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## Nationalism, Patriotism and Diversity

Conceptualising the National  
Dimension in Neil MacCormick's  
Post-Sovereign Constellation

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## **Abstract**

This paper scrutinises MacCormick's liberal nationalism. The first issue with which he grapples is how well the post-sovereign constellation can re-configure nationalism through disposing of the exclusivist and suppressive (of regional forms of nationalism) propensities built into the sovereign state. Second, is the question of the status of liberal nationalism in MacCormick's broader theoretical conception of the post-sovereign constellation. This also raises the issue as to whether there might be other, alternative, modes of allegiance that might be compatible with MacCormick's general approach to law and politics in the post-sovereign constellation. In the concluding section, it is argued that a cosmopolitan constitutional patriotism might be a more suitable mode of allegiance for the post-sovereign constellation. The potential for harnessing this to a democratic end, the chapter argues, is best ensured by building upon the deep insights in MacCormick's approach, and subsuming them under the theory of constitutional synthesis.

## **Keywords**

Democracy — Identity — Nation State — Sovereignty



## Introduction

Nationalism is probably the dominant political ideology in today's world, and it is also deeply institutionalised. In all nation states, there is a whole gamut of mechanisms and symbols that serves to remind us constantly that we are living in a national place and in a world of nations; and "this reminding is so familiar, so continual, that it is not consciously registered as reminding".<sup>1</sup> Nationalism has been so widely accepted because the nation state has been understood as the foremost (many see it as the only convincing and historically tested) carrier of popular democracy.

The term "nation" is generally understood to refer to a specific type of community based upon a form of fraternity and solidarity. This form of fraternity and solidarity translates into a sense of community - which is maintained and shaped by patterns of communication and interaction. There is now considerable agreement among analysts, certainly of a liberal bent, that a nation is an invented, or even an imagined, community,<sup>2</sup> *i.e.*, some symbols and aspects of a community's past are highlighted at the expense of others: "Only the symbolic construction of 'a people' makes the modern state into a nation-state."<sup>3</sup>

The raw material for the construction of national identity is also generally understood to be: a historic territory: "common myths and historical memories; common, mass public culture; common legal rights and duties for all members; [and] a common economy with territorial mobility for members."<sup>4</sup>

National identity is based upon the conception of a collective national consciousness, whose sources are culturally based, but need not be pre-determined or given, and can be forged. There are different views on how "thick" this sense of community and belonging is, and from where it is derived. A widely accepted distinction is between a civic and an ethnic nation.<sup>5</sup> The former locates the sources foremost in politico-legal institutional traits, the latter in ethno-cultural social traits.

In today's world, there are several important trends which suggest that the role of nationalism is changing. Globalisation, Europeanisation and sub-state regionalisation are three important developments that raise questions regarding the continued link between the state and the nation within a world in which the state's system of sovereign control is weakened.

It is against this backdrop that I will consider an important contribution to the debate, namely, that of Neil MacCormick. The focus of this chapter is on MacCormick's

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\* Forthcoming in: Agustín José Menéndez and John Erik Fossum (eds.) *Law and Democracy in Neil D. MacCormick's Legal and Political Theory. The Post-Sovereign Constellation*, Dordrecht: Springer Law.

<sup>1</sup> Michael Billig, *Banal Nationalism*, (London: SAGE, 1995), p. 8.

<sup>2</sup> Benedict Anderson, *Imagined Communities*, (London: Verso, 1991).

<sup>3</sup> Jürgen Habermas, *The Postnational Constellation: Political Essays*, (Cambridge: Polity Press, 2001), p. 64.

<sup>4</sup> Anthony D. Smith, *National Identity*, (London: Penguin, 1991), p. 14; see, also, Neil MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999), p. 186.

<sup>5</sup> John Hutchinson & Anthony D. Smith (eds), *Nationalism*, Vol. I, (London: Routledge, 2000).

conception of national identity and nationalism in a world in which both the state and state sovereignty are undergoing important changes.<sup>6</sup> MacCormick's position is particularly interesting for at least three reasons.

The first is his effort to address this situation by devising a conception of nationalism that is culturally imbued, but certainly not essentialist. If anything, MacCormick goes to great lengths to point out the excesses of nationalism – historical as well as contemporary. His effort should therefore be understood as a serious critical attempt to consider whether we may be able to rescue nationalism in a changing global context – a context which he finds, on balance, to be more favourable to such a rescue operation. But this rescue operation, he argues, can only be ensured through the manner in which liberal autonomy can be put to the task of transforming nationalism, as set out in the notion of liberal nationalism.<sup>7</sup>

The second is that MacCormick takes the present changes and transformation seriously. He explicitly and self-consciously casts his discussion of nationalism within a post-sovereign frame. MacCormick underlines that the contemporary world is one in which nationalism is undergoing important changes, mainly because of changes in the constitutive features of its main organisational carrier, the sovereign state. This applies, in particular, to the European Union as a “post-sovereign entity”.<sup>8</sup> It might also be said to apply to the UK as a multi-national state. Both entities represent cases of the de-linking of the nation and the state.<sup>9</sup> This raises the issue, as to whether, and, if so, the extent to which, nationalism can be made compatible with the simultaneous patterns of supra-state integration driven by the European integration process, on the one hand, and state fragmentation driven, for instance, by the case of Scottish nationalism, on the other.

The third reason for the focus on MacCormick's work is, broadly speaking, theoretical. This has two facets. On the one hand, MacCormick's conception of nationalism will necessarily draw on his institutional conception of law, since the law plays such a vital role in the liberal reading of nationalism to which MacCormick also subscribes. How nationalism, and – in broader terms – attachment and allegiance, figure in this institutional theory of law is an important topic unto itself. On the other

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<sup>6</sup> The most comprehensive statement and the one most systematically addressed here is *Questioning Sovereignty*, (from here on, this work is referred to as QS), note 4 *supra*. But see, also, MacCormick's writings in: “Beyond the Sovereign State”, (1993) 56 *The Modern Law Review*, pp. 1-18; “Liberalism, Nationalism and the Post-Sovereign State”, (1996) XLIV *Political Studies*, pp. 553-567; “The Rise of Scottish Nationalism”, (1974) LXIV *The Round Table*, pp. 425-438; “The Health of Nations and the Health of Europe”, (2005) 7 *The Cambridge Yearbook of European Legal Studies*, pp. 1-16; “Nation and Nationalism”, in: Ronald Beiner (ed), *Theorizing Nationalism*, (Albany NY: SUNY Press, 1999), pp. 189-204; “Does a Nation need a State?” in: Edward Mortimer & Robert Fine (eds), *People, Nation and State: The meaning of Ethnicity and Nationalism*, (London: I.B. Tauris, 1999), pp. 125-137; “Independence and Constitutional Change”, in: Neil MacCormick, *The Scottish Debate: Essays on Scottish Nationalism*, (Oxford: Oxford University Press, 1970), pp. 52-62; *idem*, *Legal Reasoning and Legal Theory*, (Oxford: Clarendon Press, 1978).

<sup>7</sup> As initially developed by Yael Tamir, *Liberal Nationalism*, (Princeton NJ: Princeton University Press, 1993). See, also, David Miller, *On Nationality*, (Oxford: Oxford University Press, 1995). Here, I do not distinguish between liberal nationalism and civic nationalism, as there are quite a few affinities between those generally listed under the second wave of nationalism, be they formally labelled as civic or liberal nationalists.

<sup>8</sup> *Questioning Sovereignty*, note 4 *supra*, p.95 & 137-56.

<sup>9</sup> QS; see, also, MacCormick, “Does a Nation need a State?”, note 6 *supra*.

hand, there is the broader question of attachment and allegiance in a changing world. How can political systems attach citizens when the key legal-political institutions that have sustained state sovereignty are undergoing significant changes? Will nationalism be up to the task?

MacCormick does not see the need to abandon nationalism in the light of the changes in the constitutive features of the state (*i.e.*, the post-sovereign constellation). He does nevertheless argue for the need to reconsider nationalism in order to ensure that it can properly accommodate itself to this changed context. Viewed in this light, one critical issue is to clarify MacCormick's position on nationalism. Doing so includes three sets of investigations. The first is to outline his conception of liberal nationalism, including its underlying theory of allegiance formation and sustenance. Given that the law will obviously play a role here, it is necessary to spell out the link to, or the role of, the institutional theory of law. The second is to assess critically whether liberal nationalism is a tamed version of nationalism. The third is to discuss whether the European Union qualifies as a post-sovereign liberal nationalist vanguard, in the sense of properly tamed nationalism.

