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

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CHAPTER NINE

THE PARTICULARISM OF CITIZENSHIP

9.1. *Loyalty*

Life is not merely about the approximately eighty years the individual spends on earth. Although it may be true, that those eighty years are all there actually are, and that, as Sartre put it, at the end of the day we are all *seul sans excuse,*[1] it is certainly not true that for the individual person, himself and his eighty years are all that matter.

Indeed, not only are we inherently historical beings, who derive meaning from being entrenched in a web of past and future, we are also inherently social beings, defining our lives in terms of what surrounds us. That is why family histories are almost universally cherished, why procreation or 'leaving something behind' is in the top level of priorities in life, and why being disconnected from the world, even when it is in a very comfortable place, as it is in Dr. Johnson's fable Rasselas[2] and in the story of Robinson Crusoe[3] (or for example in reasonably comfortable prisons), is universally perceived as a terrible misfortune.

However, it is also true for all of us that these ties that reach beyond us and connect us to the larger realm of existence, constantly pose constraints and lead us into conflicts. It seems that an unrelenting effort is required to mediate between the conflicting demands of our individual desires and expectations, and those of the many associations we are part of; or between one of our associations and another (for instance a conflict between an ancient family and the village council over claims on a certain piece of land).

The common way out of these all too familiar conflicts is through a compromise: the importance of the individual's demands are weighed against those of the family, or another group, and the desire to stick together as a whole, is reaffirmed through mutual concessions. That is how, in everyday life, we manage

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[1] Jean-Paul Sartre, *L'Existentialisme est un Humanisme* (Paris: éditions Nagel, 1946) 36-38.

[2] Samuel Johnson, *The history of Rasselas. Prince of Abissinia* (1759) (London: Oxford University Press, 1971). Cf. Theodore Dalrymple, 'Samuel Johnson (1709-1784)', in: Thierry Baudet and Michiel Visser (eds.), *Revolutionair Verval. En de conservatieve vooruitgang in de 18de en 19de eeuw* (Amsterdam: Bert Bakker, 2011).

[3] Daniel Defoe, *Robinson Crusoe. His life and strange surprising adventures* (1791) (London: The Nonesuch Press, 1968).

to live together in a generally peaceful manner – and how, when this goes wrong, associations are destroyed (as, for example, in a family feud).[4]

Associations express a form of loyalty, and as discussed in chapter 3, there are at least three types in which this loyalty can manifest itself politically: tribal, national, or religious. National – imagined and territorial – loyalty is by no means a given: indeed, in large parts of the world, people do not experience such a national loyalty – or at least not very strongly. Their loyalties are often primarily tribal or religious (or a combination of the two) – and as a result, it has proven utterly difficult to establish a political order in which minorities were accepted and civil wars were not incumbent, and in which representative institutions managed to speak for the whole. This is not surprising: in situations where such non-national loyalties prevail, the individual is under constant pressure to submit to tribal or religious laws and customs; the free market will continuously be inclined to degenerate into a system of monopolized guilds and nepotistic favours;[5] and the administration of politics and justice will be menaced by corrupted civil servants who prefer the moral codes of their tribe or creed to the ones of the state.

In Western Europe, to be sure, class-justice and a predominance of religious loyalties over national ones have continually existed throughout the centuries as well. Jews, for example, until well into the nineteenth century, were denied many citizens' rights. Catholics, in protestant countries such as the Netherlands, were regarded as not to be trusted because of supposed 'loyalties' to Rome.[6] And exclusion on the basis of race remained a big issue in large parts of the United States until well into the 1960s. The development and flourishing of the territorial, imagined loyalty, that we have identified as the *national* loyalty, was an achievement, realized at the cost of tribal and creedal ones, and demanding a constant effort. National loyalties have been taught and developed, in families and schools, through national festive days and commemorations, and they have been tamed, too, by the traumatic experiences that several over-affirmed, imperialist nationalisms have rendered.

All this brings us to the problems concerning nationality again, and brings the much-debated concept of *citizenship* in view. For what is essential in this idea, is the recognition that the others with whom we live together on the same territory are essentially members of the same political project (and it is immediately clear

[4] See on this for instance Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W.W. Norton & Company, 2006).

[5] Cf. Andreas Kinneging, 'Loyalty in the modern world', in: *Modern Age* vol. 46 (2004) 66-73.

[6] And not necessarily without reason, as William of Orange was, for instance, killed by the religiously inspired Balthasar Gérard in 1584. See on this: Cliteur (2007) 164ff, and: Jardine (2005), who writes on 51: 'This act of assassination was, it appeared, the deed of a solitary fanatic, a loner with an intense commitment to the catholic Church and a faithful upholder of the legitimacy of the rule of Philip II in the Netherlands …'.

that in this, sovereignty is implied too). Conceiving of ourselves as sharing the same nationality means that, despite all our differences in custom, religion, ethnicity, and background, we share a fundamental loyalty towards a territory and inherent therein, a loyalty towards the way of life on that territory (despite, of course, a great deal of differences).

It is this that enables us to live together with all our differences. It provides a reason for being bound by the same laws; for treating one another equally in equal circumstances; for holding up public virtue and a sense of care for both the human and the natural environment.[7] It is only with a constant reference to the shared nationality, that the fierce political debates in France are resolved; it was only because Barack Obama was experienced as a member of the same nation, that many Americans who had a different ethnicity and may have had a different religious background than him, nevertheless warmly accepted him as their president in 2008; and only in nation states would such a thing have been possible.

