no two people are entirely the same, the principle of non-discrimination is endless in its application (just as 'equal opportunity' would theoretically require a ban on private property and the dissolution of families). The prohibition of discrimination in any case, inevitably clashes with classic civil liberties such as those of expression, conscience and religion.

This is by no means a theoretical discussion only. Consider the dissenting opinion of judge Pavlovski in the case of *O'Halloran and Francis v. the United Kingdom* at the European Court of Human Rights in 2007,³¹ who believed speed limits were a violation of fundamental human rights:

In my opinion, if there are so many breaches of a prohibition, it clearly means that something is wrong with the prohibition. It means that the prohibition does not reflect a pressing social need, given that so many people choose to breach it even under the threat of criminal prosecution. And if this is the case, maybe the time has come to review speed limits and to set limits that would more correctly reflect peoples' needs. We cannot force people in the twenty-first century to ride bicycles or start jogging instead of enjoying the advantages which our civilization brings. Equally, it is difficult for me to accept the argument that hundreds of thousands of speeding motorists are wrong and only the government is right.³²

As this example shows, judges can – and will – easily stretch the rights and principles they rule upon to cover the most far-reaching phenomena; their task is not confined to merely applying the law to presented facts. There are many obvious examples from the United States as well.³³ From the *Dred Scott*

³¹ Case of *O'Halloran and Francis v. The United Kingdom* (Applications 15809/02 and 25624/02) Judgment Strasbourg 29 June 2007.

³² *Ibidem*, dissenting opinion of Judge Pavlovski.

³³ Cf. Bork (1990).

v. *Sandford* case (1856), in which the Supreme Court ruled that people of African descent, whether former slaves or not, were not citizens as meant in the Constitution;³⁴ to the *Roe v. Wade* case (1973), in which the right to abortion was found implicit in a person's rights (Fourteenth Amendment); to the *Regents of the University of California v. Bakke* case (1978), in which *affirmative action* was found constitutional (and therefore not in violation of the constitutional right of equality).³⁵

The freedom judges have is precisely the reason why becoming one is often a very selective process, and why nominations for supreme courts are almost everywhere *political* decisions (by royal resolution upon nomination by Parliament, for example, in the Netherlands³⁶). American presidents nominate judges with views consistent with their own. The Senate, which must ratify the appointments, can oppose the nomination when the majority has a different political opinion (as happened in 1987 when the candidate of Ronald Reagan was rejected). Americans know where the judges of the Supreme Court stand and weigh their chances to push for certain political changes when a judge is replaced. Democrats hope to replace Republican judges, and vice versa (as has been discussed in chapter 4.2).³⁷

Now, precisely because different judges may interpret the same rules differently, legal certainty is threatened when different judges, from a different nation, are invited to pass judgment. It is unpredictable what different judges will say. While it is certainly true that different judges of the same nation may also disagree, placing the judiciary outside the national context no doubt multiplies this problem exponentially.

But there is also another side to this point. For legal certainty not only requires that the conduct of the judges is to a large extent predictable; it also presupposes that the expectations of those subjected to the same laws are to a large extent congruent. Ordinary people do not have profound knowledge of jurisprudence; they act on the basis of a *Rechtsgefühl* that certain things may be expected from

³⁴ '... We think they [people of African ancestry] are ... not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States ...' (Chief Justice Roger B. Taney, speaking for the majority).

³⁵ '... Race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats ...' (Justice Powell, Speaking for the Court).

³⁶ Cf. Articles 117 and 118 of the Dutch constitution.

³⁷ At present, of course, debates are raging as to the proper role of the supreme court. Cf. Stephen Breyer, *Making our democracy work. A judge's view* (New York: Alfred A. Knopf, 2010); Erwin Chemerinsky, *The conservative assault on the constitution* (New York: Simon & Schuster, 2010); Jeffrey Toobin, *The Nine. Inside the secret world of the supreme court* (New York: Anchor Books, 2008).

others, and certain corresponding duties demanded.³⁸ If you and I have entirely different ideas of what 'equity' means, or what constitutes a threat to my 'honor' or 'good name', then there can be no legal certainty between us in our ordinary interactions (unless we constantly consult our lawyers).

