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# State and Transnationalism: The Contribution and Legacy of Neil MacCormick

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## Neil MacCormick and Transnational Legal Theory: Reconstructing the Legacy

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By personal disposition and political conviction, I am a diffusionist.<sup>1</sup>

### Introduction

Reading as I am, again and again, through the entire MacCormick corpus, it is difficult not to attempt to discern strands – thick or thin – that hold the entirety together. This is despite best efforts to recognise the false starts, retractions, dead ends, and all manner of wanderings of any one scholarly mind: in short, despite acknowledging the episodic, spiky, and opportunistic character of thought over time.<sup>2</sup> Certainly, some of the ideas are best read as having been articulated at a very specific time and place, in response to such-and-such stimulus (whether another’s scholar’s argument or a political event), and I recognise the duty for anyone confronting such a project of paying close attention to the appropriately contextualised shifts and changes from one particular flowering of theoretical expression to the next.<sup>3</sup> However, reading these works over and over, one cannot but hear certain echoes and rhymes, both in style and substance, over the period of MacCormick’s publishing career, from 1966 to 2011.<sup>4</sup>

I will not attempt to articulate all of these echoes and rhymes here, but there is one I want to highlight that will accompany me throughout: MacCormick’s commitment to the diffusion of power. This is not so much a theory or even a claim, as it is a character trait or a mark of temperament. It is something at once nebulous and robust. It colours, like a dye, not only the particular claims he makes in moral, legal and political philosophy – perhaps most obviously, the value he ascribes to individual moral autonomy and to ‘democracy at many levels’<sup>5</sup> – but also what he looks for and finds in those past thinkers that he keeps returning to throughout his

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<sup>1</sup> Neil MacCormick, ‘The Dialectic of Might and Right’, 1998, 62.

<sup>2</sup> This may remind some MacCormick readers of how he characterised the experience of law for the ordinary citizen (see ‘The Ideal and the Actual of Law and Society’, in J. Tasioulas (ed.), *Law, Values and Social Practices*, Aldershot: Dartmouth, 1997, 15-37, 22-23).

<sup>3</sup> As David Armitage puts it: ‘Ideas emerged from tightly defined spaces, from littoral beaches as well as laboratory benches, and from public houses as well as royal academies. When viewed microscopically in this way, the seamless web of abstract knowledge turned out to be a brittle mosaic of contingent concerns’ (*Foundations of Modern International Thought*, Cambridge, 2012, 22).

<sup>4</sup> MacCormick died in 2009, but the last publication he authorised appeared in 2011.

<sup>5</sup> ‘Democracy at Many Levels’ (one of the titles of MacCormick’s contributions to the European Parliament).

career, most especially his fellow past Scots. Thus, part of my aim in this paper is to take this character trait or mark of temperament as a guide to MacCormick's thought, but also as a reminder of the importance of looking more broadly, I dare say more deeply, when evaluating the legacy of a thinker for a particular area of present scholarly endeavour.

That area, for the purposes of this paper, is transnational legal theory, and my task – put more prosaically – is to consider what MacCormick has been seen to have contributed to it, and to argue for my own take on his legacy. Thus, in the first part of the paper, I will be looking at some – really a small, but important sample – of the explicit engagements with MacCormick's work by those whose work can be broadly characterised as falling within transnational legal theory. I will be evaluating their evaluations of MacCormick's contribution. In doing so, my aim is (re)constructive, namely I want to pick out what those reading MacCormick find worrisome and what they find promising, and I want to use that as a springboard for the second part of the paper. There, I attempt, again incompletely and but hinting at future work to be done, to (re)construct MacCormick's legacy for transnational legal theory.

If there is an overall message, it is this: MacCormick's commitment to the diffusion of power leaves an important legacy for transnational legal theory. MacCormick's institutional theory of law needs to be read in light of this commitment. Within this commitment, what looms large is the space MacCormick leaves free for the exercise of practical reason by norm-users, including respecting what they take to be valuable (e.g. their civic institutions). Further, wrapped up in that commitment is the body of work that MacCormick keeps returning to, as if to refresh his academic appetite, namely that of the thinkers of the Scottish Enlightenment. For it is in that body of work that MacCormick finds nourishment for his commitment to the diffusion of power, and an antidote to what he sees – on the other side, so to speak – as the 'sovereignist tendency' of Bentham, Austin and Dicey (and others since then, not least of all in the political theatres of the United Kingdom and the European Union).

Placing MacCormick amongst the Scots is not to attempt to characterise him as part of some antagonistic Tartan army, defiantly fighting off any whiff of sovereignty or absolute, centralised power from down south – for MacCormick engaged honestly and earnestly with English jurisprudence, learnt a lot from it and taught us all a lot about it. But it is to say that we do a grave injustice to MacCormick's legacy if we neglect his own life-long sources of inspiration, such as were Lord Stair, David Hume, and Adam Smith, to mention but three of the leading ones.

Put in its most unrestrained form, the paper can be taken to be making a plea for greater attention to be paid to Scottish jurisprudence, both in terms of its descriptive virtues – with its historically-sensitive study of law in society – and its normative commitments – again, its distrust of power. Such attention would, or so I boldly suggest, pay particularly great dividends in the context of transnational legal theory.

## **I. Reading MacCormick's Readers**

Lest anything that follows sounds defensive, let me reiterate that my aim in engaging with the responses to MacCormick's work below is to understand how he has been read: what have scholars focused on in reading him, and what have they picked out as

strengths and as weaknesses. My focus is on those theorists who have considered MacCormick's contribution to transnational legal theory broadly conceived, including most obviously his theoretical work on the European Union.

### ***I.A. From Radical Pluralism to Pluralism under International Law***

The unfortunate focus of a good deal of those who engage with MacCormick's legacy for transnational legal theory is on his (in)famous transition from radical pluralism (RP) to pluralism under international law (PUIL). I will be returning to MacCormick's own statements about this transition – some of what he said, certainly did not help his own cause – and I will be pleading that we read it narrowly, marginalising it in our evaluation of MacCormick's legacy. Amongst the responses to this transition, there are roughly three groups: first, those that would have preferred MacCormick to stick with the original endorsement of RP (here, Nico Krisch's 2011 paper serves as an exemplar of this position); second, those who think the move to PUIL was the right one, but urge a re-interpretation of what PUIL means (Pavlos Eleftheriadis' 2010 paper is the best example of this position); and, third, those who are satisfied with neither RP or PUIL, including those who nevertheless wish to build on aspects of MacCormick's theory in carving out a middle ground between, or a third way beyond, RP and PUIL (a prominent example of this effort is Neil Walker's 2011 paper). Let me briefly give an account of each of these positions.<sup>6</sup>

Krisch characterises MacCormick's transition from RP and PUIL as a matter of succumbing to certain fears and anxieties about 'political stability' (Krisch 2011, 387). According to Krisch, MacCormick comes over time, like others, such as Mireille Delmas-Marty, to soften or tame his initial pluralistic enthusiasm, and looks around for 'overarching rules' – some form of law that can help resolve conflicts between different systems of law (in this case, the European and the National Member State systems in the European Union). PUIL, says Krisch, is, 'in fact a monist conception',<sup>7</sup> though one that retains what Krisch calls 'institutional pluralism' (where there is no internal hierarchy, but where the institutions in question operate under common rules), and one 'held together by the overarching international legal obligation of both member states and the EU to cooperate and honour their commitments vis-à-vis each other' (Krisch 2011, 388). What MacCormick was doing, says Krisch, is attempting to 'limit the negative consequences of the original idea' of

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<sup>6</sup> I am ignoring here the bulk of the burgeoning literature on constitutional pluralism in the European context simply because although much of it acknowledges MacCormick as the originator of the idea of 'constitutional pluralism', few of it engages with his work in any detail. In terms of the acknowledgement, one can quote Matej Avbelj and Jan Komarek from their introduction to their excellent collection, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) who say: 'The idea of constitutional pluralism first emerged in the context of European integration. Neil MacCormick can be named as its "founding father"' (2). MacCormick then appears only in 5 of the 16 chapters, in all of which his work is cited but not discussed. Another acknowledgement appears in Julie Dickson and Pavlos Eleftheriadis's introduction to their equally excellent collection, *The Philosophical Foundations of European Union Law* (Oxford, 2012), where they say that 'the legal philosopher who examined the question [as to how philosophy of law bears upon the law of the EU] with the greatest thoroughness and whose work has had most lasting effect is Neil MacCormick' (4, fn. 4).

<sup>7</sup> Which belies a turn-around from what was a criticism of Kelsen in earlier work, such as MacCormick 1993 – Krisch repeats here MacCormick's acknowledgement of Catharine Richmond's 1997 paper on Kelsen, which MacCormick had said influenced his change of heart with respect to Kelsen.

RP, providing legal tools in order to ‘avoid fragmentation in the EU’ (Krisch 2011, 393).

Krisch acknowledges (and I will be coming back to this point) that MacCormick was responding to a particular interpretation and application of his own pluralist vision in Ross Phelan’s *Revolt or Revolution?: The Constitutional Boundaries of the European Community* (1997) (Krisch 2011, 392), which fastened, in particular, on earlier statements by MacCormick (e.g. from 1995) that it was up to national courts ‘to interpret the interaction of the validity of EC law with higher level of norms of validity in any given system’ (quoted at Krisch 2011, 392). He also suggests that the political environment in the late 1990s, in both Europe and the UK, was such that RP could be used (as it was by Phelan) not to undermine and question state sovereignty, but in fact to strengthen it – a strategy that Krisch suggests MacCormick would have been keen to avoid (given that he was about to enter the European Parliament in 1999) (Krisch 2011, 393). But where MacCormick might have been enthusiastic about Europe at this time, he was, Krisch suggests, less hopeful about politics (Krisch 2011, 396), preferring to place greater trust in the ‘law and judicial bodies’ as being ‘more likely than political mechanisms to create order and stability in society’ (Krisch 2011, 395). Law was to be preferred because it set up ‘a fixed frame for interaction’; what legal structures do is:

...lengthen the shadow of the future and stabilise cooperation beyond the immediate cost-benefit calculation of the actors involved; they set up institutions and assign powers in a way that abstracts from immediate situational pressures and interests. This helps to detach cooperation from the constant shifts in the underlying constellation of preferences and allows it to endure even if a certain set of actors is dissatisfied with it. Creating an overarching legal frame thus bears the promise of a more lasting institutionalisation, and the thicker the frame, the greater seems to be the promise. (Krisch 2011, 398)

As mentioned above, Krisch laments the fact that MacCormick gave up on RP, and proceeds, in the remainder of his paper, to articulate ‘certain advantages in a truly “radically” pluralist structure in which fundamental questions – about the scope of the polity, ultimate supremacy norms, key values – are bracketed and worked around’ (Krisch 2011, 407). Krisch’s ability – portrayed so vividly and rigorously in his 2010 book – to reveal the rough ground of interaction between institutions within and beyond Europe is impressive. His analysis of the way in which ‘conflicts of principle’ can be ‘bracketed’, remaining unresolved, but with relationships between the relevant institutions maintained through pragmatic processes of incremental mutual accommodation, is one of the most important and original contributions to transnational legal theory in recent times. This is not the moment to address it any further. What is important for my purposes is that Krisch sees MacCormick as having regrettably moved away from those virtues of a truly radical pluralism.

