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

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CONCLUSION

This book has argued that representative government and the rule of law require nation states; or, put the other way round, that it is only in a nation state, that these institutions can properly function.

The significance of borders lies in their ability to define jurisdictions, and so separate one political community from another. In doing so, borders enable the formation and protection of a national loyalty as well as the exercise of sovereignty. Representative government and the rule of law need such a loyalty and such sovereignty. The gradual dismantlement of borders, brought about by supranationalism from above, and by multiculturalism from below, dilutes sovereignty and weakens nationality, and so hollows out representative government and the rule of law.

It is unfortunate that the significance of borders has been neglected. Instead of the *sovereign cosmopolitanism* that I propose, a policy of supranationalism has been pursued. Three supranational courts – the ICC, the ECHR, and the ICJ –, as well as three supranational organizations – the WTO, the Security Council and the EU – are unaccountable to the national community, while presenting the nation with law that is not from itself. Nor is this supranational law being administered, in the last instance, by the nation itself. In this way, the national sense of membership is weakened. The law is no longer ‘ours’ or ‘from within,’ but from ‘out there.’ The judges that administer the law are no longer from within either. They are out of the reach of the national balance of powers and the pressures of public opinion. These supranational judges may have different ideas on how legal provisions should be interpreted, and their political persuasions are often unknown.

Indisputably, then, the national community has a limited say in the creation and application of supranational law. And while it inevitably becomes harder for the national community to accept the right of say of the supranational bodies as their powers increase, in the fact that no national assembly decides on the most important political decisions anymore, the reaffirmation of collective identity through collective decision-making is weakened as well.

Meanwhile, the response to mass-immigration has been one of multiculturalism, encouraging the differences between the diverse ethnic and religious groups, rather than their similarities. Instead of focusing on what the community of strangers may have in common, or should have in common, as in the ideal of a *multicultural nationalism* that I defend, multiculturalism advocates the lack of such a core-identity. While legal pluralism is still an exception, there can be

no doubt that this is a logical next step on the line that starts with denying the existence of a single, shared national identity. As a result of this, the sense of overarching membership that is required for representative government and the rule of law, is severely eroded.

If representative government and the rule of law are to be preserved, or restored, it is important to change course. Because representative government and the rule of law require a collective, national identity as well as political sovereignty, nation states should be reaffirmed. Powers should gradually be taken back from the supranational institutions that now possess and exercise them; and the importance of national loyalty in the face of the multiethnic and multireligious societies of today, should be thoroughly reflected upon.

There are clearly many alternatives to current supranational entanglements. With regards to the World Trade Organization, the compulsory jurisdiction of the panels could be reversed, and the jurisdiction of the Appellate Body could be restricted, so giving back the power to ultimately interpret trade agreements to member states themselves. The International Criminal Court could accept Security Council veto power over decisions to commence investigations. It could also narrow the scope of crimes it has jurisdiction over, to for instance genocide or the use of weapons of mass destruction only. The European Court of Human Rights, too, could narrow its jurisdiction and restrict itself to what it was originally intended for: protecting individuals against the most basic injustices in terms of physical violence and gross cruelties, and standing up for the most elementary principles of democracy only, such as the liberty of the press and free elections. It could thus apply a more formalized principle of subsidiarity. Also, the ECHR could accept that a two-thirds majority should be reached amongst its judges before states can be convicted. An annual report with leading cases could be produced by the Parliamentary Assembly, which could then be reviewed and questioned by national parliaments.

One could easily go on in this fashion: the possibilities to reshape supranational organizations in a less supranational – more intergovernmental – way, or to curtail and limit their powers, are legion and the many possibilities deserve serious debate. A *sovereign cosmopolitanism*, exercised by nation states that are open to international cooperation and global developments, but retain the ultimate say in their obligations and policies, can take shape in many different forms, too, and therefore merits further exploration.

To argue – as has been the main purpose of this book – that representative government and the rule of law can exist only within nation states, however, does not necessarily mean that those nation states that presently exist should also be held on to. There is nothing in this book that specifically defends current borders: it has been a defense of borders in general. For that reason, representative government and the rule of law would not necessarily be undermined by a

change of presently existing borders. The states that today exist do not necessarily reflect existing national identities, and the separation of Scotland from Great Britain, for instance, or the splitting up of Belgium into two nation states, may well improve the functioning of representative government and the rule of law, rather than undermine it. Nor is there in principle any objection to the merger of present-day nation states into larger nation states (the merger of Germany and Austria, for example, or, theoretically speaking, of even all European states into one United States of Europe). The point is that sovereignty and nationality uniquely enable representative government and the rule of law – not that we should hold on stiffly to historically contingent boundaries.

