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Law and Democracy in Neil MacCormick's Legal and Political Theory

The Post-Sovereign Constellation

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LAW AND DEMOCRACY IN NEIL MACCORMICK'S LEGAL AND POLITICAL THEORY

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Acknowledgments

This book is a tribute to Neil MacCormick. It contains a range of chapters all of which engage critically with his work, and, as such, are cast in his reflexive spirit. We thought that this was the most appropriate way of paying tribute to his wide-ranging scholarship and also the best way for us to help carry forward his legacy. The chapter composition is a mere faint reflection of the breadth of Neil's intellectual interests and scholarly output. The contribution is also hopefully only a first attempt to use Neil's institutional theory of law as a proper invitation to engage in more comprehensive bridge-building across academic disciplines.

The book consists mainly of revised and updated contributions that were delivered at the workshop and doctoral course "The post-sovereign constellation – Law and Democracy in Neil MacCormick's legal and political theory", which we organised at the University of Bergen during 7–9 November 2007. This workshop was, in fact, the second in a series of events aimed at engaging in broader conversations with contemporary legal and political philosophers on transversal themes. The first one was held in Oslo in 2004 and was devoted to Robert Alexy's jurisprudence (and resulted in a volume in this same series), and the third took place in Bergen in 2009, and was dedicated to the discussion of the political implications of the judicialisation of European constitutional law. Further events will, hopefully, follow in the future.

Neil MacCormick's chapter is his introductory statement to the workshop. In addition to the workshop submissions, we are delighted to have two additional chapters, one from Jeremy Waldron and one from Neil Walker, Neil MacCormick's successor as The Regius Chair on the Law of Nature and the Law of Nations at Edinburgh University.

We are grateful for the support from the Norwegian Research Council and the University of Bergen (the Meltzer Foundation and the Department of Administration and Organisation Theory), which contributed to the funding of the Bergen Workshop, as well as the Law Faculty for hosting the event. We would also like to thank the ARENA Centre for European Studies and the cross-faculty programme on Democracy, both at the University of Oslo, for support in helping to complete the book.

We would like to thank Flora MacCormick for her permission to publish Neil MacCormick's chapter and for her endorsement of this book. Many thanks also to Chris Engert for proficient editing.

Introduction

This book considers the work of one of the key contemporary legal and political theorists. The late Neil MacCormick made decisive contributions to the understanding of law, democracy and justice under conditions of social and ethical pluralism. MacCormick was proud of his triple heritage (H.L.A. Hart's path-breaking reformulation of legal positivism, Smith's and Hume's liberal and progressive political theory, and Scottish democratic nationalism). But he was keen on cultivating that heritage not by teaching it and revering it in any mechanical manner, but by making decisive and fundamental contributions to its further development, as he argues with *gusto* in Chapter 2 of this volume. And, indeed, the distinguished holder of the Regius Chair of Public Law and the Law of Nature and Nations in Edinburgh excelled both as a legal theorist and as a political philosopher. Even a brief and incomplete summary of the main lines of MacCormick's research and publications (as the one included in Part I of this book) is enough to realise its breadth, and the great range of issues and important questions that propelled Neil MacCormick's intellectual curiosity. In this brief introduction, we consider, in some more detail, the key contributions that the author whose path-breaking *Legal Reasoning and Legal Theory* and subsequent string of outstanding books and articles has made to legal and political theory (Part I). In the remainder of this chapter, we summarise the main contents of this book (Part II).

But it is proper to add that what rendered both MacCormick's theory and Neil himself especially inspiring, and also so greatly rewarding to interact with, was his intellectual honesty. In particular, we would like to point to his highly reflexive and theoretically constructive "propensity to self-subversion", to borrow the famous term from Albert O. Hirschman.[1] Neil put his own approach in question by seriously considering alternative viewpoints and positions, and based upon that, actively engaged in a reflexive re-consideration of his theory. In so far as practical reason drives the human spirit forward, this is certainly one of the best ways of ensuring it. It also demonstrates beyond any doubt the exceptional human and intellectual stature of Neil MacCormick.

[1] See Albert O. Hirschman, *A Propensity to Self-Subversion* (Harvard, MA: Harvard University Press, 1998).