The second group of theorists are those who endorse MacCormick’s transition from RP to PUIL. Most prefer not to retain the use of that label – PUIL – for example, José Menéndez (2011) characterises the change as one from RP to ‘moderate constitutional pluralism’, and evaluates it as ‘a change of critical importance, which increases, not diminishes, the coherence between MacCormick’s overall legal-theoretical project and his European constitutional theory’ (Menéndez 2011, 227). According to Menéndez, ‘moderate constitutional pluralism’ introduced something

that was missing from RP, namely ‘the regulatory ideal of the single legal order that law can serve as an institutionalised alternative to spontaneous order’ (Menéndez 2011, 227). But, as signalled above, the most extensive and sophisticated defence of MacCormick’s transition comes courtesy of a 2010 paper by Pavlos Eleftheriadis.

Eleftheriadis also finds the PUIL label ‘mistaken’ (2010, 384), arguing that, properly understood, it is a form of dualism. He begins by noting that there are two interpretations of the RP stance: first, double-monism; and second, disjunctive monism. The former holds that there are ‘two inconsistent hierarchies and we accept them both’, for what we have in effect are two monisms: ‘If we are within the national jurisdiction, then national monism is correct. If we are within the EU jurisdiction and institutions, EU monism is correct’ (Eleftheriadis 2010, 373). The second, disjunctive monism, is ‘pluralism proper, because the answer would be entirely open-ended’: ‘Sometimes the national law wins, whereas others the European law wins’, for on this position ‘Courts may help themselves to either of these two monisms. In other words, it is open to them to endorse either a solution derived from national law or a solution derived from EU law’ (Eleftheriadis 2010, 374). Eleftheriadis does not like either position, though he has particular scorn for the second, which he argues, on the back of Dworkin, ‘compromises or rejects integrity’ (Eleftheriadis 2010, 374).<sup>8</sup> More broadly, according to Eleftheriadis, RP ‘essentially affirms both hierarchies at the same time and then adds that there is no reason to regret the incoherence’ (Eleftheriadis 2010, 373). In doing so, it ‘assumes that the two systems are not actually communicating’ (Eleftheriadis 2010, 372).<sup>9</sup>

As noted above, Eleftheriadis defends the move to PUIL, but under the guise of a dualist interpretation of it. What is crucial here, says Eleftheriadis, is that we recognise that dualism ‘is not national monism’ (2010, 369 & 381). Neither is it, he adds, international monism. From the domestic side, dualism ‘does not advise us to ignore international law’; on the contrary, it ‘recognises the role of international law in the domain of relations between states and related problems’, and dualist courts ‘can be’ and often are ‘deferential to international sources and institutions’ (Eleftheriadis 2010, 381). Similarly, from the international law side, a dualist position ‘recognises certain legal relations remain in the exclusive power of national jurisdictions, whose laws and procedures determine certain things authoritatively’ (Eleftheriadis 2010, 384). In the result,

...the relations of municipal and international law are characterised by a mutually compatible dualism. This is made harmonious not by a supposedly

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<sup>8</sup> It is not entirely clear what is the problem with double monism. Eleftheriadis says that ‘it implies that in areas of law where the orders overlap, the same judge should look at the case both from his own perspective and the perspective of the EU legal order. And this is the main problem with this analysis. It suggests we endorse a constitutional framework and at the same not endorse it. Looked at more closely, double monism can give way to disjunctive monism’ (2010, 377). To look at a case from the perspectives of two systems is not necessarily to endorse one or the other: it seems conceivable that one can show some interpretive deference to each system in a process of mutual accommodation, thereby endorsing the limited validity of both.

<sup>9</sup> In fact, Eleftheriadis goes further and suggests that insofar as MacCormick thinks that RP imposes a moral or other political duty on the ECJ not to reach its interpretive judgements without regard to their potential impact on national constitutions, and vice versa, then ‘it prevents the judge from respecting the official monist position of his constitutional framework. It looks like an invitation to be disloyal to monism, i.e. disloyal to one’s own constitution’ (2010, 376). This strikes me as too strong: surely it is possible that one can ‘have regard’ to the impact of an interpretive judgement on another system without necessarily being disloyal to one’s own constitution. ‘Having regard’ does not seem to be as demanding as that.

higher institution imposing uniformity...but by the substantive content of the applicable rules (and I believe that this is the position that MacCormick had in mind under the mistaken label pluralism under international law). This makes it possible for the domestic constitutional doctrine to take seriously the claims of international or European law. Integrity is achieved because the international law respects in principle the claims of the constitutional order and vice versa. It is achieved through mutual deference. (Eleftheriadis 2010, 384)

At one point, Eleftheriadis characterises this approach as one in which ‘the various legal orders...are thus thoroughly merged in the best reasoning about the case’ (2010, 384), which would chime well with his call for ‘integrity’: ‘Integrity in law requires that national and European judges and officials speak, as far as possible, with the same voice according to the interpretive devices of fit and integrity’ (2010, 380). But it is not entirely clear where the ‘merger’ or the ‘same voice’ is in an approach that allows each system to only ever defer, or pay respect to, the other on its own terms – when it has determined that it is appropriate for it to do so. Certainly, dualism (seeing it here from the perspective of the domestic) may not be ‘a doctrine denying the effects of international or foreign law’ (2010, 384), but this is always on the terms of domestic law, i.e. it is ‘always the national forum’ (2010, 382) that decides whether or not international law is encroaching upon its own order. The premise here seems to be that both national and international law have clearly demarcated fields, and that all that will be required for mutual respect will be respecting ‘the field of application of the other’ (2010, 384). But of course the issue is bound to be: who gets to decide the scope of the field of application? If we could set the parameters of each field in advance, such that all that would be needed would be deference to another’s fields when they apply, there would never be any conflict. Conflict arises because we cannot agree on what is the proper field of application.

In any event – and the above analysis is no doubt too quick<sup>10</sup> – it is clear that for Eleftheriadis, the move from RP to PUIL (though without that as the label) is a promising one. If nothing else, says Eleftheriadis, MacCormick’s transition reminds us that we need to analyse the relation between European law and domestic law in the context of international law. As he puts it, ‘The project of articulating a political and legal theory of the EU must...proceed by taking the international dimension much more seriously’ (2010, 388).

The third and final group of theorists engaging with MacCormick’s transition are those who are not happy with either RP or PUIL, and that aim to find something in between or beyond. The theorists in this camp want to endorse the non-hierarchical spirit of the early position, but they want to find something more principled and more structured to regulate the heterarchical relations in question. Thus, Daniel Halberstam says that he wants to capture a form of pluralism that is:

...radical yet grounded. It is radical in the sense of lacking any overarching hierarchy or tie-breaker. And yet it is grounded in the sense of being a principled practice of contest and accommodation based in the common enterprise of interlocking systems of limited collective self-governance. In my view, this goes beyond MacCormick and the comfortable middle ground

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<sup>10</sup> Perhaps Eleftheriadis means something stronger by his ‘best reasoning about the case’, but if that is so, this is not explained clearly (indeed it is somewhat undermined) by talk of ‘mutual respect’ about each other’s ‘field of application’.

occupied by all right-minded people who are just muddling through. (Halberstam 2012, 288)

Theorists here want to build on MacCormick, sometimes finding resources within MacCormick's corpus, and sometimes from without – but what is clear is that they neither endorse RP nor PUIL. Some theorists approach this, as does Halberstam, by strengthening pluralism, and others, by softening unification.

Neil Walker's 2011 paper is a good example of a theorist finding resources within MacCormick's own corpus to carve out a space between RP and PUIL, but doing so primarily by offering a softer, more subtle account of unity. Walker offers a very helpful summary of what he calls 'MacCormick's dilemma' (others, such as Halberstam, called it 'MacCormick's puzzle' (Halberstam 2012, 288):

But to demonstrate the plurality of normative orders within the European legal space is not yet to demonstrate their pluralism. It is one thing to claim that the EU legal configuration is made up of multiple overlapping legal systems. It is quite another to show how these systems interact and cohere in a sustainable fashion. Here, then, we approach the horns of MacCormick's enduring dilemma. On the one hand, if it is mere plurality that he is portraying, then it is not clear that he is adding anything, theoretically, to our understanding of how, if at all, law sounds and connects beyond the boundaries of a particular legal order. Neither is it clear that he is adding anything, practically, to our understanding of how the particular multi-order configuration known as the EU works and sustains itself over time. On the other hand, to the extent that he is able to show us how law functions qua law beyond the boundaries of the legal order, how, if at all, can he do so without turning plurality back into a new kind of systemic unity that necessarily denies the distinctiveness and independence of the parts? (Walker 2011, 376)

Like others, some of whom we have encountered above, what Walker finds unsatisfactory about RP is the lack of 'relationship between the different constituent legal systems of the European legal configuration' (Walker 2011, 376). There are 'bridging mechanisms', but these are 'relationally contingent in their content' and 'system-specific in their basis of authority and interpretation', with the consequence that 'avoidance of conflict could not be guaranteed all the way down' (Walker 2011, 376-7).<sup>11</sup> If RP is not the answer, then neither is PUIL, for this 'invocation of a supervening international law' appears to be 'simply the way to a new form of normative unity and therefore a transcendence and so a denial of the very pluralism' that MacCormick was trying to embrace (see Walker 2011, 378-9). According to Walker, what MacCormick can be taken to be searching for, and what we ought to attempt to construct in his absence, is 'some notion of a unity of law standing beyond particular legal systems, but a unity which was not conceivable in terms of a new system to which the original legal systems would inevitably become subordinate' (Walker 2011, 379). As he puts it towards the end of his paper, this has to be 'an approach that offers something between the jurisdictional closure of legal-normative order and the anormative openness of strategic geopolitics as the elusive glue of the new pluralist transnational configuration' (Walker 2011, 383).

