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The Cosmopolitan Local: Neil MacCormick's Post-Sovereign World

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Forthcoming in
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Abstract

This paper examines the unresolved questions in Neil MacCormick's theory of post-sovereignty (in the context of the EU and more widely) in the light of his broader efforts to reconcile different strains in his intellectual and political world-view—universalism and particularism, cosmopolitanism and localism, internationalism and nationalism. It concludes that on that broader and deeper basis he might well have been drawn to a very thin form of universalism—namely a kind of inter-systemic framework of exchange involving mutually autonomous universalisation requirements.

Keywords

universalism, particularism, post-sovereignty, European Union, cosmopolitanism, legal system

The Cosmopolitan Local

Neil Walker

1. Neil MacCormick at home and abroad

Any tribute to Neil MacCormick and his work must begin by recognizing a striking duality to his character, to his achievements and, indeed, to his intellectual world view and considerable body of work. When in 1948 the sociologist Robert Merton famously coined the terms “local” and “cosmopolitan” to describe two different kinds of cultural orientation amongst members of a community, it was clear that his opposition was a stylized one that admitted of many exceptions.¹ In our own community of legal scholarship, it is difficult to imagine anyone who has so comprehensively and consistently given the lie to Merton’s opposition than Neil MacCormick. I have never met a more international Scot than Neil MacCormick, just as I have never met a more Scottish internationalist than Neil MacCormick. He truly was the cosmopolitan local.

This duality is manifest both in his professional and in his political life. Professionally, although he received countless attractive offers to relocate elsewhere, he was proud to hold the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh from the date of his return to Scotland from Balliol College, Oxford in 1972 until his retirement in 2008. That period of 36 years spanned more than half his life,

¹“Patterns of Influence: A Study of Interpersonal Influence and of Communications behavior in a Local Community,” in Paul F. Lazarsfeld and Frank N. Stanton (eds) *Communications Research, 1948-1949* (New York: Harper and Brothers, 1949).

and made him by a considerable margin the longest serving member of the Professoriate of the entire University. It should also not be forgotten that his earlier education was predominantly Scottish. As an undergraduate he studied Philosophy and English Literature at Glasgow University, and he cut his teeth as a law lecturer in the city of Dundee. He loved the Scottish university scene and in particular Edinburgh University and its Law School—an affair of the heart that was entirely reciprocated. He held many positions of authority and responsibility in the University and was a prominent and much respected public intellectual in the city and in the country as a whole.

Yet for all his academic rootedness, he was also very much an international figure. He was an enthusiastic and tireless traveller, and in his travels his *persona* was always that of a member of the global community of scholarship. He was a vital and inspirational figure over many years in the worldwide growth of the International Association for the Philosophy of Law and Social Philosophy (IVR). He had strong and abiding academic relations over five continents, received honorary degrees from a number of leading international universities, and worked tirelessly and selflessly to promote the discipline he loved worldwide.

Politically, he was, of course, a lifelong Scottish nationalist. Indeed, he was born to it. His father had founded the modern Scottish National Party (SNP) in 1934, his brother had been a Member of Parliament in the 1970s, and Neil himself was active for many years in the party, providing a key bridge between the sometimes sharply opposed gradualist and fundamentalist wings of the movement as well as supplying the Party's shining intellectual light. After a lifetime of good political works, and with the constitutional landmark of a new Scottish Parliament at last in the offing, he again demonstrated his cosmopolitan side by departing the Scottish scene and becoming a Member of the European Parliament on behalf of the SNP between 1999 and 2004. He was, by common accord, outstanding in that role and was particularly influential as an alternate member of Giscard d'Eistaing's Convention on the

Future of Europe, which produced its famous first Draft Constitutional Treaty of the European Union in 2003. His nationalism was of the open and liberal kind, and it was no surprise to those who knew him that it travelled well. There were many, indeed, who wanted him to extend his stay in Brussels, but he had unfinished business at home. After he returned from Europe to Edinburgh—now at last a political as well as a cultural capital city—he took great pleasure and pride in acting as a special adviser to Alex Salmond, the First Minister of the first ever SNP government of Scotland. It was a role he carried out assiduously and vigorously even during his final illness.