The Legal and Political Theory of Neil MacCormick

A legal philosopher by vocation, MacCormick led the development of the institutional theory of law. His characterisation of *law as an institutional fact* reveals not only the collective and user-oriented character of legal norms (radicalising some of the key intuitions of Hart's legal theory when affirming that the legal phenomenon cannot be fully understood without taking the standpoint internal to legal practice seriously), but also the inextricably twin nature of law as a functional means of social integration and as a vehicle for the reconstruction of the social order in ways conducive to the realisation of normative ideals (in brief, of justice). MacCormick aimed at keeping neatly distinct the realms of the "is" and the "ought" (here pursuing some of the key insights contained in Kelsen's first edition of the *Pure Theory of Law*)[2] while stressing the necessary connection between law and morality, reflected both at the systemic level of law, and in the underlying claim to the correctness necessarily underlying any legal norm (something which has also been emphasised, in different terms and within different traditions, by Robert Alexy and Ronald Dworkin). By highlighting that *law is an institutionalised order*, MacCormick claimed that the systemic character of law derives not so much from the objective nature of legal norms, but rather from the social practice of making use of the law as a means of social integration; or to phrase it differently, it is because we hypothesise that law is a system, and we do so upon the basis of a normative ideal of such a system, that law can discharge the basic social tasks that it is entrusted to perform in modern societies. Some of these key insights lingered behind the hypothetical assumption of a "*grundnorm*" which would establish the validity of the whole legal order (in Kelsen's theory) and even more explicitly, in the distinction between primary and secondary norms advocated by Hart. But MacCormick goes further than both Hart and Kelsen by taking the elucidation of the social functions of the law very seriously, thereby assigning them a key role in shaping both his theoretical and his practical understanding of law (in ways not very different from Habermas). Indeed, the characterisation of law as an institutional normative order explains, in MacCormick's view, the unavoidable tension in modern law, its divided "soul" between its "empowering" side (providing the subjects of law with the moral knowledge necessary to be just, to know what they have to do, and enabling social co-operation in order to achieve complex collective goals on a large scale), and its "coercive" nature (as the necessary doses of certainty and insurance against default can only be provided by the shadow of enforced compliance). MacCormick has indeed made decisive contributions to the exploration of both the ideal element in law and legal practice, while nonetheless remaining far from oblivious of its unavoidable "partially heteronomous" character.

MacCormick's institutional theory of law has improved our understanding of the concept, nature and practice of law, by elucidating at least five key questions: (1) *the*

[2]On the extent to which he succeeded, contrast the chapters in this volume by Massimo La Torre and Stefano Bertea.

societal foundations of law, the close connection between the normative and the institutional imagination of human beings and the integration of democratic societies through law; (2) *the normative character of law*, by determining, in a coherent and systematic manner, the implications of such a character (from the texture and the composition of the legal order and the features of legal norms, to the systemic properties of law); (3) *the pluralist nature of modern democratic law*, showing us that law is closely associated not only (even if mainly) to the nation-state, but can also be the means of integration beyond and below the nation-state; (4) *the unavoidable argumentative character of rule-based legal orders*, by integrating into a coherent theoretical vision the key positivist insight concerning the key role of rules in the integration of modern society and the fundamental post-positivistic vindication of the principled nature of democratic legal orders; and (5) *the open character of law*, by emphasising the limits of law as a means of social integration. These five fundamental themes were explored time and time again by Neil MacCormick, starting with his formidable inaugural lecture of 1974 *Law as an Institutional Fact*, to his *Institutions of Law* of 2007, and through the pivotal *An Institutional Theory of Law*, co-authored with Ota Weinberger in the mid eighties.

The core innovative features of his institutional theory of law go a long way to explain why MacCormick was not only a prominent theorist, but also a scholar who enjoyed dealing with concrete legal problems charged with social and political implications.