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<sup>11</sup> The scenario is even worse in other non-European transnational contexts, where there are no such bridging mechanisms, or cultural / political supports: see Walker 2011, 378.



In searching for such an approach, Walker considers three options, or as he puts it, three kinds of universalism: first, ‘covering-law universalism’, which would require ‘either the global recognition of a powerful strain of natural law or a robust framework of positive law’ (Walker 2011, 379); second, ‘reiterative universalism’, which would depend on the principles of legality, subsidiarity, adequate participation and accountability, public reason and rights protection (see Walker 2011, 380); or, and this is his preference, ‘methodological universalism’, which is about approaching issues in a law-like manner, but without pretensions to universalistic status.

There are a number of interesting features of this proposal by Walker. First, as noted above, Walker looks within MacCormick’s own corpus for the resources for articulating this position – and he finds it in MacCormick’s last statement on practical reason (in MacCormick 2008). Second, Walker is analogising from an ‘inter-personal level’ to an ‘inter-systemic level’ (Walker 2011, 381). And third, what Walker is constructing is a norm of reasoning, what he calls a ‘inter-systemic non-law of universalisability of justification’ (Walker 2011, 383), the most clear statement of which is that ‘if each is committed to the universalisability of its reasoning in the concrete case, and to the defence of that universal reasoning before an (implicit) audience of significant others which includes all within the relevant community of exchange, then a productive normative dynamic becomes imaginable’ (Walker 2011, 382). I do not wish to evaluate the specific proposal here, but I do wish to highlight this strategy, in particular the strategy of broadening out one’s engagement with a thinker, and his or her legacy, by drawing on what might appear, at first blush, to be sources of his or her work that deal with other, unrelated problems. For we must be slow to accuse someone who was as alert a listener to other people’s arguments and as sympathetic a reader of other people’s work (Walker 2011, 373), as MacCormick clearly was, of not providing us with sufficient resources for understanding the quality of relationships between transnational institutions or orders.

### ***1.B. Casting the Net Wider***

Walker’s strategy offers a neat bridge to this next section. In it, I want to point to the responses of some theorists to MacCormick’s work who have not focused exclusively on the above transition from RP to PUIL, but picked out other resources in MacCormick’s treatment of these and other (sometimes at first glance unrelated) problems. My aim here is not to be comprehensive: it is simply to identify some resources, picked up by other theorists, which we can incorporate into a more thorough reconstruction of the legacy of MacCormick for transnational legal theory.

One of the most interesting contemporary engagements with MacCormick’s work is that of Keith Culver’s and Michael Giudice’s. Their most comprehensive treatment of MacCormick to date can be found in their 2010 book, *Legality’s Borders*. MacCormick comes in for some criticism in this book, partly in relation to his transition from RP to PUIL – in this respect, Culver and Giudice question how MacCormick’s view is different from Kelsen’s monism, and whether he ‘successfully freed legal theory from hierarchical ways of thinking about legality, especially since it appears that his view amounts to a plurality of hierarchies’ (Culver and Giudice 2010, 71) – and partly also in terms of the object of MacCormick’s institutionalism, which according to Culver and Giudice is constrained both by focusing on ‘institutional normative orders such as the EU, which already enjoys a high degree of systematicity’ (2010, 98) and by ‘supposing the epistemological priority of state law, a highly

institutional form of legality' (2010, 99), with the consequence that MacCormick's approach may make it difficult to capture 'inchoate forms and emerging forms of legality as they emerge, for which a general jurisprudence ought to be able to account' (2010, 99).

For present purposes, it is the second of these criticisms that is of particular relevance. By carefully examining MacCormick's institutionalism, and analysing it in light of the need, so keenly felt at the transnational level, of attention to emergent social dynamics, Culver and Giudice very helpfully cast the net wider in our evaluation of MacCormick's legacy for transnational legal theory. Although I cannot hope to do justice to their analysis of MacCormick or their own theory here, two points are important to highlight.

The first is Culver and Giudice's commitment to inhabiting the perspective 'of the ordinary person in the developed world' (2010, 105). Here is how they elaborate:

Legality and legal norms certainly have a particular practical force in our ordinary person's life, but their nature and force is not well-represented by metaphors of ladders or chains of authority. Rather, a spatial metaphor seems better suited: in the complex web of norms of various kinds encountered by citizens, legal norms represent a kind of upwelling of normative force, especially forceful standards clustered around particular kinds of life events, relatively stable normative reference points in a context of constant competition amongst norms. To be sure, the distinction between legal and non-legal norms is still of interest to this perspective, but it is focused primarily on the fact of clusters of emerging, continuing, varying, and declining legality and their interaction with one another. (Culver and Giudice 2010, 105)

Culver and Giudice note that although 'a debt is owed to MacCormick's recognition of the operational nature of institutions of law as complexes of multi-norm, interactive practices', they add that 'what MacCormick leaves incomplete is an account of how legal institutions combine to produce the complex institutional formations our ordinary citizen encounters in the globalising world of the 21<sup>st</sup> century' (2010, 124). My guess is that MacCormick would have been sympathetic to the perspective adopted by Culver and Giudice. In his later development of his institutional theory, MacCormick emphasises what he calls 'the primacy of norm-users', and although his point is to limit the tendency to prioritise norm-giving and norm-making in legal theory, the perspective of the norm-user is one he would have recognised as fundamental to any legal theoretical project.

The second point is one that also makes an appearance in the quote above, namely Culver and Giudice's sensitivity to the temporal dimension of (transnational) legality. This also happens to be one of most persistent complaints raised by Culver and Giudice against MacCormick's institutionalism. Their criticism is based, in large part, on Gerald Postema's (2004) argument that MacCormick 'understands the life of legal system as a set of continuous instances of momentary validity, with each "moment" guaranteed by the fact that it is rooted in the practice of official recognition', and that, as a result, what he misses is the kind of normative coherence that occurs over time (see Culver and Giudice 2010, 109). Accordingly, Culver and Giudice argue that 'More must be done to explain how legal institutions relate to one another in a legal order, and in that relation constitute an identity *over time*, discernibly different from adjacent and distant separate legal and non-legal orders and

institutions’ (Culver and Giudice 2010, 123; emphasis added). In this respect, MacCormick’s institutional theory of law ‘is certainly on the right track in identifying the operational nature of law as a plurality of norm-subjects engage one another in solving co-ordination problems, using law to support and advance moral goals’, but the approach ‘stops short of the fuller account needed to take seriously the role of clusters, orders, and even systems of legal institutions in protecting norm-subject’s expectations over time’ (2010, 123). We need, they say, a ‘narrative concept of law’ (2010, 110) – one that tracks patterns of ‘continued mutual reference’ in varying degrees of intensity (some evolving, some devolving and decaying) amongst a variety of institutional actors (again, with varying degrees of institutionalisation).

Culver and Giudice are right to raise the issue of how to conceive of the temporal dimension, particularly in the context of an institutional theory of law.<sup>12</sup> Further, their own approach – especially insofar as it builds in sensitivity to a variety of variables (including degrees of intensity, degrees of institutionalisation) – is both important and original. If the institutional theory of law is to have a future in the realm of the transnational, it must surely build on their efforts to take temporality seriously. What I would wish to add here is that this would have been welcome news to MacCormick, and to other institutional legal theorists. Culver and Giudice are not unaware of this – they cite, for example, a wonderful quote, which I cannot resist repeating, from Peter Morton’s reminder, in his own *An Institutional Theory of Law* (1998), of the pervasiveness of change in the world of institutions:

...the most striking feature of [the institutional] world is its state of continuous change. In the world of social interaction nothing stands still; new activities emerge as new techniques are developed and new inventions are made; old activities die out or are merged with others; practices are rendered obsolete; new procedures emerge or are instituted; relationships between agencies are renegotiated; and so forth. All objects in this world are, in differing ways, vulnerable to incremental change or subject to deliberate destruction and reform. The vocabulary of the types of changes in this Heraclitean world makes the vocabulary of geomorphological or biological change seem poverty-stricken. (See Morton 1998, 4; quoted in Culver and Giudice 2010, 140)

They also mention the issue, which came up in several commentaries<sup>13</sup> on MacCormick’s early institutionalism, of how to conceive of the creation of institutional facts.<sup>14</sup> My point here is simple: MacCormick was sensitive to temporality, much more sensitive than Postema takes him to be.<sup>15</sup> There are many illustrations of this, including not only the problems surrounding the creation of institutional facts, but also the transition from informal to formal speech acts (see MacCormick and Bankowski 1986), from normative order to institutional normative

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<sup>12</sup> They are surely right, too, that ‘sensitivity to law’s temporally dynamic nature becomes important to adequate explanation of the EU legal order’ (Culver and Giudice 2012, 75).

<sup>13</sup> Arnold 1979; Atria 2002; Bankowski 1989, and others.

<sup>14</sup> See Culver and Giudice 2010, 107, where they say that MacCormick recognises ‘that legal institutions and their constituent practices are in a sense parasitic upon social institutions whose ontological and practical status as social institutions is logically prior their emergence as legal institutions’.