One central aspect pertaining to MacCormick's position on attachment and allegiance is whether a transformation of revolutionary proportions can be adequately captured within the nationalist framework that he has devised. The issue is not only one of MacCormick's conception of nationalism and whether it is apt for such a changed context, it is also a matter of the underlying assumptions that modern nationalism rests upon. This brings into focus assumptions about the role of the state and its attendant presuppositions of sovereignty – legal and political. Will salvaging nationalism promote the development of the post-sovereign constellation in today's Europe? Or does it require a different perspective on attachment and allegiance? This requires us to focus on the character of the European construct, and whether there are modes of allegiance that not only serve as real alternatives to the national and nationalism, but also capture the distinct features of the European Union as a post-sovereign constellation. I will argue that cosmopolitanism is not only suitable to the post-sovereign constellation, but that it is also in line with MacCormick's broader conception of the European legal-political configuration.

## Liberal Nationalism

Liberal nationalism might be construed as a form of "tamed" nationalism.<sup>10</sup> It is a response to the many problems embedded in nationalism, in particular, the numerous tragic excesses which we have witnessed from its ethnic variant. MacCormick is very much aware of these problems, and consequently underlines that a central concern for adherents of nationalism is to subject it properly to the requirement of individual autonomy that lies at the very heart of the liberal project; hence the prefix "liberal". "Autonomy is indeed a fundamental human good, and thus it is a great social value to uphold societies that facilitate it."<sup>11</sup>

<sup>10</sup> MacCormick notes that this is a form of tamed nationalism; see QS, p 167. It might also be added here that MacCormick's main empirical reference, Scottish nationalism, was very different from the context within which Tamir's notion emerged, namely, the Israeli context, which, if anything, would expose a deep ambivalence.

<sup>11</sup> QS, p.164.

At the same time, MacCormick is highly sceptical of the peculiar understanding of methodological individualism that posits persons as atomised or as a-social individuals,<sup>12</sup> and which informs some of the liberal positions. He, instead, underlines that individuals are socially embedded persons, or “contextual individuals”.<sup>13</sup> Liberal nationalism seeks to reconcile nationalism’s onus on the socio-cultural context (as expressed in the notion that individuals are socially-embedded persons) with liberalism’s onus on rights-based individual autonomy. How this is reconciled is a key to the broader understanding of MacCormick’s conception of society, community, and law, in the post-sovereign constellation. There is, of course, a clear cultural reference to the notion of “contextual individuals”, because the context in which individuals are shaped, is conditioned by the particular or distinct community in which they live.

Culture and institutions are attached to a given place, a country, and are of special significance to those who live there, because they belong to (or in) it as much as it belongs to them. This is a critical part of the context of the contextual individual in many parts of the contemporary world.<sup>14</sup>

In line with this, MacCormick’s notion of liberal nationalism embraces nationalism as an ideology of communal self-determination, and as “a political culture: it colours how we identify ourselves, how we justify policies and political programmes, and how we mobilize support for such programmes”.<sup>15</sup> The nationalism that is embedded in liberal nationalism is, therefore, a mode of attachment that elicits support and sustenance from those elements that are constitutive of us as persons. As MacCormick notes,

humans as moral and practical beings have ties and links of sympathy and fellow-feeling with other individuals. They have like ties in a more diffuse way with larger groups and communities of people. These particular links of sentiment are not just accidental features of phenomenal human beings aside from their rationally intelligible moral character. They are a part of what makes it possible for people to have moral character at all.<sup>16</sup>

An important point is that the liberal’s freedom of choice has socio-cultural preconditions. Kymlicka underlines the cultural dimension of this: “it is only through having access to a societal culture that people have access to a range of meaningful options.”<sup>17</sup>

In a sense, then, and seen from this angle, liberal nationalism should be seen as an

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<sup>12</sup> QS, p.162.

<sup>13</sup> QS, p.162.

<sup>14</sup> QS, p.182.

<sup>15</sup> Wayne Norman, *Negotiating Nationalism*, (Oxford: Oxford University Press, 2006), p. xvi.

<sup>16</sup> QS, p. 180.

<sup>17</sup> Will Kymlicka, *Multicultural Citizenship*, (Oxford: Oxford University Press, 1995), p. 83.



attempt to reconcile a liberal *ethos* with a communitarian ethos.<sup>18</sup> What this suggests is, therefore, that the tension that is built into liberal nationalism is one that pits autonomy against authenticity – the notion that there are certain ways of living communally that are more appropriate reflections of a person’s sense of self, including basic values and world-views. Whether or how the relation between autonomy and authenticity can be worked out is obviously important, but with the important proviso that, for MacCormick, the social dimension must be properly included in this equation.

MacCormick’s position on how this putative tension within liberal nationalism can be worked out is very interesting, because he situates the notion of liberal nationalism not in the sovereign democratic state, but instead within the post-sovereign constellation. The point of departure is precisely that the sovereign state has not struck a viable balance here. It inculcates an assimilationist and exclusivist mode of nationalism which curtails autonomy understood as communal self-governing. The majority can easily use the state’s powers to subject minoritarian nationalisms to strong homogenising measures, and effectively deprive a minority nationalism of its right to democratic self-government.

The post-sovereign constellation changes this. It entails a significant re-configuration of sovereignty, which may either entail a significant change in the internal dimension of sovereignty, or in both its external and internal dimensions. One aspect is that it opens the way for territorial exit of sub-units (which is very difficult under prevailing international law). Another aspect is that the internal relations within the political order are re-configured. This constellation has democratic potential: it offers new possibilities for dealing with minority national exclusion since state sovereignty is weakened or undermined through the creation of, and/or recognition of, legal orders below, above and beyond the nation-state. Possibly, this is precisely because law is not coterminous with the state. MacCormick understands law as an institutional normative order. Law understood as an institutional normative order may overlap with the state, but the two do not need to cohere fully. Law can exist as a normative order without a supportive state, and a political system can harbour several institutional normative orders.<sup>19</sup> Thus, law as institutional normative order is entirely compatible with legal pluralism, which is the type of legal structure that is most conducive to liberal nationalism and the post-national constellation. This type of legal structure is more conducive to minority nationalisms, because there is no longer a sovereign state that can harness the law in the service of national assimilation. Legal pluralism offers a bulwark or protective device for minority nationalisms, and also operates simultaneously as an effective brake on every majoritarian assimilationist attempt.

MacCormick thus addresses the tension built into liberal nationalism in several related manners. The first is through considering certain aspects of the socio-cultural

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<sup>18</sup> As Wayne Norman has noted, “nationalism can be considered to be one of the most successful forms of communitarian politics in the modern world”. (Norman note 15 *supra*, p. viii) MacCormick’s emphasis on “contextual individuals”, then, also has clear resonance with Charles Taylor’s notion of the modern identity. See Charles Taylor, *Human Agency and Language*, (Cambridge: Cambridge University Press, 1985); *Philosophy and the Human Sciences*, (Cambridge: Cambridge University Press, 1986); and notably *Sources of the Self: The Making of the Modern Identity*, (Cambridge MA: Harvard University Press, 1989).

<sup>19</sup> QS, p. 25.

context in which individuals are located as being autonomy-enhancing. Whether these individuals are able to govern themselves in and through their community is important to their autonomy. Self-government in this sense establishes or protects, through collective means, those features of the socio-cultural context that the individuals collectively understand as important to their individual autonomy. "If autonomous individuals require the context of some sort of freedom-enabling society, then the collective autonomy of the society itself seems a part of the necessary context."<sup>20</sup>

Democratic self-governing is autonomy-enhancing in that it is a vital component to ensure that the community undertakes those social functions that permit individuals to be fully autonomous in a social sense. This argument, as we shall see, also extends to aspects of culture.

The second is to reconsider the possible answers to the inherent dilemma of democracy, namely, that there is no democratic method – intrinsic to democracy itself – of determining the *who* of democracy, or the democratic *demos* within the post-sovereign constellation which is marked by re-configured relations between territory and systems of governing.<sup>21</sup>

In order to address this dilemma, what is required is a set of presuppositions of membership (and citizenship) to determine who are accepted as part of the community, and of how, and in what sense, they are part; of identity (people need to identify with the community for this to make up a community in the first place); and of legitimacy, as people must believe that the community's basic norms are just and valid for this to make up a democracy.

The third is that subsidiarity within the post-sovereign constellation opens the conceptual and political space for reconsidering the problem of size in democracy. In principle, subsidiarity can configure the polity in such a manner that those elements of our existence that are constitutive for us as persons can be dealt with in local-regional contexts (communal subsidiarity), without this preventing legally-binding political and economic co-operation at higher levels (rational-legislative and market subsidiarity) that is properly subject to deliberative-democratic norms and procedures.<sup>22</sup> This structure makes it possible to reconcile (minority) nationalisms within an overarching non-state communal framework that does not need to assume the character of a nation.