The American and French Revolutions (1776 and 1789 respectively) can be regarded as the definite breakthrough of the idea of a national citizenship. Instrumental in that development has been the change in how the people were understood: from being 'subjects' – who owe allegiance to the crown –, they became 'citizens', with a right to co-decide. As such a right to co-decide, however, is always – indeed by definition –, carried out in a collective form, it is implied in national citizenship that the citizen is not just an atomized individual, with 'inalienable rights', but also part of a larger community or group. (Hence the birth of the idea of a 'nation' as discussed in chapter 3).

Indeed, it was with the French Revolution, that besides all the universalist ideals, the '*principe des nationalités*' was introduced, which was the ideal that nations should have the right to political independence and self-determination. The French *National Convention*, the legislative assembly established in 1792, declared that it was ready to assist oppressed peoples to overthrow their rulers, a statement that caused much unrest in the pan-national empires of the Habsburgs and the Ottomans.[8]

But as we have seen throughout this book, European countries have now abandoned this ideal of a prevailing national loyalty. As a consequence, nation states are dissolving again into the pan-national empires that characterized the Middle Ages: internally divided, politically decentralized.

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[7] See on the relationship between local attachment and care for the environment: Theodore Dalrymple, *Litter: How other people's rubbish shapes our lives* (London: Gibson Square Books), and Scruton (2012).

[8] Martin Lloyd, *The Passport, the history of man's most traveled document* (Sutton Publishing, Gloucestershire 2005) 171. Not much later this principle was abandoned by the universalist imperial ambitions of revolutionary and Napoleonic France, as discussed in chapters 3.2, 3.3 and 8.1.

A telling illustration of how national loyalties are upset in practice, is the way in which the Dutch tradition to commemorate those who died in the Second World War has been turned around in recent years. The ceremony is traditionally carried out on the 4th of May, the day before the German capitulation of 1945. Every year at 20:00 o'clock, the Dutch Queen lays a garland on the national monument on Dam square, whereupon the mayor of Amsterdam says a few words to announce two minutes of silence. On many other squares in Amsterdam and in other cities, and in almost every village in the country, a comparable ceremony is carried out: garments are laid down, and local dignitaries voice the purpose of the commemoration before the gathered people silently contemplate the dead. In 1995, however, the *National Committee 4 and 5 May*[9] announced a shift in accent:

> No longer only the victims of the Second World War are being commemorated, but also the Dutch people that have fallen in wars, armed conflicts, and peace operations after the Second World War.[10]

At the commemoration on Dam square, the mayor of Amsterdam from now on announced that

> we practice two minutes of silence for all – civilians and soldiers – who have perished in the Kingdom of the Netherlands or wherever else in the world since the outbreak of the Second World War, in situations of war and at peace operations.[11]

The phrase 'or wherever else in the world' seems to mean that the Dutch are now, – in what appears to be an attempt to 'universalize' the national memorial –, commemorating the deaths of their national soldiers *as well as* the deaths of the ones those soldiers might have killed in combat. It reminds of the 'and-and-approach' to loyalties of the WRR (as discussed in the previous chapter).

To have a universalist commemoration of the dead of armed conflict, however, is impossible. As armed conflict is necessarily about an adversary – a 'them' –, the attempt to include everyone in the commemoration will inevitably contradict the very idea of such a commemoration in the first place. The Committee, realizing that 'since the end of the Second World War, worldwide not a day has passed without war', and that 'since 1945, more than 200 wars and armed

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[9] This is the committee that organizes the yearly commemoration. In Dutch: het *Nationaal Comité 4 en 5 Mei*.

[10] From the website of the National Committee 4 and 5 May: 'Accentverschuiving. In de loop van de jaren is de herdenking verbreed. Niet alleen de slachtoffers van de Tweede Wereldoorlog worden herdacht, maar ook de Nederlanders die zijn omgekomen bij oorlogen, gewapende conflicten en vredesoperaties na de Tweede Wereldoorlog'. Available online at http://www.4en5mei.nl/herdenken/achtergronden/achtergronddetail/_pid/kolom2_1/_rp_kolom2_1_elementId/1_90676.

[11] 'Allen – burgers en militairen – die in het Koninkrijk der Nederlanden of waar ook ter wereld zijn omgekomen sinds het uitbreken van de Tweede Wereldoorlog, in oorlogssituaties en bij vredesoperaties'.

conflicts have been fought', explained its reasons for the aforementioned shift in accent as follows:

> In the Netherlands live many who have experienced these actual situations of war, suppression, and unfreedom. Especially for young people who lack historical reference to the Second World War, commemorating can relate to the present or the recent past.[12]

At the national commemoration on May 4th, 2003, some possible consequences of this all-inclusive approach became visible. In the Amsterdam neighbourhood *De Baarsjes*, a group of Islamic youth shouted 'We must kill the Jews!',[13] during the two minutes of silence. On the *Sierplein* in the neighbourhood *Slotervaart Overtoomse Veld*, young Moroccans started playing soccer with the garlands. In the centre of Amsterdam, cars klaxoned in order to show disdain for the commemoration at the *gay monument*.

The trouble is that based on a literal understanding of the ideas of the *Committee 4 and 5 May,* these immigrants were not entirely unjustified to behave as they did. Many of them, it appears, regard Jewish people as the enemy (because of anti-Semitism in the Quran and in their culture, and because of the presence of the Jewish state in territories they perceive to be theirs, i.e. Israel), and some conceive the allied victory over Nazi-Germany as synonymous with the installation of Israel.[14] Comparable confusion arose when a high school in Amsterdam-West wanted to hold two minutes of silence on the day after the terrorist attack on the Twin Towers in New York on September 11th, 2001. The school-children started rioting and said they would not commemorate the victims of this attack. They shouted: 'Sorry for you! We have shown the Americans something!'.