<sup>15</sup> In this, and in other instances, Postema lumps MacCormick much too quickly along with Hart. Notice, for instance, Postema’s reading of MacCormick in his history of *Legal Philosophy in the Twentieth Century* (2011) as but an extension of Hartian positivism (see 341-348).

order, and from heteronomy to autonomy at the level of individual moral development. ‘Genetic’ explanations of phenomena were one of MacCormick’s favourite kinds of explanations – and thus read more expansively, there are resources within his own oeuvre for (re)constructing the temporal dimension of the institutional theory of law.<sup>16</sup>

Zooming out for a moment, Culver and Giudice make it clear that insofar as we want to build on MacCormick’s institutionalism when theorising about transnational legality, we need to: 1) dig deeper and clarify the temporal dimension of the institutional theory of law; 2) get a clearer grasp of the different senses of ‘institution’, including ‘institutionalisation’, at work in MacCormick’s writings;<sup>17</sup> and 3) locate this reconstruction of MacCormick’s institutionalism in a broader intellectual history of other institutional theories.<sup>18</sup>

Before completing this section, and also this part of the paper, it is important to notice that there are a number of other potentially useful resources (for transnational legal theory) in MacCormick’s oeuvre – these having been picked up by other commentators, perhaps especially to MacCormick’s *Questioning Sovereignty* (1999). The most striking of these is MacCormick’s recourse to the concept of a ‘commonwealth’. As far as I can tell, the first scholar to highlight MacCormick’s use of this concept was Hans Lindahl, in a paper (1998) that responded to MacCormick’s ‘Democracy, Subsidiarity and Citizenship in the European Commonwealth’ (1997). For Lindahl, it was in particular ‘the idea of commonwealth’ which ‘promises to liberate legal theory from the conceptual straightjacket imposed by the state and state sovereignty’ (1998, 482). Later, in 2001, Lindahl returned to the idea of a commonwealth, saying of it that it ‘opens up the possibility of understanding a polity as a legal and political order, yet without falling prey to the basic stratagem of the doctrine of sovereign statehood’ (2001, 173). In particular, MacCormick’s use of the notion of commonwealth signified a break ‘with the centralisation and concentration of power typical of sovereign statehood’ and went ‘hand in hand theoretical and practical efforts to re-imagine collective self-government’ (Lindahl 2001, 176). Crucial here are the ideas of ‘1) pluralistic democracy; 2) national self-determination; and 3) a politics of negotiation’ (Lindahl 2001, 168). The kind of pluralism embraced by the idea of a commonwealth ‘endorses what might be called a politics of negotiation and dialogue, which strives to maximise voluntary co-operation’ (Lindahl 2001, 170). The problem with sovereignty, which the promotion of the idea of a commonwealth is designed to highlight, is ‘nothing less than the problem concerning

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<sup>16</sup> They were also types of explanations commonly found amongst the philosophers of the Scottish Enlightenment, a point I will return to.

<sup>17</sup> This was not something MacCormick was not aware of, and indeed, he sometimes used the fertility of possible meanings for certain purposes, as when, in his 1973 Inaugural Lecture, his insistence that law was institutional in two senses, one philosophical and the other sociological, was part and parcel of an attempt to show that both disciplines were vital for our understanding of law. I come back to this below.

<sup>18</sup> Although I cannot do this here, what this means is drawing in part on those MacCormick himself identified as relevant, perhaps especially Otto van Gierke, and others he arguably neglected, such as Santi Romano. Gierke would be a great starting point here, also given the links between his thinking and that of the early English pluralists, especially FW Maitland. As William Ewald (1998) pointed out in a comment on MacCormick, it is no surprise that both Gierke and Maitland were mediaevalists – there is a great deal that contemporary transnational legal theory can learn from the legal pluralism in place in mediaeval times. For a collection of the English pluralists, see Hirst 1993; and for a recent historical treatment of legal pluralism, with particular attention to 1500-1850, see Benton and Ross 2013. For attempts to place MacCormick’s theory in the context of other institutional theories, see Croce and Salvatore 2007; Croce 2011; and now La Torre 2013.

the possibility of the “self-constitution of a community” and of the individual as a member of the community’ (Lindahl 2001, 176). As Lindahl puts it, connecting it to MacCormick’s general jurisprudence, what MacCormick is building up here is a ‘genetic account of democratic legal order’ (Lindahl 2001, 177), one that tries to decrease the gap between legality and those that the law affects (its users). The notion of the commonwealth, then, brings to the fore the theme of the diffusion of power, but also, and crucially, helps us to see the link between that distrust of power and MacCormick’s theorising of both individual and communal autonomy, including nationalism. Further, as I shall repeat later, it is no coincidence that MacCormick’s use of the very idea of a commonwealth was inspired by a Scottish thinker – David Hume. The Scottishness of the entire approach shines through very clearly.

Lindahl was not the only scholar to pick up on MacCormick’s use of the concept of a commonwealth. Ian Ward, reviewing *Questioning Sovereignty* (1999), said that ‘one of the most challenging [concepts in the book] is the notion of ‘commonwealth’ (Ward 2000, 79). It is worth quoting more of Ward’s assessment:

MacCormick suggests that the reconfiguration of Europe may best be seen as a ‘commonwealth’, and founds his thesis on the idea of a ‘perfect’ commonwealth articulated by David Hume. The idea of a commonwealth necessarily engages the political imagination; it speaks of zeal, and a belonging that is more than passive. The idea of active political participation is central. MacCormick makes much of ‘popular self-management’, and in doing so echoes a number of communitarian theses which have likewise attempted to marry self-government and participatory democracy. Good government, he repeatedly affirms, is self-government. It is no coincidence that so many communitarians, most obviously perhaps Michael Walzer and Michael Sandel, also found their theories of regenerated democracy in classical ideas of ‘commonwealth’. (Ward 2000, 79)

There is clearly here a body of work that can be turned to in (re)constructing the intellectual history of the idea of a commonwealth. It is good to remember, as Ward urges us to, that the idea is also one that surfaces in the English tradition, though it is interesting to observe that it was often used there – for instance via the notion of a ‘commonwealth of commonwealths’ – as a concept ‘consciously deployed by those who effected the real centralisation of the English, and then British, state in the 16<sup>th</sup> to 18<sup>th</sup> centuries’ (Ward 2000, 79). In that sense, it is no surprise that MacCormick focuses on the Scottish tradition.

The use of the notion of a commonwealth is connected to various other ideas, also referred to, indeed extensively so, by MacCormick, such as the idea of subsidiarity. For Joxerramon Bengoetxea, a former doctoral student of MacCormick’s and himself an important contributor to institutional legal theory at a transnational level (see Bengoetxea 1993), this idea of subsidiarity lies at the foundation of MacCormick’s ‘social-democratic liberal nationalism’, together with its commitment to the ‘proximity to the people and respect for the distinctiveness of collective civic institutions, legal and other traditions, and culture...[and] respect for persons as autonomous, self-determined contextual individuals’, including their capacity for sharing voluntary allegiance to certain civic institutions (see Bengoetxea 2011, 247). What is crucial here, as Bengoetxea recognises, is ‘a shift of focus...from hard conceptions which stress power, independence and non-interference from other powers, to softer or lighter conceptions based upon co-decision-making capacity in a

connected world of interdependence' (Bengoetxea 2011, 246). This is a shift, needless to say, from the concentration to the diffusion of power.

## **II. Reconstructing the Legacy**

In this second part of the paper, I aim to offer some hints for the reconstruction of MacCormick's legacy for transnational legal theory. I do so in three steps: first, I look at MacCormick's own interpretations of the Scottish thinkers he kept returning to, and consider what he found valuable to retain from their work – in particular, the commitment he draws from them to the diffusion of power; second, I build on that in re-telling, in very broad brushstrokes, the story of his general jurisprudence; and, third, I make some tentative (and embarrassingly brief) suggestions as to the importance of this reconstruction for transnational legal theory.

### ***II.A. A Note on the Transition from RP to PUIL***

Before launching into this sketchy reconstruction, let me make one comment about MacCormick's above-discussed transition from RP to PUIL. I have already made a plea to 'cast the net wider' and not focus our efforts on reconstructing MacCormick's legacy for transnational legal theory on this transition. To provide an extra motivation for this, let me repeat what Krisch (2011) noticed, namely, that MacCormick's invocation of PUIL was, at least in large part, a response to what he saw as an alarming application of his RP to the EU. As noted above, the application in question was Phelan's argument that sought to give, as MacCormick put it, 'unbounded discretion to state courts in permitting, for the sake of the domestic constitution, limitation of the local effectiveness of Community law' (MacCormick 1999, 120). This was precisely the kind of approach that MacCormick had been resisting with his original RP, so to find it used in this way must have come as a rather nasty shock. In looking around for what resource might be found to counter this application, and thus something that would pull states back in to a self-avowedly non-hierarchical relation with European institutions, MacCormick fastened onto international law. In other words, I think it is fair to read MacCormick as adding to his conception of RP the element of international law in order not to make the kind of move that Phelan was making impossible. Certainly, in adding it, he does not merely make it 'a further non-hierarchical interacting system' (MacCormick 1999, 118). Instead, he argues that we ought to see the co-ordinate, non-hierarchical relationship between Member States and the European Union as authorised and conditioned by international law: according to PUIL, he says, 'the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems' (MacCormick 1999, 118). But, overall, it seems reasonable to assert that MacCormick is using international law to discipline Member States: 'it is a clear mutual international obligation of states', he argues, 'not to fragment the Community by unilateral decisions either judicial or legislative (or, for that matter, executive)' (MacCormick 1999, 120). Why is that so? Well, because of 'the origin of the Community in Treaties and the continuing normative significance of *pacta sunt servanda*, to say nothing of the fact that in respect of their Community membership

and otherwise the states owe each other obligations under international law' (MacCormick 1999, 120).

MacCormick is of course aware that European Union law sees itself as distinct from international law. He says that 'Community law is self-interpreted as being something other than a mere regional subset of norms of international law. And unless this were to be shown untenable or absurd, a theoretical account of the totality of juridical relationships in Europe should seek to accommodate it' (MacCormick 1999, 118). The same goes for Member States. The picture he wants to build is one in which international law functions to hold in check the claims of either the EU or the Member States to some kind of supremacy – something that would forestall the kind of non-hierarchical, co-ordinate relationship that he believes is needed. At all times, international law is being used to balance and distribute power amongst the institutions of both the Member States and the EU:

...state Courts have no right to assume an absolute superiority of state constitution over international good order, including the European dimensions of that good order. This is not the same as saying that they must simply defer to whatever the ECJ considers to be mandated by the European constitution. For its reading of that constitution and the state Court's reading of its own constitution ought both to have regard to the international obligations which still subsist notwithstanding, or indeed because of, the fact that Community law is a 'new legal order sui generis'. (MacCormick 1999, 121)

But Phelan's position practically forces him to play his cards forcefully – indeed so forcefully as to characterise his own position as 'a monistic framework' (MacCormick 1999, 117). It is true that in addition to holding the Member States and the European Union in check, MacCormick suggests that international law can also serve as a resource for resolving conflicts – even to the extent that 'in the event of an apparently irresolvable conflict arising between one or more national courts and the ECJ, there would always on this thesis be a possibility of recourse to international arbitration or adjudication to resolve the matter' (MacCormick 1999, 121). Many, as we have seen above, have found these moves to be problematic, and also unrealistic.<sup>19</sup> My plea would be that we see them in light of the overall purpose of the discussion in which these statements take place, i.e. primarily an attempt to show why and how Member States, and their courts, ought not make claims to supremacy, risking the fragmentation and demotion of European law.