All of this would be remarkable enough for one life. But of course, this is without even mentioning the stuff that animates this volume, namely his extraordinarily deep and diverse contribution to writing and thinking about the place of law in the order of things. Here again, even in the surface themes of his work, we can see the two sides of MacCormick—the local MacCormick rooted in the particular and the cosmopolitan MacCormick astride the universal. There was the MacCormick who wrote with poise and passion about nationalism, about sovereign statehood, about subsidiarity, and about the manifold diversity and unique particularity of normative orders. Then there was the MacCormick who wrote with just as much insight and commitment about European and international law, about post-sovereignty, about the general nature of legal reasoning, about the institutional anatomy of any and all legal systems, and about the deep and universal structure of moral reasoning.

It would take a book-length study to do justice to the inner connections—the inevitable tensions as well as the notable successes—of such a rich and intricate life, and I know that at least one will be written in due course.² My very modest aim here is simply to

² An intellectual biography of MacCormick by Maksymilian Del Mar has been commissioned by Stanford University Press as part of their *Jurists: Profiles in Legal Theory* series. It is scheduled to appear in 2013. An edited collection on the Scottish dimension of MacCormick's life and work will appear later in 2011; N. Walker (ed) *MacCormick's Scotland* (Edinburgh: Edinburgh University Press, 2011)

point to the continuity between the professional, political and intellectual dimensions of Neil MacCormick, cosmopolitan local *extraordinaire*, and to flag up some of the most obvious issues this raises about his life and work.

To begin with, there is the question of causality. To what extent did the professional and political persona, and the contrasts thrown up in these aspects of his life, influence his intellectual world-view, and to what extent vice-versa? Even to pose the question is to invite the obvious conclusion that the pattern was one of mutual causality. By any standards, and especially by academic standards, Neil MacCormick's was a remarkably integrated life. To read or hear him was to become keenly aware of someone whose thought was deeply informed by personal observation and experience. Equally, to encounter him was to observe someone whose knowledge and belief system was deeply informative of his actions—someone who not only preached but acted out the virtues of practical (rather than merely theoretical) reason.³

In the second place, there is the question of trajectory. Patently, Neil MacCormick's was a progressive life. His political ambitions and priorities shifted as external circumstances altered and as new opportunity presented itself. His professional life, too, evolved over time, his precocious success in the Regius Chair ensuring the early and relentless accumulation of the responsibilities of office—responsibilities, nevertheless, that he invariably met with great enthusiasm, careful commitment, good humour and skill. And, as we shall see, his intellectual gaze also shifted over the years, especially with regard to his mature interest in questions of postnational legal theory. Again, however, the abiding impression of MacCormick is of a life of integrity—integrity over time as well as between the component parts. Their particular manifestation may have changed, but the deep issues that engaged the mature MacCormick were by and large the same deep issues that engaged the young MacCormick. Such was the

³ This holistic approach is never more apparent than in his final book, written in the last year of his life; *Practical Reason in Law and Morality* (Oxford: OUP, 2008)

distinctiveness in both style and substance of Neil's approach, both on the page and on the platform, that the author of this extensive oeuvre was, from the beginning to the very end, unmistakably one and the same.

Thirdly, and of most immediate importance for an academic volume, the question of integrity also arises in the narrower intellectual domain. If there is no doubt about MacCormick's remarkable ability to marry theory to practice in his own life, or about the resilience of his commitments over time and often quite profound changes in circumstances, what of the body of thought and work itself? Neil was drawn to contrasting orientations in his work not because he was intellectually perverse, or footloose, or determined to dazzle with his virtuosity, but just because the hard questions that he was interested in often drew him to the difficult edges and 'in-between' zones of theoretical thought. This is true, for example, of his journey from a fairly orthodox positivist position towards something called "post-positivism", which he describes in his contribution to this volume. It is also true, for example, of his increasing interest in his later writings in Luhmannian systems theory or Habermasian discourse ethics, perspectives which he could never whole endorse but which helped him get to places that his more familiar intellectual resources could not readily reach.

