

draft

National identity, law and human rights

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Abstract

The establishment of a ministry of “national identity” in France raises the question of the legal content of such a notion and the extent to which it is compatible with other norms, in particular human rights and non-discrimination. This paper will assess the extent to which the legal assertion of a particular national or cultural identity is compatible with the respect of human rights and non-discrimination principles.

Referring to “social contract” theories as well as theories of nationalism, I will first show that the nation-state has been conceived as providing both a universal and equal protection to all its individual members and protecting a particular cultural character. The nation-state is thus based on the constant tension between universal and particular.

Second, I will show how, in order to build a cohesive society, the State has developed integration policies, recently to manage migration, but historically to build as well internal cohesion. Linguistic and education policies have been developed as a result. Multiculturalism is seen as an alternative as the notion of a dominant culture becomes increasingly contested.

Last, I will address the legal compatibility between national identity and human rights and non-discrimination principles. I will address the various ways in which national identity can be translated in legal texts, in particular in constitutional texts, and then turn to compatibility of such legal notions with human rights and non-discrimination principles.

Key words

National identity, nation-state, nationalism, human rights, constitutionalism, culture, multiculturalism

Introduction

The main concern of this paper will be to assess the extent to which the protection of human rights can or should be dissociated from the assertion of national identity, or to turn the issue around, to what extent is the assertion of national identity compatible with human rights.

This paper will ask in particular a number of questions:

1/ To what extent is the nation the only viable framework to exert human rights: is the link necessary or merely historically contingent? Is this link a theoretical or practical link?

2/ A related issue is whether the nation should be seen as an end in itself, which can eventually be constrained by human rights, or as a means for other ends, meaning that the first purpose of the nation is to establish rule of law and human rights and that the other elements are secondary to this pursuit.

3/ The last question will not be the usual question of whether multiculturalism is compatible with human rights, but whether monoculturalism as the assertion of a single identity (be it group or national identity) is compatible with human rights.

A close look at the idea of the nation-state as embodying this connection is here needed. Social contract theories have served and remain today the main paradigm through which one can account for the simultaneous existence of a particular group and universal rights.

However, a number of thinkers have severely criticized the abstract notion of human rights. They do not so much refuse any notion of rights, but see these as derived from the particular history of a given group, a construction rather than a natural fact. The problem with such views is that they make human rights highly contingent on historical development and the will of society.

I will show the need to go beyond this opposition. The key problem is to distinguish between aspiration and reality, theory and practice. While one needs to move away from natural law, social contract theories remain useful to describe contemporary nation-states. To underline the constructed character of notions of human rights, nation, culture or ethnicity does not invalidate their normative or actual value.

1. (Re)defining national identity or the “Janus-face” of the nation-State**A. Social contract and human rights: a misunderstanding ?**

The ideal model of a community which allows the reconciliation of the particular and the universal is provided by “social contract” theorists, in particular Jean-Jacques Rousseau.¹ Rousseau’s theory postulates the congruence between individual and general will of the “people”. The most interesting aspect of Rousseau’s thought is precisely that: he does not see a necessary contradiction between individual and group rights. While foreseeing some tensions, Rousseau believes that if and when the general will can be discerned, it cannot go against individual rights and interests.²

Singling out the French revolution, Edmund Burke has pointed out the misunderstanding which lies at the heart of the notion of social contract: a natural convergence between collective will and individual rights.³ This contradiction is at the heart of the universal project of the French revolution. What is interesting in Burke’s thinking is that *he is not opposed to the idea of rights, but to the idea that these could be considered universal*. He opposes the 1688 English declaration of rights to the 1789 French declaration, underlining that, in England, rights are indissolubly linked to the English crown, they are the result of a long history, they are inherited, not abstract principles as the “rights of men”, but as the “rights of Englishmen”.

