

THE FOUNDATIONAL PILLAR OF NATION-BUILDING: LAW

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ABSTRACT

This article argues that law is the foundational pillar of nation-building - not one instrument among several, but the structural element upon which the other components of a nation rest. Where the study of nation-building has emphasised shared language, common memory, education and market integration, this article contends that these unify a population into a nation only when they are ordered, guaranteed and rendered durable by law. It develops the argument in six movements. It first distinguishes the state from the nation and locates law at the point where the two meet. It then sets out four functions through which law builds the nation: constituting the political community and its membership (citizenship); defining and limiting public power (constitutionalism and the rule of law); integrating a plural society into a single civic order (equality before the law); and generating the trust and predictability on which cooperation, welfare and a shared future depend. Drawing on the theory of nations and nationalism, institutional economics, and legal and constitutional theory, the article maintains that a nation without law is a population without a shared framework, and that the durability of any nation is finally a function of the quality, equality and legitimacy of its law. It closes with the risks of an over-legalised or instrumentalised understanding of law, and with principles for a law-centred conception of nation-building.

Keywords: nation-building; law; rule of law; constitutionalism; citizenship; legitimacy; institutions; social trust.

АННОТАЦИЯ

В статье утверждается, что право является основополагающей опорой государственно-национального строительства — не одним из многих инструментов, а тем структурным элементом, на котором держатся остальные составляющие нации. Если исследования национального строительства подчёркивали общий язык, общую память, образование и рыночную интеграцию, то в данной работе утверждается, что эти элементы объединяют население в нацию лишь тогда, когда они упорядочены, гарантированы и сделаны устойчивыми правом. Аргумент разворачивается в шести частях. Сначала различаются государство и нация, а право помещается в точку их встречи. Затем выделяются четыре функции, через которые право строит нацию: конституирование политического сообщества и членства в нём (гражданство); определение и ограничение публичной власти (конституционализм и верховенство права); интеграция плюралистического общества в единый гражданский порядок (равенство перед законом); и создание доверия и предсказуемости, от которых зависят сотрудничество,

благосостояние и общее будущее. Опираясь на теорию наций и национализма, институциональную экономику и правовую теорию, автор утверждает, что нация без права — это население без общей рамки, а устойчивость любой нации в конечном счёте есть функция качества, равенства и легитимности её права.

Ключевые слова: национальное строительство; право; верховенство права; конституционализм; гражданство; легитимность; институты; общественное доверие.

INTRODUCTION

Every nation is a construction, and every construction rests on a foundation. The literature on nation-building has proposed many candidates for that foundation: a shared language, a common history and memory, a national system of education, a unified market, a set of symbols and myths, an ethnic core, a civic creed. Each of these has been shown to matter, and each has generated a rich body of scholarship. This article advances a different and, it will argue, more fundamental claim: that beneath all of these lies a single load-bearing pillar - law. Language, memory, education and market may furnish the materials of a nation, but it is law that turns those materials into a structure. A shared language without a legal order that recognises it, a common memory without institutions that transmit it, a market without rules that govern it, a people without a constitution that constitutes it - none of these is yet a nation. Law is the element that binds the rest into a durable whole. The claim is easy to state and easy to underestimate, because law is so pervasive that it becomes invisible - the water in which political life swims. Precisely because it is everywhere, it is rarely named as the foundation; it is treated as a technical instrument in the service of other, supposedly deeper forces such as identity or economy. This article reverses that ordering. It argues that identity and economy themselves become nation-building forces only when they are given legal form - when belonging becomes citizenship, when memory becomes a constitutional narrative, when exchange becomes contract and property, when power becomes office. In each case, law is not the servant of the deeper force but the form through which the force acquires public reality and endurance.