From the point of view of multiculturalism, they in fact had a point. If we accept the *Committee's* commemoration of 'all who have perished', why commemorate the dead from the Twin Towers, and *not* commemorate Muhamed Atta and the other suicide terrorists indeed?[15] Why mourn the fallen Dutch

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[12] 'De actualiteit geeft betekenis aan herdenken en vieren. Sinds het einde van de Tweede Wereldoorlog is er wereldwijd nog geen dag zonder oorlog geweest. Vanaf 1945 zijn er meer dan 200 oorlogen en gewapende conflicten uitgevochten. In Nederland leven ook velen die deze actuele situaties van oorlog, onderdrukking en onvrijheid aan den lijve hebben meegemaakt. Vooral voor jongeren zonder historisch referentiekader met betrekking tot de Tweede Wereldoorlog kan herdenken betrekking hebben op het heden of recente verleden.'

[13] 'Joden moeten we doden'.

[14] 'Had Hitler maar gewonnen, dan hadden de Palestijnen nu een leven gehad. Dat is wat je hoort in de klas', in: 'Juf, wordt het fout gerekend dat ik Joden vergeten ben!', *NRC Handelsblad*, 29 April 2006.

[15] 'Marco Strang – leraar geschiedenis, voorheen sportschoolmedewerker, openlijk homoseksueel – keek er niet van op toen in mei 2003 een paar Marokkanen met bloemenkransen gingen voetballen. Maar hij was nog wel verbaasd toen zijn school – het Meridiaan College in Amsterdam-West – op de dag na 11 september twee minuten stilte zou houden voor de doden in de Twin Towers. "Er waren leerlingen die zeiden dat ze dat niet deden. Ze gingen herrie maken." De euforie. De blik waarmee naar hem gekeken werd. Jammer voor jullie, nou hebben wij de

resistance fighters and bring homage to the British and Americans who had to put out hundreds of thousands of Germans in order to liberate the Netherlands and other countries, while condemning those who killed only a few thousand Americans in an attempt to 'liberate' what they believed to be the 'Palestinian' lands, on September 11th, 2001? If all cultures are equal, and if all conflicts are equally just, and if all victims equally deplorable – there should be no reason to make a distinction, should there? When the Dutch proclaim to commemorate *all deaths*, on *all sides of conflicts*, why should these immigrants not express their grief over the loss of the supposed 'Palestinian' lands? And given some anti-homosexual trends in much of Muslim culture, is it really surprising that when they are granted the moral right to commemorate whichever value they choose, they might choose a condemnation of gays?

As a nation state, it is simply not possible to commemorate universally, as much as it is not possible to fight on both sides of an armed conflict.

This mistake of the *Committee* should, however, not blind us to its good intentions. Its idea has clearly been to reshape the national commemoration in a way that may actually *include* immigrants. They supposedly wanted the 4th and 5th of May to be more than a merely historical commemoration, but an actual, *national* commemoration. But what is necessary for that, again, is some positive formulation of values. A better rephrasing of the commemoration announced could have been:

> We practice two minutes of silence for all – civilians and soldiers – who have perished in defense of the Kingdom of the Netherlands or its allies or its way of life since the outbreak of the Second World War.

This too, is a universalistic approach to the nation, open to newcomers, yet living up to the need for particularism that is intrinsic in the whole concept of commemorating.

Nor was the *Committee* right in supposing that newcomers in the Dutch nation can have no connection to the ancestors who gave their lives in wars of the past. Because in fact these Dutch ancestors gave their lives for the national culture and the national territory, and by living on those grounds, and having membership of that same nationality, one enjoys precisely what they have fought for and died for – so not being heir to them by blood, is not a reason at all not to be grateful for their sacrifice. It only shows the ethnic misconception of nationality.

One final example of the mistaken approach of the *Committee of 4 and 5 May*: the 'theme' of the commemoration of 2009 was 'Freedom and Identity'. Why? Because:

Amerikanen eens wat laten zien', in: 'Juf, wordt het fout gerekend dat ik Joden vergeten ben!', *NRC Handelsblad*, 29 April 2006.

> it was shown in the Second World War how thoughts about identity can affect freedom.

Conclusion, apparently: abolish national identity, and you will get unmitigated freedom.[16]

In France, a comparable debate about national commemorations and national identity exists. In an attempt to reaffirm the national spirit amongst the younger generation of Frenchmen, President Sarkozy announced shortly following his installation in the Elysée in May 2007, that on October 22nd of each year, the letter of 17 year old communist-resistance activist Guy Moquêt, written just before his execution in the prison camp in the French village of Chateaubriant, would be read out in every school class throughout France.

On May 16th, Sarkozy went to the Bois de Boulogne, where the Gestapo had shot 35 resistant fighters in 1944, and announced:

> I wanted to hold my first commemoration in my capacity as President of the Republic here, in this place where young Frenchmen were murdered because they could not conceive of France turning its back on all of its history and all of its values. I wanted to use the first day of my term to honour these young resistant fighters to whom France was more important than their party or their church. I wanted to have the moving letter that Guy Môquet wrote to his parents on the eve of his execution read out loud. I wanted these things because I believe it is critically important to explain to our children what a young Frenchman is, and to explain how the sacrifice of some of these anonymous heroes who have been left out of the history books can show us the greatness of a man who devotes himself to a greater cause.[17]

Then he concluded: 'Children of France, remember that admirable men have sacrificed much to conquer the freedom that you enjoy.'[18]

Analogous to this French – national – approach, the mayor of Amsterdam in the Netherlands could for example announce on the yearly Dutch commemoration on the 4th of May: 'Children of the oldest free Republic of the world, children

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[16] 'In de Tweede Wereldoorlog is gebleken hoe gedachten over identiteit de vrijheid kunnen aantasten.'