Thus, his major contributions to legal reasoning and legal rhetoric are to be found in *Legal Reasoning and Legal Theory* of 1978 and in *Rhetoric and the Rule of Law* of 2005. These two major books and a long series of articles and book chapters were decisive in the transformation of our understanding of legal argumentation, along with Alexy's, Raz', Aarnio's and Peczenick's contributions. The relevance that MacCormick assigned to the analysis of social legal practices led him to be very attentive both to the steering of societal conflicts through rules obeyed in "spontaneous" and "quasi-automatic" fashion by the subjects of law (what, indeed, classical positivism assumed was the core of the legal phenomenon), and to the argumentative practices through which discrepancies in the actual normative implications of legal principles are settled. *Legal Theory and Legal Argumentation* was, indeed, one of the leading treatises which brought back to the forefront of legal theory the analysis of how legal cases were actually argued, and the drawing of conclusions regarding the nature of law itself, and, very especially, the role of the said principles in modern legal orders. Indeed, *Legal Reasoning and Legal Theory* is properly characterised as an attempt to integrate some of the key insights of Dworkin's criticism of Hartian classical legal positivism with a view to rescuing the brand of positivism defended by Hart. But the more that MacCormick explored his original contributions, the more that he came to distance himself from the author of the *Concept of Law*, although this does not necessarily imply that he came to converge with Dworkin's position. As Massimo La Torre claims in his chapter in this volume, it may, perhaps, be fairer to say that MacCormick pursued some of the key insights of Hart's theory to their logical and normative conclusion(s), and, in doing so, integrated theoretical findings coming from other angles and traditions;

his keen interest in "positive" legal topics and his very fruitful collaboration with Ota Weinberger may have rendered a genuine and promising third way possible. Through these works, MacCormick made a decisive contribution to the coming of age of "post-positivism", a form of legal positivism which is conscious not only of the morality necessarily underpinning law, but also of the structural shift implied in the constitutionalisation of national legal orders, making the law bind through principles to be detailed and derived into rules, not through rules which would then be generalised into principles.

And thus also his outstanding contributions to constitutional theory beyond and below the nation-state, reflected both in his theoretical re-construction of European constitutional practice from *Beyond the Sovereign State* to *Revisiting Legal Pluralism*, and to the decisive *Questioning Sovereignty* of 1999. His lifelong preoccupation with legal pluralism, concurrently fuelled by his understanding of the nature of law and his sympathies towards the cause of Scottish nationalism led Neil MacCormick to develop what may be fairly said to be the first theory of European constitutional law which takes the specific features of the European Union as a process of legal, economic and political integration seriously. In particular, the Scottish philosopher aimed at showing that European law is grounded in an overlapping set of legal social practices which pre-suppose different understandings of the validity basis of Community law. In lieu of obsessively focusing upon which of the two alternatives is right (the national constitutional practice which claims that the European legal order rests upon the twenty-seven national constitutions, or the supranational constitutional practice which affirms that integration has led to a mutation in national legal orders, now absorbed into a single European constitutional order framed by the constitutional law of the Union), legal theory should occupy itself also - if not principally - with determining why and how the European legal order does, indeed, keep on discharging its basic social tasks, despite the coexistence of such practices. Or to express it differently, the really intriguing question is not which of the two standpoints is right (both of them *are* from their own perspective) but why a legal order can be pluralistic without descending into chaotic diversity.

MacCormick was also a major political philosopher. He played a major role in vindicating and renovating the political philosophy of the Scottish Enlightenment by means of putting forward a distinctive theory of distributive justice and a theory of liberal nationalism aimed not only at rendering nationalism attractive, but also at rooting his cosmopolitan and liberal political project. This was reflected in his fundamental (and, perhaps, unfairly neglected) *Legal Right and Social Democracy* of 1982, but was already at work in the volume which he edited in 1970 under the title of *The Scottish Debate* (which includes a fundamental exposition of the philosophical roots of his liberal nationalism), would be articulated in *Questioning Sovereignty,* and exposed in its final form in his *Practical Reason in Law and Morality*. This keen interest in the theoretical aspects of constitutional theory reflects a thorough consideration of the theory of the state, and, very especially, of the normative dimensions of the *Rechtsstaat*, closely intertwined with the basic assumptions of his institutional theory of law. Although it is beyond doubt that his interest in nationalism was not

only academic, but also reflected a deep existential commitment, MacCormick made a major contribution to the re-thinking and re-positioning, so to say, of nationalism as part of a liberal and cosmopolitan political project. In particular, his reflections cast light on the role that "liberal" nationalism could play in rooting and grounding what, in most cases, remains the abstract and detached political philosophy of cosmopolitanism. In his writings, nationalism becomes the emotional side of democratic federalism. A side which a child of the Scottish Enlightenment could not but struggle to make sense of.