MacCormick argues that nations have a right to democratic self-government.<sup>23</sup> Every nation has that right, but it does not amount to exclusive territorial control along the lines of the sovereign state. What constitutes a nation is therefore important to establish.

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<sup>20</sup> QS, p. 164.

<sup>21</sup> This is a matter of vital importance to the contemporary conception of justice. It brings up the issue of the proper frame within which to consider substantive questions of justice. See, for instance, Nancy Fraser, "Reframing Justice in a Globalizing World", *New Left Review*, (Nov-Dec 2005), 36:69-88.

<sup>22</sup> The notion of comprehensive subsidiarity refers to how representative democracy is supplemented with extensive processes of open and effective deliberation (QS, p. 154).

<sup>23</sup> "(T)he members of a nation are as such in principle entitled to effective organs of political self-government within the world order of sovereign or post-sovereign states." (QS, p. 173).

A nation is constituted by a sense in its members of important (even if internally diverse) cultural community with each other based in a shared past, a 'heritage' of common ways and traditions, including at least some of a family of items such as language, literature, legend and mythology, music, educational usages, legal tradition, and religious tradition.<sup>24</sup>

Autonomy-guaranteeing democratic institutions combine with a sense of communal attachment and identification to render the political system legitimate. But this system differs from the sovereign state, in that the membership conditions – and requirements – are very different. The post-sovereign constellation is configured along the lines of subsidiarity, which entails that citizens have membership in multiple communities, which undertake different, albeit complementary, functions. Thus,

(c)hoices between claims of different nations can cease to be choices between rival claims to sovereign statehood over disputed territories and populations. They can become choices about allocation of levels of political authority within a transnational commonwealth embracing many nationalities and cultural traditions or groupings.<sup>25</sup>

Thus, there are new and more inclusive opportunities for democratic self-governing in the contemporary post-sovereign context because of the changes which it ushers in, which promise to re-configure our established and largely taken-for-granted state-based national societies.

This position should locate MacCormick as one of the very early forerunners of the "second-wave" nationalism theorists.<sup>26</sup> MacCormick shares with "first-wavers" the need to legitimise nationalist enquiry, but, in doing so, he also moves the discussion forward and into the "second wave" by explicitly associating liberal nationalism with the post-sovereign constellation. In this sense, he, arguably, also goes further than the liberal theorists who seek to formulate ways for national minorities to co-exist within the framework of the multi-national federal state.<sup>27</sup>

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<sup>24</sup> QS, p. 186.

<sup>25</sup> QS, p. 191.

<sup>26</sup> Neil MacCormick spoke of a liberal version of nationalism as early as 1982, in his *Liberal Right and Social Democracy*, (Oxford: Oxford University Press, 1982). See, also, Joxerramon Bengoetxea's chapter in this volume. For the distinction between "first" and "second-wave" nationalism, see Norman, note 15 *supra*.

<sup>27</sup> Consider notably Will Kymlicka, *Liberalism, Community, and Culture*, (Oxford: Oxford University Press, 1989); *Multicultural Citizenship. A Liberal Theory of Minority Rights*, (Oxford: Clarendon Press, 1995); *Finding our way*, (Oxford: Oxford University Press, 1998); Norman, note 15 *supra*; Alain-G. Gagnon & James Tully (eds), *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001). I say "arguably" because I would also claim that the key reference case for theorists of multinational federalism, namely, Canada, has clear built-in cosmopolitan traits.

## Post-Sovereign Liberal Nationalism Assessed

The post-sovereign framework is designed to replace domination with justification. One obvious advantage with this framework is that the overarching structure must justify why the community should stay together. The point is that the post-sovereign structure places a much stronger onus on the need for such a justification (perhaps even in an ongoing manner), because there is no recourse to either the form of coercion or to the strong mechanisms of assimilation that the sovereign state has available. Thus, there is a greater scope for reflexivity, which entails that the polity is open to challenge, re-interpretation, and amendment. A reflexive polity is not only open to deliberative challenge, it is also a forum for critical self-examination on who we are, who we should be, who we are thought to be, and who we think we are.

The onus on justification is also intrinsic to subsidiarity, whose three core principles are specifically designed to render the overarching structure reflexive:

- “The first is linked to the idea of inviolate and inalienable rights. Not only individuals but also communities have such rights. There are some rights a higher level under no circumstances can revoke, or a lower level give away...
- The second proposition is that a higher level has a duty to support a lower level to the degree that this helps the lower level to fulfil its true potential...
- The third proposition is that ‘the principle of subsidiarity governs the burden of proof’. The higher level is obliged, through arguments, to make it clear why a decision should be taken at a higher level.”<sup>28</sup>

We might add that MacCormick’s notion of comprehensive subsidiarity is intended to inject a deliberative component as a vital supplement to representative democracy into the entire structure.

Having said that the post-sovereign scenario also brings up a number of problems and challenges. One critical issue is to clarify whether the answer to who has a right to self-government will end up enhancing democracy or stymieing it. Finding a proper answer to this question is a major challenge for democratic theory, with some of the most innovative solutions coming from transnationalists such as James Bohman.<sup>29</sup>

Nationalism figures as a central component in triggering the right to minoritarian self-government in the post-sovereign constellation. MacCormick argues that, in today’s societies, the main problem rests with the state and state sovereignty, not with the nation and nationalism.<sup>30</sup> There is, as he notes, a close link between nationalism and

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<sup>28</sup> Lars Chr. Blichner & Linda Sangolt, “The Concept of Subsidiarity and the Debate on European Cooperation: Pitfalls and Possibilities”, (1994) 7 *Governance*, pp. 284-306, at 284-289. This also has a clear affinity to MacCormick’s conception of subsidiarity; see QS (notably Chapter 9); see, also, his *Institutions of Law*, (Oxford: Oxford University Press, 2007), p. 266.

<sup>29</sup> See James Bohman, *Democracy across Borders. From Dêmos to Dêmoi*, (Cambridge MA: The MIT Press, 2007).

<sup>30</sup> QS, p. 190.

the right to self-government, and this link has a bearing on the social significance of national identity:

(c)ontextual individuals may have as one among their most significant contexts some national identity. To that extent, respect for national identities, and commitment in principle to the nationalist principle stated above [the members of a nation are as such and in principle entitled to effective organs of political self-government], are not merely not incompatible with nationalism, but are actually required by it.<sup>31</sup>

Given nationalism's central role, it is important to clarify how it figures here. It is, after all, the ability of citizens to understand themselves as the authors of the laws that they are affected by that is the core condition for democratic self-government, and this is clearly also present in MacCormick's line of reasoning.<sup>32</sup> But, for MacCormick, what triggers this right is the existence of a nation or a national community, regardless of whether it forms a majority or a minority within a larger political entity.

One problem this raises is that, in so far as we assign a right to self-determination to a nation, when and under what conditions can this right be triggered? If all potential nations were to cash in on this claim, we could end up with thousands of nations; thus the principle relies on some element of self-restraint. This has prompted Ronald Beiner to note that "(i)t seems a strange kind of normative principle that relies on its coherence on the willingness of most national groups not to cash in the moral voucher that the principle gives them."<sup>33</sup> We therefore need clear criteria for establishing that this something actually is a nation. This raises the question as to whose claims to this effect are authoritative? One important problem which I see here pertains to the fact that nationalism enjoys such a great legitimacy and prestige in today's world that there is a great propensity, on the part of élites, to want to define a political system as national. In the extension of this, there is what we may term a "reification fallacy": to accept as an already established fact that which one wants to come into existence.<sup>34</sup> This is at the heart of what we may label the ideology of nationalism. The risk for the analyst, the decision-maker, and the public is to be co-opted into type-fixing an entity

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<sup>31</sup> Neil MacCormick, note 7 *supra*, p. 132.

<sup>32</sup> But it should be noted that regional nationalism, in MacCormick's framework, has a kind of federal-democratic role. With regard to the Scottish case, he notes, in his "Independence and Constitutional Change," note 6 *supra*, p. 53, that: "the centralization of political and economic power round the centre of government, which necessarily characterises modern states, makes it necessary to diversify centres of government. Centralization in its present form will reduce Scotland the worst sort of provincialism and parochialism, unless a real centre of power is established in Scotland." To this effect, it should also be added that Scotland already had its own legal system.