However, what I want to concentrate on here is a third example, namely the tension between his longstanding endorsement of constitutional pluralism and his belief in the unity of law. This example is an especially apt one, I believe, and not only because it speaks clearly and directly to the present volume's specific concerns with that 'post-sovereign constellation' which MacCormick's work did so much to illuminate. It is also particularly appropriate in offering a vivid case-study of just the kind of practical preoccupations that led to his internal theoretical tensions and conflicts; of the seriousness, clarity and candour with which he typically approached these conflicts; and, finally, of the ways in which a body of work as rich

as his can allow us to imagine *MacCormickesque* solutions to problems he himself ran out of time to try to fix.

2. Constitutional Pluralism and the Unity of Law

Neil MacCormick was always very good at developing new questions out of old ones. He was also extremely adept at persuading his audience, including many who were still in thrall to the old questions, that these new questions were the right and most important questions to ask and to answer. This aptitude had a lot to do with native intelligence, but it also had something to do with what he calls in his contribution to the present volume his preference for a constructive/collaborative rather than a critical/dialectical approach to legal study. MacCormick sincerely believed that he always had more to learn from a room full of people than they had to learn from him. He was the most alert of listeners to other people's arguments and the most sympathetic of readers of other people's work. He conducted himself this way out of genuine humility, unfailing courtesy and unremitting intellectual curiosity, but also because he knew that this was the best way to get others to take his arguments seriously.

This quality was, if anything, intensified in his work on European law and polity. It was an area to which, as already noted, he came comparatively late in a multi-faceted intellectual life and one in which he had, from the outset of his involvement, a direct political interest in developing a voice that would be broadly persuasive. These factors reinforced his already well-honed instinct to go about his business by seeking to absorb what everyone else had to say and by endeavouring to present his own contribution, however fresh and however challenging, as somehow continuous with that received thought. In a nutshell, in European matters even more than elsewhere, MacCormick's way was to start from the point of view of others and only gradually work back to his own, and to do so in a manner that focused on

opening up new possibilities and lines of inquiry rather than closing issues down. MacCormick's development of a specifically pluralist understanding of the relationship between national law and supranational law in the EU can be understood in the light of that overall academic sensibility and imperative of political engagement, as well as reflecting his efforts as a 'cosmopolitan local' to integrate the universal and particular strands in his work.

Both in its explicitly trans-systemic ambition and in its exclusive concentration on systems displaying an institutional formality akin to that found in the state legal system, MacCormick's pluralist analysis differs in type from the classic tradition of legal pluralism within legal anthropology. That tradition tends instead to focus on the relationship between the official legal system of a single law-state and the various other self-styled legal or normative orders operating within the territory of that law-state. MacCormick's starting point was his observation that there were not one but two main—and fundamentally incompatible—perspectives in play in the understanding of the European legal configuration. On the one hand there were those for whom the last word in legal authority as to the nature of the European legal configuration rested with the national constitutional authorities, and according to whom the whole of European law could be understood as a massive but reversible and so conditional pooled delegation of national sovereign right. On the other hand there were those for whom the last word rested with the supranational institutions themselves, self-conceived and self-constituted as an independent or autonomous authority, within the domain of the national competences and capacities transferred to them in the basic Treaties of the Union.⁴

MacCormick's response to this perceived state of affairs was neither to dismiss either opposing perspective as irrelevant nor to agree with either position in full. On the one hand, he did not pursue the route of those—more influential in the academy than in the popular or

⁴ See, in particular, N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999) ch.7.

political discourse—whose response was to reject both the state-centred and the EU-centred approach as trapped in an outmoded pedigree-centred attitude to legal authority and who instead looked at the configuration of the EU in combination-with-the-states either as a new kind of complex unity⁵ or as something to which the very idea of bounded order and coherence was not appropriate.⁶ On the other hand, he wanted to reject what he saw as the one-sided sovereigntist bias involved in accepting entirely and exclusively either the state-centred or the EU-centred approach.