The argument unfolds in six movements. Section 2 distinguishes the state from the nation and locates law at the junction where the machinery of the state becomes the shared home of the nation. Section 3 examines law as the constitutive act of the political community and of membership in it - the law of citizenship. Section 4 turns to law as the definition and limitation of public power - constitutionalism and the rule of law. Section 5 considers law as the integrator of a plural society into a single civic order - equality before the law. Section 6 analyses law as the generator of trust, predictability and a shared future - the social and economic yield of legality. Section 7 addresses the limits and risks of a law-centred view, and Section 8 concludes. Throughout, the guiding thesis is constant: that law is not one pillar among the pillars

of nation-building but the foundational pillar on which the others stand, and that the durability of a nation is, in the last analysis, the durability of its law.

State and Nation: Where Law Stands Between Them

Any account of law in nation-building must begin by distinguishing two things that ordinary language runs together: the state and the nation. The state, in the classic definition, is the apparatus that successfully claims the monopoly of legitimate force over a territory; the nation is the imagined community of people who understand themselves as belonging together and as the rightful bearers of political self-rule.¹ Benedict Anderson taught a generation that the nation is 'imagined' - that its members will never know most of their fellows yet hold in their minds the image of their communion.² Ernest Gellner argued that nations are made, not found - that industrial society, with its need for a mobile, literate, interchangeable workforce, called forth the culturally homogeneous nation and the educational state that produces it.³ Charles Tilly showed how war and the extraction it required drove the formation of the modern state itself.⁴ These are theories of how populations become peoples and how apparatuses become states.

What these accounts share, and what this article foregrounds, is that neither the state nor the nation coheres without law. The state's monopoly of force is a legal claim: it is not mere violence but authorised violence, force exercised under and limited by rules, and it is the rules that distinguish a state from a mere army or a mafia. The nation's self-understanding, likewise, becomes politically effective only when it is inscribed in law - in a constitution that names the people as sovereign, in citizenship statutes that define who belongs, in the official status of a language, in the legal recognition of a calendar of memory. Law is the hinge on which state and nation turn toward one another: it converts the state's coercive capacity into legitimate authority, and it converts the nation's felt solidarity into enforceable rights and duties. The state without law is domination; the nation without law is sentiment; it is law that makes the one legitimate and the other durable.

This is why nation-building, understood as the deliberate creation of a shared political community, is at its core a legal enterprise. The founders of new states do not begin by writing anthems; they begin by writing constitutions. The decisive acts of nation-formation - declarations of independence, constitutional conventions, the first citizenship laws, the establishment of courts - are legal acts, and they are understood as such by those who perform them. Bruce Ackerman has described these as 'constitutional moments,' the rare episodes in which a mobilised people authors the

¹Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 212-216, 941-955, on legitimate domination and the state's monopoly of legitimate force.

²Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 2006).

³Ernest Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983).

⁴Charles Tilly, *Coercion, Capital, and European States, AD 990-1992* (Cambridge, MA: Blackwell, 1992).

fundamental law under which it will thereafter live.⁵ The nation, in this sense, is not merely reflected in its law; it is in significant part authored by it. The remaining sections examine the four ways in which this authorship proceeds.

Law as Constitution of the Community: Citizenship and Membership

The first and most basic function of law in nation-building is to answer the question that every nation must answer before it can do anything else: who belongs? A nation is not a crowd; it is a bounded membership, and the boundary is drawn by law. Citizenship - the legal status that marks a person as a full member of the political community - is the juridical form of national belonging, and its rules determine the shape of the nation as decisively as any myth or memory. Whether citizenship is acquired by descent (*jus sanguinis*) or by birth on the territory (*jus soli*), whether naturalisation is open or closed, whether dual nationality is permitted, whether the children of immigrants are members from birth: these legal choices constitute the nation as a concrete body of persons.

Rogers Brubaker's comparison of France and Germany showed how deeply these legal definitions run and how consequential they are. The French tradition, territorial and assimilationist, made citizens of those born and raised on French soil; the German tradition, for long organised around descent, drew the boundary of membership around a presumed ethnocultural community.⁶ Two neighbouring nations, comparably modern and prosperous, built different peoples through different citizenship law. The lesson is general: the nation does not precede its citizenship law as a natural fact that the law merely records; the citizenship law is one of the instruments through which the nation is made. To change the law of membership is to change the composition, and over time the character, of the nation itself.

