
MACCORMICK'S SCOTLAND

Edited by
Neil Walker



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Preface and Acknowledgements

The present volume began its life at a celebratory event held at Edinburgh Law School to mark the extraordinary contribution of Neil MacCormick, our dear colleague of thirty-six years, who retired in 2008 and died the following year. The main activity of that memorable June day in 2010 was a seminar on the Scottish themes in Neil's life and work, at which most of the contributors to the book we have before us spoke. This event was attended by a mix of friends and colleagues, mostly from the Law School itself, but also embracing a select number who had a particularly close connection with Neil or who had some special insights to offer on the issues that had engaged him for so many years. The seminar was followed by the unveiling of a memorial plaque for Neil in the new Neil MacCormick Room, a ceremony introduced by Neil's old friend, Sir David Edward, and performed by his widow Flora. A day of fond remembrance and of involvement in just the kinds of activities that Neil would have enjoyed to the full was fittingly capped by a convivial dinner at a local restaurant.

The title of the book speaks for itself. Such is the esteem in which Neil MacCormick is held and so great has been his influence that we can expect – and are already beginning to experience – a flood of memorial collections, of essays of tribute, and of general re-engagements with his life's work. By concentrating on MacCormick's *Scotland*, we have sought to do something distinctive – the importance of which seemed obvious to the denizens of Old College but is perhaps less well appreciated by many unfamiliar with the pattern of Neil's life. There has been no more cosmopolitan figure in the legal academic world over the past thirty years than Neil MacCormick. He lived and loved the life of the global intellectual, the champion of transnational academic collaboration, the dedicated European, the ever-curious traveller. Indeed, it is hard to imagine a less parochial World-view than that inhabited by Neil MacCormick. Yet he was also Scottish through and through. This was a matter of politics, and his brilliantly asserted and selflessly committed

nationalism. But as anyone who knew him or who heard or read him at any length would confirm, it was also a question of culture and belief, of literature and lore, of landscape and memory, of family and familiarity, of a style and a tone that could only ever have been made in Scotland.

The essays that follow all, in their different ways, seek to represent the Scottish dimension which was so central to Neil's life and times and such an integral part of his distinctive and remarkable character. The opening Section, "Scotland's MacCormick", asks what it meant for Neil to belong to Scotland. Hector MacQueen examines how Neil's Scottishness informed various aspects of his work, providing a constant backdrop to his remarkably diverse and ever-evolving set of intellectual and political concerns and commitments. Maks Del Mar supplements this with a splendidly comprehensive bibliography of Neil's work, one that doubtless will surprise many by the sheer volume of Scottish material it reveals, together with a short but insightful essay on the various Scottish strands in his writing. One of these strands, of course, was the Scottish Enlightenment, and the second section brings together essays by John Cairns and Alexander Broadie on two of Neil's favourite Enlightenment thinkers, John Millar and Adam Ferguson. Both authors seek to bring out the continuities between the intellectual and practical concerns of these two towering eighteenth-century figures and the kinds of contemporary issues that Neil sought to address.

The third section turns its attention to MacCormick the lawyer and legal theorist. Gerry Maher and Julie Dickson take as their point of departure Neil's abiding concern with the nature and anatomy of a legal system, a concern that combined his interest in the character of legal order in general with his particular preoccupation with the distinctive properties and at least semi-autonomous quality of the Scottish legal system and Scots law. Both authors stress how elusive and multi-faceted the concept of legal system is, and how closely tied up with questions of identity as well as with the more familiar matters of coherence, order and effectiveness. Section 4, "Sovereignty and Beyond", continues the legal theme, but is explicitly concerned with those large constitutional questions of Scotland's relationship to the UK and to Europe which brought Neil's academic and political interests into such close alignment. Neil Walker traces the relationship between MacCormick's liberal nationalism and his well-known post-sovereignty perspective in the context of his views on Scottish independence, while Joanne Scott examines that same post-sovereignty nationalism against the backdrop of Scotland's shifting position as a region within supranational Europe.

The final section puts the various pieces of Neil back together again,

asking not how Scotland influenced Neil, as did the opening section, but how Neil sought to influence Scotland. Drew Scott and Will Storrar both examine Neil as a prime example of the Scottish public intellectual. They describe his remarkably varied and effective role in the Scottish public sphere, and also ask what his career tells us about what is distinctive about the Scottish public intellectual more generally. And, in conclusion, Zenon Bańkowski, Neil's oldest colleague and friend in the Law School, offers a very personal perspective on what it meant for him, as a non-Scot indefinitely abroad and increasingly at home in Scotland, to engage with and be engaged by Neil's Scottishness over forty years.