MacCormick’s theory of law as institutional normative order was the device through which he distinguished himself from either set of positions. The idea of law as institutional normative order is one in which an arrangement of norms is grounded in a set of law-making and law-applying institutions and associated practices and attitudes, which, in a mutually reinforcing way, ensure the *systemic* quality of that normative order; that is to say, features such as its settled authority, its internal coherence, its reflexive adaptability.⁷ Against those who would move too quickly to embrace the complex unity of European law, the idea of law as institutional normative order as invoked by MacCormick reminds us that quite different systems make up—configure—the whole that is European law, and since a key systemic feature is the recursiveness and resilience of the relevant complex of attitudes, institutions and practices, these different systems of institutional normative order will not easily lose their separate identity. Against those who would not think it interesting or fruitful to think of law in terms of bounded systems *at all* and so would see nothing of particular interest or critical concern for law at that place of the confluence of different streams of national law,

⁵ See e.g. D. Curtin and I. Dekker, “The EU as a “Layered” International Organization: Institutional Unity in Disguise” in P. Craig and G. de Burca (eds) *The Evolution of EU Law* (Oxford: OUP, 1999); A. Von Bogdandy, “The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Treaty of Amsterdam” (2000) 6 *Columbia Journal of International Law* 27-54.

⁶ See e.g. O. Gerstenberg and C. Sabel, “Directly-Deliberative Polyarchy: An Institutional Ideal for Europe” in C. Joerges and R. Dehousse (Eds) *Good Governance in the European Union* (Oxford: OUP, 2002).

⁷ See e.g. MacCormick, n4 above, ch 1; and at greater length, N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: OUP, 2007)

MacCormick would play the system card to opposite effect. He would insist that however difficult it was to identify the basic legal warrant for each and every unit in the complex mix of legal norms in the overall European configuration, the nature of that warrant was nevertheless best thought of in system-specific terms; that, as he put it, even in the most crowded normative space the “settled, positive character” of any particular unit of law remained stubbornly “jurisdiction-relative”.⁸

Yet against those who would plump exclusively for the settled orders of national law or the settled order of supranational law, MacCormick would hold that this takes too narrow a view of the terms of co-existence of different normative orders or jurisdictions. Just as these orders are not fated to merge into a complex unity, so too it is unnecessary to the survival of any that one is entirely subordinated to and subsumed under the other. The idea of institutional normative order allows each relevant discrete complex of institutions and practices and the overall regulative ideal or orientation which recursively feeds into and emerges from it to be sustained notwithstanding the fact that, from a spectator’s standpoint, none has comprehensive or unrivalled normative authority in its own domain, as was paradigmatically the case in the world of the mutually exclusive and mutually corroborating sovereign states under the modern Westphalian system.

It is this break from the idea of absolute and unrivalled authority, indeed, which lies behind and accounts for MacCormick’s claim to be a “post-sovereigntist”, and also a post-statist.⁹ Certainly, an institutional normative order must make at least a plausible claim to the plenitude of normative authority in its own terms—its regulative ideal must be corroborated by significant and sustained real-world success—but this is not incompatible with the resilient co-existence of two or more candidate orders and associated regulative ideals in areas where their claimed jurisdictional domains overlap. What is more—and this is where

⁸ MacCormick, n4 above, 14.

⁹ *Ibid* ch.8. See also N. MacCormick, “Sovereignty and After” in H. Kalmo and Q Skinner (eds) *Sovereignty in Fragments* (Cambridge: CUP, 2010).

the political MacCormick rejoins the academic MacCormick—it would be a stark refusal to acknowledge the salient political facts of European integration as well as a failure of the theoretical imagination not to recognize the continuing force and plausibility of claims from national and supranational perspectives *alike*.

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 one or more 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 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? The fear is that we are here faced with a truly Procrustean dilemma. Either we have too little to say about the relationship between the parts, and so there is no additional properly legal step through which to turn legal plurality into an arrangement in which the connection of the legal parts is itself regulated by law, or in so providing this extra step of legal regulation we end up saying too much about the relationship between the parts and so destroy the distinctive integrity of the parts.

