A European Constitution in a Multinational Europe or a Multinational Constitution for Europe?

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Abstract: *What is the role of the nation-state in the process of European constitutional integration? How can we transcend our divisions without marginalising those who believe in them? This article critically analyses the theoretical bases of the Treaty Establishing a Constitution for Europe and tries to explain why its ratification is so problematic. Authors such as Habermas have argued that a new European model of social cohesion is needed, and Habermas suggests that the sense of 'community' in a democratic Europe should be founded exclusively on the acceptance of a patriotic constitution. However, this view is criticised by authors such as Weiler and MacCormick. In this article, I explain the limits of these theoretical analyses. I will argue that a European constitutional project can be more than formally legal only if two normative conditions are satisfied: it is the result of public debate and the European Constitution includes the procedures for the recognition of European national diversity. I suggest that a theory of constitutional multinationalism, similar to the one proposed by Tully, might provide an attractive model for a European social integration. The article is divided in two parts. In the first, I explain why Habermas' constitutional patriotism or MacCormick's states based Europe cannot provide a convincing theoretical model for a socially and constitutionally integrated Europe. In the second part, I will give an outline of Tully's idea of multinational democracy as a model for a European constitutional integration.*

I   A Patriotic or a Civic Europe?

Thirteen years after Maastricht, the European Union proposes the adoption of a constitution. Why do we need a constitution? The Treaty on European

Union[1] transformed the project of European economic cooperation into a truly social and political enterprise. The political enlargement of the European Economic Community coincided with the fulfilment of its institutional objective; the economic development of a peaceful Europe.[2] The political acknowledgement of this achievement combined with the demands of more articulate social and legal integration supported the institutional renovation of the European integration project. The Treaty Establishing a Constitution for Europe is the latest development on this project.

Obviously, there are several issues related to constitutional process since it may radically transform the political structure of a polity.[3] In this article however, I will focus on the relationship between nation-state and the European integration project. Authors such as Weiler argue that a European constitutional integration should be based on the protection of the existing linkage between the European nations and the state: 'I would argue that in the modern notion of the European organisational national-state, the state is to be seen principally as an instrument, the organisational framework within which the nation is to realise its potentialities'.[4] He argues that pragmatically the political stability of modern states is underpinned by the shared sense of belonging to the national community. This idea is criticised by authors such as Habermas, who argues that a process of European integration should be based exclusively on a patriotic constitution that is the result of rational reading of the evolution of European constitution-making. His hypothesis appears endorsed in the preamble of the Treaty Establishing a Constitution for Europe: 'convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny'.[5]

Habermas argues that historically the formation of the European 'national-state' has followed three different paths. It might have started from an already-established kingdom that transformed its subjects into a quasi-uniform national population, such as France, or it could be the result of intellectual campaigns conducted by romantic writers and poets—this was the case of the Italian and German unification—or it could be the result of the process of decolonisation. These three processes superseded the political model based on divine right of the Royal family and justified the arbitrariness of European state's borders with the moral claim of national self-determination. However, Habermas argues that state and nation are normatively different. The state is the apparatus in charge of collecting taxes and protecting the peace within its borders, whereas the concept of nation refers to a community which shares—or is believed to share—some cultural characteristics. The activity of civic institutions and of social inte-

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[1] The Treaty of the European Union, Maastricht on 7 February 1992, entered into force on the first November 1993.

[2] A similar point is made by J. Habermas, 'A Constitution for Europe?' (2001) 11 *New Left Review* 7. It might seem ironic that the signature of the Maastricht Treaty happened during the former Yugoslavia civil war, which was the first armed conflict in Europe since the end of World War II. However, the war reinforced the belief that the European Union had created the environment for avoiding armed conflicts between Member States.

[3] For general analysis of the European constitutional process see for instance: C. Closa, 'Deliberative Constitutional Politics and the Turn toward a Norm-Based Legitimacy of the EU Constitution', (2005) 11: 4 *European Law Journal* 411–431; N. Krisch, 'Europe's Constitutional Monstrosity', (2005) 25: 2 *Oxford Journal of Legal Studies* 321–334.

[4] J. H. H. Weiler, *The Constitution for Europe: 'Do the New Clothes Have an Emperor?' and other Essays on European Integration* (Cambridge University Press, 1999) p. 339.

[5] Preamble, Treaty Establishing a Constitution for Europe, 2004, signed in Rome on 29 October.

gration are two normatively distinct elements of modern state. States civic institutions can direct resources—capital, labour, and administrative power—towards a maximum economic efficiency and protect rights[6] but they cannot create a truthful social integration. The substantial connection between democracy and policy making might be, and in many cases is, contested by a minority that represents almost half of the population.[7] We cannot assume—Habermas argues—that institutional formal legitimacy can create social integration. A population (*demos*) can be connected to its institutions only if laws that legitimise them are the result of a discussion, and this debate satisfies certain procedural presuppositions, such as the equality of the speakers and the openness of the debate. The collective interaction during a moral discussion prevents subjective reflections on moral issues from becoming legal statutes without being accepted as legitimate statutes. In this representation of constitutional democracy, Habermas outlines a consensual theory of legitimacy, according to which constitutional norms can be legitimated only when social interests are discussed through the discursive channel of public debate.[8] The prospect of achieving this rational legal system, Habermas points out, depends on the procedural protection of the freedom to intervene in the political arena, and on the equality of the speakers. These two limits guarantee that individuals will be involved in the democratic process with the sole interest of disclosing personal reflections, and the openness of the public debate guarantees rational political decisions as the final product of an activity of communicative persuasion. A European Union ruled in such a fashion, not the one ruled by its institutions, will link European people to *their* European norms.[9]