But we can also take a further step back – back to the 1993 article, 'Beyond the Sovereign State', which launched this line of inquiry. There, MacCormick asked us to notice that it was possible to take seriously the perspectives of both the Member States and the European Union. His primary purpose, as I see it, was just that: to create the theoretical space for both viewpoints, refusing to accept that it was necessary to see either one or the other as superior or supreme. MacCormick certainly used the language of pluralism to characterise what he was doing, but perhaps the better term is 'diffusionism'. The attack on the 'monocular' perspectives of various theorists can then be read as part of a more fundamental distaste of theories favouring centralisation and concentration of power. Diffusionism, as I have hinted at above, is

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<sup>19</sup> See also Miguel Maduro, who argues that 'it is not clear how international law could give an appropriate and satisfactory legal solution to a potential conflict between the EU and a Member State' (2003, 533).

less a claim about the state of (legal) affairs, and more a temperament or trait of character – at its strongest, perhaps, a research direction or agenda. And it is one which I think emerged clearly in the following moving passage from that paper:

Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap? If this is possible practically as it clearly is conceptually, it would involve a diffusion of political power centres as well as of legal authorities. It would depend on a high degree of relatively willing co-operation and a relatively low degree of coercion in its direct and naked forms. It would create space for a real and serious debate about the demands of subsidiarity. (MacCormick 1993, 17)

There is, in this passage, a broader, far-reaching vision than simply one of describing the co-existence of two legal orders in Europe. It is a vision that we ought to, and can, respect and further flesh out by taking into account a greater range of both MacCormick's inspirations and his contributions to scholarship.

## ***II.B. MacCormick amongst the Scots***

The first step in the reconstruction of the above-mentioned vision, but also MacCormick's legacy as a whole, ought to be the intellectual tradition from which MacCormick gained so much nourishment, namely the Scottish Enlightenment heritage, and its rare and wonderful mix of moral, legal and political philosophy, sociology and history. It is time, then, to switch tracks, and move from reading MacCormick's readers to reading those who MacCormick read. Of course, this paper is not the time and place for a full review of these sources: my aim is simply to whet the appetite, and show how consistently important they were for MacCormick, and thus how vital it is to engage with them when reconstructing his legacy.<sup>20</sup>

MacCormick's earliest writings engage with Scottish thinkers. Even his very first published article, 'Can *Stare Decisis* be Abolished?' (1966), which ostensibly deals with the-then fresh decision of the House of Lords that they would no longer apply the strict rules of *stare decisis* to their own past judgements, drew both on the practice of the Scottish Court of Session as well as on what MacCormick called 'the rationale of the force of judicial decisions...given by the Scottish Institutionalists' (MacCormick 1966, 202). One of his last articles was entitled: 'Stair and the Natural Law Tradition: Still Relevant?' (2009), the focus of which is obvious enough, and indeed rounds off nicely an almost-40 year effort (beginning with 'Ius Quaesitum Tertio: Stair v Dunedin', in 1970) reminding readers of legal theory and legal scholarship of the importance of James Dalrymple, First Viscount of (and later simply Lord) Stair. And all in between, in every decade, MacCormick makes valuable contributions to our appreciation of the Scottish tradition, with everything from tracing the influence of the Scottish Enlightenment (including Fletcher, Ferguson,

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<sup>20</sup> See also Neil Walker's collection, *MacCormick's Scotland* (2012). My own contribution (Del Mar 2012), which offers a full bibliography of MacCormick's works, also contains a bibliographical essay on Scottish sources and themes in his writings.



Smith and Hume) on the United States Constitution,<sup>21</sup> to using Adam Smith's device of the impartial spectator to modify Kant's categorical imperative and set up an arguably more realistic, more earthy, and ultimately more human account of moral cognition (in MacCormick 2008).

The breadth of MacCormick's reading here ought to also be noted: certainly, Stair, Hume and Smith feature prominently, but MacCormick also pays attention to, in addition to those mentioned above, the jurists, such as John Erskine, Lord Bankton, Lord Kames, and John Millar, and the philosophers, Francis Hutcheson, Thomas Reid, and Dugald Stewart. He was also very much aware of the history of scholars who had previously held his chair – the Chair of Public Law, and the Law of Nature and Nations at the University of Edinburgh – though, equally, he did not shy away from honestly evaluating their contributions (see 'On Public Law and the Law of Nature and Nations', 2007). Part of this was the result of his co-teaching – together with Hector MacQueen – a course on the Legal Theory of the Scottish Enlightenment – but part of it was also his own personal 'addiction' (as he once confessed)<sup>22</sup> of the writings of many of these figures, perhaps especially Hume.

Indeed, Hume deserves to be singled out from this distinguished crowd. MacCormick is all too often characterised as a Hartian, or more generously, as someone who was once an all-out Hartian, and then (and increasingly) had second thoughts. MacCormick was himself somewhat responsible for this, occasionally characterising his own career as 'pre-Hart, Hart and post-Hart'.<sup>23</sup> But I think he is better thought of – if he must be associated with another thinker – as Humean. This is all the more helpful in that MacCormick often disagreed with Hume: indeed, an argument could be made that a good deal of MacCormick's corpus can be seen as a dialogue with Hume.<sup>24</sup> But the disagreements, no matter how fertile, should not hide from view the similarities and resonances between the two. Let me elaborate briefly on some of those, including substantive, stylistic and temperamental.

Beginning with the temperamental, and just to give a taste of this, consider the following statement from Knud Haakonssen in his introduction to Hume's *Political Essays*:

...one of the most provocative aspects of Hume's political writings was his ability to find something to be said on both sides of most public questions, that is, to identify something to talk about. He juxtaposed opposing standpoints, often in semi-dialogue form, in order to make this explicit. Similarly he imitated ancient models of character drawing in order to convey the

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<sup>21</sup> See 'Republicanism and Enlightenment Thought' (1992).

<sup>22</sup> See 'Does Law Really Matter?', 2006, 19. Another phrase that MacCormick used in connection with Hume was that he was 'a star-struck fan' of Hume: MacCormick 2006, 9. It ought to be remembered that MacCormick was an Honorary Vice-President of the David Hume Institute (<http://www.davidhumeinstitute.com>) and included in their book commemorating their 25<sup>th</sup> anniversary (the excerpt included is from MacCormick's *Legal Reasoning and Legal Theory*, 1978).

<sup>23</sup> See his contribution to *Legal Philosophy: 5 Questions* (2007).

<sup>24</sup> For instance, offering a respectful answer to Hume's scepticism about the role of reason in human affairs – respectful because limited: yes, there was a role for reason, but this role had its limits. The pursuit of this challenge is evident from both *Legal Reasoning and Legal Theory*, 1978 through to *Practical Reason in Law and Morality*, 2008, and much else in between. MacCormick also sought to other challenges posed by Hume, for example consider MacCormick's argument, pace Hume, for the compatibility of the rule of law and social welfare in the first chapter of *Legal Right and Social Democracy* (1982).

complexity of political personalities and thus get away from one-sided panegyric and denunciation. (Haakonssen 1994, xviii)

A reader of MacCormick will recognise this feature as one that pervades MacCormick's work: I have already mentioned the marrying up of Smith and Kant in MacCormick's *Smithian Categorical Imperative* (2008), but there are many other examples, e.g. MacCormick's attempt to learn from both, while not adopting either, the Hayekian right and the Marxist left in his *Legal Right and Social Democracy* (1982). The same characteristic is on show in MacCormick's reviews of the works of others, or even in his general responsiveness to the views of those he did not share: there was always something one could learn, no matter how much disagreed.<sup>25</sup>

Another resonance is in the descriptive interest in genetic explanations of phenomena, as well the normative endorsement of gradualism – both of which are evidently present in Hume. The idea of the social (conventional) roots of property and money, and ultimately also law, are present from the beginning in Hume – certainly, in the *Treatise*, one hears Hume speak of how the stability of possession 'arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it', or as Stein paraphrases it, 'the gradual way in which men by force of habit come to accept certain conventions about property, which are justified by their utility in that particular society' (see Stein 1980, 14). Or, consider this as an explanation of Hume's theory of the emergence of law:

We have first an *emotion* of approval or disapproval in a *particular* case; second, a *judgment* of approval or disapproval constituting a generalization as to the desirability of cases of this type; third, *folkways, mores, and usages*, informal non-institutionalized embodiments of previously formed judgments of approval or disapproval, but generally understood and commonly accepted as applying to all cases of this general class; finally, accepted *institutions*, culminating in *law*, the formal crystallization of the previously formed judgments of approval or disapproval, into *express statutes*, with definite penalties for violation. (Cairns, *Legal Philosophy from Plato to Hegel*, 1949, 379-80)

Hume, of course, was by no means alone in this interest, and manner of explaining law: arguably, the strategy can be traced back to Montesquieu, and then subsequently his enthusiastic adoption in Scotland, in large part thanks to via the gregarious figure of Henry Home, Lord Kames. Stein refers colourfully to 'Kames and his Salon', saying of it that the kind of work it encouraged was precisely 'the philosophical history of legal institutions' (see Stein 1980, 30). Lord Kames', and then Hume's, mantle, was carried by Smith, who 'had assimilated the teaching of Hume on the gradual development of conventions concerning property, and of Montesquieu concerning the relations of law to the particular circumstances of society' (Stein 1980, 30).<sup>26</sup> Going back to the above passage describing Hume's theory of the emergence of

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<sup>25</sup> These matters of character – one could say, MacCormick's ethics of reading – have of course been noted by others: just to give one example, see Walker 2011.

<sup>26</sup> Hume needless to add was an accomplished historian – indeed, in his life time he was more famous as a historian than as a philosopher. There are different models of history at play in the Scottish Enlightenment – there is the philosophical history we tend to associate with Montesquieu and his 'four stages', and there is Hume's history of England, to mention but two. It would be fascinating to delve more deeply into the models and methods of historiography, and more broadly the uses to which

law, there is certainly more than a hint in it as to how we could combine various elements of MacCormick's corpus of work so as to form one coherent story, beginning with a portrait of the practical reason (including its affective dimension) of a norm-user, right through to the institutionalisation of the normative orders in which that norm-user participates in (indeed, I will attempt to flesh out this hint in the next section).