<sup>33</sup> See Ronald Beiner (ed), *Theorizing Nationalism*, (New York: SUNY Press, 1999), p.5.

<sup>34</sup> Jacob Levy has cogently argued that: "'Nation' does not denote a kind of community describable apart from nationalist projects and the claim of national self-determination. Once we have a sociologically persuasive account of where a 'nation' is, we find that one way or another the political mobilization that nationalist theory is supposed to justify is already part of how we have picked the community out. In other words the political program of nationalism is built into the category of nation to begin with; the normative argument is always circular." Jacob Levy, 'National Minorities Without Nationalism', in: Alain Dieckhoff (ed), *The Politics of Belonging: Nationalism, Liberalism, and Pluralism*, (Lanham MD: Lexington Press, 2004), pp. 155-74, at 160.

according to the entity's own self-description, rather than through critical and detached scrutiny. In effect, it renders us vulnerable to the ideology of nationalism, and might prevent us from developing a deeper sense of when a nation is, and *when it is not*. The additional problem is that, in accepting a nationalist claim, one may simply contribute to reify nationalism, and in so doing, also gloss over changes in the modes of allegiance and the sense of community in a more globalised world.

In order to address these issues, it is important to look more closely at the type of nationalism that MacCormick has in mind, and how he understands it to be both produced and sustained. In what sense is MacCormick's liberal nationalism different from mainstream ones? The point is that the appropriate nationalism must somehow provide us with assurances that minority nationalisms will not develop exclusivist propensities, or discriminate against either minorities within, or members of the majority within. It also follows that they cannot prevent the members of a minority within, or members who are part of the majority, from relating to other minorities outside, including, presumably, those members who are pursuing alternative nationalist projects.

The liberal dimension of liberal nationalism is supposed to ensure that the community is open to the inclusion of outsiders. Furthermore, the liberal *ethos* posits that there is ready-exit from the community. Subsidiarity is an additional safeguard. But it should be noted that, subsidiarity figures more as a doctrine for social organisation than as an alternative mode of belonging to nationalism, in MacCormick's scheme. Therefore, the question of whether, or in what sense, exit is possible under nationalism still has relevance. In order to address this, we need to look more closely at the mode of attachment that is associated with nationalism, because the *ethos* of nationalism is very much about loyalty. The strongest position here is that adopted by Bernhard Yack,<sup>35</sup> who speaks of the myth of the civic nation. This myth is created by the presupposition in the civic nation that there is a close connection between political and cultural community. Yack underlines that there is no necessary connection between the two. To show this, he compares the modern situation with the situation of Ancient Greece in order to extrapolate the distinctive feature of modern nationalism. Despite civic nationalism's assertion of civicness, there is a particular form of identity associated with modern nationalism that links loyalty to the nation directly to the sense of personal identity: "Because it brings political and cultural community together in a way that was foreign to the ancient Greeks, modern nationalism, whether of the civic or the ethnic variety, combines political loyalty with loyalty to oneself."<sup>36</sup>

Thus, in the modern context, to be disloyal to the nation is the same as to betray oneself. This is distinctive of the nationalist *ethos* and locates it in direct conflict with liberal autonomy. From this highly sceptical reading, we find that liberal nationalism is based upon two incompatibles. Is there such an incompatibility in MacCormick's conception of liberal nationalism? There are two issues here which have a direct bearing on MacCormick's theory. The first pertains to the post-sovereign constellation. Is the situation changed in the post-sovereign constellation, in the sense that there is no longer a requirement for the co-existence of cultural and political

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<sup>35</sup> Bernard Yack, "The Myth of the Civic Nation", (1996) 10 *Critical Review*, pp. 193-211.

<sup>36</sup> *Ibid.*, p. 206.

community? If this is the defining characteristic of the post-sovereign constellation, then the tension to which Yack refers does not exist. The second, and related, issue is whether the post-sovereign constellation is one in which the very notion of nationalism changes, or whether the post-sovereign constellation is one that operates different constraints on nationalism. In other words, does nationalism's onus on loyalty change, or does it remain the same within the post-national constellation? This issue is important in terms of both the durability and the sustainability of the post-sovereign constellation, as well as of the prospects for slipping back to more standard versions of sovereignty.

Is the mode of nationalism that MacCormick depicts one that is clearly and unambiguously different? There are two aspects to this. One is the conception of nationalism; the other is whether communal subsidiarity (where the cultural identities of people are formed and sustained) is sufficiently inclusive. On the latter, the answer has not been spelled out in much detail. On the former, however, he notes that differences in forms of nationalism are matters of degree, and liberal nationalism can also develop ethnic roots (thus communal subsidiarity can also harbour ethnic nationalism). The emphasis on "contextual individuals" and the general manner in which MacCormick depicts nationalism sit rather well with quite mainstream definitions of nationalism.<sup>37</sup> The reliance upon the same basic definition and the onus on different forms as different gradations suggest that it is more a matter of taming nationalism "from the outside" than through liberal nationalism somehow altering the genetic code or ushering in a qualitatively different conception of nationalism *per se*. Central "taming" devices are rights that ensure individual autonomy, together with an emphasis on voluntary membership in the community, the possibility of exiting from the community, and legal pluralism, as such.<sup>38</sup>

This suggests, then, that there may be a built-in tension also in MacCormick's thoughts on nationalism: precisely because he takes both nationalism and liberalism so seriously, he also ends up with a conception of liberal nationalism that harbours a certain tension between a liberal and a communitarian *ethos*.

How significant this tension is requires attention to how liberal nationalism figures in his broader intellectual scheme. This requires attention to the relationship between nationalism and the broader structure that is set up not only to ensure autonomy, but which also conditions the entire manner in which individuals understand themselves as community members and citizens, namely, law. This is also of particular interest because MacCormick has devised a distinct theory of law, namely, the institutional theory of law.

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<sup>37</sup> He notes that: "Our sense of identity arises from our experience of belonging within significant communities such as families, schools, workplace communities, religious groups, political associations, sports clubs – and also nations, conceived as cultural communities endowed with political relevance. A nation is constituted by a sense in its members of important (even if internally diverse) cultural community with each other based in a shared past, a 'heritage' of common ways and traditions, including at least some of a family of items such as language, literature, legend and mythology, music, educational usages, legal tradition, and religious tradition." (QS, p. 186)

<sup>38</sup> The two latter points are not only among the designative features of liberal nationalism, they are also positions that the entire body of "second-wave" nationalist theorising has embraced.

Legal pluralism is understood as a national taming device. Clearly, the post-sovereign constellation operates with weaker mechanisms of power because it is no longer supported by the same levers of power that are found in the sovereign state. This is one of the key elements in taming nationalism: it is no longer possible for any form of nationalism, be it majority or minority, to draw (to the same extent at least) on the mechanisms that have sustained majority forms of nationalism in the sovereign state. But this could also mean that the mechanisms for taming nationalisms would be similarly weakened. This is clearly not MacCormick's view,<sup>39</sup> but it is useful to touch upon it because it sheds light on law's nationally-stabilising role in the post-sovereign constellation, and, in particular, on the question of whether law depends on nationalism for its stability at all. To access this, we need to consider whether nationalism is a necessary complement, or a more contingently-related element, to law in MacCormick's scheme. This is a broad question to which I cannot do full justice here. Consequently, I will confine myself to some brief remarks.

In order to look at this, we should start by considering how nationalism figures in relation to the institutional theory of law. This is relevant because it tells us something about law's underlying socio-cultural foundation, which, in turn, helps us to clarify its relationship to nationalism.<sup>40</sup> Does the sense of belonging to a community, accompanied by loyalty and trust, which nationalism seeks to instil, provide law with a set of necessary or requisite social stabilising devices? This issue matters to MacCormick's theory because it is an *institutional* theory of law. Law programmes social and political institutions, but law is also programmed by more informal social and cultural norms and traditions. Furthermore, it should also be added that many of the institutions that law does, in fact, programme, are institutionalised organisations that develop informal institutional cultures and repertoires of action that may help their sustenance.<sup>41</sup> The gist of this is that the more salient nationalism is in programming the law, the weaker will be the law's taming effects on nationalism.

Clearly, the strongest case would be if nationalism were somehow to infuse the "gene code" of law, and to contribute to shape the rationale for the law abidance of the people.<sup>42</sup> This would probably be the case on the far ethnic side of the national scale, but this is also a scenario that MacCormick seeks to guard against. An alternative view is that it is a more complex process that works through the way in which nationalism links in with democracy (with democracy as the means for enlisting the

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<sup>39</sup> MacCormick could also point to the very resilience of Scotland here, as reflected in its retention of its own legal system, and notably its own common law tradition.