Habermas also contests the possibility of having a Europe based on a network of civic nation-states. The term nation, which is now used as synonymous to state, was used to distinguish communities that speak different languages. This transformation of meaning is connected to the new function attributed to the idea of the nation-state. The invention of the nation-state has added an element of social integration to the egalitarian value of republicanism, which in the eighteenth century replaced tribal and local connections.[10] Habermas makes the point that on one hand this concept solves the problem of the legitimisation of the state, which was previously based on the theological predestination of the royal family. On the other hand, it gives a response to the sense of confusion in individuals who had nothing in common. The idea of the nation is the element of union between people and state, and it gives to the state the possibility of considering itself an autonomous entity, which is conceptually detached from its

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[6] E. Christodoulidis, 'Constitutional Irresolution: Law and the Framing of Civil Society', (2003) 9: 4 *European Law Journal* 401–432.

[7] This tension—Habermas argues—between majority and minority affects the legitimacy and stability of European liberal states, which are entangled on a never-ending cycle of political crises. J. Habermas, *Legitimation Crisis* (Heinemann, 1976).

[8] J. Habermas, *The Theory of Communicative Action* (Heinemann, 1984). For a more general analysis, see for instance: N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65: 3 *Modern Law Review* 331.

[9] J. Habermas, 'Toward a Cosmopolitan Europe', (2003) 14: 4 *Journal of Democracy* 86–100.

[10] 'Popular national self-consciousness provided the cultural background against which 'subjects' could become politically active 'citizens'. Belonging to the 'nation' made possible for the first time a relation of solidarity between persons who had previously been strangers to one another. Thus the achievement of the nation-state consisted in solving two problems at once: it made possible a new mode of legitimation based on a new more abstract form of social integration. J. Habermas, 'The European Nation State: On the Past and Future of Sovereignty and Citizenship', in *The Inclusion of the Other: Studies in Political Theory* (Polity, 1999) p. 111.

constitutive elements—population, territory, and institutions—and free to consider itself as an equal subject in the international political arena. By moving the legitimisation of the state from the divine right of the Royal family to the right of self-determination of the nation creates a new form of freedom that competes with the individualistic concept of freedom.[11] This new form of autonomy has two pragmatic effects on the European political arena. First, it irrationally equips European national-states with a moral reason to act as individuals who struggle to protect their own private interest in a free market. Second, it allows democratic states to behave in the international political arena similarly to the political template supported by the Royal family they have just superseded. This includes the idea of a right of protecting national interests (with violence if necessary) that previously was associated with the defence of the crown.

However, Habermas argues that the European integration cannot be based on this irrational linkage between nation-states.[12] Defending the national community and protecting republican values are conceptually separate: 'The nationalism which was inspired by the works of historians and romantic writers founded a collective identity that played a "*functional*" role for the implementation of the citizenship that arose in the French Revolution'.[13] In modern times, multiculturalism and globalisation have made the chimera of a homogeneous national population more visible, but Habermas explains that theoretically the incoherency of the binomial relationship between state and nation has been clear since it appeared.[14] The secular democratic values (which were established during the French Enlightenment) could not substitute the process of social cohesion of a seventeenth-century European religious society. This space, which

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[11] Habermas *op. cit.* note 10 *supra*, p. 114.

[12] For a more general analysis of this point see for instance. P. De Greiff, 'Habermas on Nationalism and Cosmopolitanism', (2002) 15: 4 *Ratio Juris* 418–438, and V. Breda, 'The Incoherence of the Patriotic State: A Critique of Constitutional Patriotism', (2004) 10: 3 *Res Publica* 247–265.

[13] J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe', (1992) 12: 1 *Praxis international* p. 4. Emphasis in the original.

[14] Habermas gives the example of the 'Germanists' meeting in 1848, where intellectuals from all over Germany met to suggest an intellectual base for a newly formed German state detached from the imperial values of the Austrian Royal family. The project, Habermas points out, of making the political basis for a state ruled by Germans was faced with theoretical difficulties. 'In this respect things were even more difficult for the German jurists than the philologists. While foreign languages formed nothing more than the back-ground for philologists, Roman law still ruled in the jurists own country'. J. Habermas, *The Post-national Constellation: Political Essays* (Polity Press, 2001) p. 11. The German legal system, like all the European legal institutions, relied on Roman codifications, such as the Corpus Juris Civilis and Corpus Juris Canonici, and on their mediaeval interpretations by Italian scholars, such as Pillio and Accursio. The universal value of this foreign theoretical material was supported by a long interpretative tradition of ancient texts. The substitution of these universal values that support the Roman legal doctrine with national laws was difficult for constitutional lawyers. On writing about a proposal for a new constitution for Germany theorists had to substitute theological values with the right of self-determination of the nation, and at the same time they had to make a constitutional text without referring to Roman law. 'The juristic version of the doctrine of the people runs into three major difficulties: . . . Above all, they were unable to provide the bases of legitimation for a democratic constitutional state from their own legal-historical resources. But such legal-political transformation would have lacked driving force, and formally established republics would have lacked staying power, if a nation of more or less self-conscious citizens had not emerged from a people defined by its subjection to power. This political mobilization called for an idea that was vivid and powerful enough to shape people's convictions and appealed more strongly to their hearts and minds than the dry ideas of popular sovereignty and human rights. This gap was filled by the modern idea of nation, which first inspirited in the inhabitants of state territories an awareness of the new, legally and politically mediated form of community'. *Ibid.*, p. 12.