The Contents of the Book

This book engages in a critical reconstruction of MacCormick's work, aimed at the three-fold objective of offering a critical introduction to his work, furthering his insights into each specific field, and revealing the connections between the different sides (legal, political, and philosophical) of his work.

In the chapter which forms Part I, **Neil Walker**, successor to Neil in the Regius Chair of Public Law and the Law of Nature and Nations in Edinburgh, highlights the joyous creative tension between the two sides of the *oeuvre* of MacCormick the intellectual and the person (of temperament and disposition): the local and the cosmopolitan. Indeed, the fact that Neil's biography and convictions attracted him to the "in-between", contributed, to a large extent, to shape and to mould his legal and political theory, by rendering him sensitive to questions which tended to be ignored or sidelined in mainstream theories. This is, indeed, the background against which MacCormick developed his many contributions to legal theory (his post-positivistic institutional theory of law, which Ota Weinberger also contributed to the development of), and political theory (his views on democratic nationalism and supranationalism), which prompted him to analyse the pluralistic structures of the democratic constitutional state, (both at supranational and at infranational levels). The chapter ends by coming to terms with the actual implications and significance of MacCormick's constitutional pluralism. In MacCormickian fashion, Walker reconsiders the tensions in MacCormick's shift from radical to moderate pluralism, and ponders on the extent to which the different strands of the pluralistic literature may be characterised as renderings of the ideas with which MacCormick was struggling.

The second part contains a chapter by **Neil MacCormick** himself, in which he reflects on the seven big themes of his legal and political theory: the normative character of the legal order, the institutional character of the legal order, the central but far from exclusive role played by state law in social integration, the relationship between law and morality, the synthetic and systemic aspects of law, and the relationship between reasons and emotions in practical reasoning. In reviewing these themes, MacCormick both paints an overarching broad-brush picture of his theory, and also reveals the intricate connections and links between the different parts, thus providing a very appealing introduction to the broad range of readers that will be inspired by his work.

The third part deals with MacCormick's concept and conception of law. **Lars Christian Blichner** claims that MacCormick's theory is of special interest to social scientists, because he is one of the rare contemporary legal scholars who was keenly interested in exploring the limits of law as a means of social integration, and law's relationship to other normative orders. Neil's historical sensibility makes of his work a reminder both of the fundamental relevance of the delimitation of the province of law and of the fact that the difference between law and other normative orders is one of degree, rather than absolutes. Blichner's contribution to the theory of juridification and de-juridification (and their multi-faceted character and interaction) is an apt means to highlight, reconstruct and even complete some of MacCormick's basic insights on what concerns the relationship between normative orders, institutional normative orders, and legal orders. Blichner's key message is that processes of juridification and de-juridification should no longer be regarded as "borderline", "marginal" questions which legal theory can blissfully ignore; they should be analysed as determining factors of the social tasks that law can perform effectively. **Massimo La Torre** considers the unfolding of Neil MacCormick's legal theory by reference to the concept of law, which underlies his work. La Torre claims that the legal theory of the Scottish philosopher is the true heir to the normative project underlying Hart's legal theory, in the precise sense that it has pushed to its logical and normative conclusion the quest for a non-decisionistic understanding of law, which stresses the key role played by social legal practices, the centrality of the standpoint *internal* to law as a normative order to understand legal phenomena, and consequently, calls for a theory which focuses on the addressees of the law and not exclusively on institutional actors. **Stefano Bertea** focuses on MacCormick's contributions to legal theory on what concerns the identity and validity of legal systems, and, in particular, MacCormick's master rule. While the Scottish professor started by building upon Hart's characterisation of the distinction between primary and secondary norms as the key to jurisprudence, thus affirming that the identity and validity of the legal system are tied up with the rule of recognition as a conventional rule supported by a social practice, he was to engage in a long-term critical reconsideration of the problem. Moved by the inadequacy of the rule of recognition to serve as the basis of a plausible recognition of the legal order of constitutional states, especially of the open, co-operative and pluralistic European *Rechtsstaat* (of the post World War II period), and influenced by his reading of Kelsen's views on the matter (and very especially by the "fundamental norm" of a legal system as a hypothetical norm that plays a rather similar structural role as the one proper of the rule of recognition), MacCormick came to affirm that the identity and validity of the legal system is based upon a master rule, which is defined by reference to a more inclusive (more democratic) social practice, wherein citizens are considered relevant as norm-users, and not only judges as norm-givers. Bertea finds that, while the institutional theory of law in general, and the master rule in particular, have made major contributions to our understanding of law, the master rule fails to provide a complete and sufficient account of the normativity of law. As long as the master rule is *conventional*, as Hart's rule of recognition is (and thus not hypothetical as Kelsen's fundamental norm is), its capacity to account for the normativity of law is conditioned on the