<sup>40</sup> MacCormick, *Institutions of Law*, note 28 *supra*, underlines the central role of what we may label political culture as a central underpinning of law. An important issue, here, is how prominent is the political, as opposed to the cultural, component of such an underpinning element.

<sup>41</sup> See Kymlicka 1998, note 17 *supra*, and Norman note 15 *supra*, Chapter 2, for two comprehensive lists of relevant factors.

<sup>42</sup> In this scenario, if nationalism were to figure as a necessary complement to law, and law is understood as a social institution, we should expect nationalism both to underpin and to give sustenance to a political culture that supports law-abidance. Furthermore, we should expect nationalism to render such an underpinning through a unique or distinct type of - national - support. This would mean that law would be socially embedded; that this social embedding would be vital to law's stability as a socially regulatory mechanism; and that the social embedding would be steeped in a distinct national culture within a distinct national community.



participation of citizens and for instilling in them the notion that they are a self-governing community).

MacCormick's institutional theory of law is not explicitly set up to account for allegiance formation. This is something we need to discern more indirectly through interpretation. The institutional theory of law starts from the notion of normative order, which refers to something that is norm-based and ideal. A normative order is not ideal in a normative-prescriptive sense, understood as "the best of all worlds" sense, but in terms of being norm-based and providing guidelines to direct *praxis*. As such, it is concerned with putting ideals into a practically realisable state.<sup>43</sup> Institutional normative order is normative in the sense that norms are understood to guide conduct; it is also normative in that the relevant norms carry value, in the sense of being valuable. It is institutional in that it forms a system capable of both passing and enforcing judgments. When institutionalised the normative order has a certain self-referential quality, "there is a way, conclusive within the system, for determining what counts as an authoritative norm of the system, or a definitely established right or duty of some person under the system."<sup>44</sup>

Human beings are inculcated into this order through patterns of nurture, socialisation and education. Law is institutional normative order and is distinct from politics, which is about power and capability. Law, in contrast, being a normative order, is not value-free or ethically neutral, and as such resembles critical morality. But it is, nevertheless, also distinct from critical morality. Law is positive and "jurisdiction-relative", in contrast to morality that may be controversial, but whose moral judgements have universal applicability.

MacCormick's institutional theory of law is thus based upon the notion of humans as norm-oriented actors.<sup>45</sup> It also clearly recognises that law has informal social roots and anchorings. MacCormick notes that the institutionalisation that underpins the constitutional state is one where "the formal rests on informal, customary foundations".<sup>46</sup> Furthermore, he notes that "law [is] indeed a part of culture in its broader sense".<sup>47</sup> But the way in which he depicts humans as norm-oriented does not programme them as reliable *national* carriers. MacCormick also underlines the notion of spontaneous order, which is deeply rooted in universalistic moral principles of justice and fairness. This is to highlight that the law embodies a clear connection between the normative imagination and inclination of human beings, on the one hand, and institutional structures, on the other. One way to approach this is to underline that law has built into it a coherent regulatory ideal, which pertains not

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<sup>43</sup> There is a clear ambiguity here, however. Norms do prescribe certain courses of action and rule out others, and, in doing so, they promote certain values and world-views and downplay other.

<sup>44</sup> QS, p. 8. He further notes that "the characteristic of an institutional normative order is that competent judgement in it is conclusive within its own order, except to the extent that there is coordinated cross-recognition of different orders". *Ibid.*

<sup>45</sup> Consider the strong emphasis on habits about rules and of how rule following becomes routinised behaviour because the human mind is in the habit of forming habits, (see MacCormick *Institutions of Law*, note 28 *supra*, Chapter 4.

<sup>46</sup> *Ibid.*, p. 304.

<sup>47</sup> QS, p. 173.

only to systemic coherence, but which, in the modern world, is also infused with the norms of democratic constitutionalism.

This also means that it is where the institutional theory of law operates in a national context that law might be, somehow, nationally imprinted. But since law does not need nationalism for its sustenance, there is nothing, as such, that translates the notion of human beings as norm-oriented beings into vehicles for institutionally encoding nationalism into law. It should be added that MacCormick's notion of law as institutional order underlines law's built-in reflexivity and defeasibility.<sup>48</sup> These are factors that render any system of established truths about national origins, national character, and national distinctness open to deliberative challenge and contestation.

From these comments, it should be clear that, whereas law has socially-integrative functions, they are not dependent on a particular communal doctrine such as nationalism. In this sense, the relationship between law and nationalism is clearly contingent, at the very most. Nationalism *may* increase the socially-integrative functions of law, but then through various mechanisms. One is the manner in which nationalism contributes to define the community by adding criteria regarding who is a member of the national community and who is not, and by programming procedures and institutions that inculcate national allegiance.<sup>49</sup> The legal means for regulating exit and entry and for social inculcation could, however, also be tailored to suit other social doctrines entirely compatible with law as institutional normative order. Thus, the relationship between law and nationalism appears *quite contingent*. From this, we can see that there is not such a great tension within MacCormick's overarching scheme because nationalism figures less prominently here. However, when we look at the more concrete portrayal of nationalism, the tension re-appears. How much of the tension thus remains will, to a great extent, hinge upon the taming effect of the post-sovereign constellation, which requires explicit attention to the European Union as the foremost example of the post-sovereign constellation.

## Some Further Reflections on Nationalism

Before doing so, I will look a bit more closely at what taming nationalism might entail. Can nationalism be properly tamed? Investigating this also serves as a prelude to the discussion of the possible alternatives to nationalism. This brief assessment should be seen, first and foremost, as a methodological attempt to establish which factors we need to bear in mind when thinking about how nationalism - as political doctrine, ideology, and institutional reality - actually programmes our conceptions of community and allegiance in the contemporary world. With this in mind, we also obtain a better sense of what "taming nationalism" in the contemporary world really requires.

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<sup>48</sup> MacCormick, *Institutions of Law*, note 28 *supra*. See, also, his *Rhetoric and the Rule of Law*, (Oxford: Oxford University Press, 2005).

<sup>49</sup> Through citizenship provisions, the law programmes the access of immigrants to the polity, and erects high barriers against collective, and, notably, territorial, exit. It also programmes the system of education and socialisation, the main levers for inculcating nationalism.

I will start by looking closer at how Charles Taylor, as a “holistic liberal”,<sup>50</sup> conceives of contextual individuals, because Taylor has devised the most advanced conception, including the most developed methodology, for analysing this.<sup>51</sup> Taylor sees human beings as self-interpreting animals.<sup>52</sup> They see and discover themselves through the kinds of values that they endorse. These values are culturally entrenched, and the individual derives his or her self-interpretations from the interaction with the community. The values are often expressed in emotive terms, and emotions are vital to the understanding of human motivations, as well as of human actions.<sup>53</sup> Emotions are also cues to the moral and ethical evaluations that humans make. Such evaluations can be either strong or weak.<sup>54</sup> Humans distinguish themselves from animals in their ability to be morally self-reflective, and their morally-salient self-reflections are expressed through strong evaluations,<sup>55</sup> which denote not wishes, but visions of life and who the person wants to be. Thus, these self-reflections entail a qualitative evaluation of the worth of one’s desires.<sup>56</sup> Strong evaluations refer to emotive claims that are morally salient, because they are related to our conceptions of self and who we are, *i.e.*, they are standards of assessment that are embedded in human beings as persons or as a species. In this sense, language is not simply a means of communication, but also a means through which the people within a language community become cognisant of, and are able to sustain, their identity. To Taylor, then, the protection of a cultural language community is important to the protection of identities,<sup>57</sup> which also suggests that cultural protection is an important means to ensure symmetrical relations of esteem among both individuals and groups.

Viewed in this light, what is particularly important is that nationalism has obtained a similar status in modern societies. It is, perhaps, best understood as a kind of umbrella over, and a form of unifying device for, a range of community-defining (and sustaining) features, such as language, religion, and shared tradition, all of which are expressed through strong evaluations. Nationalism thus not only draws upon but also subsumes under it – and gives a unified communal shape to – a range of factors that are understood not only as designative of us as persons, but also as emotionally-salient categories (considered in terms of strong evaluations). These can, therefore, be harnessed to serve the political ends of nationalism, which is to ensure not only that the community governs itself, but also that it governs itself in such a manner as to ensure that the national *ethos* properly permeates the community’s self-understanding. In such a context, there will always be strong social pressures on individuals and groups to conform.

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<sup>50</sup> See Stephen Mulhall, “Articulating the Horizons of Liberalism: Taylor’s Political Philosophy”, in: Ruth Abbey (ed), *Charles Taylor*, (Cambridge: Cambridge University Press, 2004), pp. 105-126.