The core of the disagreement is on the nature of rights and in particular of equality. For Rousseau, rights are at the origin of the social pact, whereas for Burke they are its contingent result. The individualism of Rousseau is criticized as abstract and a source of tyranny by Burke.⁴ For Rousseau, equality is the very foundation which allows the compatibility of the individual and collective levels. Equality acts as an “automatic” balancing factor which will contain excesses by the sovereign power: the nature of the social pact is such that its reciprocal nature ensures that others’ interests are also one’s own interest.⁵

However, coming from such different viewpoints and assumptions, both Rousseau and Burke share similar ideas on the nation.⁶ Both believe that a good government should reflect the traditions of the people. When it comes to the legal form taken by the “contract”, Rousseau gets closer to Montesquieu: the social pact should reflect the national character of the people and should build civic virtue out of it.⁷ He underlines the need to take into account the particular character of each people: Rousseau’s anthropology is therefore one which is concerned with the “natural” diversity of the various

peoples.⁸ The “general will” is not represented by a particular form of government, it should first of all reflect longstanding local traditions and customs.⁹ Burke does not question the social contract or natural law *per se*, but gives a different account: once the individual has entered civil society, he has divested himself of his natural rights: “government is not made in virtue of natural rights”¹⁰ which exist independently from it. Once a society is formed the rights change of nature and can include restrictions in the interest of society as well as liberties. The balance between society and individual is clearly in favour on the former in Burke’s view.

Rousseau’s view remains more dependent on the idea of natural law, the social contract being the political mediation between nature and society: instead of destroying “natural equality”, the social pact substitutes a “moral and legitimate equality”.¹¹ Burke’s views are more historical and positivist: for him, rights can only be discovered over time through a patient process during which society builds these rights, rather than they being inherent in individuals. The most interesting outcome of this discussion of these two major authors is that we find before us *two ways to reach a similar outcome*: rights can be substantially similar, but in one conception, they would exist from the origin of the political community, in the other, they would be the result of a social process.

B. Nation-state and citizenship:

Social contract theories inspired in particular the French revolutionaries. The theory of the “general will” inspired the Declaration of the rights of man and the citizen adopted in 1789.¹² The sovereign nation is thus a “society of individuals”: sovereignty is not seen as limiting the freedom of the individual but on the contrary, in the “rousseauist” way, as enhancing this freedom.¹³ Modern democracy is thus born under the form of the nation: the nation provides the political framework to respond to aspirations to equality.¹⁴

The nation is composed of persons who see themselves as individuals: citizenship represents the ideal model of the link between individual and collective levels.¹⁵ The nation-state responds to the need to protect both individual and group and, in order to do so, it transforms the individual and his or her private, personal attachments into a citizen guided by a concern for the public good. The nation-state thus represents the political and collective response to individualism, linking the individual and collective levels.¹⁶

The nation-State provides at the same time a universal and equal protection to all its members and protects a distinct cultural character. The key issue is that *both universal and particular* objectives are in constant tension: this is the “Janus face of the modern nation”.¹⁷ In the nation-state, the individual is recognized both as a member of a political community (a citizen) and a holder of rights (a human). As a result, the nation-state is dependent on a double source of legitimacy: the consent of the citizens and the respect for individual rights. The problem is that the idea that the sovereign deliberation of the people will always respect human rights is grounded in natural law which is today a highly contested concept.

The scope of human rights is also problematic: are rights those of the citizen or of all humans? In other words, how are the “universal” rights of all “men” connected to their implementation in the context of a given “particular” nation? Hannah Arendt points out the dilemma of universal human rights: either you have rights guaranteed through the mediation of the nation-State and become prisoner of this particular group, or rights are simply a vacuous abstraction.¹⁸ What Arendt fails to grasp is certainly the distinction between theoretical and practical approaches: while she is correct about the practice of human rights, she does not really say why human rights should be tied to the nation-state. The core idea here is that human rights *are* political in nature and cannot exist outside political institutions, but these political institutions need not be *only* the nation-state.

C. Nationalism and ethnicity:

Another distinction which should be revisited is between (political) nationalism on one side as neatly opposed to (cultural) ethnicity on the other: “the convenient, but false, dichotomy between political and cultural nationalism should be discarded in favour of an analysis of the dialectic between politics and culture within each concrete nationalism.”¹⁹ For Montserrat Guibernau, nations become increasingly ethnic and ethnies increasingly national.²⁰

Ethnicity, as well as nationalism, is the produce of mixed elements, both modern and ancient: ethnic identities, as much as national identities, are largely constructed and deeply relational.²¹ The distinction between ethnicity and nationalism and the transition from one to the other needs to be reassessed: in both cases, the key is to understand how cultural transformation becomes political consciousness.