More substantively, it is interesting that whenever MacCormick spoke about the intellectual history of legal theory, especially about positivism, he was careful to place Hume, rather than Bentham, at its fountainhead (see MacCormick 1981).<sup>27</sup> Of course, he realised that Bentham was influenced by Hume – indeed, he drew a line from Hume through to Bentham, Austin, Dicey and Hart, as well as from Hume to Hagerstrom, Lundstedt, Olivecrona and Ross (see MacCormick 1981, 100). But he was always very keen to remind us of the 'pre-Benthamite' era.<sup>28</sup> More strongly, he once said that it might be best 'intellectually interring our Austin and metaphorically burying our Bentham' (at least temporarily) (see MacCormick 1983, 22). The reason for this is not difficult to find: where Hume's sensibilities are diffusionist, Bentham's and Austin's are 'sovereignist': '...it is easy to see', MacCormick says, 'Benthamite constitutionalism as the mainspring of the sovereignist tendency, or certainly one of its most powerful buttresses. The insistence is that, while power may be delegated in various directions, it remains and ought to be secured as essentially unitary and central' (MacCormick, 'Might and Right', 1998, 50). It is clear from MacCormick's work that he positions his own institutionalist theory in opposition to the sovereignist tendency he sees exemplified in Bentham and Austin, reaching back to Hobbes (but not, in this respect, Hume!):

...the institutionalist way of looking at legal and political order opens up possibilities about pluralism. It makes possible, though not necessary, a degree

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history was put, in the Scottish Enlightenment. Indeed, MacCormick lamented the neglect of this aspect of the Scottish Enlightenment: he said, for instance, in an early paper on 'Smith on Law' (1980-1) that 'the attempts of the Scottish moralists to account for the historical development of legal orders within theories of economy and society has been altogether too much neglected since then' (243), and about Smith in particular, MacCormick observed, with enthusiasm, that Smith 'combined, as the basic elements of the economy of different forms of human society, a theory of natural rights with a theory of the social development of laws and legal institutions' (245). MacCormick continued to stress this aspect of the Scottish Enlightenment throughout his career, e.g. referring to the 'broadly evolutionary theory of law-in-society' of Scottish thinkers, singling out Hume, Smith and Millar (MacCormick 2007, 153).

<sup>27</sup> It is interesting that there is little engagement in MacCormick's corpus with Hobbes – after all, Hobbes also uses the term 'commonwealth'. Of course, Hobbes's commonwealth is very different to Hume's – where Hume's is shot through with the diffusion of power, Hobbes's is very much in favour of its centralisation and concentration. As Berns puts it: 'A commonwealth [for Hobbes] must be constituted as one legal person by a great multitude of men, each of whom covenants with all the others to regard the will of this legal, civil, or artificial person as his own will. This legal person, the sovereign, 'is' the commonwealth. In practical terms this means that every subject should regard all actions of the sovereign power as actions of his own, all legislation by the sovereign as his own self-legislation': Berns in Strauss and Cropsey, eds. *History of Political Philosophy*, 1987, 404-5). This is almost the negation of subsidiarity and self-government at many levels. Whether this is a fair assessment of Hobbes is of course another matter. No doubt, if he looked closer, MacCormick would have found more to learn from Hobbes, e.g. consider the fact that in the *Leviathan*, chapters 13 to 15, Hobbes starts not from the top down with a definition of law but from the bottom up with a psychology of the person in social interactions (see Hardin). Thus there might have been some resonances at a methodological level.

<sup>28</sup> See, for example, his 'Dworkin as Pre-Benthamite' (1978).

of opposition to traditional centralising theories about sovereignty, its absoluteness, and its essential quality for securely established law. In place, we can put ideas about subsidiarity, negotiation, balance between different forms and levels of government and self-government. This is not necessarily an easy way of looking at law, or of running a society. The problems about societal insecurity that lie at the heart of Hobbes's vision of the human condition, and that continue to animate Bentham and Austin, are real problems. The diffusionist picture is a happy one from many points of view, but its proponents must show that the Hobbesian problems can be handled even without strong central authorities, last-resort sovereigns for all purposes. (MacCormick, 'Might and Right', 1998, 62)<sup>29</sup>

Typically, MacCormick still tries to learn from those he disagrees – here, Hobbes, Bentham and Austin. But his sympathies are clear: where Bentham & Co are sovereigntist in their tendency, he – like Hume – is a diffusionist (with apologies for the length of the quote):

The diffusionist tendency can be read more boldly as pointing towards something altogether less monolithic than the Benthamite conception either of law or of constitution. It points towards acknowledging a plurality of interlocking sets of standards of right and wrong, operated by different authorities in different spheres of responsibility. These spheres of responsibility engage in some cases larger, in some cases smaller, participant populations to take part in one or another scheme of collective self-government. Perhaps it is not, or will over time prove not to be, necessary to have or to assert a single all-purpose supreme authority. Certainly, if there were none, the situation emerging would require careful management at all levels to avoid deadlock or damaging conflict among rival authorities. Each level would need to respect the sphere of competence of every other, and there would have to be ongoing dialogue to secure common understanding of the scope and limits of various authorities. A diffusion of legal theory would entail a parallel diffusion of political power. Those who hold power at particular levels or for particular purposes would be likely to find themselves subject to checks and controls on their action that emanate from different authorities, [53] and are not amenable to change by processes in the power of those controlled by them. To cope intellectually with such developments would require a legal theory that is pluralistic rather than a monistic in its approach to legal and political order... (MacCormick, 'Might and Right', 1998, 54)

There is a striking parallel to be drawn between this passage and the way in which MacCormick draws on Hume's essay, 'On the Idea of a Perfect Commonwealth'. MacCormick engaged with this essay explicitly in an address to the David Hume Institute in 2006, arguing that there was much to learn from Hume's notion of a commonwealth in our efforts to understand and improve contemporary Europe. As MacCormick saw it, Hume's essay was concerned with how best to tame democracy – Hume 'favoured democratic government', hence his use of the term 'commonwealth',

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<sup>29</sup> Dicey was also often treated in this vein, e.g. 'With Bentham and Austin, and with Dicey's apotheosis of the dubious doctrine of Parliamentary sovereignty, the 10<sup>th</sup> century in Britain marked the near total triumph of juridical voluntarism': see 'Future of Legal Systems', 1990, 15.

which in the 18<sup>th</sup> century ‘meant a democratic polity as distinct from a tyranny or a constitutional monarchy or an aristocracy or oligarchy’ (MacCormick 2006, 2). But Hume also acknowledged that democracy was a ‘problematic form of government’ (MacCormick 2006, 2), and he set about providing a model, based perhaps surprisingly on the organisation of the Kirk (Church) in Scotland, that would bring governance to the people while avoiding the dangers of mob rule. The details of Hume’s scheme are not important here – essentially, he advised that we ‘Divide the people into many separate bodies and then they may debate with safety and every inconvenience seems to be prevented’ (Hume quoted in MacCormick 2006, 13) – but what is interesting is what MacCormick saw in it and how he applied it to contemporary concerns.

One feature of Hume’s approach that MacCormick singled out was that, as a result of breaking up the polity into many bodies (and requiring proposals for legislation to be sent between the senate and this diffuse assembly of the people), government was decidedly slower. MacCormick saw this as a virtue: ‘This is a kind of government’, he said, ‘which can’t be hurried into rapid and rash decisions... effective democratic government is inefficient – it is deliberately inefficient’ (MacCormick 2006, 16). Further, democracy, as envisaged by Hume, and endorsed by MacCormick, is a ‘complexification device. Democracy demands that even what seems obvious to nearly everybody must be discussed before it is enacted’ (MacCormick 2006, 16). Summing up, MacCormick concluded that ‘If you believe in democracy, you necessarily believe in complex and often slow decision-making in government’ (2006, 17).

Interestingly, though broken up, in Hume’s scheme the people all contributed to a common decision. Put more clearly, democracy, as Hume saw it, was easier in a bigger polity: ‘Take a large country’, said MacCormick paraphrasing Hume, ‘where people live in places far distant from each other, and you can establish an appropriately structured republic. Distance and diversity will render it free from the evils of faction and from any opportunity for excessive influence by demagogues’ (MacCormick 2006, 18). And later, similarly:

Distant and remote parts may not share any particularly strong anterior sense of cultural or social community with others equally distant and remote. Yet all can contribute to a common decision making process, provided they are brought into a broadly fair balance. A sense of community or of ‘peoplehood’ is more likely to be a consequence of participating together in a common enterprise of democratic self-government than a necessary precondition for establishing such a process. (MacCormick 2006, 28)<sup>30</sup>

It may not come as a surprise that MacCormick thought this model could be applied successfully in Europe. ‘It was vital’, MacCormick argued, ‘that in some sense the EU becomes better connected to the European people’ (MacCormick 2006, 10). How was this to be achieved? Well, Hume’s model provides an answer – the manner in which it can be realised in Europe is via ‘subsidiarity’, including the specific proposal for its

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<sup>30</sup> MacCormick added (2006, 18) that this aspect of Hume’s account must have influenced Madison, Hamilton, Jay and other Federalists in the US in the late 18<sup>th</sup> century. I am not suggesting MacCormick would always endorse this aspect of Hume’s essay – just that it was convenient in the context of his applying it to the EU.

enhancement in the *Draft Constitution for Europe*.<sup>31</sup> As he puts it explicitly, ‘The subsidiarity proposal in the Constitution...more or less replicates the Humean idea of passing a proposal back down the line’ (MacCormick 2006, 27). By no means does this mean attempting to ‘create a single cohesive sense of collective popular “selfhood” on a European scale’ (MacCormick 2006, 28) – to the contrary:

Subsidiarity for ever! What emerges will not be the decision of an imagined ‘demos’ which doesn’t exist. But democracy does not mean rule by a single personified demos, Volk, or the people. It means a system of rule in which everybody affected gets a say on broadly equal terms in circumstances of fair and broadly equal opportunities of political participation. (MacCormick 2006, 29)

There were others in the canon of Scottish thought that could be drawn on to further flesh out the importance of active political participation, and notably in a thoroughly diffusionist spirit. Thus, for instance, Andrew Fletcher could be enlisted to argue that the liberty of a community depended on its capacity to take political initiative. For Fletcher, this meant political communities needed to be kept ‘manageably small’, so as ‘to build a regard for the public good upon the sense of loyalty to community, which the ancient tradition of small polities fosters’ (MacCormick 2004, 101). This was obviously connected to Fletcher’s opposition to union between Scotland and England, his view being that such a union ‘would remove from Scotland all independence of political initiative, depriving it of that theatre of representative politics in which, he considered, civic virtue and the opportunity for dedication to the public good of one’s community can alone be realised’ (MacCormick 2006, 100). This was clearly a view MacCormick was sympathetic to – arguing as he did, so forcefully, from early on in his career (e.g. see MacCormick 2007) for a Parliament for Scotland (quite separately from any ambition for independence).<sup>32</sup>

While Fletcher was a pioneer, it was Adam Ferguson who is, according to MacCormick, ‘the classic representative’ of the ‘theory of smallness as favourable to liberty’ (MacCormick 2004, 102). Ferguson, who drew heavily on the Greek and Italian civic republics of antiquity, stressed that it was the links, fostered by those republics, between the individual and community, that encouraged the formation of personal and communal virtues, and that enabled citizens to make ‘independent contributions to the commonweal out of their own commitment to it and their own judgement of what is required’ (MacCormick 2004, 102). It is important to underscore here that the community in question is not envisaged as a homogeneous one, where everyone agrees on the best way forward. Quite the contrary (here paraphrasing Ferguson, with approval):

The good emerges not from bland consensus but, like truth, from the vigorous dissensus of passionate debate. The end should not be the extinguishment of faction but the securing of pluralism and overall equilibrium among factions.