<sup>51</sup> See, in particular, Taylor, *Sources of the Self: The Making of the Modern Identity*, note 18 *supra*.

<sup>52</sup> See Taylor, *Human Agency and Language*, note 18 *supra*, Chapter 2.

<sup>53</sup> Taylor, *Sources of the Self: The Making of the Modern Identity*, note 18 *supra*.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, Chapter 1.

<sup>57</sup> Charles Taylor, *Reconciling the solitudes: Essays on Canadian federalism and nationalism*, (Montreal & Kingston: McGill-Queen’s University Press, 1993), and “The Politics of Recognition”, in: Charles Taylor & Amy Gutmann (eds), *Multiculturalism*, (Princeton NJ: Princeton University Press, 1994), pp. 25-74.

One re-enforcing element here - and a distinguishing mark of nation-building - has been that it has both shaped and conditioned other modes of allegiance. Precisely through the marriage with the state, nation-builders were able to eliminate competitors, or to subsume them under the national label, or even to relegate them to the private sphere. Nationalism has, therefore, not only become a deeply internalised mode of attachment, in modern societies, it also effectively forms the top of a hierarchy of modes of attachment. It is this element (the historical forging of which has often taken place entirely devoid of democracy) which, in turn, is used to justify claims to democratic self-government. It is in this sense that nationalism's justification for democratic self-governing rests on shaky historical foundations (effected through morally unjustifiable procedures).

Nationalism has a prescriptive communal *ethos*, namely, to create a national community. This not only permeates the different spheres of society (political-administrative system, culture, economy, sports, education, defence, *etc*), it also produces mutually reinforcing effects across all these spheres.<sup>58</sup> This strong internalisation of the national dimension raises the threshold (and cost) of exit. It also makes it clear that all those that enter (and want to stay in) the community go through quite a process of national inculcation.

At the same time, it is less clear precisely how (and how well) nationalism attaches citizens. The affective ties that a shared culture furnishes are understood to provide the effective motivation for actors to sustain the patterns of cultural reproduction and socialisation required for proper social integration. The problem is that some of the arguments that have been mustered in support of this view fail:

People can affectively identify with each other despite not sharing particular norms or beliefs; the trust indispensable to social integration is not dependent upon shared national culture; national-cultural diversity may raise the costs of, but does not rule out, achieving higher degrees of communicative transparency; and the higher economic costs of national-cultural diversity, even if not fully balanced by diversity's economic benefits, do not render homogeneity an 'objective imperative' for industrial liberal democracies.<sup>59</sup>

The relationship between cultural nationalism and social integration is far more contingent than what is generally held. The same argument also applies to the role of nationalism in supplying social justice. Prominent liberal nationalists,<sup>60</sup> including MacCormick, attach great importance to social rights and social justice. National identity is widely held to supply the type of solidarity and interpersonal trust that are required for sustaining social justice and welfare arrangements. Many studies have found no support for such a relationship, and even a very carefully crafted study on the relationship between national identity and the welfare state in Canada finds this to be a more contingent relationship than what is generally thought, but also that a

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<sup>58</sup> See Norman, note 15 *supra*.

<sup>59</sup> See Arash Abizadeh, "Does Liberal Democracy Presuppose a Cultural Nation?", (2002) 96 *American Political Science Review*, pp. 495-509, at 507.

<sup>60</sup> Consider, notably, Miller, note 7 *supra*, p. 96.

critical factor is trust in government.<sup>61</sup> These studies point to the need to consider other important factors that attach citizens to the political system. Trust in government could for instance mean that national identity is the product of an underlying constitutional patriotism.

Nationalism's strength no doubt derives at least in part from its very ubiquity, which adds to both its attraction and its taken-for-grantedness. Nationalism is not just sustained by factors internal to each state; this internal process of national inculcation draws sustenance and re-inforcement from the fact that each state (and many regions) is similarly programmed. This is by now a systemic feature of the system of states and exercises a mutually reinforcing effect on all the components (nation-states and aspiring regions) in the structure (the system of states). The system is literally encoded in the conceptual categories and the prescriptive mode of community embedded in nationalism. These are universally shared, and their hallmark is that each state and nation should be the bearer of a distinct national identity. This isomorphic pressure takes a distinct form, which we might label as the "universal programming of national specificity". In other words, nationalism is programmed to highlight certain forms of specificity as being distinctive of the community; these are not natural distinguishing features, but are raised to prominence by those in charge of the nation-building process. A successful nation-building process presents these features as "natural", distinctive and designative of a given community. They appear as institutional facts. In a world of states, national self-government at regional level will always have state-based national self-government as its model.

This raises the question as to whether the development of a post-sovereign vanguard in Europe will sufficiently weaken these conditioning structures, or whether it will, itself, be conditioned by them, instead. If the European Union is the only post-national vanguard, it will continue to face significant isomorphic pressures from the states outside it. Thus, it might be that the system of states needs to turn post-sovereign for this to be effective in taming nationalism.

Liberal nationalism portends to include these contextual factors, but, since it does not programme nationalism in the appropriate terms of strong evaluations and does not spell out how nationalism is able to orchestrate these, in a world made up of national entities, it also effectively under-communicates the problem of reconciling autonomy and authenticity, which is still built into the liberal nationalist notion.

What is important to bear in mind, when it comes to taming nationalism, is nationalism's ability to put a range of ethically-salient features of modern societies to its own ends. The liberal nationalist must take proper heed of the deeply institutionalised nature of nationalism: its very taken-for-grantedness, and the liberal nationalist must, in addition, recognise that this also applies to how analysts relate to it. Many analysts and political commentators simply take the nationalist pattern of thought, vocabulary, the assumptions of mode of community and belonging, and the attendant notion of political organisation as their frame of reference, without questioning whether this is a relevant and/or a viable reference-point or not. Nationalism, in this sense, has come to dominate the conceptual categories and modes

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<sup>61</sup> Richard Johnston, Keith Banting, Will Kymlicka & Stuart Soroka, "National Identity and Support for the Welfare State", (2010) 43 *Canadian Journal of Political Science*, pp. 349-377, at 351.

of seeing society to such an extent that this particular social construction of reality has become increasingly objectified, taken for granted, and, in normative terms, also elevated to the only meaningful way of organising a political community.<sup>62</sup> The result is a “methodological nationalism”, which:

assumes this normative claim [every nation has the right to self-determination within the frame of its cultural distinctness] as a socio-ontological given and simultaneously links it to the most important conflict and organisation orientation of society and politics. These basic tenets have become the main perceptual grid of social science. Indeed, the social-scientific stance is rooted in the concept of nation state. A nation state outlook on society and politics, law and justice and history governs the sociological imagination. To some extent, much of social science is a prisoner of the nation state.<sup>63</sup>

The right to self-government gives further normative credence to this, and gives it a democratic justification. The problem is that the democratic licence is then also understood as a licence to inculcate a certain conception of the good. Even if we think of the community as being open to exit and entry, the *ethos* of nationalism is to seek to bring to fruition the greatest possible degree of congruence between cultural and political community; thus it must instil as far as possible the mode of loyalty that Yack associated with the modern national condition.

The problem facing minority nationalists is to single out those features that can be seen as constitutive of nationalism at regional level and, at the same time, contain the urge to impose this programming also on other aspects of the community. If we relate this to MacCormick’s communal subsidiarity, there is no clear prioritisation; it is, in principle, open to such re-enforcing effects.

Thus, there are grounds to argue that the only fail-safe way to prevent this from happening is to alter the communal *ethos*. In my view, the best way of doing so is by considering alternatives to nationalism. To illustrate the mind-frame of one alternative, let us consider federalism and its view of fraternity, a value that is central to both nationalists and federalists:

It is the imagining of fraternity ... that gives meaning to the nationalist’s idea of the nation and motivates citizens willingly to die for it. The fraternity of nationalism unites a strong emotional content with the sentiments of kinship, friendship, and love in the heightened atmosphere of something like religion. Nationalists embrace a primordial idea of fraternity, attach it to the nation, and use it to characterize the type of relation that exists between those who share a culture or a language or a way of life. But the concept of fraternity is

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<sup>62</sup> A highly instructive account of how such a process of conceptual retooling took place over time in connection with the development of the modern nation-state is provided by Michael Oakeshott in his “The vocabulary of the modern European state”, (1975) 2-3 *Political Studies*, pp. 319-341, and (1975) 4 *Political Studies*, pp. 409-415.