A convincing view of nationalism makes it the adaptation, the reaction of a given community when faced with the challenge of modernity:

nationalism is a transformation of culture and thus can be linked to ethnicity. B. Anderson and E. Hobsbawm have shown how nations supposedly based on deep historical roots are in fact “imagined communities” based on the “invention of tradition” or “fictive ethnicity”: both show how a supposedly deeply held ethnicity can in fact be a recent historically invention.²²

The link between nation building and ethnicity is evident in a number of cases, even where the civic dimension is dominant. In the France, the civic nation relies on the implicit idea of ethnic assimilation into mainstream community by internal and external minorities. Mexico and its vision of a common citizenship based on the idea of ethnic mixing (*mestizaje*) offers another example which has led to the denial in the public sphere of the cultural expression of the Indian minorities.²³ Turkey, where citizenship was based on a notion of "Turkishness" as a common ethnicity, perceived itself as under threat from other ethnies, such as the Kurds or the Armenians.²⁴

2. From integration to multiculturalism ?

If we see the nation as linked both to a given cultural community and to the state, the role of the state in shaping and forging a common culture is central. Rousseau insisted on the need for the state to forge a national culture through national education and civil religion. National identity, even if it draws on existing cultural traditions, is characterised by the importance of a voluntary process to build a culture, through cultural engineering which uses in particular linguistic and education policies, but also a wide array of social and economic policies to foster a unified national community.

The link established between nation and culture raises a number of issues which have pointed out early on by political philosophers such as Burke who questioned the limits of equality or Tocqueville who feared the “tyranny of the majority”. More recently, thinkers of multiculturalism have shown how the claim to neutrality and equality of the nation-state was hiding the promotion of a majority culture.

A. A sociological approach to citizenship: integration

Schnapper advocates a sociological approach of the nation and makes of integration the defining sociological dimension of the nation: a nation defines itself by ability to integrate individuals in a “community of citizens”.²⁵ This integration is first political, hence the close link between nation and State. Second, integration has also other social, economic and

cultural dimension. The success of integration thus depends on the transformation of the individual into a “*homo nationalis*”²⁶ based on the institutional ability to transform an “imagined community” into an effective solidarity.

Integration can be seen as one single process which encompasses first the internal population and then the migrants. Cultural policies have been central to define the specificity of the nation (role of linguistic, education and cultural policies). Welfare policies have also been used to foster integration. The nation (in particular in Western Europe) is increasingly linked to a conception of citizenship that includes social solidarity and to the welfare State.²⁷ In France, education was used during the Third Republic to “standardize culture” through the spread of French as a dominant language and how internal migration from the countryside to the main cities was a factor of integration.²⁸ The aim is the “fusion of culture and political society”.²⁹ Linguistic unification played a similar role in many eastern European countries.³⁰ In Indonesia, one language (*bahasa*) among the many spoken in the archipelago has been used as an “inter-insular lingua franca” to unify disparate ethnic groups.³¹

B. Defining the public sphere

Another and related aspect is the issue of the distinction between public and private spheres. In order to unite its citizens, the nation-State is built on the establishment of a common public sphere. The existence of a public sphere is regarded as an essential element of the protection of the rights: equality is made possible by the existence of a public space which overrules social distinctions. Protecting the private sphere allows personal freedom to express itself outside the constraints of a given social and cultural context.

The notion of a public sphere can prove to be a contested concept when it comes to implementation. Its scope and content can differ according to the historical context. It is historically based on the expression of particular cultural values, it expresses the tradition of a given group and results from a history which has led to particular cultural referents defining the public space (language used, religious signs, choices of holy days). The French “model” has been based on the promotion by the State of a single culture, whereas the American “model” has been based on a much “thinner” view a common culture, leaving much more room to private space.

The existence of a public sphere has led to a repression of the traditional hierarchy within the limits of the private sphere. Khosrokhavar

describes this mechanism of repression and how it is called into question under the pressure of the diversity of expressions in the contemporary society (minorities in the Western countries, cultures which were subjected to colonial domination), all of which claim their share in the public space.³²

C. Ethnic democracy vs. multiculturalism ?

The importance of culture and ethnicity as part of the nation-building process raises the issue of how the state should be linked with culture. In short, one could ask *whether there is a "right" not to assimilate*.³³ The issue would be to what extent one can assert a "right to be different" or a right not to participate in some aspect of the dominant national public life.