. MacCormick’s early instincts led him towards *understating* the relations between the parts.¹⁰ In this view, which he subsequently labelled “radical pluralism,”¹¹ he accepted that

¹⁰ See in particular, his “Beyond the Sovereign State” (1993) 56 *Modern Law Review* 1-18.

there was no legal relationship between the different constituent legal systems of the European legal configuration other than those which could be reduced to the terms of either or both systems. Instead the only connections between the legal orders were (a) relationally contingent in their content and (b) system-specific in their basis of authority and interpretation. That is to say, (a) they were the product of particular bridging mechanisms negotiated between each order, such as the preliminary reference procedure between national courts and the ECJ, the transposition of European directives into national law, the direct national effect of European regulations, the duty of national courts to implement EU law etc, and (b) the meaning and implications of the exchanges conducted across these bridges was ultimately decided by each system in its own terms. In addition, there were, of course, strong political and cultural relations between the systems. The political institutions of the EU each in their own way recognized and represented the constituent member states in their deliberations and decision-making—the Commission, Council and European Council doing so at the level of the states themselves and the Parliament doing so at the level of the populations of the states. Culturally, the relative convergence of the states of Western Europe, itself reinforced by legal and political ties, found many expressions—including, reciprocally, indirect legal expression in ideas such as the judge-made and later Treaty endorsed invocation of the ‘common constitutional traditions’ of the member states as a source of the human rights jurisprudence of the EU itself.

As already intimated, such an approach was open to both practical and theoretical objections. Practically, it could offer no proof against inter-system conflict. The dense network of bridging mechanisms was clearly very effective in anticipating, resolving or deferring conflict, but the ‘contractual’ contingency of these mechanisms, and, even more so, the diverse system-specificity of their authoritative interpretation meant that such avoidance

¹¹ MacCormick, n4 above, 117.

of conflict could not be guaranteed all the way down. Political and cultural ties also helped, but again could not guarantee against conflict, especially as the EU became larger, more politically and culturally diverse, and more economically unequal. The large set piece engagements of constitutional courts with European law over questions of the fundamental limits of encroachment on national sovereignty (as in the German *Maastricht* and *Lisbon* cases), over the protection of fundamental rights (as in the *Solange* cases), over the transfer of security functions from the national to the supranational (as in the European Arrest Warrant cases), and—particularly telling from the perspective of growing political and cultural heterogeneity—over the power-transferring implication of joining the EU from the perspective of the only recently independent CEE Enlargement states, all speak to the precariousness of the inter-systemic proof against conflict.¹²

Theoretically, too, this approach offered nothing about the nature of law beyond a positivist investment in sources and pedigree. Whatever the general limitations of such a conclusion (to which we turn below), moreover, this could not have but been a cause of unease, and even embarrassment, to Neil MacCormick, who, as already noted, in his later work was wont to describe himself as a ‘post-positivist’. It is also an embarrassment that grows and becomes more acute as we go beyond the EU itself. For, as I have argued elsewhere,¹³ it is no accident that the idea of pluralism between constitutional orders first flourished in the European domain. The intensity and sophistication of the EU’s contingent bridging mechanisms together with the strength of the political and cultural ties provided something of a ‘regional comfort zone’ for this new brand of ‘constitutional’ legal pluralism. As we have seen, on the thin positivist understanding of the radical pluralist perspective the pluralist bond remains a precarious accomplishment even within this comfort zone. Beyond this, however, in the increasingly dispersed networks of transnational legal relations and

¹² For a good recent overview, see J. Baquero Cruz, “The Legacy of the Maastricht-Urteil and the Pluralist Movement” (2008) 14 *European Law Journal* 389

¹³ N. Walker, “Constitutional Pluralism in Global Context” RECON Online Working Paper, 2010/3.

institutions outside of the EU, in relations between national order and other regional trading blocks, functional regimes (trade, environment, criminal law), global general institutions (United Nations), private or hybrid forms of sectoral organisations (from ICANN to the International Olympic Committee), the limitations of radical legal pluralism are exposed even more vividly.¹⁴ Here, there are neither the dense, mutually reinforcing bridging mechanisms nor the sustained cultural and political supports that sustain the EU theatre. Here, even more so than in the EU, the question of the necessary glue of legal pluralism is starkly posed.