finding of a proper explanation of how such a convention can become normative, how the *is* becomes an *ought*, without indulging in the naturalistic fallacy. Bertea considers the three main characterisations of legal conventionalism in the literature (legal conventions as indicators of acceptance, as co-ordination conventions, and as constitutive conventions) and finds that all three are inadequate. This casts a long shadow over MacCormick's master rule, which nonetheless, does not impair the standing of the institutional theory of law as one of the most powerful contemporary legal theories.

The fourth part considers three aspects of MacCormick's post-positivistic jurisprudence and its relation to a liberal political theory. **Marina Lalatta** explores the systemic nature of MacCormick's legal theory by focusing on the underlying tension between his claim to uphold a "moderate" relativism in moral questions, and his late acceptance of the existence of a systemic connection between law and morality, which comes close to the "claim to correctness" theory of Robert Alexy. While she acknowledges that MacCormick's reluctance to abandon a moderate relativistic position is not without good reasons (recently highlighted by the enthusiastic endorsement of non-relativistic theorists and political actors of blatant violations of fundamental rights in the so-called war on terror), Lalatta claims that MacCormick should endorse a non-relativistic position without having to endorse the less attractive aspects of cognitivism. **Jeremy Waldron** takes issue with a core premise of MacCormick's post-positivistic characterisation of the relationship between law and morality, his "reservation principle", which reconciles the autonomy of law from morality with the claim that the case for integration through law as an autonomous social medium does not require individuals to abandon their own morality. Building on some of Hart's intuitions on the "thin" intrinsic morality of law and on his opening towards an inclusive legal positivism, MacCormick came to defend the "reservation principle" as a core principle of his political theory in *Practical Reason in Law and Morality*. Waldron challenges the scope of the reservation principle by considering whether it is justified in all cases, or whether, in some circumstances, it undermines law as an effective means of social integration. He does so by contrasting the implications of MacCormick's reservation principle and Hobbes' non-reservation principle in several circumstances. By doing so, Waldron not only problematises one key aspect of the post-positivistic turn of MacCormick (and of *discursive* theories of law in general, which have shifted the centre of gravity of legal systems from rules to principles), but also reveals the underpinning relationships between law and legal culture which, in themselves, may go a long way to account for MacCormick's persistent defence of the central role of rules in democratic legal systems, as in the mass of circumstances in which law integrates society, it is rules that undertake the job. As, indeed, Waldron claims, law is needed as a routine internalised in the lives of its addressees. **Tanja Hitzel-Cassagnes** considers the extent to which MacCormick succeeds in constructing a synthetic theory of law and politics capable of accounting for the various transformations of law as a means of social integration in a "pluralistic" context without renouncing any of the key normative categories of political philosophy inherited from the Enlightenment. MacCormick claims that there has always been a pluralistic potential cloaked behind, so to speak,

the apparently monistic political and legal language of modernity; and what had served to conceal this potential was the historical, political and legal pre-eminence of state law, its characterisation as the unique form of institutional normative order. But while we cannot but share MacCormick's "pragmatic" concern, and while there is much to be learnt from his actual theory, Hitzel-Cassagnes rightly points out that it is simply not the case that the universalistic drive of law is a side-effect of the pre-dominance of the "nation-state" paradigm, but that it is actually the constitutive character of law as a means of social integration; this implies not only a "structural" universalistic proclivity of law, but also a "normative" universalistic proclivity. As a consequence, norms governing the relationships between legal orders should also be legal norms underpinned by a universalistic drive. The powerful insights behind MacCormick's democratic celebration of social pluralism are, according to Hitzel-Cassagnes, more fittingly brought to fruition through Kant's vision of law as a reflexive and provisional structure. This reconciles the move away from considerations of the primacy and competence of the law in an ontologising fashion, and towards a reflexive process in which the promise of autonomy and self-determination stand a chance of being realised.