Given the central role of the nation as a reference point for the state and its citizens, democracy cannot evict identity and culture from the political debate. On the contrary, democracy means that identity becomes a matter for political deliberation, thus linking "ethnic" and "civic" dimensions. Different visions of the nation in major democracies between left (civic, revolutionary) and right (traditionalist, racist/xenophobic) have not prevented a basic consensus on the content of national identity (language, constitution etc...). The nation-state thus offers a framework in which identity is a disputed and democratically contested concept. A number of thinkers have termed this "liberal nationalism", whereby the promotion of a national culture by the State does not prevent an open conception of citizenship and of the tolerance for other cultural practices.³⁴ In this model, called "liberal nationalism" or "ethnic democracy",³⁵ the issue is not so much the extent to which national identity is asserted, but whether this is accompanied by proper democratic and human rights safeguards.

The alternative is multiculturalism. For proponents multiculturalism, if the nation-State is understood as both a community based on a given identity and on the equality of its members, the issue is to square the demand for cultural recognition and the equality principle. Multiculturalism proposes to draw a new line between universalism and particularism: citizenship means a common civic space which would not be based on a particular culture. For Kymlicka, "claims for minority rights must be seen in the context of, and as a response to state nation-building",³⁶ not as a negation of the idea of citizenship itself. The previous link between nationality and citizenship, and between nation and State thus needs to be revisited. The main issue is *how to ensure equal treatment of various cultural groups within the State*. Just as secularism has been an effort to separate State and religion, one can consider multiculturalism as an effort to separate State and culture.³⁷ Belgium, Canada, as well as India or Lebanon, provide examples of how

State and culture can be separated, but also of the difficulty to ensure fair treatment of various cultural, religious, linguistic communities and maintain unity at the same time.

A problem with multiculturalism is that it has been more concerned with minorities and asserting group rights within a wider community, but it does not address the problem of how to define citizenship for all: it has been a reaction to the cultural domination of the majority, but it has not defined a common framework for all. This criticism of multiculturalism relates also to the republican view of the nation as underpinning the possibility of expression of individual rights.

3. How to legally assert national identity: constitutionalism, human rights and discrimination

Constitutions are the closest one can get to an explicit, written elaboration of a "social contract". They are based on the sovereignty of the people, provide the basic rules which unite individuals to a national community, granting them rights and duties as citizens and laying down basic collective principles and rules. Constitutions are thus typically the key document where both the particular nature of the State, its specific cultural background is asserted and the universal nature of citizenship is laid down, usually in the form of a bill of rights or of general statements on the equality among citizens (sometime expanded to cover all persons, but we will be more concerned here with the provisions concerning citizens).

The issue is thus the extent to which particular provisions relating to the defense of a culture, a language or a religion are compatible with the general human rights framework, in particular the non-discrimination principle. The general definition proposed of human rights, unless stated otherwise, will be one laid down in the core international human rights instruments.

A. Models of cultural accommodation under a constitutional framework:

As shown above, absolute neutrality cannot be achieved under a national constitutional framework. A number of authors have proposed legal models for cultural accommodation.³⁸ The key divide is between models focusing on unity of the polity as opposed to models focused on diversity. The key issue is whether the emphasis should be on promoting one single culture (possibly at the expense of minority cultures) or preserve pluralism (with the risk of promoting separate communities).

On the side of unity, Smooha distinguishes between: 1/ individual liberal democracy (based on non-discrimination and without official culture, religion or language), 2/ republican liberal democracy (based on a common civic culture), 3/ ethnic democracy (dominance of an ethnic definition of citizenship, which gives special status to the majority ethnic group, while ensuring basic rights to all). On the side of diversity, Smooha distinguishes between multicultural democracy (limited recognition of collective rights, in particular cultural rights) and “consociational” democracy (full and equal recognition of group rights, including political representation).