was left empty after the relinquishment of the *ancien régime*, should be filled by the sense of belonging to the national community. The idealised national community substituted the model of social cohesion around the Royal family and stood side-by-side with the new constitutionally protected republican values.[15] Modern citizens are linked to constitutionally protected republican values and to the national group with which they share their communal identity. On the one hand, a citizen is in contractual partnership with the liberal set of principles embedded into the constitution. In this relationship he or she is obliged to renounce the use of violence to enforce his/her claims and the state is committed to protect his/her fundamental rights. On the other hand, a citizen is an organic member of the national community.[16] These cultural elements create in the individual a set of obligations that lead the member to respect his/her cultural tradition. Because of this, a member of a national identity appears to possess a unique form of *commitment* to the past.

However, Habermas suggests that the political success of the traditional nation-state is the result of a balanced equilibrium between social integration and the republican protection of individual freedom:

> The nation is Janus-faced. Whereas the voluntary nation of citizens is the source of democratic legislation [*Staatsbürger*], it is the inherited or ascribed nation founded on ethnic membership that secures social integration [*Volksgenossen*].[17]

If the relationship between the two is not well adjusted there are two possible consequences. First, the community might return to the form of democratic associations that historically preceded the national state, such as the mediæval belt of Central European Cities.[18] Every single element of these political associations—such as a city or a region—is socially detached from the other, and it is preoccupied on its ethnocentric search for the myth of the original national population. This incessant search for an irrational imagined origin drives apart the members of the association with dangerous democratic consequences. The recent separation of the former Yugoslavia is an example of this process. Second, linking the concept of nation to the political structure of the state might endanger the republican values on which the nation-state is based. The republican achievement of the lay state is endangered when the integrative force of the nation of citizens is considered to be something independent from the republican basis of modern democracy.[19] Habermas argues that the European integration has simply magnified the historical shortcomings of the national state. Multiculturalism constantly increases the gap between the myth of the ethnic uniformity of the European states

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[15] Habermas, *op. cit.* note 10 *supra*, at 112.

[16] A defence of the linkage between national identity with a political community was recently revived by communitarians such as Taylor C. Taylor and A. Gutmann, *Multiculturalism and 'the Politics of Recognition': An Essay* (Princeton University Press, 1992) and Walzer. M. Walzer, *The Politics of Ethnicity* (Belknap Press of Harvard University Press, 1982). In contrast with the communitarians, Habermas explains that a psychological linkage between members of the national community and state does not mean that the two elements are conceptually related. Habermas, *op. cit.* note 10 *supra*. There is a huge literature on the relationship between political self determination and nationality. For a more general analysis of this point see for instance: B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983); M. Ignatieff, *Blood & Belonging: Journeys into the New Nationalism* (Vintage, 1994); M. Canovan, *Nationhood and Political Theory* (Edward Elgar, 1996); D. Miller, 'Bounded Citizenship', in R. Dannreuther (eds), *Cosmopolitan Citizenship* (Macmillan, 1999).

[17] Habermas, *op. cit.* note 10 *supra*, at 114.

[18] Habermas, *op. cit.* note 13 *supra*, at 2.

[19] Habermas, *op. cit.* note 10 *supra*, at 115.

and the factuality of cultural pluralism. However, the connection between nation and state nations is a precarious historical fabrication that preceded the process of European integration.

Nationalism is a form of collective consciousness that presupposes a reflexive appropriation of cultural traditions that have been filtered through historiography and that spread only via the channels of modern mass communication. Both elements lend to nationalism the artificial traits of something that is to a certain extent a fabrication, thus rendering it by definition susceptible to manipulative misuse by political élites.[20]

Habermas makes clear that the relationship between nation and state is—and I am of the same opinion—the precarious base for the template of the European state. However, the deductions which he draws from this analysis are less convincing.