[17] 'Si j'ai tenu à faire ici ma première commémoration en tant que Président de la République, dans ce lieu où de jeunes Français furent assassinés parce qu'ils ne pouvaient pas concevoir que la France reniât toute son histoire et toutes ses valeurs, si j'ai tenu au premier jour de mon quinquennat à rendre hommage à ces jeunes résistants pour lesquels la France comptait davantage que leur parti ou leur Eglise, si j'ai voulu que fût lue la lettre si émouvante que Guy Môquet écrivit à ses parents à la veille d'être fusillé, c'est parce que je crois qu'il est essentiel d'expliquer à nos enfants ce qu'est un jeune Français, et de leur montrer à travers le sacrifice de quelques-uns de ces héros anonymes dont les livres d'histoire ne parlent pas, ce qu'est la grandeur d'un homme qui se donne à une cause plus grande que lui.'

[18] The translation comes from the official website of the Elysée, http://www.elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2007/speech_by_nicolas_sarkozy_president_of_the_republic_at_the_memorial_ceremony_for_the_bois_de_boulogne_martyrs.76687.html.

of Holland, remember! Wherever you come from, whatever your religion or ethnicity … Remember! (etc.)'.

This approach to the nation, once again, is open to all, to newcomers as well as to those who have been in the Netherlands for generations, and so complies with the criteria of an open concept of nationality, as defended by Ernest Renan and Fustel de Coulanges (see chapter 3). Yet it does not jeopardize the idea of a shared community of which politics necessarily forms an expression if it is to remain representative and if a shared rule of law should continue to apply.

With Sarkozy's speech, however, the complicated issue of *patrimony* comes into play as well. *Patrimony* is the cultural heritage of a society, and as 'the freedom that [we] enjoy' is not isolated from social context and history, it is not unconnected to political arrangements either. As whatever 'freedom' that may be enjoyed is inevitably part of the complex fabric of society, an understanding of patrimony comes close to what Edmund Burke meant when he explored the relationship between convention – custom – and law. While going so far as to say that 'if civil society be the offspring of convention, that convention must be its law',[19] Burke realized that whatever *contract* this society may be, it would inevitably be a 'partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'.[20] 'The state ought not to be considered as nothing better than a partnership agreement', according to Burke, as living together – and governing together – implies sharing a common culture, from which the political order and the law come forth.

If the state is the representative of the people that live on the territory over which it claims jurisdiction – which (as argued in part I) is the pretention of the nation state – it is natural for the state to conceive of itself as the herdsman of the culture, the customs, and in general the particular form of life that has taken shape on it.

9.2. *The Public Sphere*

This has consequences for what is commonly denoted as 'the public sphere'. Although generally conceived as 'neutral territory' to which the state ought to be indifferent, there is nevertheless an indisputable connection between the nation – and its history and identity – and this public sphere. A first element

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[19] Edmund Burke, *Reflections on the Revolution in France. A critical edition.* Edited by J.C.D. Clark (Stanford: Stanford University Press, 2001) 218.

[20] Burke (2001) 261. Thomas Paine did not agree with Burke on this, see Thomas Paine, *Rights of Man, being an answer to mr. Burke's attack on the French Revolution* (1791) 8. Available online at http://www.iowagrandmaster.org/Books%20in%20pdf/Paine--Rights%20of%20Man.pdf. Cf. Craig Nelson, *Thomas Paine. Enlightenment, Revolution, and the Birth of Modern Nations* (New York: Viking, 2006) 181ff: 'Droits de l'Homme, ou Droits du Seigneur?'.

of the public sphere that comes to mind is the language spoken. France poses an interesting example of state support for that element of the public sphere in the form of the *Académie Française*, founded in 1614 by Richelieu, who also defended, as we have seen, the importance of a national political loyalty. With the official mission of 'watching over the French language',[21] the academy has, in its own words,

> worked in the past to stabilize the language, in order to create a common patrimony for all Frenchmen and for all those who use our language.[22]

Especially the reference to the French language in the Academy's mission statement as 'our language' ('notre langue') is interesting: French is not conceived of as a neutral, utilitarian *open source medium* merely serving the exchange of information, but as the possession of a nation, and the expression of a way of life.[23] To further support the French language worldwide, the French state founded the *Organisation International de la Francophonie* in 1970, organizing conferences, supporting initiatives, and generally promoting the French language. In line with this, the French constitution reads that 'the language of the Republic is French'.[24] This means that the French state openly speaks out for a particular language, and that it does not, by implication, just as happily see English or Arabic being spoken.

It is not surprising that nation states, seeking representative government and the rule of law, emphasize the importance of a shared language. For how would either be possible without such a shared means of communication? A national public debate is impossible amongst citizens who cannot understand one another, as it would be to follow the developments of government and parliament. Without a shared language, such institutions as national newspapers

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[21] 'Veiller sur la langue française'.

[22] 'Travaillé dans le passé à fixer la langue, pour en faire un patrimoine commun à tous les Français et à tous ceux qui pratiquent notre langue http://www.academie-francaise.fr/role/index.html.

[23] Cf. the book of the current member of the Académie Française, Marc Fumaroli, *Quand l'Europe parlait Français* (Paris: Éditions de Fallois, 2011) 26-27: 'La grammaire française, le lexique du français, don't Voltaire n'avait pas peur de tourner en derision la relative pauvreté, la syntaxe française, la sémantique exigeante du français, sa versification dont Walpole voyait bien les défauts un siècle avant la "crise du vers" diagnostiquée par Mallarmé, les genres où notre langue excellait, notamment les genres intimes, la lettre, le journal, la poésie de circonstance, les *Mémoires,* et ce genre littéraire oral qu'est la conversation entre amis, tout cet apprentissage difficile avait le sens d'une initiation à une manière exceptionnelle d'être libre et naturel avec autrui et avec soi-même. C'était tout autre chose que de communiquer. C'était entrer "en compagnie"."