A number of polarities can be identified:

- 1) Negative vs. positive recognition of culture: in the case of religion, secularism can be seen either as separation (between State and Church) or equal recognition. A similar approach can be extended to culture: is the State actively promoting culture(s) or based on the absence of any reference to a particular culture ?
- 2) Equality vs. asymmetry: is the legal framework based on equal recognition of cultures and religions or on the contrary based on the promotion of a particular culture ?
- 3) Individual vs. group rights: is the individual the sole legal subject or do groups have legal personality? In particular is there a single legal framework recognizing only individuals or some degree of legal pluralism recognizing different groups within the State ?

B. Constitutional models to reconcile national identity and human rights:

I will here concentrate on two models outlined above: first, the “republican” or “civic” model and second, the “ethnic” (which I will call “asymmetric” – in order to cover as well cases where the State is based on religion) model. Both aim to establish a unified political culture, while at the same time claiming to establish a rule of law and respect for human rights. The question is how to legally assert national identity without putting in question human rights. The main problem is the extent to which national identity can be asserted while respecting human rights, in particular non-discrimination principles.

Law can address national identity in a number of ways, through provisions concerning citizenship, religion and culture (in particular language and education):

-Citizenship: citizenship is a major instrument of cultural control by giving the possibility to delimit membership in the State, which is little constrained by international human rights law. The classical distinction is made between *jus soli* and *jus sanguinis* needs to be revisited: Weil shows a convergence of nationality laws in Europe, based on a mix of “ethnic” (*jus sanguinis*) and “civic” (*jus soli*) considerations which defy any simple categorisation.³⁹ While States are free under international law to define how they grant citizenship, this cannot be completely arbitrary and should not be done in a discriminatory way.

-Religion: the official recognition of a national religion or culture does not *in itself* prevent impartiality from the State: the UN Human Right Committee considers that the existence of a State religion is not in itself an obstacle to religious freedom.⁴⁰ In many countries, such an official recognition is simply a reflection of the existence of a majority religion, without strong normative value: it is therefore not an obstacle to the recognition of other religions (even if there are –often historical- biases such as State funding, school curricula etc...).

-Culture: the existence of an official language is considered a legitimate public aim thus not in itself constitutive of discrimination and compatible with liberal democracy. The existence of an official language which is also the medium of compulsory education is generally considered as compatible with individual rights, in particular as the existence of an official language does not exclude the parallel recognition or teaching of other languages. However, under the International Covenant for Civil and Political Rights (articles 2 & 27), language cannot be a ground for differentiation in the enjoyment of rights and linguistic minorities are protected.

The “republican-civic” model is based on the active promotion of a common unitary civic culture as opposed to particular cultures seen as sources of internal divisions. Under this model, the dominant culture of the majority will tend to be promoted at the expense of minority cultures. At best, minority cultures are ignored in the public sphere, the free expression of minority culture being allowed, but not afforded any official recognition (France and Turkey are representative of this model, although both are evolving towards enhanced recognition of minority cultures). This model is based on the link between State and a people defined as a unified entity, which excludes the recognition of other groups which would compete with

this unity: as an example, the French Constitutional Court removed a reference to the “Corsican people” in a law on the autonomy of the Corsican region, as this was incompatible with the idea that the sovereignty is exclusively vested in the French people. The Court also considered that the European Charter on minority languages was contrary to the Constitution as it would lead to the use of such languages in public life and to the recognition of separate territories and groups. The same is true in Turkey with the promotion of a single common culture, based on Turkish language at the exclusion of a number of minorities (in particular the Kurds).⁴¹ The “republican-civic” model often hides a special treatment for the dominant religion, based on the control of the Church by the State. It generally results from a history of struggle between the State and a dominant religion. As a result, the State tends to take over religious functions (e.g. personal law) and carve out a special legal framework for the dominant religion, despite formally legal neutral provisions.⁴²

Under the “asymmetry”-“ethnic democracy” model, the State is explicitly established with reference to a particular culture or religion, which receives official support and whose members are explicitly favoured against members of other cultures. Fiji,⁴³ Malaysia,⁴⁴ Israel,⁴⁵ Estonia⁴⁶ as well as a number of Arab countries⁴⁷ are representative of this model. The Constitutions (when they exist) of these States refer to a dominant culture or religion and sometime state the preservation of a given culture as a constitutional objective: this is achieved through a number of policies, in particular linguistic policies (official language), education and access to citizenship (which will privilege ethnic descent over residence).