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<sup>31</sup> MacCormick was a member of the Convention on the Future of Europe, which was responsible for drafting the Constitution.

<sup>32</sup> Consider the following from his introduction to that collection on *The Scottish Debate* (1970): ‘Despite being unconvinced that independence would be the best course for Scotland or for the rest of Britain, I am a member of the Scottish National Party, since it seems to me abundantly clear that neither of the two large parties is likely to take the smallest step towards any worthwhile form of self-government for Scotland...’ (2).

It is from the tension among vigorously held and hard-won contentions that a real conception of and regard for public good emerges. Such a spirit is also essential to the preservation of individual and political liberty. (MacCormick 2004, 102)

Dissensus, then, in circumstances of diffusion – a worthy heritage indeed, and one MacCormick never tired of recalling.

I have, of course, barely scratched the surface here of what MacCormick drew from his Scottish predecessors. To mention but one more idea, with an eye to the next section, the notion of civility or civil society, which looms large in MacCormick's institutionalism (especially in his *Institutions of Law*, 2007), is one MacCormick took from Scottish thinking, especially from Smith. For instance, MacCormick once observed that our 'capacity to communicate and accumulate knowledge... implies a capability to develop a more and more extensive civil society, in turn requiring an extension of at least provisional trust across an ever-wider range of people who are not personally acquainted with each other – and here says the idea is familiar to any reader of Adam Smith' (MacCormick, 'On Public Law', 2007, 159). Crucially, this understanding of civility as 'impersonal trust', with its 'sense of duty and obligation to each other', develops and flourishes 'prior to any authoritative imposition of rules upon us' (MacCormick, 'On Public Law', 2007, 160). The very capacity to speak language, and speak with sincerity,<sup>33</sup> illustrates that we can be civil to each other without the explicit articulation of norms, formality or authority. This is very important to MacCormick, who stressed that 'we humans are norm-users before we are norm-creators, or legislators', and for whom the development of 'civil institutions' would have been impossible if it were not for this capacity for informal, un-institutionalised, norm-using (see MacCormick, 'On Public Law', 2007, 160). In the context of the above, what I would emphasise is that there is a link here between the descriptive observation that we are norm-users before we are norm-givers, and the normative commitment to enabling active political participation of individuals in the self-government of their communities.

### ***II.C. Norm-Users and Institutionalisation***

We have now, I hope, sufficient momentum and inspiration to offer, at least in necessarily schematic form, some suggestions for reconstructing MacCormick's legacy. Here is roughly how we could proceed to reconstruct MacCormick's general jurisprudence:

1. It would make sense to begin with the processes of norm-using, at their most informal and non-institutionalised. Good examples of these processes will be the practice of communicating in language, together with the various norms or virtues we might reasonably ascribe to those practices, e.g. in the case of speaking a language, the norm or virtue of sincerity.<sup>34</sup>

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<sup>33</sup> The virtue of sincerity, especially insofar as it is linked to the way language works socially, is one that re-appears throughout MacCormick's work, see e.g. 'What is Wrong with Deceit?' (1983), and chapter 2 of *Practical Reason in Law and Morality* (2008).

<sup>34</sup> There is an obvious link here with Bernard Williams' *Truth and Truthfulness* (2002).

2. These processes can be conceived of as normative orders: norm-users participate in normative orders, and they do so in virtue of sharing, though in a very rough and at best overlapping way, some sense (not necessarily articulate) of what is right and wrong (or, probably better, wrong and not-wrong) within that normative order. The form of participation in normative orders is inherently interactive: in the course of participation, mutual beliefs, containing mutual expectations about correct and incorrect conduct, arise and stabilise over time.
3. While beginning with these processes of norm-using, it would be important not to lose sight of the norm-user. Certainly, normative orders develop in the course of interaction between persons who, thereby, over time, become norm-users. But at any given time, any one norm-user will be born and grow up in a variety of normative orders that pre-existed them. They will thus be confronted with these normative orders heteronomously, and if they develop, as they can as they ought, they will begin to reflect on at least certain aspects of these orders in an autonomous way.
4. Keeping in mind both processes – i.e. the process of heteronomous enculturation of norm-users as well as the development of their individual normative consciences – is important, for presumably even the most developed normative conscience is not so autonomous as to be bereft of heteronomous influence of norms that they have not yet subjected to scrutiny and reflection. Understanding these processes would be assisted by running the two strands of reason and emotion together, recognising 1) the role of observing and indeed experiencing the reactions of others (to whom do they express sympathy to, for what reason, and in what degree) in enculturation; and 2) the role of sympathy in guiding one's use of universalisation as part of the development of an autonomous normative conscience.
5. In conceptualising normative order, we recognise that this involves judgement: normative orders are not static, they develop and change, and they do so (often, if not always) as a result of a judgement of how to go on given something unexpected, in response to some disruption of the order (e.g. someone jumping the queue, but with a potentially valid reason). This judgement can be exercised in an ad hoc way by the norm-users themselves, but a decision can also be taken to invite a third party – not themselves directly, in that moment, a participant in the relevant normative order – to assist with making a judgement, which is then more likely to be accepted as legitimate by the norm-users (given that it is being made by someone without a direct stake in the outcome). Thus, the first stage of institutionalisation – at this point, at the extreme end of a low degree – is that of an ad hoc third party exercising judgement upon a particular event in a particular normative order that requires judgement about how to go on.
6. The second stage of institutionalisation involves standardising that practice of third-party judgement, and this can bring along with it various related practices, each of which can be understood as further intensifying institutionalisation. These related practices include: 1) articulating the norms that might be said to govern the relevant normative order and that one wants



the third-party to use when making judgements with respect to that order (while being aware that no such articulation will be exhaustive, both in the sense that it will be subject to interpretation and in the sense that that interpretation is bound to take into account values one might see as underlying the normative order); and 2) articulating the rules thanks to which the standardisation of third-party judgement is to occur (i.e. establishing the institution of adjudication, including, e.g. the process of selection and appointment of the adjudicators, their jurisdiction, etc.). What is crucial to see here is that the institution – in the sense of a social institution that, through its members, carries out the task of judgment – can carry out its work before the creation of rules that regulate it (in a formal sense, even establish it), and carries on its task in ways that are not exhaustively explained by either the norms it is expected to apply or the rules that govern that institution's operation.<sup>35</sup>

7. One can be more or less complex in the ways in which one articulates the norms that might be said to govern the relevant normative order and that one wants the third-party to use when making judgements with respect to that order. Certain formulations of norms with respect to certain normative orders – for instance, the norm of waiting one's turn in a queue – will be relatively

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<sup>35</sup> This is a vital point that would require a good deal more unpacking than I can afford here. What is important is that we pry apart, and indeed give primacy to, institutions (in the sense of social institutions performing certain functions) from rules that can be said (in a certain mode of talking) to constitute them. Thus, this means resisting the common tendency to define institutions in terms of rules. For an illustration of the importance of this, consider the following criticism of Hart's alleged 'reduction of institutions to rules' by Robert Summers (1963, this being a paper cited by MacCormick as one of his sources for his Inaugural Lecture on 'Law as Institutional Fact', 1974) – Summers outlines the following dangers of this reduction: 'First, there is some risk that what is truly primary and what is truly secondary will be inverted.... Rules alone cannot do the job; and they are only means to the end – they merely specify who is to do the job and how it is to be done. Secondly, if legal institutions are thought of as aggregations of rules, there is some danger that this may 'obscure the distinctive characteristics of law and of the activities possible within its framework'. Thus, for example, if courts and administrative agencies are compared as functioning institutions we will readily see that administrative agencies typically have much more 'leeway' within the legal framework than do courts. This difference is in many ways an important fact and is obscured by viewing courts and agencies not as functioning institutions but as aggregations of rules. Thirdly, to concentrate on the rules is to obscure the role of the personalities of the officials who administer the system... Fourth, emphasis on the concept of rule rather than on the conception of a functioning social institution may, in some cases, obscure the true character of 'legal' action. Some actions of legal institutions are, in a sense, beyond the rules. Thus courts resolve uncertainties in the 'rule of recognition. When [644] this involves a judgement that the court itself has power to decide, and when there is no higher court of appeal, we should here view the court's action as that of a social institution successfully bidding for power rather than as the action of a creature of law dissolvable into rules of jurisdiction' (Summers 1963, 644-645). That this was taken seriously by MacCormick is evident from his dual account of the institutionality of law, namely, what he calls the 'philosophical sense' of institutions (such as contract or trust, which are comprised of institutive, consequential, and terminative rules) and the 'sociological sense', which are precisely the social institutions and their functions (see MacCormick 1974). Another source mentioned by MacCormick in his Inaugural Lecture was Karl Llewellyn's 'The Constitution as an Institution' (1934), in which Llewellyn defines an institution as 'in the first instance a set of ways of living and doing. It is not, in first instance, a matter of words or rules' (17). Given these sources, it is no surprise that MacCormick is at pains to point out that though 'many important elements of law can be profitably contemplated as institutions facts in the philosophical sense...we cannot squeeze the whole of the law into that category; in other aspects it can only be comprehended as an institutional phenomenon in the sociological sense. Jurisprudence is, and must remain, a joint adventure of lawyers, philosophers and sociologists' (MacCormick 1974, 129).

simple, while others – such as those establishing and governing the concept of contract or trust – will be more complex. These more complex articulations can be understood by way of three sets of rules: institutive, consequential and terminative. One can also call these ‘institutions’, though more in the sense of concepts than function-performing standardised practices (such as those of judgement in adjudicative institutions). There will be numerous choices to make in one’s articulation of these kinds of institutions, including degrees of specificity in articulation (ranging from rules to standards, with accompanying degrees of discretion). How these choices are made, and by whom, can itself develop into the practice of a particular social institution (that of norm-making, and thus legislative institutions). This process of articulation, with all of its different choices, including the processes by which such articulation is achieved, can be understood as stage three.