Habermas argues that connecting the nation-state with Europe not only is irrational, but it can endanger republican values. A Europe of nation-states—such as the one supported by Weiler—cannot develop peacefully.[21] In Habermas' analysis the only possible solution to the risks associated with the traditional form of the nation state is to renounce this irrational ambivalence and to change the actual structure of Europe from nation-state based to patriotic:[22]

> Compare 'freedom' in the sense of national independence. i.e. collective self-assertion vis-à-vis to other nations, with 'freedom' in the sense of political liberties the individual citizen enjoys within a country; the two notions are so different in meaning that, at a later point, the modern understanding of republican freedom can cut its umbilical links to the womb of the national consciousness which had originally given birth to it.[23]

Habermas claims that the model of European social cohesion, which binds citizens who are strangers to one another, should not derive from the sense of belonging to the national community, but it should rather spring from individual commitment to the historical evolution of constitution-making. He argues that the linkage between law and the process of social integration around an autonomous system of constitutional statutes is not guaranteed in a polity made of nation-states. Confusing the protection of national interest with the protection of democracy is a general problem of a Western society that is magnified in the European Union where Member States irrationally protect their national interests. Habermas argues that the irrationality of the linkage between state and the protection of national interests is made obvious by a rational reading of the history of European constitution-making where nationalism is traditionally associated with xenophobia and anti-Semitism.

However, the fact that we cannot prove the existence of a substantive link European social integration and the political structure of the nation-state should be distinguished from the political claims proposed by Member States that want to protect their national interests. These claims and the political discussions generated by them cannot be aprioristically excluded from the political arena—as Habermas argues—without endangering the internal coherence of his theory of an open communicative democracy, and crucially for us, without making the European Constitutional venture undemocratic. This point is developed by MacCormick.

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[20] Habermas, *op. cit.* note 13 *supra*, at 3.

[21] '*The positive self-understanding of one's own nation now became an efficient mechanism for repudiating everything regarded as foreign. for devaluing other nations, and for excluding national, ethnic, and religious minorities, especially Jews*', Habermas, *op. cit.* note 10 *supra*, at 111.

[22] Habermas, *op. cit.* note 10 *supra*, at 111.

[23] Habermas, *op. cit.* note 13 *supra*, at 4.

A   MacCormick's Europe of Civic Nations[24]

What is the role of the nation-state in the process of European constitutional integration? How can we transcend our divisions without marginalising those who believe in them? These questions are essential for understanding the role of nation-states in the European constitutional process of social integration. In the previous part of this article I explained that Habermas' constitutional patriotism seems to endorse the universal values of European humanism, but then it inserts itself in the middle ground between a procedural and a substantive theory of democracy. On the one hand, he argues that the only form of true social integration is the one that allows an open communicative interaction of all citizens. This interaction is the exclusive source of social and constitutional integration. On the other hand, it appears to criticise the constitutional template of the European nation-state for being a dangerous political elements that should be aprioristically ruled out from a constitutionally integrated Europe.

An aprioristic constitutional system such as the one proposed in Habermas' constitutional patriotism does not create social integration. Authors such as Keating,[25] MacCormick,[26] Miller,[27] Přibáň,[28] and Walker,[29] to name just a few,[30] and institutions such the European Commission[31] have produced various proposals that try to accommodate a legal protection of national identity that Habermas rejects with European institutions policies. This acceptance of communal choices is possible only if democracy takes into account the individual self-realisation that depends on a substantial degree of support from Member States' economical and social backing. From this assumption, MacCormick argues that the collective sense of belonging that supports democratic Europe should be considered an individual right of its members:[32]

> The assertion of national aspirations does not have to be, and rationally ought not to be, a ground for denial of other aspirations of a similar kind. This is a principle which can and should be recognised among the principles of right (or justice) that set the terms of shared democracy in a large-scale confederal commonwealth like the European Community.[33]

The idea of European commonwealth, which MacCormick suggests here,[34] is compatible with the reduction of national sovereignty, but it is not clear whether it is compatible with the basic rules of the democratic régime. To pre-empt this critique, he argues that democracy requires a sense of loyalty to collective decisions and national-

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[24] Professor Sir Neil MacCormick (MEP) was an alternate member of the European Convention. Personal page available at <http://european-convention.eu.int/CVs/pdf/MacCORMICK.pdf>.

[25] M. Keating, 'So Many Nations, so Few States: Territory and Nationalism in the Global Era', in J. Tully and A. Gagnon (eds), *Multinational Democracies* (Cambridge University Press, 2001).

[26] N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth* (Oxford University Press. 1999).

[27] D. Miller, *On nationality* (Clarendon Press, 1995).

[28] J. Přibáň, 'European Union Constitution-Making, Political Identity and Central European Reflections', (2005) 11: 2 *European Law Journal* 135–153. For a general review of these analyses, see for instance N. Krisch, 'Europe's Constitutional Monstrosity', (2005) 25: 2 *Oxford Journal of Legal Studies* 321–334.

[29] N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65: 3 *Modern Law Review* 317–359.

[30] For a general review of these analyses, see for instance N. Krisch, 'Europe's Constitutional Monstrosity', (2005) 25: 2 *Oxford Journal of Legal Studies.*

[31] European Commission, *European Governance Debate.* 2002. Available at <http://europa.eu.int/comm/governance/contributions/index_en.htm>.

[32] MacCormick *op. cit.* note 27 *supra*, at 176.

[33] *Ibid.* p. 191.

