

REFLECTING ON NATIONALISM WITH IAN BURUMA

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1. As the only jurist among the authors in this volume – albeit one who has also read philosophy – , I aim to set forth in what sense jurists can make a useful contribution to the discussion of nationalism. However, let me dwell first on what I see as the major added value of a historian's perspective on the topic at hand.

Historians can raise our awareness of the relative nature of institutions, for instance by pointing out the numerous ways in which diversity and more specifically its variants, cultural, religious and ethnic diversity, have been dealt with in the past. They can teach us, among other things, that there is more than just one legitimate model of tolerance, as indeed Michael Walzer brilliantly explained in his work *On Toleration*¹. Historians teach us that a given society has at any one time but a limited choice of such models, that they are not simply manufacturable at will, and that their manufacturability is largely dependent on that society's history.

Historians can therefore to a large extent explain how a certain society developed into a particular state and consequently also how our own society became what it is today. Some historians strongly believe in demythologisation, and more specifically in demythologising the nation, but this new myth presented as an anti-myth is, in my opinion, of limited help in the current debate.

Finally, historians can teach us the value of trial and error, or, to put it more positively with an old term favoured by jurists, the value of artificial reason, which is reason that, through considerable amounts of experience and study, has been slowly constructed by generation after generation, as opposed to natural reason, which everyone is supposed to possess and which ideologues who call themselves philosophers like to rely upon².

¹ Michael WALZER, *On Toleration* (Yale Univ. 1997).

² Compare sir Edward COKE in his *Prohibitions del Roy* (conversation with James I): “*causes which concern life, or inheritance, or goods, or fortunes of (subjects) are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before a man can attain to the knowledge of it*”. See my article ‘Edmund Burke en de traditie van de *artificial*

2. In contrast, jurists, at least good jurists, can tell us something about the questions how to resolve conflicts, how to shape institutions and how to distribute power and responsibilities. They can also tell us, if they have practised some *Reflexion auf eigenes Tun*, what part the law can play and, more importantly, what part it cannot play.

3. After this *captatio*, let me turn to the main topic of the debate at issue, which, as I understand it, can be phrased as follows: 'What does it take to keep a political community together?'. I will focus in particular on the value of 'constitutional patriotism' (after Habermas's term *Verfassungspatriotismus*).

I would like to share ten thoughts in this regard.

4. First of all, we have to accept that a possible answer to this question is that certain political communities belong together insufficiently closely to be upheld. Separatism may offer a legitimate solution. More generally, it will often be useful to divide power and responsibilities over several levels, i.e. to organise some type of federalism³. We cannot and should not a priori assume that the only sensible direction history can take is that of greater centralisation of more powers at a higher level. The idea that history can move in one direction only is what Milan Kundera called 'leftist kitsch'⁴.

5. The answer that mainly consists in seeking salvation in *Verfassungspatriotismus* is in my view problematic for three reasons at least.

My first critical reflection is that this answer does not say anything about the crucial question of the distribution of power and responsibilities over several

reason tegenover natural reason', in Andreas Kinning, Paul De Hert, Maarten Colette (eds.), *Edmund Burke* (Brussel: VUB press / ASP 2017).

³ At this abstract level, it is not useful to distinguish different forms of federalism or to distinguish between federalism and confederalism.

⁴ M. WALZER, *Thick and thin. Moral argument at home and abroad* (Notre Dame: University of Notre Dame Press 1994), p. 8-9, referring to Kundera: "There is nothing to gain from the merger, for the chief value of all this marching lies in the particular experience of the marchers. There is no reason to think that they are all heading in the same direction. The claim that they must be heading in the same direction, that there is only one direction in which good-hearted (or ideologically correct) men and women can possibly march is an example – so writes the Czech novelist Milan Kundera of leftist kitsch". M. KUNDERA himself wrote in his *Nesnesitelná lehkost bytí*, quoted here from the English translation *The Unbearable Lightness of Being* (New York: Harper & Row, 1st ed. 1984), p. 257: "The fantasy of the Grand March that Franz was so intoxicated by is the political kitsch joining leftists of all times and tendencies. The Grand March is the splendid march on the road to brotherhood, equality, justice, happiness; it goes on and on, obstacles notwithstanding, for obstacles there must be if the march is to be the Grand March. (...) What makes a leftist a leftist is not this or that theory but his ability to integrate any theory into the kitsch called the Grand March."