<sup>63</sup> See Ulrich Beck, “Toward a New Critical Theory with a Cosmopolitan Intent”, (2003) 10 *Constellations*, pp. 453-68, at 454.

more complex than nationalists appear willing to allow. What they fail to notice is that the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life. There is no greater fraternity than the brotherhood and sisterhood of all people. Moreover, it may not be possible to confine fraternity in the way that the nationalist program presupposes. If fellowship ... is morally compelling in part because it connotes respect and concern for others ..., is it not compromised when confined in expression to a particular group of people?<sup>64</sup>

Federalism injects a more complex and inclusive mode of attachment into the notion of fraternity, which permits a more inclusive conception of identity and community than is to be found in nationalism.<sup>65</sup> Federalism, of course, begs the question of the terms under which one enters into such an arrangement, and is premised on some form of formal constitutional contract or federal covenant. But modern federalism, as Elazar has steadily reminded us, has itself been tamed because it has been directed to serve the nation-state, and it has also frequently been mistakenly relegated to a mere organisational device.<sup>66</sup> The post-sovereign constellation presents new scope for federal theorising.<sup>67</sup>

The question, then, is whether the post-sovereign constellation might usher in greater opportunities with regard to forging and sustaining other, more inclusive, modes of attachment, than nationalism. The European Union is the most obvious, but it is far from the only possible candidate to consider in this regard.

## The Case of the European Union

In Europe, states have rescinded sovereignty through acceding to the European Union, and the European Union has become an institutional normative order with a self-referential legal system. The European Union has a democratic vocation, is configured as an institutional normative order, but it does not embed this in state sovereign form. The European Union is the world's foremost manifestation of re-configuring Member State sovereignty along post-sovereign lines within a legal (moderately) pluralist structure. Can this system tame nationalism and deliver the form of liberal nationalism that MacCormick propounds?

MacCormick is carefully optimistic on this point. In his *Questioning Sovereignty*, he depicts the European Union as a Commonwealth based upon a mixed constitution. It is a consensus-based system with a modicum of democratic institutions that ensure a limited measure of self-government coupled with an oligo-bureaucratic structure and

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<sup>64</sup> Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism*, (Montreal & Kingston: McGill-Queen's University Press, 1996), p. 26.

<sup>65</sup> Daniel J. Elazar, *Federalism as Grand Design: Political Philosophers and the Federal Principle*, (Lanham MD: University Press of America, 1987); *Exploring Federalism*, (Tuscaloosa AL: The University of Alabama Press, 1987); LaSelva, note 64 *supra*.

<sup>66</sup> Elazar, note 65 *supra*.

<sup>67</sup> See Daniel J. Elazar, "From Statism to Federalism: A Paradigm Shift", (1996) 17 *International Political Science Review*, pp. 417-429.

a system of indirect legitimation.<sup>68</sup> One key taming-device is the fact that this system is neither set up as a sovereign state, nor does it have the vocation to become one. But the European Union does express a set of common objectives, it is an institutional normative order, it has established direct links to the citizens (through European citizenship provisions), and thus it requires some mode of citizen attachment. The Union's more narrow remit of action, its large size, and the sheer distance to the citizen implies that there is no need for a European nation. These factors suggest that the citizens can feel themselves to be attached to the Union through some form of civic identity akin to a form of constitutional patriotism.

A second taming-device is found in the Union's distinct form of legal pluralism, which is characteristically non-hierarchical (it could be, as Menéndez notes in his chapter, resting on *the plural but equal standpoints thesis*). This system provides the proper legal-institutional framework for subsidiarity to serve as the key organising principle that can help to render this system legitimate. This complex structure would then balance several modes of subsidiarity in order to ensure a common market within a multi-levelled structure of representative-democratic institutions and deliberative arrangements, in such a manner as to keep the tasks of primary concern to the citizens - as close to the citizen as possible. The point about this structure in national terms is three-fold: to prevent an overarching hegemonic nationalism from arising and overpowering those at the lower levels; to permit the development and flourishing of nationalism at the sub-unit or regional level as a more democratic (because it is closer to the citizen) way of incorporating citizens; and to render the entire structure attentive to autonomy through commitment to liberal rights and justificatory procedures at all levels.

This depiction of the European Union raises three questions. One pertains to the prospects of subsidiarity fulfilling this overarching structuring role in today's European Union. MacCormick emphasises that subsidiarity must "go all the way down", notably to the regions. This also pertains to the democratic authorisation of the system, which must encompass all the relevant levels of society. In today's European Union, the general tendency has been for the Member States to appropriate this principle and to limit its applicability to the regions.<sup>69</sup> We see this institutionally in the development of the European Council, notably in the central role which it has in the constitution-making process. The most explicit example of this was in the closed and secretive process of forging the Treaty of Lisbon (2007-2009). Thus, empirically speaking, there appears to be little hope for this principle to play an overarching structuring role along the lines that MacCormick depicts.

The second issue pertains to the emphasis on installing a form of constitutional patriotism at European level, which would be conducive to a "civic *demos*" in which

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<sup>68</sup> QS, p. 149.

<sup>69</sup> Consider for instance Protocol 2 of the Treaty of Lisbon (on subsidiarity and proportionality), which provides national parliaments with a subsidiarity check on Union legislation. Lisbon Treaty Consolidated, OJ C 115, Volume 51, 8 May 2008. See Andreas Føllesdal, "Subsidiarity and democratic deliberation", in: Erik O. Eriksen & John E. Fossum (eds), *Democracy in the European Union*, (London: Routledge, 2000), pp. 85-110. Justus Schönlaue in the recently published paper, "The Committee of the Regions - The RECON Models from a Subnational Perspective", RECON Working Paper, 2010/10, shows some modest gains for the COR in the Treaty of Lisbon but the general picture is still one of subsidiarity privileging the Member State, not the regional, level.



the attachment of the people is to a common constitutional order. A viable constitutional patriotism presupposes that: “those who are subject to a special legal system should have the ultimate say about its contents, hence the residents of such a territory should also possess democratic legislative institutions.”<sup>70</sup>

The mode of allegiance that constitutional patriotism refers to is one that draws on *democratic* constitutionalism. The question is whether it is possible to instil a viable constitutional patriotism in a setting that is not wholly democratic. In a setting that is marked by a mixed constitution, the commitment to instil a viable constitutional patriotism is therefore concomitantly a commitment to replace the mixed constitution with a democratic constitution in order to ensure both citizen support and legitimacy.

In the literature, there are also very different versions of constitutional patriotism, which draw variously on some form of cosmopolitanism<sup>71</sup> and on nationalism.<sup>72</sup> In the latter version, Craig Calhoun criticises Habermas’ cosmopolitan-inspired stance on a European form of constitutional patriotism for placing too little onus on the need for the constitution to foster bonds of mutual commitment embedded in a common sense of attachment to the constitution. For this attachment to be salient, we would not only need a constitution worthy of its name, but also a set of institutions able to imprint some sense of attachment and an ability to sustain it.

Upon the basis of the above, if a European form of constitutional patriotism is properly installed, this would entail a democratic Union capable of legitimately claiming the attachment of its citizens. One question is, therefore, whether this structure might end up being too compelling and attach citizens to itself in such a manner as to privilege the central level. In the extension of this, what would prevent such an entity from claiming that it was a nation, along liberal nationalism lines, and developing institutions to give credence to this claim? After all, the entity (the European Union) would operate in a world of nations, internally and externally, each of which would assert a claim to self-government; thus representing a strong isomorphic pressure on the Union to comply with the prevailing norm (democratic self-government embedded in a nation).

This is not, of course, how MacCormick depicts the European Union, but it does underline that we need to consider other modes of allegiance that are viable alternatives to nationalism because they do not have these effects. This takes us to the third point, namely, the need to ensure that the current EU structure (which falls well short of MacCormick’s notion of subsidiarity) retains sufficient devices to render the

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<sup>70</sup> QS, p. 167.

<sup>71</sup> See Jürgen Habermas, “Struggles for Recognition in the Democratic Constitutional State”, in: C. Taylor & A. Gutmann (eds), *Multiculturalism*, (Princeton NJ: Princeton University Press, 1994); *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA: The MIT Press, 1996); *The Inclusion of the Other*, (Cambridge MA: Polity Press, 1998); “Constitutional Democracy: A Paradoxical Union of Contradictory Principles”, (2001) 29 *Political Theory*, pp. 766-81; and *The Postnational Constellation*, (Cambridge MA: The MIT Press, 2001). Patchen Markell, “Making Affect Safe for Democracy? On ‘Constitutional Patriotism’”, (2000) 28 *Political Theory*, pp. 38-63, detects two different readings of constitutional patriotism in Habermas’ works. See, also, John Erik Fossum, “Constitutional patriotism: Canada and the European Union”, in: P. Mouritsen & K.E. Jørgensen (eds), *Constituting Communities - Political Solutions to Cultural Difference*, (London: Palgrave, 2008), pp. 138-161.