8. As soon as one has more than one standardised practice of judgement – and thus multiple institutions of adjudication – a further level of complexity is reached, which can be called ‘stage four’. What can appear at this stage are various informal processes of mutual reference / accommodation / deference between such institutions, and these can of course occur at various levels of intensity and density. These informal processes can themselves come to be regulated by more explicit norms (such as we have, for instance, within private international law) in the form of rules or standards for managing jurisdictional overlap or conflict.
9. At some point – and one can see this as stage five – the articulation of the norms in question may be such as to benefit from seeing them as forming a kind of unity. The need for this can arise in various ways, including for the purposes of education and perhaps also adjudication. What is crucial to acknowledge is that no matter how systematic a picture is constructed of these various articulated norms, that picture remains a ‘regulative ideal’ – it does not represent reality, but offers a construction that may be beneficial for certain purposes. Of course, there may be times when such a construction would not be beneficial, and fragmentation in the form of competition between the various social institutions and their ‘institutions of law’ is seen to be more useful. Again, it is better to conceive of such attempts at constructing unity as one kind of process that can occur, with contrasting processes, emphasising the virtues of specialisation and fragmentation, also occurring, sometimes simultaneously.
10. It is important to emphasise that throughout the various stages of institutionalisation one does not lose sight of the effects of those various degrees of institutionalisation on the practical reason of norm- (and institution) users. To the extent it becomes useful to think of norm-users as either citizens or officials, it also becomes crucial that the practical reasoning of citizens is not lost sight of.<sup>36</sup>

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<sup>36</sup> Consider the following from MacCormick’s 1990 paper, ‘Citizens’ Legal Reasoning’: ‘Whatever else practical reason and law have in common, they ought to share this: ordinary people have to think about how law does and should enter into their conduct and planning of their person affairs, their collective affairs with friends and partners and, indeed, their corporate and communal affairs at large’ (15).

The boundaries between the various stages are not sharp – they can overlap, e.g. stage three develops within and to a certain extent part of stage two (recall, for example, the fact that judges in early English law were also legislators). Furthermore, although the stages are conceived of as successive, one can imagine particular cases in which some later stages appear earlier. Finally, no claim is made that it is only upon reaching a certain stage that one has legality – the argument is that legality is better conceived of in degrees of institutionalisation, with a low degree of legality present at a low degree of institutionalisation, and a high degree of legality present at a high degree of institutionalisation.

Of course, this is but a sketch, and it is a sketch, furthermore, that has been articulated in descriptive mode: it is offered as a way of tracking the emergence of legality, conceived of as relative institutionalisation, initially from, but always relating it in various ways to, informal, non-institutionalised processes of norm-using. Although this conception – a reconstruction of MacCormick’s institutionalism – has been presented in descriptive mode, this ought not to mask the fact that it is suffused with a particular normative commitment, namely that to the diffusion of power.

What loom large in the above model are the processes of normative order and the practical reason of norm-users. Although there is recognition built in of the capacity for legality, depending on its level of relative institutionalisation, to move somewhat away from everyday processes of normative order, the connection between institutionalisation and normative order is always maintained – for instance, there is continuous tracking within this model of the exercise of practical reason by norm- and institution- users. Contrast this with an account of the emergence of law as a matter of the exercise of the will (in a position of power). Legality, on the above model, is an associational concept – not a voluntaristic, or even a rationalist one.<sup>37</sup>

That being said, it must be acknowledged that the democratic credentials of the above model are only contingent. Certainly, they at least open up the possibility of a conception of legality where varying degrees of institutionalisation emerge from the practices of norm-users; or, to put it differently, what is important is that the cards are not stacked, from the outset, in favour of the exercise of some sovereign will. However, there is of course no guarantee that, as soon as certain levels of institutionalisation are reached, these will not become so removed and detached from the norm-users they affect as to be undemocratic and tyrannical. The relationship between law and power, on this view, can take several forms – some more diffusionist and some more sovereigntist. But, unlike in some conceptions of law, the odds are not against the diffusionist – if anything, the way legality is conceived on this view alerts us to the temporal primacy, and thereafter continuous presence, of norm-users.

Equally, it is not the case that the above model endorses any position on nationalism – but it should not come as a surprise that someone with such a model should be sympathetic to the idea of respecting those individuals who treat as valuable the commitment to their own institutions (especially social institutions, but perhaps also institutions of law), this being precisely civic nationalism and the only form of

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<sup>37</sup> To the extent there is something one might call ‘natural law’, it is conceived of that which naturally accompanies the development of language, e.g. precisely the norm or virtue of sincerity. By nature, we might say, we are norm-users, and we might even develop a thin account of the kinds of norms, given certain practices (such as speaking language) that we are likely to develop – but nothing stronger than this.

nationalism that MacCormick championed.<sup>38</sup> MacCormick's nationalism is obviously a complex topic, and one that changed shape over the course of MacCormick's career, but perhaps one note about it can be offered given the above discussion: we should not get too hung up on 'nationalism'; the key, instead, is MacCormick's keen sense of the value of each individual. His is not a classic liberalism in the sense that he spoke in favour of schemes of redistribution<sup>39</sup> and even (limited) moral establishment,<sup>40</sup> but there is certainly an unshakeable and consistent recognition of the value of self-government, beginning with the individual and emanating outwards to what the individual treats as valuable. My argument has been that diffusionism, and the associated conception of legality as relative institutionalisation, were both vital parts, and perhaps the key expressions, of that attitude.

#### *II.D. Transnational Legal Theory*

Finally, it remains to offer a few observations about how and why the above reconstruction of MacCormick's contribution, is important for transnational legal theory. In the interests of space, let me offer but three much-too short observations.

First, and perhaps most obviously, I would argue that an approach to legality that treats it as an emergent property – emerging, in particular, from already normative relations, in varying degrees of density – will be particularly suited to the transnational realm. As others have argued, the transnational realm requires an approach to law that respects the capacity of individuals to relate to each other normatively in the absence of already established, let alone already legitimate, authorities. This is not to say we can be naïve about the presence of power in the transnational: to the contrary, powers are exercised, and still, and perhaps increasingly, without much transparency or control. What it does mean is that we must enable ourselves to see the gradual rise of multiple voices, all making a normative input, some stabilising into various degrees of formality. Although we cannot treat all that is happening at the transnational level as bottom-up, neither can we conceive of law to such an extent that we only ever look top-down. So an approach that has its ear to the ground, so to speak, and is sensitive to dynamics over time,<sup>41</sup> is surely much needed to help us make sense of what is happening transnationally.

Second, and less obviously, but no less importantly, we need to keep two balls in the air: the normative and the descriptive. This is particularly important for the transnational, where there is great scope for exploitation of vulnerability. This is why an approach that at least makes it possible to connect legality to those whom it most affects – to keep, by diffusing power, institutionalisation close to norm-users – is so important. But it is one thing to make it possible, and another to make it desirable. One might argue, for example, that some forms of self-government in the transnational are precisely the problem: private powers setting their own standards for their own behaviour, which fall far short of what is required. There might be scope for the argument that some forms of centralisation or concentration of power are, at

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<sup>38</sup> MacCormick was clear that the value of nationalism was contingent on individuals treating their commitment to collective civic institutions valuable.

<sup>39</sup> See 'Legal Right and Social Democracy', chapter 1 of the book under the same title (1982).

<sup>40</sup> See 'Against Moral Disestablishment', chapter 2 of *Legal Right and Social Democracy* (1982).

<sup>41</sup> I have only spoken of institutionalisation here, but one must also pay attention to de-institutionalisation.

times, warranted – if only to curb the greater danger of another power. A model of legality as relative institutionalisation, understood to be suffused with a commitment to diffusion of power, does not necessarily lead to a certain kind of normative theory: instead, it serves as a reminder not to lose sight of certain things, e.g. the practices of norm-users and what they treat as normative and as valuable. But the fact that a certain descriptive model does not lead to a certain normative theory ought not to be an obstacle to us recognising the dynamic relationship between the descriptive and the normative.

Third, theorising the transnational necessitates combining the strengths of a number of disciplines. Right from the beginning, and in a way that I hope has been clear from the above reconstruction, MacCormick was committed to combining the strengths of philosophy and sociology, and to a lesser extent, history. All three are vital for engaging with the transnational (though equally with any other realm).<sup>42</sup> There are various ways to characterise this triad, e.g. the conceptual, the empirical and the diachronic. The point is that there must be methodological balance: one offers hypotheses (concepts, models) on the basis of certain observations (most probably at first haphazard impressions); one then returns to testing those hypotheses in a more rigorous regime of observation, including both contemporary and diachronic; and one rejects and starts again, or refines and makes more subtle one's concepts and models. This all sounds rather abstract, and probably unhelpful, so let me make one claim here: if one maintains this methodological balance, one should end up with a series of variables that come in degrees. It is hopeless, and especially in the case of the transnational, to draw sharp lines between, say, social and legal norms, or between law and morality, or law and politics. One must find ways of articulating relations between them, and this means coming up with concepts and models that help us see how certain variables, when they reach a certain degree, are usefully thought of as, say, having a good deal of legality. Put differently, thinking in variables and degrees helps us to see those relations. MacCormick's model of legality as relative institutionalisation, as reconstructed here, has that built in. In this, as in many places, being ambiguous means being clear.

## Conclusion

Part of the aim of this paper has been to show how a descriptive model – in this case, the general jurisprudential model of legality as relative institutionalisation – is illuminated by awareness of a scholar's normative sensibility, in this case, MacCormick's commitment to the diffusion of power. I choose the word 'sensibility' advisedly: when evaluating a scholar's legacy, we need look wider and (again, dare I say) deeper, constructing our best sense of what a scholar valued and was most anxious about. But I need to end with a disclaimer: this paper is part of a broader project in which I attempt to offer an overall picture, perhaps a narrative, of MacCormick's ideas, set in the context of the political and scholarly events he participated in. I feel the responsibility of that project very keenly – indeed, I cannot think of a heavier scholarly responsibility than the ethics involved in reading another's work. So I offer the above as the beginning of a dialogue about MacCormick's contribution, and I expect and hope for as much dissensus as possible!

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<sup>42</sup> The historical has been the most neglected of these. A number of scholars are changing that, e.g. Christopher Thornhill.

## **Bibliography**

*With apologies, time prevented the completion of the bibliography – those interested should feel free to email me ([m.delmar@qmul.ac.uk](mailto:m.delmar@qmul.ac.uk)) following the seminar.*