The key problem posed by this model, in particular as regards international law, is that the equality principle is not respected when the recognition or preference given to one culture/religion is not compensated by similar rights for minorities or other groups present in the country. In a number of cases, the explicit assertion of a dominant culture in law is accompanied with the recognition of a number of rights to minorities. the existence of a collective dominant culture goes hand in hand with the recognition of the possibility for minorities to preserve their own culture.

The issue is thus not so much the extent to which a particular identity is promoted, but the way in which minorities are actually protected or not, and whether the law establishes differential treatment according to ethnic origin. In the Baltic States (Latvia and Estonia), the policies can be considered in many ways as “assimilationist” rather than of ethnic ascendancy, as their linguistic and citizenship policies are open to all: citizenship is available to all who meet the requirement of the law (in

particular knowledge of Estonian or Latvian language) with any kind of distinction based on ethnic origin.

A convergence between ethnic and civic legal models can thus be noted, with an "ethnicisation" of civic models and a "liberalisation" of the ethnic models. The introduction of linguistic requirements for residence and citizenship in West Europe is not radically different from similar requirements in Estonia or Latvia. The line between promoting ethnic democracy as opposed to nation-building is a thin one.

Conclusion: what model to ensure the compatibility of national identity and human rights?

The aim of the paper was to define some of the basic elements of various constitutional frameworks to assess how the assertion of national identity and human rights can be made compatible. Two core concepts of national identity were distinguished, one based on the unity of the body politic, the other on its explicitly recognised diversity.

International law creates a number of obligations. First, it creates a general obligation for States to ensure that there is no discrimination in the enjoyment of rights. Second, there is an obligation to take positive measures to prevent discrimination ("affirmative action"). Third, there is an obligation to protect minority cultures and ensure the freedom to enjoy one's culture.

While the "republican" model aims to prevent discrimination, it fails to protect minority groups through positive discrimination or by allowing particular cultural rights. By favouring the building of a civic culture based on the dominant culture, the "secular" model will tend to leave aside minority cultural claims. In particular it can foster "indirect discrimination", defined as neutral measures which in fact favour the majority: language laws are typical of this as they are not discriminatory per se, the language requirement applying to all without distinction, but in practice being detrimental to minority languages. The single civic culture, being built on the notion that all individuals should be under the same law, is not conducive to the recognition of particular claims, either under the form of affirmative action or under the form of minority rights.

The "asymmetry" model explicitly discriminates against minority cultures, by asserting a dominant culture. Even though it may grant some degree of legal recognition to minorities, it will often fail the test of non-discrimination as the rights granted will not compensate a more general

pattern of discrimination and tend to separate minorities, rather than integrate them. International law allows and even imposes “affirmative action” to actively promote the rights of a given community/group of persons which is subject to a particular discrimination. The goal is however not to promote special rights, but is rather an extension of the non-discrimination principle. In particular, if the Constitution or laws of the State may refer to a particular culture or religion, it should also provide explicit recognition and support to minority cultures present in the country.

NOTES

- ¹ The following works from Jean-Jacques Rousseau will be referred to:
Du Contrat Social edited, with introduction, by Bruno Bernardi. Paris, France: Flammarion [1762] 2001.
Considérations sur le Gouvernement de Pologne, et sur sa Réformation Projetée (first published : 1782) available at :
http://classiques.ugac.ca/classiques/Rousseau_jj/considerations_pologne/considerations_pologne.pdf
Projet de constitution pour la Corse (1763), available at:
http://classiques.ugac.ca/classiques/Rousseau_jj/projet_corse/projet_corse.pdf
- ² See Cobban, Alfred *Rousseau and the Modern State* London: George Allen and Unwin, 1964, pp. 8-9
- ³ See Burke, Edmund *Reflections on the Revolution in France*, Yale University Press, New Haven and London, 2003
- ⁴ Cobban, Alfred *Rousseau and the Modern State* London: George Allen and Unwin, 1964, pp. 22-25
- ⁵ *Du Contrat Social* pp. 56 & 71
- ⁶ Cobban, Alfred *Rousseau and the Modern State* London: George Allen and Unwin, 1964, pp. 104-105
- ⁷ see Rousseau, *Considérations sur le Gouvernement de Pologne, et sur sa Réformation Projetée & Projet de constitution pour la Corse* and Cobban, Alfred *Rousseau and the Modern State* London: George Allen and Unwin, 1964 pp.108-111
- ⁸ See *Du Contrat Social*, pp. 92-94 & 117-122
- ⁹ See *Considérations sur le Gouvernement de Pologne, et sur sa Réformation Projetée* Pologne, p. 6 and *Du Contrat Social*, p. 94
- ¹⁰ Burke, Edmund *Reflections on the Revolution in France*, Yale University Press, New Haven and London, 2003, p. 51