Citizenship, however, is not only a boundary; it is also a bundle of rights and duties, and in this second aspect it is the engine of national integration. T. H. Marshall's classic account traced the historical expansion of citizenship through three stages - civil rights (the rights of individual freedom and equality before the law), political rights (the right to participate in the exercise of power), and social rights (the right to a measure of economic welfare and security).⁷ Each stage is a legal achievement, and each deepens the substance of membership: the citizen is progressively constituted not merely as a person who belongs, but as a person who is free, who governs, and who is secured against destitution. Through this expanding legal status, a population of subjects becomes a nation of citizens - people bound to the political community not only by sentiment but by a shared and enforceable stake in it. Citizenship law thus performs the first work of nation-building: it draws the

⁵Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1991), on constitutional moments and popular sovereignty.

⁶Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992).

⁷T. H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

circle of the community and fills that circle with the rights that make belonging worth having.

Law as the Definition of Power: Constitutionalism and the Rule of Law

If citizenship law constitutes the members of the nation, constitutional law constitutes its government - and, crucially, limits it. This is the second nation-building function of law, and it is the one that most sharply distinguishes a nation of citizens from a mere population under a ruler. A constitution does two things at once: it establishes public power, creating the offices and institutions through which a people governs itself, and it binds that power, subjecting it to rules that even the highest office cannot lawfully transgress. The genius of constitutionalism is that these are a single act: the same law that authorises power limits it, so that authority and constraint are born together.

The principle that gives this its force is the rule of law - the requirement that public power be exercised through general, prospective, public rules applied equally to all, rather than through the arbitrary will of officials. A. V. Dicey's classic formulation held that no one is above the law and that all are subject to the ordinary law of the land administered by the ordinary courts.⁸ Lon Fuller showed that law has an 'inner morality' - that to govern through rules at all, a system must make its rules general, public, prospective, clear, non-contradictory, possible to obey, stable, and actually followed by officials - and that a regime which systematically violates these desiderata is not merely unjust but fails to be a legal system at all.⁹ Tom Bingham's modern synthesis gathered these threads into a working ideal of the rule of law that protects the individual while ordering public life.¹⁰ For nation-building, the rule of law is not a luxury added after the nation is built; it is constitutive of the kind of nation worth building - one in which citizens are governed by laws they can know in advance rather than by the shifting will of the powerful.

This constitutive role has a further dimension that recent scholarship has emphasised. Francis Fukuyama has argued that a well-ordered political order rests on the balance among three elements: a capable state, the rule of law that constrains it, and mechanisms of accountability that answer it to the governed.¹¹ A strong state without the rule of law is despotism; the rule of law without a capable state is a paper promise; accountability without either is disorder. Nation-building, on this view, is the work of assembling all three in balance, and law is the medium of the assembly - it both empowers the state and binds it, both creates accountability and enforces it. Guillermo O'Donnell made the point from the side of democratic theory: without the rule of law, citizenship itself is hollow, because rights that cannot be vindicated

⁸A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), pt. II, on the rule of law.

⁹Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 33-94, on the inner morality of law.

¹⁰Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

¹¹Fukuyama, *The Origins of Political Order*, on the balance among the state, the rule of law and accountable government.

against power are not rights but hopes.¹² Constitutionalism, in short, is the branch of nation-building in which the nation protects itself from its own government - and thereby makes that government trustworthy enough to be obeyed.

Law as Integrator: Equality Before the Law in a Plural Society

No modern nation is homogeneous. Every nation contains diversity - of region, religion, language, ethnicity, class and conviction - and the central practical problem of nation-building is how to make a single political community out of a plural society without either suppressing the plurality or dissolving the unity. This is the third function of law, and perhaps the most delicate: to integrate difference into a common civic order. The instrument is equality before the law - the principle that the law applies to all persons alike, regardless of the groups to which they belong, and that all are entitled to its equal protection.