<sup>72</sup> Craig Calhoun, “Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere”, (2002) 14 *Public Culture*, pp. 147-72.

existing forms of nationalism subservient to liberal principles. In its current shape, and judging on the track-records of both new and old Member States alike (consider, for instance, the recent case of how Slovakia, Italy and France have dealt with the Roma people), we see clear breaches of core liberal principles.

In its present shape, the EU clearly provides inadequate safeguards for taming state-based forms of nationalism, with implications for both the European level and for regional-national self-government. But what are the implications for MacCormick's general framework?

## **The Post-Sovereign Constellation and the Cosmopolitan Option**

The previous discussion has revealed that none of the modes of allegiance discussed thus far sits well with the notion of the post-sovereign constellation, as manifested in the European Union. Liberal nationalism is prone to reify the ideology of nationalism. It might also downplay the identitarian changes that occur when the decline of sovereignty unleashes the politics of identity from the shackles of the nation-state. Federalism may hold promise in terms of depicting the more complex fraternal relations that the sustenance of such an entity requires, but it presupposes an explicit agreement or a commitment to submit to the federation. Federalism is also so closely associated with the sovereign state that it is necessary to devise a proper federal road-map for the post-sovereign constellation. This has not yet been done.

Does this fling us into an incessant search for developing new modes of allegiance, or might there be a solution closer to home? To approach this, it is first necessary to revisit the European Union. The Union is, as MacCormick rightly underlines, an autonomous institutional normative order. But, in its present form, it is neither a fully-fledged manifestation, nor an adequate representation of the theory of law as an institutional normative order. It could, of course, be added here that every actual manifestation is, in some sense, at most an approximation to theory. But, for the EU, we need to include the proviso that there must be an adequate and clearly articulated theory that can capture the distinct constitutional character of the EU. MacCormick, as Agustín José Menéndez shows in his chapter, provides most of the intellectual basis for such a theory, which both of us have developed into a theory of constitutional synthesis (with applicability, perhaps, also beyond the European Union)<sup>73</sup>.

My point of departure is that the theory of constitutional synthesis offers a better view on how we can ensure allegiance in a democratic post-sovereign constellation such as the EU. This theory starts from the notion that the European Union is a constitutional union of already constitutionalised states. The European Union is a "synthetic polity" built on the legal-constitutional foundations of the Member States, albeit, in a particular trapping, namely, in the form of the common constitutional law of the Member States. In this structure, they combine their old role as national constitutional systems (each of which has a distinct constitutional identity), with their new role as part of the collective supranational constitution. The process of constitutional

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<sup>73</sup> See John Erik Fossum & Agustín José Menéndez, *The Constitution's Gift - A Constitutional Theory for a Democratic European Union*, (Lanham MD: Rowman and Littlefield, 2011). There, we develop and apply the theory with reference to both the European Union and Canada.

synthesis thus represents the development of the distillation of a common constitutional system from a range of diverse legal orders (normative synthesis) within a set of supranational institutions with a strong Member State imprint. The present European Union is the result of a gradual and stepwise creation of a supranational supporting institutional structure, a structure that has been superimposed on the national institutional structures without aiming at a hierarchical structure or even a clear-cut division of labour when it comes to competences.

This structure deals with the identitarian-democratic problems which we found in MacCormick's scheme, but is nonetheless at the same time, quite compatible with core traits of MacCormick's approach to law and the EU, especially and critically so if it were to inform the re-construction of both European and national constitutional law (in the latter case, *vis-à-vis* regional constitutional orders). There are several reasons for why this is so. First, the process of constitutional synthesis is powered by the notion of a common constitutional law as a powerful regulatory ideal. This propels the integration process. The regulatory ideal is infused with the core norms and principles of democratic constitutionalism, and, as such, reins in legal pluralism and renders it subservient to the basic tenets of democratic constitutionalism. Second, the structure retains the justificatory element of subsidiarity that MacCormick underlined. But it strengthens it through expanding its applicability: it is not only a matter of a vertical structure in which the higher level must justify to the lower level why it should take on added tasks; it is a matter of compelling all constitutional agents to justify, to each other, that they abide by democratic constitutionalism. The process of constitutional synthesis injects a powerful horizontal justificatory dimension, in that only those norms that are true reflections of what is common (and in accordance with democratic constitutionalism) in the common constitutional traditions of the Member States will be uploaded to European level (as already indicated, it could also be extended to the regional level in a similar fashion; the national constitution will reflect the common constitutional law of the regions which make up the state). Third, the structure presupposes the forging of a form of constitutional patriotism at European Union level. This is steeped in cosmopolitan principles (because it reflects the universalistic norms and principles embedded in democratic constitutionalism). This structure also has stronger built-in safeguards against undue centralisation and nation-building, for two reasons. One is because it is embedded in a pluralistic institutional structure with significant centrifugal elements (an institutional field). The other is because the institutional structure has a strong built-in Member State presence as an additional safeguard to prevent the central structure from straying from the democratic path. MacCormick is also well aware of this institutional pluralism; the advantage of constitutional synthesis is that it has a clear theory to account for the democratic authorisation of the EU structure, which MacCormick's scheme lacks.

The theory of constitutional synthesis thus addresses several problems with which MacCormick's scheme could not adequately deal. Of direct relevance to the liberal-nationalism in the post-national constellation, two such problems stand out. The first is the question of European democracy. The second is how best to tame and transform nationalism. Constitutional synthesis is ultimately steeped in a form of cosmopolitanism, but, as noted, with a particular twist: a clear anchoring in the basic norms underpinning democratic constitutionalism. Constitutional synthesis thus provides a way of addressing the problem of ensuring individual autonomy, and does so through the manner in which the synthetic constitution embodies basic liberal

rights of applicability across all levels of the polity. It does so in a manner that is faithful to a cosmopolitan-oriented form of constitutional patriotism because the entire structure is informed by the regulatory ideal of democratic constitutionalism. Note that this mode need not initially replace, but may, instead, initially co-exist alongside, deeply institutionally-entrenched national identities. It is the process of ongoing constitutional synthesis - legal-constitutional harmonisation and institution-building - that sets the outer limits for the ability of this system to tame the existing forms of nationalism. But, precisely *because* it represents the injection of a cosmopolitan impetus into the system from across levels, it offers a greater assurance of reflexivity. In this sense, it is also entirely open to the system's morphing into new and more inclusive modes of allegiance.

## Conclusion

In this paper, I have critically assessed Neil MacCormick's highly innovative approach to law, democracy and community in the post-sovereign constellation. MacCormick pinned his hopes on a *liberal* nationalism in an effort to rescue cultural cohesion and social solidarity in a rapidly changing world in which the established normative and institutional templates were increasingly being questioned. MacCormick was intellectually bold and open-minded. He was concerned with adequately capturing the new. But he combined this intellectual inquisitiveness with due prudence. Precisely because he saw the central role of normative factors in human existence, he not only sought to devise an approach to law that would fully capture this, but it also informed his thoughts on how to strike a proper balance between change and continuity in the post-sovereign constellation. From this perspective, it is clear that, when faced with uncertainty and rapid change, one should focus on that which needs protecting, lest the changes will eradicate what we cherish. In this connection, it is easy to understand the support for civic national identities that play the role of safe haven and protection from the anomie and havoc which, for instance, a very specific path to globalisation has brought about.<sup>74</sup>

I am very sympathetic to MacCormick's overall approach. I also agree on the need to ensure that what is presently wrought is properly infused with a sense of fraternal community and social solidarity. But I think this can be ensured through focusing on the prospects for a viable form of cosmopolitanism rather than liberal nationalism. The two main reasons for this are because nationalism is saddled with too many negative connotations and conditions which behave in an exclusivist direction, and also because cosmopolitanism is already more deeply ingrained in our contemporary world than we often admit. These are conclusions that MacCormick might have disagreed with, but which he, in his familiar reflexive manner, would engage with seriously, not least because he was a cosmopolitan local, as Neil Walker puts it so well in his chapter.

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<sup>74</sup> This is, indeed, the same structural reason that MacCormick famously employed to turn von Hayek's argument on its head and sustain a defence of the welfare state against neo-liberals. See "Spontaneous Order and the Rule of Law: Some Problems", (1989) 2 *Ratio Juris*, pp. 41-54.

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