[34] *Ibid.*

ism is among the sociological aspects—but not the only one—which contribute to make these choices a shared element within a particular community. These choices—in the context of democratic decision-making—are a factor which helps the implementation of the European principle of subsidiarity.[35]

The template of the nation-state—MacCormick argues—links together institutions (regional, national, and European) and cultural aspects, such as religion, languages, and cultural heritage, and it cannot aprioristically be excluded from democracy as Habermas argued. The template of the nation-state combines the protection of national cultural characteristics, which are generally associated with ethnic nationalism, with civic nationalism, which supports constitutional democracies such as that of the USA. MacCormick suggests that Member States' protection of national interests is on the middle ground between the protection of cultural heritage and the protection of civic society. In a contest in which all democracies are nationalistic, the protection of national identity moves the balance between the respect of multiculturalism and the promotion of nationalism. MacCormick points out that pragmatically, some countries might move their internal policies close to the limit of the two axioms: republican values and nationalism. However, he suggests that: 'it is the common culture that prevails'.[36] He asserts that whereas civic nationalism reads nationalism as a shared agreement between institutions and national community, ethnic nationalism considers nationalism as a matter of belonging. However, the two ideas of nationalism are not exclusive. Ethnic communities can make their own institutions, and civic commitment might create a sense of belonging to the community, in which this loyalty is shared.[37] He concludes by saying that nationalism is not a homogenising force, which only wants the preservation of its own cultural features without recognition, but it is a political movement that claims the right of national self-determination for preserving cultural diversity.

The Treaty Establishing a Constitution for Europe endorsed 'the third way' suggested by MacCormick, and rejected Habermas' Patriotism. Initially, the Draft Treaty Establishing a Constitution for Europe gives its backing to Habermas' constitutional patriotism:

> Conscious that Europe is a continent that has brought forth civilisation; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason.[38]

Equality, freedom and the respect of the best argument are the basic elements of theory of Constitutional Patriotism but the wording changed in the signed treaty. 'DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of

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[35] Old conceptions of the state-sovereignty and of the absolutism of the nation-state are in the process of being transcended, and will perhaps be completely transcend, if people realise that this is possible and in certain important ways desirable. The process does not abolish nations as political-cultural communities. It may create space for the flourishing of nations and, in a significantly qualified sense, of nationalism'. *Ibid.* p. 167.

[36] *Ibid.*, p. 169.

[37] Similar point was recently made by Přibáň 'Unlike the utopian image of one European nation, the European identity is most likely to be constructed as a hybrid mixture of common civil ethos and persisting different national loyalties.' *op. cit* note 28 *supra*, p. 151.

[38] The Preamble, Draft Treaty Establishing a Constitution for Europe. Brussels, 18 July 2003.

the human person, freedom, democracy, equality and the rule of law'.[39] These three elements combined with the protection of national and regional identities of Article 5 show that Member States embrace MacCormick's hypothesis of a social integrated liberal Europe where nation-states and regional identities cooperate in a single political project.

By adopting MacCormick's idea, the Treaty Establishing a Constitution for Europe EU seems to have answered the questions which opened this article. (Does the European Union require social cohesion? Is the Treaty Establishing a Constitution for Europe the answer to this need?) However, it does not explain why European Member States find so difficult to accept a constitution for Europe. Ten months after the signing, only five Member States have ratified the treaty.[40] On 29 May the French electorate said 'no' to the referendum over the ratification of the treaty and few days after, the same answer arrived from The Netherlands. Given the French and Dutch rejection of the treaty, there is a debate over the usefulness of endorsing the constitution in others Member States since the constitution for Europe seems a 'terminally ill' project. A reason for this European failure to convince public opinion on the possible political danger of nationalism might be strategic; nationalistic propaganda can easily link unrelated sociological situations such as unemployment with the increase of asylum-seeking demands and individuals can assimilate nationalism as a protection of their own private interests.[41] Theoretically this is a trivial point but if we assume that the Treaty Establishing a Constitution for Europe is protecting national and regional identities, why are European nations so sceptical of this European constitutional integration? A theoretical answer to this question might come from Tully.[42] He points out that the solution to this problem is the enlargement of the group's involvement in the democratic process. Ideally—he argues—political choices, which affect all, should be decided with the direct participation of the whole community: 'In theory, "*Quod omnes tangit*" [what touches all must be approved by all], one of the oldest principles of western constitutionalism, has been revived and given a variety of multilogical reformulations as a principle of democratic legitimacy'.[43] In the project of European constitutional integration, this high level of political participation can be achieved only by adopting a procedural template of democracy that enlarges individual's and group participation on the European constitutional project.

II   The European Constitution and the Missing Process of Recognition

On the previous section, I explained the theoretical bases which supported the adoption of a constitution for Europe. I clarified the reasons that excluded Habermas's

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[39] The Preamble, Treaty Establishing a Constitution for Europe, 2004, Signed in Rome on 29 October.

[40] Spain, Slovenia, Lithuania, Italy, Hungary.

[41] Across different levels of political analysis, there is plethora of debates over the reasons of the French '*non*'. Here a review form a socialist source. 'The dilemma facing the ruling elite in France—and Europe— was summed up by the influential daily *Le Monde* in a dramatic catchphrase: 'Each social conflict contains the seeds of a rejection, even a hatred, of Europe. Unemployment is rising again? Europe. A production plant moving out? Europe. A post office closing? Europe. Stagnant wage levels? Europe. High cost of living? Europe'. Richard Dufour, 'French Referendum on European Constitution Set for May 29.' *World Socialist Web site*, 2005. Available at
<http://www.wsws.org/articles/2005/mar2005/fran-m18.shtml>.