Equality before the law performs the work of integration in a distinctive way. It does not require that citizens share a religion, a mother tongue, a regional loyalty or a comprehensive view of the good; it requires only that they share a common legal standing. A plural society can be a single nation, on this model, not because its members are alike but because they stand in the same relation to the law - subject to the same rules, protected by the same rights, able to appeal to the same courts. Law thus offers what culture alone cannot: a form of unity that does not demand uniformity. It is the thin but strong bond that can hold together people who differ in everything except their equal membership in the legal community.

The modern development of this idea has moved beyond formal equality toward the legal accommodation of difference. Will Kymlicka's work on multicultural citizenship argued that, under certain conditions, the equal standing of citizens may require differentiated legal rights - language rights, self-government rights, or exemptions that allow minority communities to participate in the national community as equals without abandoning their distinctness.¹³ Whether one accepts the strong or the weak version of this claim, its structure confirms the thesis of this article: the integration of a plural society is achieved through law - whether through the strict uniformity of formal equality or through the calibrated differentiation of group rights - and not through the erasure of difference by force or the abandonment of unity to fragmentation. The nation that endures is not the one that makes its members the same, but the one whose law can hold difference and unity together. Law is the only instrument capable of doing both at once: general enough to bind all, flexible enough to recognise each.

Law as the Ground of Trust: Predictability, Cooperation and a Shared Future

The fourth function of law in nation-building is at once the most concrete and the most far-reaching: law generates the trust and predictability on which a nation's cooperative and economic life depends. A nation is not only a community of

¹²Guillermo O'Donnell, 'Why the Rule of Law Matters,' *Journal of Democracy* 15, no. 4 (2004): 32-46.

¹³Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

belonging and a structure of power; it is a vast web of cooperation among strangers - of exchange, investment, association and mutual reliance - and this web can be spun only where people can trust that agreements will be honoured, that property will be secure, that wrongs will be remedied, and that the rules will not change arbitrarily overnight. Law is the source of that trust.

Institutional economics has established the point with unusual clarity. Douglass North argued that institutions - the humanly devised rules that structure interaction, of which law is the most formal - are the fundamental determinant of long-run economic performance, because they establish the predictability without which complex cooperation and investment are impossible.¹⁴ Daron Acemoglu and James Robinson extended the argument into a theory of national success and failure: nations prosper where their institutions are 'inclusive' - securing property, enforcing contracts, and opening opportunity broadly under the rule of law - and fail where institutions are 'extractive,' concentrating power and insecurity in few hands.¹⁵ The difference between a prosperous nation and a poor one, on this account, is in large part the difference between good law reliably enforced and bad law or law unreliably applied. Prosperity is not merely served by law; it is in significant measure produced by it.

Yet the trust that law builds is not only economic. Legal predictability is the precondition of the citizen's capacity to plan a life - to marry, to raise children, to build, to save, to associate, to dissent - in the confidence that the framework will hold. And the manner in which law is made and applied shapes the citizen's willingness to accept it. Jurgen Habermas argued that the legitimacy of modern law is bound up with the citizen's status as its co-author: law commands willing allegiance when those subject to it can understand themselves as also its makers, through the procedures of democratic will-formation.¹⁶ Tom Tyler's empirical research confirmed the psychological mechanism: people obey the law far more because they regard it as legitimate and its procedures as fair than because they fear punishment; perceived procedural justice, not deterrence, is the main engine of compliance.¹⁷ These findings complete the picture. Law builds the nation not only by structuring cooperation from without but by earning allegiance from within: a law that citizens experience as legitimate and fair becomes a law they uphold voluntarily, and a nation whose members uphold its law voluntarily is a nation that coheres without constant coercion. In this sense law is the invisible infrastructure of national life - the medium in which trust, planning, prosperity and allegiance all become possible.