MacCormick himself was, of course, aware of this wider environment but tended to restrict his response to the problem of the thinness of radical pluralism to Europe, as his domain of particular interest. His revised proposal in the light of the thinness objection was to conceive of Europe's supranational pluralism as "pluralism under international law."¹⁵ This was in recognition that European supranational law had originally emerged as a species of the genus international law—and here we see the resilience of MacCormick's positivist, pedigree-based conception of law—but also out of a broader sense that, in the name of moving beyond mere plurality, there had to be some kind of normative *tertium quid* which would stand above the competing particularities of national and European law.

For some, MacCormick's later solution firmly impales him on the second horn of the procrustean dilemma. For is the invocation of a supervening international law not simply the way to a new form of normative unity and therefore a transcendence and so a denial of the very pluralism that MacCormick seeks to embrace? The answer to this is somewhat unclear from looking at MacCormick himself. He does not actually have much to say about the content or mode of articulation or vindication of this aspect of international law (and to that extent, his new approach is also open to the opposite objection that it is no more than a rhetorical gesture, a mere relabeling of his radical pluralism which does not begin to address

¹⁴ See, for example, N. Walker, "Beyond boundary disputes and basic grids; Mapping the global disorder of normative orders" (2008) 6 *International Journal of Constitutional Law* 373-96

¹⁵ MacCormick, n4 above, 117.

the latter's problems), save that it is the supposed thin solvent that turns plurality into pluralism while avoiding "flat unity".¹⁶ So let us conclude by briefly posing some new questions, and providing some fresh indications as to what he *might have* meant by this. In so doing, we should bear in mind not only the substantial work that has been subsequently been done in this area, much of it inspired by MacCormick's pioneering example, but also some of the 'post-positivist' thoughts that may be mined from elsewhere in his body of work.

To the extent that MacCormick was searching for 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, three possibilities, or at least three distinctive areas on a spectrum of possibilities, seem to present themselves. The first is what we might call, following Michael Walzer, a "covering-law universalism."¹⁷ What this entails is a version of legal unity so strong, so insistent on subordinating the particular to the epistemic and moral authority of the universal, that it does not allow of internal differentiation and division at all and so does not recognise the subordination that would flow from that differentiation. Covering-law universalism would require either the global recognition of a powerful strain of natural law or a robust framework of positive law. Patently, such a unitarian solution is neither feasible nor remotely in keeping with the recognition of the integrity of the local and particular in any new global framework of law—an abiding concern of MacCormick but also of the vast majority of thinkers on the ethics of global law. Crudely, the covering-law approach only 'solves' the problem of pluralism by denying the very baseline plurality out of which the question of pluralism flows.

A second possibility, again borrowing our label from Michael Walzer, is one of "reiterative universalism."¹⁸ Here again, there is a general or universal quality to the norms

¹⁶ *Ibid* 121

¹⁷ M. Walzer, "Nations and Universe" in *Thinking Politically: Essays in Political Theory* (David Miller ed., New Haven, Yale University Press, 2007) 183-218, 187.

¹⁸ *Ibid* 184

that integrate the pluralist configuration. Yet the articulation of these common norms is not seen as a matter of simply ‘reading off’ the local version from some inert universal covering-law, but as a continuous and progressive process of recontextualization in which the universal is not simply realized, but reshaped by the particular. Some examples of this can be found in the new global legal literature. According to one prominent scholar of Global Administrative Law, for example, the relevant universals can form around notions as general as the principles of legality, rationality and proportionality, together with respect for the Rule of Law and basic protection of human rights.¹⁹ Over time, these normative ideas, all of which are engaged in key tasks of “channelling, managing, shaping and constraining political power”²⁰ tend to circulate more widely and more readily. Gradually, “as the layers of common normative practice thicken, they come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory.”²¹ Meanwhile, a similarly cosmopolitan story is being told today about the development of global constitutional law across state and post-state sites, centred upon the nurturing of universal constitutional commitments to principles of legality, subsidiarity, adequate participation and accountability, public reason and rights-protection.²²