In the fifth part, **Flavia Carbonell** engages with MacCormick's theory of legal argumentation. Carbonell reconstructs, in a critical fashion, MacCormick's concept of coherence in legal reasoning, and places it in the context of his theory of legal pluralism. The salience of the theory is determined by analysing the extent to which MacCormick's theory underlines the jurisprudence of the Court of Justice of the European Union; and the extent to which coherent argumentation may ground the claim of MacCormick to it being the best possible theory of European Community law. Carbonell finds that the resort to coherence by ECJ as a means of increasing the breadth and scope of Community law does not foster a legally pluralistic reconstruction of Community law, but is, indeed, an instrument of its monistic reconstruction. Indeed, it turns the Court into the final decision-maker in charge of solving conflicting interpretations or collisions of norms. This casts some doubts not only as to the *affinity* between legal pluralism and coherence, but also as to the extent to which the European legal order is a pluralistic one.

The sixth part focuses on MacCormick's theory of legal pluralism, and, very especially, on its application to the constitutional theory of the European Union. **Martin Borowski** finds that MacCormick's theory of post-sovereignty represents the most sophisticated attempt to date to explain the "pluralistic" nature of Community law, overcoming the simple confrontation of the "European view" and the "national view" of the European Union, which has characterised legal and political scholarship for decades. However, he finds that legal pluralism is not convincing, either as a general theory or as the basis of the reconstruction of Community law. This is basically so because it fails to reconstruct the derivative nature of Community law, and cannot provide an adequate framework for deciding conflicts between EC law and national constitutional law. However, MacCormick's contribution to tackle the difficult and complex problem of the reconstruction of Community law is taken, by Borowski, as the point of departure for what amounts to a sophisticated and revised version of the national theory of constitutional law, namely, Borowski's

derived and nearly unconditional supremacy of Community law. This entails that the actual breadth and scope of the supremacy of Community law is subject to potential exceptions, to be determined by means of weighing and balancing the normative reasons underpinning the claim to supremacy (in concrete, the very weight of European integration) with weighty countervailing reasons which may justify the opposite result in a handful of cases. **Agustín José Menéndez** aims at situating MacCormick's European constitutional pluralism in the *problématique* of European constitutional law. What Borowski labelled as the "European enigma" is de-coupled into two riddles, concerning the *genesis* of the European legal order (how what formally were international treaties could result in the establishment of a constitutional polity), and the *relationship between legal orders* (how Community law is granted almost unconditional primacy in European constitutional practice). The standard constitutional theories that have portended to solve these problems have failed to provide plausible answers to these two riddles. MacCormick's constitutional pluralism broke new ground and offered a coherent reconstruction of European constitutional practice from a sociological perspective. But it remains unsettled as a constitutional theory. Departing from MacCormick's shift from a radical to a moderate pluralistic position, Menéndez tries to reconsider the key implications of European constitutional pluralism, and to apply the manifold insights left to us by MacCormick to the fashioning of a constitutional theory capable of accounting for the pluralistic traits of Community law, but without reneging on the regulatory ideal of law as a single legal system. That alternative theory is the theory of constitutional synthesis, which assigns a central role, in the legal and political process of European integration, to the *collective* of national constitutions, which were seconded from the entry into force of the Treaty of Paris onwards to the role of the common constitution of the Union.

The seventh part considers the political theory of liberal nationalism put forward by Neil MacCormick. **Joxerramon Bengoetxea** focuses on MacCormick's contribution to the understanding of nation, law and state in contemporary Europe, and, in particular, on his concept of "internal enlargement", or, to express it differently, the possibility that Member States divide or split into new Member States so as to realise the aspirations to self-government of region-states. He reflects on the correlation between MacCormick's institutional theory of law, with his emphasis on non-state institutional normative orders, and his defence of "liberal nationalism", as a legally differentiated and distinct form of liberal political philosophy. Bengoetxea considers in detail the key role that such a form of nationalism could play in rooting and providing support for the cosmopolitan *telos* which characterises the European integration project. **John Erik Fossum** also focuses on MacCormick's liberal nationalism. The first issue with which he grapples is how well the post-sovereign constellation can reconfigure 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.

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Lars Christian Blichner is Associate Professor at the Department of Administration and Organisation Theory, University of Bergen. He has published seminal articles on subsidiarity in the European Union, interparliamentary deliberation and more recently, on juridification.

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