[42] J. Tully, 'Introduction', in J. Tully and A. Gagnon (eds), *Multinational democracies* (Cambridge University Press, 2001).

[43] Tully, *op. cit.* note 42 *supra*, p. 24. Emphasis in the original.

constitutional patriotism as a suitable model for a constitutionally integrated Europe, and discussed MacCormick's Europe of civic nation-states. At first sight, Mac-Cormick's idea seems an attractive model of constitutional integration, but it cannot explain the negative reactions to a treaty that—*de facto*—endorses his theory. The dilemma is that, on the one hand, MacCormick's idea of Europe wants to limit the demands of extremist groups that slow the European integration, yet on the other hand, if the process of constitutional recognition of national and regional identities is reduced to a 'yes or no' debate, national identities will feel unrepresented by the decisions taken within the political arena.

A theoretical solution might be drawn from Tully's analysis of the process of constitutional recognition of national identities.[44] He argues that national identities should be considered as essential elements of modern democratic society. From this point, he draws the conclusion that a modern constitution should acknowledge these political groups. The acknowledgement of the participants in a debate is a logical requirement of the discussion that can be easily overlooked for those who consider the state population to be a homogeneous group of people, but it is only by accepting that modern society is multinational that we can have a representative and democratic constitutional debate. The idea of legally recognising a national identity is often perceived as the first step in a process that sends a constitutional project down the path of segregation (i.e. Habermas),[45] but this fear is unfounded. Tully explains that the most common political claim of modern national groups is not independence and state sovereignty, as it is widely assumed, but the reconfiguration of the existing constitutional associations.

This connection between independence, which in the modern world is a chimera for any state,[46] and national aspirations is a result of the overlapping of meaning between national and state sovereignty.

This classic understanding of the freedom of self-determination has been called into question and discredited by the persistence of struggles for recognition in the very societies that, until recently, were legitimated by it, for the struggles demonstrate that the constitution is not acceptable for all. As a result, the question of the freedom of self-determination is raised anew. It is raised in the context of multinational societies whose members have passed through the experience of struggles over recognition and learned that these do not admit a definitive solution.[47]

Tully argues that the assumed constitutive elements of popular sovereignty, such as the uniform political association of free individuals, the individuals' recognition of the legitimacy of the constitution, and the unquestioned moral validity of its norms, eliminate cultural diversity as a constitutive aspect of politics. The doctrine of national sovereignty is misinterpretation of the relationship between identity/ies and democracy, which has the negative effect of creating tension between those who demand recogni-

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[44] For a more general analysis of Tully's work in the contest of modern constitutional discourse see for instance: M. Loughlin, 'Constitutional Theory: 25th Anniversary Essay', (2005) 25:2 *Oxford Journal of Legal Studies*, pp. 197–200; S. Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2004) p. 9, pp. 168–169; Walker, *op. cit.* note 29 *supra*, pp. 320, 326, 331.

[45] Habermas, *op. cit.* note 10 *supra*.

[46] Commercial relationships and international treaties bind all states to respect some form of international orders. This pragmatically and theoretically limits ideas of absolute sovereignty, such as those proposed by Carl Schmitt and Lord Acton, to academic discussions.

[47] Tully *op. cit.* note 42 *supra* at 6.

tion of their national identity and those who refuse this claim on the ground that it is theoretically incompatible with a constitutional set of norms.[48]

The unreasonable refutation of multinationalism by modern constitutional theory— Tully continues—denies the political role of national groups and this breaks the link between *demos* and the democratic practice of law making. A theoretical solution to this problem might be to consider the struggle for recognition of national identities to be part of the democratic practice of contesting and understanding previous political decisions.[49] If the process of recognition of national identities were to be inserted into the democratic process, it would change its function from an act of protest to a step toward the amendment of constitutional norms. If we abandon the concept of ethnically uniform nation-state, the demands of national groups become expressions of political freedom that might be channelled into constitutional norms. However, recall that democracy is perpetuated by the decisional practice that leads to the formation of constitutional rule, not by norms. It is precisely for this reason that federalism, confederation, and regionalism do not represent a solution to the problematic relationship between the nation/s, democracy, freedom, and constitutional law.[50]

The linkage between these elements constitutes what Tully calls the 'third dimension' of the constitution.[51] This third dimension gives a right for any individual to demand the recognition of her/his identity and a duty for other members of the community to answer.

> Each member must possess this right to initiate rule change and the correlative duty to acknowledge and answer, if the society is free and democratic. [This] follows from the 'democratic principle'. As a consequence, a free and democratic society is involved in a 'continuous process of discussion', a process which includes both the right to voice dissent and the duty to 'acknowledge and address those voices in the laws by which all in the community must live.[52]

The political and/or judicial tools that acknowledge the dynamic of this relentless practice of recognition of national and regional identities are already present in most European states, such as Belgium, Germany, Italy, Spain, and the United Kingdom.[53] However, its normative impact on the Treaty Establishing a Constitution for Europe is limited to a 'yes or no' debate. The normative importance of the practice of discussing the rule of recognition is downplayed by constitutional lawyers who restrict their accounts of the recognition process to constitutional responses (e.g federalism). This creates the false assumption that constitutionalism can provide definitive solutions to

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[48] 'Consequently, multinational democracy appears to run against the prevailing norms of legitimacy for a single-nation democracy and it is condemned as unreasonable or abnormal by both the defenders of the status quo and the proponents of secession'. Tully *op. cit.* note 42 *supra* at 3.