Would MacCormick be attracted to this kind of narrative of authorization as a way of fleshing out what he meant by pluralism under international law? Possibly so. Certainly it finds a much better balance and blend between the universal and the particular—the cosmopolitan and the local—than the covering-law version of universalism. And if his idea of the normative primacy of international law is intended as one of the primacy of a body of legal doctrine (however dynamically and dialogically conceived), then reiterative

¹⁹ See, B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” (2009) 20 *European Journal of International Law* 23-57, 31-34.

²⁰ *Ibid* 32

²¹ *Ibid* 30

²² See M. Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World?* (Cambridge: CUP, 2009) 258-325.

universalism would seem to fit his needs. Given his earlier commitment to radical pluralism and to the integrity of local legal and political self-determination, however, and, just as significantly, given the manner in which he discusses the concept of the universal elsewhere in his work, I suspect that reiterative universalism would in the end, for MacCormick, continue to err too much on the universalist side of the argument.

In particular, MacCormick's more general work on practical reasoning and on the relationship between law and morality—work which he concentrated on very closely in his last years—suggest a more modest but still important role for the universal domain, and one whose relevance to the present discussion is apparent.²³ In his discussion of the overlapping qualities of legal and moral reasoning MacCormick, guided by Kant but even more so by Adam Smith, has much to say about universalizability and the process of universalization. Crucially, his main concern is with the *methodological* rather than the *substantive* significance of the idea of the universal in our legal and ethical lives. Just as any positive system of law requires us to act upon its *heteronomous* norms as if they applied to all like situations, i.e., universally, so too we should approach our *autonomous* moral choices in a similar law-like manner. We should make all these choices and only those choices that we would be prepared to defend universally. In that way we would both, introspectively, avoid treating ourselves as somehow exceptional, as above the moral law, as well as, extrospectively, being prepared to think through and accept the broader consequences if all were to act like us.²⁴

Arguably, this kind of thinking has relevance at the inter-systemic level as much as at the inter-personal level. Where the positive law of any system runs out, and the terms of trade have to be worked out between the overlapping systems, then perhaps the relevant 'law' here

²³ See esp. MacCormick, n3 above; see also, N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: OUP, 2005).

²⁴ See esp. MacCormick, n3 above, chs 1-5. For an incisive analysis of the Kantian and Smithian influences in his work, see M. Del Mar, "The Smithian Categorical Imperative: How MacCormick Smithified Kant" SSRN (2010).

is simply the autonomous requirement on all parties to think of their actions and decisions in law-like terms. This involves no requirement that they defer to the same substantive universals, nor even an expectation that they will necessarily generate the same substantive universals in the process of universalisation. However, it does provide some kind of mutually reinforced self-discipline, and some attendant idea of comity which is in keeping with the ethos if not the letter of international law—something less than positive law but more than purely strategic interaction.

Some of the ideas that have gradually gained currency in global legal thinking in recent years, including Miguel Maduro’s contrapunctual law²⁵ and Nico Krisch’s model of pluralist public autonomy²⁶—both notably influenced by MacCormick—their work may, at least on one reading,²⁷ be understood in terms of the kind of inter-systemic law of universalisability here proposed. Whether MacCormick himself would have approved is another question. But the mixture of dual-sourced and pluralistically reconciled idealism and deep pragmatism which made him the most cosmopolitan of locals and the most local of cosmopolitans, would certainly have drawn him in this direction.

²⁵ M. Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 501-38

²⁶ N. Krisch “The Case for Pluralism in Postnational Law” LSE Legal Studies Working Papers 12/2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418707. See also his *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010)

²⁷ See, for example, some of the doubts expressed by Krisch himself; ‘The Case for Pluralism’ n26 above, 14-17.