[24] Constitution Française, Article 2: 'La langue de la République est le français. L'emblème national est le drapeau tricolore, bleu, blanc, rouge. L'hymne national est la "Marseillaise". La devise de la République est "Liberté, Egalité, Fraternité". Son principe est : gouvernement du peuple, par le peuple et pour le peuple.' The full text of the French constitution can be found at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=64C8027EBFD9CE02B300CE6F0E48AC7F.tpdj009v_1?cidTexte=LEGITEXT000006071194&dateTexte=20110518. The article was added to the constitution in 1992.

and national television channels would have severe difficulties to function.[25] They refer to a national public debate and reaffirm the idea that a shared public interest exists. Parliament, supposedly the reflection of the national debate and the place where the national interest is ultimately decided upon, needs to find reception in the nation in order to live up to its democratic claims.

The French state, in addition, performs a wide range of other promotional activities not only of its language, but also of its culture. And the French state is by no means unique in this. Just as France has the *Alliance française*, Germany has a network of *Goethe Institutes*, organizing lectures, inviting speakers, and generally promoting the German culture in other countries worldwide[26] – the Netherlands has a network of *Dutch institutes*, and so on. The examples are endless.

When it comes to the content of the national culture, the French state again choses an interesting approach. While the state formally possesses strict 'neutrality' towards all 'cults' (religions), it financially supports a great amount of church buildings, which are considered to be part of the *patrimoine* of the French nation. Indeed, in the years following the famous *law of 1905* that installed this secularism, the French state, having prided itself for centuries for being the *fille aînée de l'église,* the oldest daughter of the church, and being covered, in the words of Sarkozy, by a 'manteau de cathédrales',[27] realized an 'absorption of the old diocese buildings by the historical Monuments'.[28]

With the exception, to this day, of Alsace and Lorraine, which at the time were not part of France and have never accepted the law of separation since their reunion, the French state is considered to be neutral towards all religions, yet at the same time to remain a defender of the cultural heritage of the French nation, in which the churches inescapably play a large role.[29] In the course of the 20th century, a great number of additional laws have been passed bringing more and more elements of society – certainly not only religious ones – under the aegis of the French state.

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[25] See on this for instance Benedict Anderson's analysis of the importance of national newspapers in the developments of *imagined communities*: Anderson (1991) 37ff.

[26] On its website the Goethe-institute announces: 'The Goethe-Institut is the Federal Republic of Germany's cultural institution operating worldwide'; available online at http://www.goethe.de/enindex.htm.

[27] Nicolas Sarkozy said this at a Speech held on 13 December, 2007. Cf. Catherine Gouëset, '8 ans d'idylle entre l'Elysée et les catholiques', in: *l'Express*, 8 October, 2010. Available online at http://www.lexpress.fr/actualite/politique/8-ans-d-idylle-entre-l-elysee-et-les-catholiques_925948.html.

[28] 'L'Absorption des anciens édifices diocésains par les Monuments historiques'. A. Auduc, 'L'héritage des croyants devient patrimoine national', in: *Hommes et Migrations*, vol. 1259, 'Les 100 ans d'une idée neuve, II. Culture(s), religion(s) et politique', Dossier coordonné par Alain Seksig (janvier-février 2006) 70-77.

[29] Cf. Olivier le Roy, *La laïcité face à l'Islam* (Paris: Stock, 2005); Gerard Noiriel, *A quoi sert l'identité nationale?* (Marseille: Agone, 2007). When still a government minister, Nicolas Sarkozy also authored a book partly on this subject, *La République, les religions, l'espérance* (Paris: Editions du cerf, 2004).

In their several ways, almost all Western nation states have developed comparable means to support a particular patrimony. From a strictly universalist perspective, then, they all discriminate. They discriminate firstly between citizens and non-citizens; but secondly, they favor a particular culture, and a particular way of life. Whether in the form of a language, or through the upkeep of architectural heritage, rarely have states remained indifferent to the way or ways of life of which they are the ultimate herdsmen.

This is not disconnected from the rule of law either. The law itself – as I have attempted to show in chapter 5 and 6 –, implies a choice for a *particular* law, and for particular values and approaches to such themes as free will, accountability, the relationship between men and women, the right form of punishment for criminal offenses, and so on. If a state upholds the rule of law, it is always a *particular* law – and it is to be hoped that this law is perceived by all who are submitted to it, to be *theirs*.

Underneath the discussion over the French protection of its Catholic heritage, lie, then, complicated questions concerning the right to confess one's religion in public. For not only is freedom of religion understood to mean freedom of conscience, it has also come to mean the freedom to express one's religion publicly. From that perspective, all faiths may be said to be equal. Yet at the same time, the churches and cathedrals in many European states are major anchor points of the national awareness. Since Chateaubriand, many have praised the church bells as possessing 'undoubtedly a beauty of the first rank, that what artists call *the great*',[30] even when they are no longer practicing believers. The bells have become a part, to some extend, of the cultural heritage of many nation states. They are reminiscent of an inherited religious tradition, of the great history and artistic achievements of Christian Europe; of a sense of provinciality, too, which many cherish as an antidote against modern hectic life.

To say that the state is the expression of a heritage is not to say, of course, that this heritage is fixed forever. However, to question the neutrality of the public sphere, and to regard it as an expression of a certain kind of heritage, is to understand it not only legally, but also sociologically. To see the public sphere as an expression of a certain social reality makes it self-evident that the social right to make a strong impact on the public sphere has to be 'earned'.