[49] 'A contemporary constitution can recognise cultural diversity if it is received as what might be called a "form of accommodation" of cultural diversity. A constitution should be seen as a form of activity, an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiated agreement on their forms of association over time in accordance with the three conventions of mutual recognition, consent, and cultural continuity'. Tully *op. cit.* note 42 *supra*, at p. 13.

[50] This point of Tully's analysis is critically analysed by Christodoulidis, *op. cit.* note 6 *supra*.

[51] Tully *op. cit.* note 42 *supra*, at 13.

[52] Tully *op. cit.* note 42 *supra*, at 14 (emphasis added).

[53] Before continuing our analysis, it is important to make clear that constitutional models such as the one suggested above are not a template for and ideal European constitution. Obviously, it is the reader's prerogative to challenge the veracity of the examples proposed, or indeed the correctness of the reasoning deduced from them. However, these are examples to support the theoretical possibility of dynamic constitutional debate over the role of national identities not to be used as templates for European constitutional proposal.

the issues related to multinationalism and a referendum might provide an adequate arena for legitimising a change of individual's and group status. However, this search for a constitution for Europe creates new dissenting voices that generate new demands into the process. The traditional understanding of the relationship between Member States and Europe unreasonably simplifies these demands of self-recognition of a national identity to a practice of exclusion and strategic protection of—political or economic—national interests. On the one hand, those who support the European universal values they claim are embedded in a constitution protect a superimposed agenda by rejecting any demand that might alter the Treaty Establishing a Constitution for Europe. On the other hand, those who demand recognition of their identity reject the legitimacy of the constitutional system that unfairly fails to acknowledge their struggle for recognition.

I argue that if Europe wants to break this deadlock, the process of evaluation of these claims cannot exclude the acknowledgement of the identity of those who put forward these demands. We have to accept that demands of changing the constitutional rules of recognition within a political community assume different forms in relation to those who demand it. For instance, the demand for European recognition from the Turkish inhabitants of Cyprus is different from the European claims proposed by the Scottish Parliament. However, independently from the type and the identity of who puts forward these claims, they should be acknowledged by all parties who are affected by the proposed changes. This will give them the occasion to enter the negotiation process that acknowledges the role of a group within a truly democratic European Union.

In his analysis, Tully calls this process '*identity discussion and formation*'.[54] It is composed of three discursive stages. First, if a group wants to change the rules of recognition of a democratic community—for whatever reason—it has to show to the rest of the community that the majority of its members belive that they are misrepresented by the legal system. Thus, the first stage in a process of recognition of an identity is always an *internal debate*. In his book, *Strange Multiplicity: Constitutionalism in an Age of Diversity*,[55] Tully proposes the debate within the constitutional process of recognition of the original inhabitants of Canada as an example of this first phase. Second, the members of the group demanding recognition should start the debate with members of other identities since an amendment of the rules of recognition would change the role of national identity in the whole community (*external debate*). Third, the publicity of the *referendum* allows for the further enlargement of the debate about the recognition of a national identity. However, a referendum is not the final word in the procedure of self-recognition. A referendum is one of the processes that leads to the recognition of a national identity. The publicity of the referendum will extend beyond the community in which this form of direct democracy takes place. Groups that are not directly affected by the proposed changes might adopt a similar proposal and start the process of changing their rules of self-recognition within the larger community in which they live.

The first two phases of this process are missing in the project of European constitutional integration. The European Convention, which prepared for drafting the Treaty Establishing a Constitution for Europe, aimed to rationalise the existing system of

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[54] Tully *op. cit.* note 44 *supra*, at 17.
[55] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

treaties and to set a blueprint for a new model of European Governance.[56] Because of its institutional structure and mission, the Convention was not a suitable democratic arena for a process of recognition of national identities and their claims, which were depicted as an obstacle in the process of European integration.

> Since Maastricht, the latest Treaties have been difficult to negotiate and have not met their original aims: discussions within the Institutions have often given precedence to national interests over consideration of the common European good . . . The shortcomings affect Europe in its present configuration. They will be even more critical in an enlarged Europe. We must remedy them in the interests of Europe, but also in the interests of the world.[57]

Despite the presence of national institution's representatives, the agenda of the Convention was limited by the idea of making a European Constitution that embraced the—supposed—universal values of humanism and reasons. This idea, which aprioristically limited the debate over the role of national identities in a constitutionally integrated Europe, makes the entire project of European Integration socially dissatisfying and theoretically incoherent.[58]

It is socially dissatisfying since it lacks of an adequate process of social integration. Tully makes clear that it is by discussing and denying political demands that members of a polity and aliens constitutionally define themselves in relation to each other. The interaction that results from the process of struggling for—and against—recognition is multilogical and multiform. The complexity of the international relation and the possible rejection of political demands might slow down a process of constitutional integration. This appears to be what has happened in Europe. However, these cannot be reasons for procedurally or substantially restricting the European process of constitutional integration to a tool for increasing the speed of European unification, as suggested by the president of the convention.

