

REVIEW: QUESTIONING SOVEREIGNTY

Ian Ward

Neil MacCormick, **Questioning Sovereignty: Law, State and Nation in the European Commonwealth**, Oxford University Press, 1999, ISBN: 0198268769, x+210pp, £40.

Questioning Sovereignty: Law, State and Nation in the European Commonwealth addresses the pressing question of constitutional and political reconfiguration in contemporary Europe. It is a subject which has engaged the author's attention over a long period, and the origins of some of the essays lie a number of years ago. Accordingly, it provides a mature and considered statement, and inheres its own sense of immanent development.

The initial essays in the book concentrate on sovereignty, and more particularly on the thought that the concept can no longer be accepted in its classical form. The idea that we are now 'beyond sovereignty' will be familiar to those who have charted the evolution of MacCormick's constitutional thought. It is an arresting thesis, bred largely from a need to reconcile the demands of the new world order, and particularly the European bit of it, with received ideas of sovereignty articulated by the likes of Austin and Hart.

If the Austinian thesis was ever sufficient an explanation for legal orders and institutions, it certainly is not today. The ability of UK courts to disapply domestic legislation, under the authority of the 1972 European Communities Act, renders such ideas of legal sovereignty arcane. MacCormick suggests that the thought that we can, and should, now go 'beyond' sovereignty is 'profoundly exciting'; something, indeed, which requires a revolution in the 'political imagination'. There is certainly a crusading sentiment about **Questioning Sovereignty**, and there is no doubt that the citizens of the 'new' Europe are in dire need of a spot of zeal. Europe needs 'exciting possibilities'.

Questioning Sovereignty advances a number of ideas and concepts which are intended to provide a stimulus to this political imagination, to provide a

Ian Ward is professor of law at the University of Newcastle.

Review: Questioning Sovereignty

little excitement. One of the most challenging is the notion of 'commonwealth'. 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'.

It is worth pausing a moment to contrast the English idea of commonwealth, one that was advanced a century or so before Hume and which was founded more on a metaphysical faith in a chosen nation, rather than on a rational belief in the utility of civic institutions. Though widely employed as a term of art, in the writings of Hobbes and Locke for example, the idea of an English commonwealth found a particular expression in the Church and State theses of men such as Hooker and Filmer, Bolingbroke and Burke. Ultimately, it described the core components of a quintessentially Tory political imagination. Commentators such as Simon Heffer, casting around for some kind of English political identity, have already sought to revisit this particular imagination.

At the heart of classical ideas of commonwealth, whether English or Scottish, is an acceptance that a political community is a cultural, as well as a political, expression. This is also central to MacCormick's thesis, and finds its clearest expression in his concentration, in the later essays, on the question of devolution and the break up of the UK. The idea of a 'commonwealth of commonwealths' was dear to the heart of many an early modern Presbyterian and Independent sectary; and it was a fiction consciously deployed by those who effected the real centralisation of the English, and then British, state in the sixteenth to eighteenth centuries. The presumed identity of state and government which underpinned this centralisation is convincingly undermined in MacCormick's particular commentary on the Clive Ponting case.

As the essays towards the middle of the collection turn increasingly towards Europe, the catalyst for MacCormick's thesis becomes ever clearer. Whilst dismissing the idea, shared by Sir William Wade and others, that the UK's

Scottish Affair

accession to the European Community represented a constitutional 'revolution', MacCormick clearly recognises that it requires a considerable leap in the political imagination. Although the UK might one day repeal the 1972 Act and detach itself from the Union, such arguments are indeed bred of jurisprudential nicety rather than political or economic pragmatism. To all intents and purposes, Article 2 of the 1972 Act has turned constitutional theory upside down; or at least, and this is what really matters, it appears to have done so.

As the discussion of Europe develops, and as the critique of sovereignty deepens, MacCormick is still centrally engaged with the problem of hierarchy. Repeated discussions of the Brunner case evidence this particular concern; for the kind of pluralism which he finds so attractive - 'pluralism under international law' - is one which denies solid hierarchies, and depends instead upon the power of 'mutual respect' for any number of overlapping political jurisdictions; a notion that enjoys considerable resonance with John Rawls's later work on constructive rationality and the 'overlapping consensus'.

Unsurprisingly, the idea of subsidiarity is pivotal to these various ideas of decentralization and devolution, participatory democracy and a revitalized political imagination. MacCormick suggests that a more sophisticated idea of subsidiarity, one that isolates and develops alternative notions of market, civil, legislative and dialogic subsidiarity, might provide the means by which European politics can be reshaped. If it does, it might also effect the investment of the political imagination which is so necessary if some kind of European public philosophy is ever to emerge. The argument is persuasive; but whether the nation-states which still, in political terms at least, govern the Union, accede to such a radical and challenging thesis, remains doubtful. The last thing that the nation-states of Europe want is a European public philosophy, still less an inspiring one.

As MacCormick's argument develops inexorably, putting theories of unitary sovereignty to rest, reinvesting notions of commonwealth and recasting them in terms of self-government, deploying subsidiarity, and championing the European project as the model for a new and 'exciting' constitutional politics, a monster lurks. That monster is nationalism. As MacCormick rightly observes, nationalism has a bad press. The twentieth century is soaked in the blood of nationalists. Established in large part to preempt any comparable carnage, in many ways the European Community and Union exist to suppress nationalism, to draw its sting. Yet nationalism is a reality, and there is no point ignoring it. If it cannot accommodate nationalism, the European project is destined to fail.

Review: Questioning Sovereignty

This is perhaps the most perceptive, but also the most controversial and adventurous, argument in the book. Nationalism and European integration must be made to work together. It is futile to expect the latter to somehow erase the former. Nor is it desirable. The political imagination in contemporary Europe is still founded on affinities with nation-states, as indeed the definition of European citizenship in Article 19 affirms. The kind of nationalism projected by MacCormick, a nationalism which respects the mutual 'rights of self-determination', which is founded on a 'statable acceptance of diversity in human groupings with mutual respect and like rights to respect', is a vital component for the future stability of Europe. Such a definition echoes the kind of liberal nationalism advocated by Richard Rorty, and in a rather different way, Julia Kristeva. Nationalism does not necessitate bloodshed. The failure to respect the political, cultural and emotional affinities of others usually does.

It is appropriate that MacCormick's essays should end amidst the complexities of nationalism. It is now the burning issue in the reshaping of Europe, as well as the reshaping of the United Kingdom, and its various constituents. Scotland, and Scottish commentators, are well versed in the intricacies of nationalism. England is now slowly waking to the same questions. Politicians and academics raise up spectres of a rampant English nationalism, as if England might be frightened away from exploring its national identity. The need to take a serious look at the positive aspects of nationalism are probably more pressing in England today than they are anywhere else in the new Europe. England can learn much from the experience of Scottish nationalism.

February 2000