Again, France provides an interesting example, with the great mosque that was built in the centre of Paris in the 1920s. It was the first mosque to be built in France, and its construction was decided upon after the battle of Verdun, in which more than 50.000 Algerian Muslims had lost their lives while fighting

[30] 'Indubitablement une beauté de la première sorte: celle que les artistes appellent *le grand*'. Chateaubriand, *Génie du Christianisme. Ou beautés de la Religion Chrétienne* (1802) (Paris: Éditions Gallimard, 1978) 893: part 4, book 1, chapter 1. Cf. Ernest Renan, 'Souvenirs d'enfance et de jeunesse' (Paris 1883), in: Henriette Psichari (ed.), *Œuvres Complètes d'Ernest Renan* II (Paris 1949-1961) 723.

on the French side. It was strongly felt that through their sacrifices for the French nation, the Muslim community had earned the right to partake in the public sphere and so place a symbol of their culture and religion in the midst of French society. In any ordinary social situation, most people would regard this as a most common thing: to adapt to an existing social code, to a certain way of living, a certain architectural style, to gradually 'earn' the (social) right to influence the way things are done; these are amongst the immediate data of conscience, self-evident to all who have ever been a part of a society, a group of friends, a club, or a family.

Much abstract thought about rights, such as social contract theory of the kind expounded by John Rawls (as discussed in chapter 8), while emphasizing the importance of the 'neutrality' of the state, neglects the social experience that is implied in every form of political organization. But while it may or may not do justice to their similarities and differences to classify Judaism, Christianity and Islam under the same word 'religion' (Tocqueville for instance believed there were 'a thousand' reasons not to do so[31]), to have an impact on the public sphere raises not only theological and legalistic, but also sociological questions – ultimately culminating in that most fundamental question of all: will the others be tolerated? If human history shows one thing, it is that accepting our differences is never unproblematic. As Arthur Schlesinger puts it: 'The hostility of one tribe for another is among the most instinctive human reactions'.[32] A way to overcome this natural hostility is by creating a common point of reference – which in the past has often been a common enemy, but which can also be a common nationality, a common home. By emphasizing the shared nationality – an association that all members of society are a part of –, the different tribes, races and religions can actually manage to live together in a peaceful manner.

What happens when this unification around a shared nationality fails, is illustrated by the Dreyfus affair that I have discussed in chapter 3. Had the French self-image not been injured so fundamentally after the defeat in 1871, then it is unlikely that the fever to 'purify' the nation would have taken such a pathological shape. Moreover, hadn't the German self-consciousness been crushed in Versailles, then the popular support for such resentful movements as the Nazi-party, is, if not unimaginable, at least highly improbable.

It is not implausible that contemporary disdain for the ordinary, peaceful national feelings of the European peoples may cause them to be charmed by intolerantly nationalist or 'populist' politicians today. The all too severe emphasis

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[31] Tocqueville, *Democracy in America*, vol. 2, book I, chapter 5. Cf. Cliteur, Paul, 'A Secular Reading of Tocqueville', in: Raf Geenens and Annelien de Dijn (eds.), *Reading Tocqueville: From Oracle to Actor* (Houndmills, New York: Palgrave, MacMillan 2007) 112-132.

[32] Arthur M. Schlesinger jr., *The Disuniting of America. Reflections on a Multicultural Society. Revised and enlarged edition* (New York: W.W. Norton & Company, 1998) 12.

of mainstream politicians on abstract and universalist principles, has possibly caused them to insufficiently accommodate the shared national identities of European states. Instead of debating the meaning of national identities, political fora have been permeated by what Mary Ann Glendon calls 'rights talk':[33] the rephrasing of disputes in terms of abstract, universal rights.

Especially the 'universal human right' to enjoy equal treatment proves to be problematic.[34] Reminding us of John Rawls' ideas of a just society, article 2 of the 'Universal Declaration of Human Rights' condemns distinctions 'of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[35] The European Convention on Human Rights has put it almost identically, outlawing 'discrimination' (in its article 14) 'on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[36]

The Dutch constitution has a comparable formulation, expressed in its very first article:[37] 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.'[38]

The list is so extensive and explicitly mentions 'all other forms' (i.e. all possible forms) of discrimination, that the grounds of distinction that are to be combated according to the universalist worldview are unlimited (rendering significant power to the judges at, for instance, Strasbourg to do so in accordance with their own political views).

But since laws are ultimately not to be supported by force but by heartfelt endorsement by the community that they apply to, a society that condemns all forms of discrimination, 'on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever', must necessarily implicate the citizens' *indifference* towards those criteria. The ideal citizen (for those who aim the banning of all forms of 'discrimination') is the one who says:

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[33] Glendon (1991).

[34] Cf. N. Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (Alphen aan den Rijn: Sijthoff en Noordhoff 1970) 46.

[35] The Universal Declaration of Human Rights was issued by the United Nations General Assembly, on December 10th, 1948.

[36] The European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted in Rome, on 4 November 1950. This article got the heading "Prohibition of Discrimination" according to the Provisions of protocol 11 (ETS no. 155), 11 may 1994.

[37] Since 1983.

[38] This is the official translation of the Dutch text, provided by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Department, in collaboration with the Translation Department of the Ministry of Foreign Affairs. www.minbzk.nl. The Dutch text reads: 'Allen die zich in Nederland bevinden, worden in gelijke gevallen gelijk behandeld. Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan.'

> to me, any religion, belief, political opinion, race, sex, or really any difference between human beings is equal.