levels and about the implementation of the subsidiarity principle. Historians may point to the fact that the pendulum can move back and forth, and that periods of more centralisation of responsibilities alternate with periods of decentralisation. I have explained elsewhere why the emergence and strengthening of a European Union is one of the main causes, as a pull and push factor, of (calls for) separatism in several member states (or regions thereof). The European Union indeed largely eliminates the disadvantages of creating new (inner) borders. Conversely, the importance of the Union increases the need of people and regions who feel insufficiently represented by their own government, to establish themselves as a proper member state.

6. My second critical reflection is that the homogeneity required for keeping together a political community increases along with that society's higher level of solidarity. Bart De Wever puts it very graphically: either the borders are being closed or social security is. *Verfassungspatriotismus* may function as a sufficient glue in a community that experiences a 10% tax burden rather than in a community with a 50% or higher tax burden. Public support for the latter is most unlikely if there is no stronger sense of belonging together. It probably even basically requires people to speak the same language: "Zusammengehören heißt zunächst sich zusammen hören" (Literally: *Togetherness primarily means to 'hear' one another together*) (Peter Sloterdijk⁵).

7. My third critical reflection is that the success of gathering around a Constitution as an effective method of creating togetherness inevitably also depends on what that Constitution says. It can express a very 'thick' sense of identity or a rather 'thin' one (alluding to that other book by Michael Walzer, *Thick and thin*⁶). If *sharia* is the Constitution, or a virtually integral part of it, a very far-reaching homogeneity is imposed by means of a very illiberal constitution. There are countries with a constitutional review in relation to such a Constitution, as we can see in Iran with its *Fuqaha* serving the same function as the French Constitutional Council, even though the French reference norms (review standards) are – fortunately – very different. In Belgium, however, a former 'purple' government issued its so-called 'Handvest voor het Staatsburgerschap' (*Charter on Citizenship*)⁷, approved on 8 July 2005, which was meant to list all the values that newcomers had to accept as part of their integration process in order to become citizens of our community. It turned

⁵ P. SLOTERDIJK, *Im selben Boot. Versuch über die Hyperpolitik*, p. 21; compare also p. 63-64.

⁶ M. WALZER, *Thick and Thin. Moral argument at Home and abroad* (University of Notre Dame Press, Chicago 1994).

⁷ Prepared by a 'Commission intercultural dialogue', whose report can be found at <http://www.unia.be/nl/publicaties-statistieken/publicaties/eindverslag-commissie-voor-interculturele-dialogoog>, p. 95, esp. no. 4.

out that it achieved little more than the imposition of an act of faith in absolute gender equality, abortion, euthanasia and homosexual marriage. Other countries express their identity precisely by enshrining in their constitution the exact opposite traditional values, thus protecting them from activist constitutional judges. I myself have defended the notion that a constitution had better be modest and not too passionate⁸.

If the constitution imposes too high a level of homogeneity, this will have a stifling effect. At the same time, a low level of homogeneity will not provide the glue required by the political community.

8. I am personally convinced that legal norms – and a sensible Constitution should consist only of legal norms – alone cannot provide the necessary cohesion. *Quid leges sine moribus!* In order to keep a political community together, a sufficient number of common customs and practices, shared memories and festivals and such more are required, not all of which can be laid down in laws. Moreover, many things that could be fitted into laws do not belong in there either: after all, an open society distinguishes between legal rules and rules of morality and decency. The latter are not all raised to the level of legal rules, but do not lose their legitimacy for not having been imposed as laws either⁹. It is very dangerous to abolish that distinction either by imposing as laws rules of decency and morality or by withdrawing the legitimacy of rules of morality and decency that have not been recognised as legal norms.