¹¹ *Du Contrat Social* 64

¹² The link between human rights and the “general will” is made in article 6 of the 1789 Declaration (“the Law is the expression of the general will”) as the link between human rights and sovereignty results from article 3 (“the source of all sovereignty lies essentially in the Nation”). The Sovereign is no more the King, but the Nation.

¹³ See Gauchet, Marcel *La Révolution des droits de l’homme*, Gallimard, Paris, 1989, pp. 48, 72-73, 78-79

¹⁴ Schnapper, Dominique. *La Communauté des Citoyens*, Paris: Gallimard (folio essais), 1994, pp. 23-24

¹⁵ See Dumont, Louis *Essai sur l’individualisme*, Seuil, 1983, pp. 21-22

¹⁶ Balibar, Etienne & Wallerstein, Immanuel. *Race, nation, classe: les identités ambiguës*, Paris: La Découverte, 1998, pp. 127-130 and Noiriël, Gérard. *Etat, nation et immigration*, Paris: éditions Belin, 2001, pp. 167, 203-205

¹⁷ Habermas, cited in Benhabib, Seyla “Transformations of Citizenship: The Case of Contemporary Europe”, *Government and Opposition*, Volume 37, Number 4, October 2002, p. 450

¹⁸ Arendt, Hannah *The Origins of Totalitarianism*, New York: Harcourt, Inc. (1968, 1966), pp. 290-302

¹⁹ Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, p. 4

²⁰ Guibernau, Montserrat *Nations without states: political communities in a global age* Cambridge : Polity Press, 1999, p. 6

²¹ See Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, pp. 37-45 & 65; see also Barth Frederik (ed.), *Ethnic Groups and Boundaries. The Social Organisation of Cultural Differences*, Universitetsforlaget, 1969 (reissued 1998), Waveland Press Inc.

²² Anderson, Benedict. *Imagined Communities* New York, NY: Verso, 1983;

Hobsbawm, E. & Ranger, T. (eds.) *The Invention Of Tradition* Cambridge: Cambridge University Press, 1983; see also see Smith, A. D., *Nationalism and modernism: a critical survey of recent theories of nations and nationalism* London : Routledge, 1998, pp. 198-205 and Balibar, Etienne & Wallerstein, Immanuel. *Race, nation, classe: les identités ambiguës*, Paris: La Découverte, 1998, pp. 130-131

²³ De la Peña, Guillermo, “A new Mexican nationalism? Indigenous rights, constitutional reform and the conflicting meanings of multiculturalism”, *Nations and Nationalism* 12 (2), 2006, 279–302

²⁴ Isyar, Bora “The origins of Turkish Republican citizenship: the birth of race”, *Nations and Nationalism* 11 (3), 2005, 343–360

²⁵ Schnapper, Dominique. *La Communauté des Citoyens*, Paris: Gallimard (folio essais), 1994, pp. 59-72, see also Noiriel, Gérard. *Etat, nation et immigration*, Paris: éditions Belin, 2001

²⁶ Balibar, Etienne & Wallerstein, Immanuel. *Race, nation, classe: les identités ambiguës*, Paris: La Découverte, 1998, p. 126

²⁷ See Marshall, T. H., *Citizenship and social class* London: Pluto Press, 1992

²⁸ Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, pp. 66-69

²⁹ Gellner cited Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, p. 69

³⁰ Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, pp. 70-73

³¹ Anderson, Benedict. *Imagined Communities* New York, NY: Verso, 1983, pp. 120-123 & 132

³² Khosrokhavar, Farhad "La fin des monoculturalismes", in Michel Wieviorka, Jocelyne Ohana (dir.), *La différence culturelle. Une reformulation des débats. Colloque de Cerisy*, Paris, Editions Balland, 2001, p. 17-30