The non-discriminatory citizen has become a universal human being, without preferences or particular attachments that he favors over others. The Rawlsian society, that is indifferent to any 'conceptions of the good' the citizens may have, has ceased to be a society. In the words of James Fitzjames Stephen:

> Complete moral tolerance is possible only when men have become completely indifferent to each other – that is to say, when society is at an end.[39]

As 'national identity' is necessarily something *particular*, it implies also that certain forms of behavior or cultural practices are *not* part of it. A national identity implies, in short, a distinction, which is a form of inequality that constitutes – strictly speaking – a form of discrimination.

It is implied in the modern conception of citizenship, which grants to all the right to partake in democratic decision making, that those with citizenship have a different status than those without. Guests or temporary visitors may enjoy the hospitality of the community, but, as they do not bear the burdens of membership (nor are demanded to fulfill the duties that go hand in hand with it), they do not have a natural entitlement to all of its benefits either.

Indeed, from this perspective, to demand equal treatment and non-discrimination to strangers, implies denying the legitimacy of the sense of membership altogether. That is why the universal prohibition to discriminate even to those who are not citizens – through the European Court of Human Rights –, if applied consistently, is contradictory to the very idea of citizenship. Or, put the other way round: citizenship necessarily discriminates between those who possess it, and those who don't.

The right to partake in democratic decision-making is granted to all citizens, yet, as a rule, denied to foreigners (though not always on the municipal level). Properly understood, all nation states say, as does the Spanish guerrilla fighter Pablo in Ernest Hemingway's *For Whom the Bell Tolls*:

> What right have you, a foreigner, to come to me and tell me what I must do?[40]

Much practice that is condemned as being 'discriminatory' concerns a different treatment of immigrants as compared to natives. It is called 'discrimination', for instance, when an immigrant with an unfamiliar name is rejected at a job for that reason; or when Switzerland votes to ban the building of new minarets (while still allowing the building of for instance church towers). Whereas the experience of membership always poses demands on the members, the universal approach to

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[39] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1874), quoted in: Roger Kimball, *Experiments against reality. The fate of culture in the postmodern age* (Chicago: Ivan R. Dee, 2000) 159.

[40] Ernest Hemingway, *For whom the bell tolls* (London: Vintage Books, 2005) 17.

the 'fundamental rights' of the individual has made it incumbent upon Western states to ignore that element of membership. In this way, it would be possible to understand the 'non-discrimination' project not as a demand for 'equal rights in equal circumstances', but of 'equal rights in unequal circumstances'.

The question whether these equal rights for different groups and practices *should* in fact be given, leads to a discussion on the criteria of membership and the future of the identity of the community again.

To demand equal treatment on the basis of race or ethnicity, moreover, is an entirely different thing than to demand it on the basis of faith, religion, way of life, and 'conceptions of the good'. For the former are not the result of a choice or a matter of moral significance. The latter, on the contrary, are subject to choice and imply a moral position. Rational beings can be held personally responsible for their 'conceptions of the good'. By implying that nations do not have a right to resist certain 'conceptions of the good', the general movement against discrimination has become, over the past decades, a one-sided battle for minorities' – and immigrants' – rights, and thus a tool for the political project to abandon borders and weaken national identities.[41]

There is also a crucial role for symbols to be played in this. As discussed in the previous chapter, most modern nation states have a number of official festive or memorial days. Usually there is a role for the national anthem and the national flag at the ceremonies that mark the beginning or conclusion of these happenings. In times of civil war, one of the very first things that the different factions do is develop their own flag. It seems to be difficult to have a political organization without such symbols. The first observation that seems important in relation to this is that group identity expresses itself through symbols. Flags, anthems, signs, colours or special words can thus carry meaning for members of a social group and so express their loyalty to that group.

After the publication of twelve cartoons that mocked the Islamic prophet on September 30th, 2005, in the Danish newspaper *Jyllands Posten*, Muslims felt that a symbol to which they were attached was desecrated and protested all over the world. Responses were, amongst others, the burning of the Danish flag. They were offended not by the mocking of themselves, but of their prophet; those who felt offended held the whole nation in which the publication had occurred, responsible. Thus understanding the Danish nation as to some extent a collective identity, they responded by attacking *the symbols* of that nation, such as the flag.[42]

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[41] See on this, for instance, Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: W.W. Norton and Company, 1995).

[42] In contrast with many other countries, burning the flag is not illegal in Denmark. Section 110 (e) of the Danish penal code forbids to desecrate the flags or national symbols of foreign nations, while it doesn't prohibit to burn Denmark's own national flag. The reason for this is that the burning

As a matter of fact, this attachment to symbols, as illustrated by the unrest that followed the publication of the Danish cartoons, is what we all live by on a daily basis. National festive days, the flag, the anthem, and so on, express the collective identity that is necessary for representative government and the rule of law to make sense. When a judge puts a person in the wrong, he must do so with a reference to a law that this person must, in order to accept the judge's decision, also consider authoritative over him. This provides an additional argument for the wearing of uniforms by judges and others involved with upholding the law, such as police officers and prison guards, too: they are not supposed to be individual agents, but representatives of a collective body.[43]

A final aspect of modern citizenship and the conception of 'national identity' that is implied in it is connected to the facilities of the welfare state: the national health care, national welfare, national pensions, national aid programmes and tax cuts for donations to national development programmes. All such forms of state-funded or fostered solidarity imply a sense of national loyalty that provides legitimacy for it. Indeed, it is very difficult to imagine social democratic politics without presupposing the existence of a nation.[44] This is also the reason why many traditional left-wing parties have taken a sceptical position towards immigration (whereas many right-wing parties have been wary of the idea of a national identity and defended global free trade and open borders[45] – interestingly enough almost the exact opposite to the present!). But it cannot be denied that the welfare state rests upon a sense of national solidarity: a sense of community.