In addition, the idea of delegating to the European convention the role of a constitution maker is democratically precarious.[59] The practice of discussing and denying the role of national identities within a polity is part of the wider procedure of highlighting discrepancies and injustices within a political community.[60] The presence of a component of chronic disagreement among the members of a culturally diversified society is a normative factor of democracy, since it is discontent over previous political and constitutional choices that underpins the democratic debate. The impossibility of

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[56] Introductory Speech by President V. Giscard D'estaing to the Convention on the Future of Europe. 26 February 2002. Available at <http://european-convention.eu.int/docs/speeches/1.pdf>.

[57] *Op. cit.* note 57 *supra*, at 5.

[58] For a detailed analysis of the structural limitations of the Convention see for instance: J. E. Fossum and A. J. Menédez, 'The Constitutional 's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union', (2005) 11: 4 *European Law Journal* 409.

[59] A more general analysis of the democratic limits of the convention is proposed in Closa, *op. cit.* note 3 *supra* sections I and II. For an account of the relationship between popular identification in the project of European Constitutional Integration see for instance: N. Gibbs, 'Examining the Aesthetic Dimensions of the Constitutional Treaty', (2005) 11: 3 *European Law Journal* 342–362. For an *quasi* empirical analysis of the relationship between the work of the European Convention and IGC process of treaty making see for instance: J. E. Fossum and A. J. Menendez, 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union', (2005) 11: 4 *European Law Journal* 380–440.

[60] 'The mutual disclosure and acknowledgement of the contests falls short of full constitutional recognition. What is disclosed in any given contest over recognition is partial and revisable, and the form of acknowledgment and response by other members is equally partial and revisable in the future'. Tully, *op. cit.* note 42 *supra*, at 21.

creating a universal consensus over a process of recognition of a national identity is one of the elements that sustain the democratic process. This continuous contesting, mutual disclosure, and acknowledgement also fulfil a normative function. The activity of acknowledging national identity not only pragmatically discharges the resentment of those who do not feel represented in the constitution, but also—and more importantly for us—it supports the democratic activity that creates temporary agreements over moral and political issues. This activity has been relatively overlooked because theorists and practitioners have tended to presume that a socially integrated Europe should have some moral aims set in a constitutional system, and democracy is one of the means for achieving these intentions. European unification theories such as the one proposed by Habermas and endorsed by the European Convention, usually universal in their intent, see the recognition of national identity as something to overcome, but the divisions over a politic of recognition of identity feed into the democratic debate. However, the process of constitutional integration of the European nation-states cannot be limited without breaching the normative connection between *demos* and democratic self-determination.

III   A Multinational Constitution for Europe

An ideal European constitution is not simply a mere executor of normatively superior political agreements between Member States, but it also works as a conveyor of moral demand, which emerge from the social debate into the institutional organisation of European institutions. Thus, European constitutional norms cannot but have a privileged status. They pragmatically bridge the gap between the democratic process of discussing political decisions, which is the real source of legitimisation, and systemic integration, which looks after the European economics integration. The constitution partly directs institutional policies that have to do with capital; labour, administrative power, and goods towards a maximum economic efficiency. However this linkage between civic institutions cannot be a base for a constitutionally integrated Europe. To solve this problem, Habermas argues that the sense of 'community' in a democratic society should be founded exclusively on the acceptance and support of a system of constitutionally established rules, which are the logical result of the historical evolution of republicanism.

In contrast with Habermas's idea of a patriotic Europe, MacCormick[61] argues that the political stability of the European Union is based on the interrelations between European of civic nations. It is the connection between nation-states and European liberal values that morally and politically underpins the European process of constitutional and social integration. At first sight, MacCormick's proposal might be considered an alternative to Habermas's patriotism, and the Treaty Establishing a Constitution for Europe—*de facto*—endorsed MacCormick's proposal. This hypothesis is powerful and may eventually be convincing, but it is unpersuasive on one crucial mater. Why do European people find it so difficult to accept a European Constitution which—in theory—protects European national identities?

In this article I have suggested that Tully's theory of multinational democracy might provide an answer to this dilemma. He explains that a process of constitutional integration is a multiphase discursive process. It is this practice of discussing and denying

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[61] MacCormick *op. cit.* note 25 *supra*.

political demands that creates a socially and constitutionally integrated community. In a multinational Europe where Member States struggle for the protection of their national interests, social integration cannot be but a 'discursive practice'. However, this practice of discussing group and individual political demands provides the democratic link between people (*demos*) and their constitutional system. The process adopted for making the European constitution was seriously limited. The composition of the European Convention and its ideological agenda which embraced Habermas's patriotism substantially restricted the political process of discussing the forthcoming blueprints for a European constitution. This antidemocratic effect is not reduced by the Member States' referendum, which forces individuals and groups to take a political position on the 'yes or no' debate. The Treaty Establishing a Constitution for European was already decided and the democratically precarious nature of the process which produced it cannot be redeemed by an expression of direct democracy.