The Limits and Risks of a Law-Centred View

To argue that law is the foundational pillar of nation-building is not to argue that law is sufficient, nor that more law is always better. The thesis carries

¹⁴Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).

¹⁵Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown, 2012).

¹⁶Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996).

¹⁷Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

characteristic risks that must be named if it is to be held responsibly. The first is the risk of legalism - the illusion that a nation can be built by legislation alone, that enacting the right statutes will produce the solidarity, trust and civic culture that law can frame but cannot manufacture. Law can constitute citizenship, but it cannot by itself make citizens care for one another; it can guarantee rights, but it cannot by itself instil the habits that make rights secure. Law is the foundation, but a foundation is not a house; it supports what a living political culture must build upon it.

The second risk is the instrumentalisation of law - its capture by power as a tool of domination dressed in legal form. The same legal machinery that can constitute a free nation can be turned to constitute an unfree one: citizenship law can exclude as well as include, constitutional law can entrench power as well as limit it, and the forms of legality can be used to launder arbitrary rule. This is why the argument of this article has insisted throughout not on law as such but on law of a certain quality - general, equal, public, predictable, legitimate. Ran Hirschl's study of the global expansion of judicial power warned, from another direction, that the transfer of political questions to courts can narrow democratic self-rule even as it strengthens legality; the rule of law can shade into the rule of lawyers.¹⁸ The pillar metaphor must therefore be read with care: it is not any law that founds a nation, but law that is itself bound by the principles - equality, publicity, accountability - that distinguish a legal order from an apparatus of command.

The third risk is the neglect of the non-legal foundations with which law must cooperate. Language, memory, education, economy and civic culture are not rivals to law for the title of foundation; they are the materials that law orders and the soil in which legal institutions must be rooted to survive. A constitution imposed on a society without the civic culture to sustain it is a text without a people; a rule of law proclaimed without the administrative capacity to deliver it is a promise without a guarantee. The claim that law is the foundational pillar is therefore not the claim that law stands alone, but the claim that law is the element that gives the others their public form and durable structure - and that, without it, the others remain materials that never become a building. The right conclusion is not the supremacy of law over the other foundations, but the recognition that the other foundations become nation-building forces precisely by taking legal form.

CONCLUSION

This article has argued that law is the foundational pillar of nation-building - the structural element on which the other components of a nation rest. It distinguished the state from the nation and located law at the junction where coercive apparatus becomes legitimate authority and felt solidarity becomes enforceable membership. It then set out four functions through which law builds the nation. Through citizenship law, it constitutes the community and its members, drawing the boundary of belonging and filling it with the rights that make membership substantive. Through

¹⁸Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

constitutional law and the rule of law, it establishes public power and binds it, creating a government trustworthy enough to be obeyed. Through equality before the law, it integrates a plural society into a single civic order, offering a unity that does not demand uniformity. And through the predictability of legal institutions, it generates the trust on which cooperation, prosperity and a shared future depend, while earning, through its fairness, the voluntary allegiance that lets a nation cohere without constant coercion.

Three conclusions follow. First, law is not one instrument of nation-building among others but the medium through which the others operate: identity becomes citizenship, power becomes office, exchange becomes contract, and memory becomes constitution only by taking legal form. Second, it follows that the durability of a nation is, in the last analysis, a function of the quality of its law - its generality, its equality, its predictability and its legitimacy. Nations do not fail merely for want of resources or of shared feeling; they fail when their law fails - when it excludes rather than includes, when it serves power rather than binding it, when it is applied unequally or unpredictably, when citizens cease to regard it as their own. Third, and consequently, the central task of those who would build or repair a nation is a legal task in the deepest sense: not merely to pass statutes, but to establish a legal order that is general, equal, public and legitimate, and to cultivate the civic culture that keeps such an order alive. A nation, in the end, is a people held together by a law they can recognise as just and call their own; and the strength of that law is the strength of the nation. The pillar and the building stand or fall together.

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