9. In order to impose and justify a high level of solidarity and maintain sufficient support for it, much more is needed than common legal rules, including a common language (preferably literally but at least figuratively) and a common philosophical attitude (such as a common religion can offer). Rationally as well as emotionally more is needed, with language, for instance, playing an important role in both aspects.

Contrary to what has been argued by some, this cannot merely be an imagined community, but rather needs to be an ‘expressed’ community¹⁰. For such a

⁸ See my ‘Res publica en rechtsstaat: vrijheid in een onvolmaakte samenleving. Pleidooi voor een functionele (niet te bevlogen) grondwet voor Vlaanderen’, www.law.kuleuven.be/personal/mstorme/vlaamse-republiek.html, in *CDPK (Chroniques de droit public – publiekrechtelijke kronieken)* 2009 n. 2, p. 382-389; earlier in Johan Sanctorum e.a., *De Vlaamse Republiek: van utopie tot project* (Van Halewyck 2009), p. 165-187; a shorter version in *Rechtsfilosofie & Rechtstheorie* 2009, p. 50-59.

⁹ I developed this i.a. in my essay ‘De fundamenteelste vrijheid: de vrijheid om te discrimineren’, see www.storme.be/vrijheidsprijs.html.

¹⁰ See my essay ‘Geworteld en gelaagd: over culturele identiteit, welvaart, solidariteit, zingeving en democratie’, via www.storme.be/geworteld.html.

society, a sufficient amount of assimilation is required. That is why it is not only senseless to talk about a multicultural society – which is a *contradictio in terminis* – but equally meaningless to talk about a multi-ethnic society, since a society only remains multi-ethnic as long as people of diverse ethnic origins do not start having children together and consequently hopefully also enter into stable individual relationships. It is after all utter nonsense to still refer to a society as multi-ethnic when ethnic groups’ progeny is entirely mingled. It is therefore interesting to try and understand which barriers keep people of different ethnic origins from mingling in such a manner. Religion appears to be a much bigger factor of division than so-called race.

10. If in addition we want to talk about a common European identity related to values, it is meaningless to identify those values as universal ones. A particular political community does not acquire its identity from universal values, except maybe from the particular way in which it concretises and expresses them.

The question then arises whether these are European values rather than either values from just part of Europe or simply Western values. Even though some values are experienced dramatically differently by the USA and Western Europe, European societies are also different from each other, to the extent, even, that each of them differs hardly more from the USA than it does from other European countries¹¹.

11. For the legitimacy and cohesion of a political community it is not only the ‘vertical’ division of powers and responsibilities (as described earlier) that is relevant, but also the ‘horizontal’ division: 1° How is power distributed between the people and their representatives and does this come with an equilibrium between representative democracy and direct democracy?; 2° How is power distributed between institutions that rely on elections and institutions that rely, or should rely, on expertise, bearing in mind that these institutions have very often not been composed on the basis of equal voting, but increasingly often by compartmentalisation through quota of representatives of all sorts of categories of stakeholders or interest groups (social dialogue bodies, institutions like the *High Council of Justice* and more and more frequently other institutions as well); 3° How legitimate and representative is judge-made law, especially when these judges are empowered to put themselves above Parliament?

¹¹ Ph. NEMO rightly called his essay ‘Qu’est-ce que l’occident’ and not ‘Qu’est-ce que l’Europe’; in the last chapter he deals explicitly with the relation between Europe and (North) America.

PART III
POPULISM

Verhandelingen
van
de Koninklijke
Vlaamse Academie
van België
voor
Wetenschappen
en Kunsten



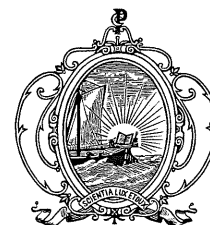
Nieuwe reeks, nr. 33

Coverafbeelding: The liberation of Dudzele (near Bruges) by Canadian troops, 12 March 1944. Coll. NSB Dudzele/WO1Dudzele.brugseverenigingen.be

The End of Postwar

Essays on the Work of Ian Buruma

Marc Boone, Gita Deneckere & Jo Tollebeek



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