³³ Zook Darren C. "Decolonizing Law: Identity Politics, Human Rights, and the United Nations" *Harvard Human Rights Journal* / Vol. 19, Spring 2006, 95-122 (see p. 115)

³⁴ See Tamir, Yael. *Liberal Nationalism*, Princeton University Press, 1993 and Kymlicka, Will. *Politics in the vernacular*, Oxford University Press, 2001, pp. 40-41

³⁵ See Smootha, Sammy. *The Model of Ethnic Democracy*. ECMI Working Papers #13. Flensburg, Germany: European Centre for Minority Issues (internet edition: http://www.ecmi.de/doc/public_papers.html) 2001

³⁶ Kymlicka, Will. *Politics in the vernacular*, Oxford University Press, 2001, p. 1

³⁷ Kymlicka, Will. *Politics in the vernacular*, Oxford University Press, 2001, p. 23; Dieckhoff, Alain & Jaffrelot, Christophe (eds.) *Revisiting nationalism: theories and processes* London: Hurst & Co., 2005, p. 101

³⁸ Smootha, Sammy. *The Model of Ethnic Democracy*. ECMI Working Papers #13. Flensburg, Germany: European Centre for Minority Issues (internet edition: http://www.ecmi.de/doc/public_papers.html) 2001; Kymlicka, W. and Norman, W. "The Return of the Citizen: A Survey of Recent Work on Citizenship Theory" 104 *Ethics* 352-381 (1994); Guibernau, Montserrat *Nations without states: political communities in a global age* Cambridge : Polity Press, 1999

³⁹ In Aleinikoff, Thomas Alexander & Klusmeyer, Douglas (eds.) *Citizenship Today: Global Perspectives and Practices*, Carnegie Endowment for International Peace, 2001. The opposition between an "ethnic" *jus sanguinis* and "civic" *jus soli* should be revisited more generally: first, because all States have adopted *jus sanguinis*, and thus recognize descent-based citizenship; second, because the more progressive *jus soli* already existed in medieval times and is not a modern creation; third, because social contract theories based on consent insist on acquisition of nationality by will rather than birth or descent (in this respect the French Constitution of 1793 was the most progressive, granting citizenship after one year of residence – but only to men...).

⁴⁰ HRC General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) - 30/07/93 - CCPR/C/21/Rev.1/Add.4

⁴¹ Turkish is recognised as the official language under article 3 of the Constitution. Aydın & Keyman (2004: 34-39) have shown how the accession process to the European Union has contributed to remove restrictions on the Kurdish language, but without giving it official status.

⁴² This is particularly true in Turkey, where the State has effectively taken control of Islam and is administering it through the Directorate for Religious Affairs in Turkey. There is also a *de facto* support to the dominant religion in France through subsidies to religious buildings built before 1905 and to confessional, predominantly Christian, schools: the law of 9 December 1905 (article 13) on the separation between Churches and State provides for public funding for religious buildings that remain public property (see official text at: <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm>). Also 17% of French pupils go to private schools (95 % of which are catholic schools). Private schools receive around 10 % of the State budget for education (data provided by the official version of the 2006 education budget on http://alize.finances.gouv.fr/budget/plf2006/bleus/pdf/DBGNORMALMSNE_C.pdf)

⁴³ The Fijian Constitution (Chapter 2, Section 6) provides for the special interests of the Fijian community, which is singled out among the groups present in Fiji.

⁴⁴ Article 153 of the Constitution provides for a special status for Malays as opposed to other citizens.

⁴⁵ See Smooha, Sammy "The Model of Ethnic Democracy: Israel as a Jewish and Democratic State." *Nations and Nationalism* 8, 4 (October 2002):475-503

⁴⁶ see the preamble of the Estonian constitution which refers to the "preservation of the Estonian nation and its culture"

⁴⁷ Saudi Arabia is the most extreme example with the Sharia being the exclusive source of law. Egypt or Morocco are examples of unitary States based on one religion (Islam) and culture (Arabic) but without recognition of minorities (see CERD concluding observations and summary records: CERD/C/SR.1020, 1484, 1485, 1554 & 1555; CERD A/58/18 (2003); CERD A/ 56/18 (2001))