Moreover, as the courtroom is never more than an ultimate remedy, the 'rule of law' really implies that the individuals in a society generally have a shared, internalized idea of morality and that they live more or less according to it.

This also works the other way round. For how could a judge determine what equity or 'good faith' or 'grave reasons' or 'casting a slur on a person's honor' (legitimizing self-defense) mean, if he could not refer to a general – dominant, *Leitkulturliches* – viewpoint or tradition in society?³⁹

For these reasons – the need for congruence in both the viewpoints of judges and in the expectations of the people – the content of the law itself is in practice mostly congealed culture. However abstract legal reasoning may be, and however intellectual the arguments may be: properly understood, the rule of law is only the tip of the iceberg of social cohesion. The very idea implies a *Leitkultur*.

To be a judge is therefore inescapably a representative function on behalf of a community. The judge has been granted the confidence of the members of the community to voice and co-determine their way of life.⁴⁰ Even the administration of 'fundamental' values requires a judge to choose position: between being reserved and being activist, between keeping in line with past cases or changing course, between defining racism in the strict etymological meaning or in a more wide-ranging, 'cultural' sense; or between interpreting the right to life as prohibitive of the death penalty, of abortion or of assisted suicide.

Judges cannot give arbitrary opinions, and the aim is to give a judgment that would win the consent of other independent rational observers. But this does not remove all subjective elements from the activity of judges.⁴¹ As David Pannick writes: 'However knowledgeable judges may be about their biases, we cannot expect them to give other than an informed and intelligent but never-

³⁸ Cf. Scruton (1988) 61ff.

³⁹ As indeed multiculturalism has shown, it becomes increasingly difficult for judges to condemn so-called 'honor killings' as these acts were sanctioned by a culture that had been granted the same rights as the dominant national culture (See chapter 6).

⁴⁰ It is precisely because of this proper function of judges, that a portrait of the Queen is present in every Dutch courthouse: to emphasize that judges bear the authority of the majesty, and that the duty of obedience arises from that in which all Dutch citizens are represented – the sovereign. If judges did not have such authority, the losing party should have no reason to accept their verdict. Who would those men and women in gowns be to tell them what they should or should not do? Again: 'What right have you, a foreigner, to come to me and tell me what I must do?' Ernest Hemingway, *For whom the bell tolls* (London: Vintage Books, 2005) 17.

⁴¹ See on this: Arie-Jan Kwak, 'Het (on)persoonlijke gezicht van het recht; de rechter tussen objectiviteit en gezag', in: *Trema* (Special 2, 2008) 428-431; Arie-Jan Kwak (ed.), *Holy Writ: Interpretation in Law and Religion* (Surrey: Ashgate, 2009).

theless subjective view of the facts and the law. It is therefore a matter of great importance who is appointed to the Bench.⁴²

Their role as a counterweight against mere majority rule,⁴³ may thus easily be perceived as a 'tyranny of the minority'. His decision can only have authority, if the judge is recognized and accepted by the parties seeking a remedy through him. Although his 'impartiality' is an important feature for him, it is only 'impartiality' as to the conflicting parties; he has to be at the same time recognized by both as part of the community; as part of their 'we'. In this way, tyranny of the majority and tyranny of the minority are the Scylla and Charybdis a wise constitutional system has to navigate its way through.⁴⁴

This observation is also relevant for our discussion of multiculturalism. For the national judges can only be accepted as such by cultural and religious minorities, if there is a sense of shared community that gives the judge in question his authority and enables him to speak in this particular case (hence the enthusiasm of some Muslim communities for Sharia courts with *their own* judges, see also chapter 9.3). Thus in fact, a judge is not so much supposed to be 'objective' as to be 'authoritative': and that can only be the case when he is part of a larger whole, of which the conflicting parties are also members. And only the nation provides the territorial context for such authority.

⁴² David Pannick, *Judges* (Oxford: Oxford University Press, 1987) 44 (and backflap).

⁴³ Cf. J. Hampton, 'Democracy and the rule of law', in: Ian Shapiro (ed.), *The Rule of Law: Nomos XXXVI. Yearbook of the American society for Political and Legal Philosophy* (New York: New York University Press, 1994) 13-44.

⁴⁴ Cf. Thierry Baudet, 'De achilleshiel van de rechtsstaat', in: *NRC Handelsblad*, 16 December, 2011.