Nevertheless, I have tried to point out – in chapters 1, 3 and 9 especially – that there are great difficulties connected to creating the national membership that is required for representative government and the rule of law. It is certain that the kind of national loyalties that – however imperfectly – exist today, have been shaped at tremendous costs, over a long period of time, and that European states have made a great effort in building them. The idea that a European nationality could be created seems to me to be frivolous and completely out of touch with reality. The difficulties that uniting East- and West-Germany in the 1990s already posed are illustrative: if unification asked already such effort from two countries with the same history, language and culture, after only half a century of separation – how on earth could this be done on a European scale? And if after more than 180 years of existence as a state, still hasn't led to the formation of a generally experienced Belgian nationality – what can we really, realistically speaking, expect from the packing together of Poles, Spaniards, Dutchmen, Frenchmen and Bulgarians?

There are, moreover, many plausible intergovernmental alternatives to the present supranational EU. The powers of the European Union could be severely diminished by for instance reconsidering the interpretation of the common market, the Schengen-agreement on open borders, as well as the euro currency. Gradually dismantling the politico-economic structure of the EU and moving back to the idea of a free trade zone is not difficult to imagine and might prove to be a stable format for European cooperation.

This hypothetical intergovernmental Europe, an open network of intensively cooperating, yet sovereign states, would have many attractive elements. If border controls were restored, it would make cooperation with non-European countries much easier. One result could be the opening up of the old continent to the vast markets in the Middle East and Northern Africa. By granting these countries, which could include Turkey, Egypt, Morocco, Russia, and even Turkmenistan and Kazakhstan, a status of 'peripheral benevolent countries', the richer and technologically more advanced (Western-) European countries could ensure access to cheap production in those countries, while maintaining control over

their national economies and immigration. As national sovereignty would be restored, European states would cease to be obliged to converge their several foreign policies. International relations would again be determined on the basis of the historical loyalties, the national interests, and the policy decisions of the elected national governments.

The main argument against such an intergovernmental EU seems to be that, as the foreign policies of European countries could diverge, it would disable Europe to secure its 'common' global interests in the longer term (if there even exists such a thing). What some people fear is that by not installing an overarching political structure, the European states may become subject to policies of *divide et impera* by such great powers as India, China and the United States, thereby dwarfing the political clout of the European continent on the international scene. Recent events suggest that this might indeed be the case. Gas contracts with Russia which will be given to only a limited number of European countries; Chinese trade deals and customs agreements denounced as a result of some European state's critique on Chinese international geopolitical behavior; hardly are European political leaders being listened to in military conflicts around the globe; and so on.

The defender of an intergovernmental EU would argue that all these difficulties are the problem of the European nations themselves; and that it is their challenge to deal with them, as a federal European Union is – for lack of a single European nationality – unattainable. The European federalist, on the other hand, would argue that the formation of such a single European nationality is nevertheless possible. To form such a federal union, it would be necessary to transfer political sovereignty to the European political centre. Choosing this option would mean the end of the current, supranational EU and with it the thousands of regulations and directives that the Monnet method has produced, and the beginning of a new, democratic European nation state.

European foreign policy would have to converge. France would have to give up its permanent seat in the Security Council to be replaced by a common, 'European' seat; Germany and France must accept the possibility of being outvoted by former Communist countries in the East of Europe when it comes to questions of foreign policy and support for American military interventions around the globe; the Italians would have to fight in the same army as the Spaniards, the Germans, the Dutch and the Danes. The significantly less liberal majorities in Middle and Eastern European countries may outvote Dutch ideals on gay rights, abortion, euthanasia, drugs and so on. A European *lingua franca*, which will most certainly be English, would eclipse the importance of the great culture-languages of the continent. And so on.

As I have said, to my mind this is grotesque and indeed absurd, and I don't see how this could possibly be believed to be a realistic scenario. Moreover, I

fear that going this way would incite an intolerant and closed nationalism – of the kind that also helped to bring about the explosion of Yugoslavia – rather than invoke enthusiasm for yet more ‘Europeanization’. But whether this is so or not, and whether the process of unifying Europe politically must therefore be set in motion or not, goes beyond the scope of this book. The point here has been that the present, supranational ‘in between’ concept of European integration, with an EU that is stuck somewhere halfway between a federation and mere intergovernmental cooperation, is unsustainable. Sovereignty and national identity must coincide for representative government and the rule of law to exist.