9.3. *Without a 'We', It Won't Work*

Ultimately, representative government and the rule of law are thus dependent upon a territorial loyalty that is sufficiently imagined to allow newcomers in, yet not so universal that it leaves its members without shared symbols or objects of identification. As national loyalty is connected to a collective identity, it is only natural that it also encompasses a certain claim on the public sphere. The inevitable consequence of supranationalism and multiculturalism is the development of parallel loyalties that will challenge the unity of the state, and

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of foreign flags is a matter of foreign policy, as it could be understood as a threat to that country. In fact, according to Danish tradition, burning is also the proper way to dispose of a worn flag.

[43] See on this for example Cliteur, 'Ambtenaar en Politiek. Over de anarchie in ons openbaar bestuur', in: *Tegen de Decadentie, de democratische rechtstaat in verval* (De Arbeiderspers, Amsterdam, 2004)143ff.

[44] See on this for instance: Leszek Kolakowski, *Main Currents of Marxism* (London: Norton Publishers, 2005) 81.

[45] Although John Stuart Mill already recognized the necessity for a 'principle of cohesion' amongst the members of a state, as discussed in the previous part.

thus hollow out representative government and the rule of law (as well as the preconditions for any form of state-initiated welfare).

The WRR may be right that multiple loyalties – to religion, family, different cultural backgrounds, and so on – will always exist. It is undesirable that the state should seek to eliminate this entirely; such a state would be a totalitarian state, recognizing only itself as a legitimate purpose in the lives of its subjects.

Nevertheless, the opposite is undesirable to largely the same extent: if different institutions and authorities consequently present alternatives to the national law – ultimately challenging the monopoly to the legitimate use of force of the state[46] –, representative government and the rule of law will effectively be hollowed out. The double problem that may, moreover, be rising in Western Europe is this: while multiculturalism sets in motion a centrifugal tendency out of the national idea, supranationalism offers the tools to defend a non-national law. Most clearly in the form of the ECHR and the ICC, supranational law presents, at a deeper level, the ongoing example that ultimately, reference is not to be made to the national law, but to the universal rights that every single individual is supposedly always entitled to.

When taking the perspective of multiculturalism, emphasizing the equality of each cultural group, and the right to an equal share in the state's cultural foundations, there is no reason why Muslims would not be encouraged to accept *their* form of non-national universal jurisdiction: *sharia* law. It is not unlikely that increasing numbers of Muslims, seeking a home in the modern world, will retreat into fundamentalism and derive from the language of universal jurisdiction the tools to defend divine commands. Then what may be evolving in the slipstream of the spread of 'human rights' is a concept of universal jurisdiction of the same nature as the religious jurisdiction that was finally abandoned – after more than a century of devastating warfare – in the 17th century.[47] This is a problem related to 'universal' human rights that lies below their superficial attractiveness. Not only do they seem to generate a rights- rather then a duties-based conception of citizenship (as discussed in chapter 8.3), but they also bear an innate justification of divine law, and thereby diminish the authority and indeed legitimacy of a shared, national law.

And this applies not only to the European Court of Human Rights, or the human rights discourse generally, but to the entire supranational idea. Supranational – i.e. global, universal – jurisdiction actually nourishes the idea that national law is of no particular authority and could be easily overridden. The

[46] As seems to be a tendency in the suburbs of many large European cities, from Paris and Amsterdam to Berlin and Marseille.

[47] Cf. Karin Jespersen and Ralph Pittelkow, *Islamisten en Naivisten.* Met een introductie van Afshin Ellian (Amsterdam: Uitgeverij Nieuw Amsterdam, 2008).

weakening of national authority that this leads to is a dangerous development.[48] National loyalty is the common point of reference for the rule of law and representative government, and provides the sense of home into which strangers can be welcomed.[49] It is impossible to collectively deliberate and ultimately decide upon political questions, unless an assembly may speak for a collective whole: the people. It is unlikely that disputing parties will accept the verdict of a judge, if they do not experience both themselves and the judge as part of the same community. Globalization, migration, virtualization and so on pose great opportunities and chances. The twenty-first century seems to become a most exciting and international century, full of exchanges and unexpected developments. Yet if we want to continue living under representative governments with a shared rule of law, political organization will have to continue to focus on strengthening national loyalties, for 'without a we, it won't work'.[50]

[48] Again the French example is relevant. Each year on the morning of the fourteenth of July, in every French city and village, the inhabitants come together to play the *Marseillaise*, run their eyes over the lists of *Morts pour la Patrie*, and celebrate the hoisting of the flag. The French 14th of July may be compared with the several national festivities and commemorations in the Netherlands: April 30th (Queen's day), May 4th (the national commemoration of the dead), May 5th (Liberation day). The rituals attached to these festivities and commemorations can and should reaffirm the sense of membership, not only of particular communities, but also of the political whole, which ultimately comes down to the nation, which in turn is expressed through representative institutions and the shared rule of law. In France, of course, much (intellectual) weight is given to the French Revolution and the ideals that surfaced with it; but the celebrations on the 14th of July are not about the triumph of certain intellectual ideas. This day is, just as the symbols of the flag and the anthem, clearly the expression of a common home.

[49] Evidence from the *European Value Studies* suggests that for inhabitants of the EU, national loyalty still takes clear precedence over their loyalty to the union: '[F]or Europeans, nation comes first, then Europe. Europe has only been accepted in an instrumental and utilitarian way; no emotional or affective attachment exists towards the Union. Europeans perceive themselves first and foremost as French, Italian or Polish. They cherish their language, their habits and national culture" (Halman et al. 2005: 15)'.

[50] Paul Scheffer, *Het land van aankomst* (Amsterdam: De Bezige Bij, 2007).