Neither the original seminar nor the book that has followed would have seen the light of day without the generous support and excellent efforts of many people. Thanks are due, first and foremost to Flora MacCormick, and also to Neil's sister Marion, for their warm encouragement and active involvement in the day of celebration. Thanks are also due to all the contributors from Edinburgh and beyond, with a special word for Maks Del Mar and Hector MacQueen who did not have the opportunity to present at the original event but were happy to work to tight timetables to make their own invaluable contribution to the final product. I am also obliged to the many other colleagues who supported and participated in the event. On the academic side, I would like to mention in particular Douglas Brodie, then Dean of the Law School, who was so generous with his time and financial support, and Claudio Michelon, Sharon Cowan, Stephen Tierney and Kenneth Reid, all of whom were closely involved in the preparation of the event or as academic commentators on the day. On the administrative side, too, I have a number of people to thank. Neil had a special bond with many of the administrative and secretarial staff of the Law School, and it was telling how many – past and present – were delighted to take a full part in the day's events, contributing greatly to the atmosphere of warm collegiality. Special thanks are due to Lisa Kendall for general planning and to the Research Office, and in particular Alison Stirling and Lorna Gallacher, for excellent hands-on organisation. Last but far from least, I would like to acknowledge my gratitude to Bonnie Holligan, who was a model of diligence and calm intelligence as an editorial assistant, and without whom I certainly could not have brought this project to timely fruition.

Neil Walker,
Old College, Edinburgh
August 2011

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Scotland's MacCormick

1 A Post-Positivist Outlook from the Thistle

*Hector MacQueen**

- A. INTRODUCTION
- B. SCOTTISH INDEPENDENCE, DEVOLUTION AND NATIONALISM
- C. SCOTS LAW AND THE SCOTTISH LEGAL SYSTEM AS A SOURCE
- D. STAIR, HUME, SMITH AND KANT: NATURAL LAW AND ENLIGHTENMENT
- E. CONCLUSION

A. INTRODUCTION

You did not have to spend very much time in Neil MacCormick's company in the Faculty (later School) of Law at Edinburgh University to realise how well and how much he knew about Scotland. It was not just the Scottish Enlightenment philosophers such as David Hume (1711-1776) and Adam Smith (1723-1790), who were so important to his own thought, or the Scottish politics in which he played such a prominent and activist part. It was also the country's history (perhaps especially that of the West Highlands and Islands), geography, topography and general culture (including the Gaelic dimension inherited from his forebears in the Ross of Mull). Something of the flavour of Neil's conversation on these occasions can be detected in his introduction to the re-issue of his father's memoir, *The Flag in the Wind*,¹ where he recalls school holidays at Bunessan in Mull, Killin in Perthshire and Tayvallich in Argyll, picnics at Loch Lomond, Loch Lubnaig and Inverkip, and boating on Loch Sween and Loch na Lathaich. The introduction also mentions the views from the family flat at 2 Park Quadrant in Glasgow to the Kilpatrick Hills and the Campsie Fells and the more distant Argyll and Perthshire mountains. Also within more immediate eyeshot was "the magnificent side view of Gilbert Scott's Glasgow University"² (where Neil would in due course read English

* Scottish Law Commissioner and Professor of Private Law, University of Edinburgh. As so often, I am grateful to John Cairns for helpful comments on an earlier draft of this contribution.

1 J MacCormick, *The Flag in the Wind* (2008; first published 1955) xi.

2 MacCormick, *Flag in the Wind* xi. Influential for Neil was his Glasgow moral philosophy

and Philosophy). Elsewhere he said of Scott's fantastic edifice: "To this day, my unreflective paradigm of going to University is defined in terms of the path up over Queen Alexandra's bridge to Gilmorehill and the mullioned windows of its lecture halls."³ But the view from Park Quadrant also took in the cityscape of industrial Glasgow and the cranes of the Clydeside docks shipyards. The whole was a perspective, Neil wrote, on Scotland in miniature; so an outlook was formed, in every sense of the word.⁴

There was also the observation of everyday life around him in his adopted city of Edinburgh, sometimes simply for the humour in it, intentional and unintentional alike; but also sometimes providing the means for illuminating serious points. There are examples of the latter in his published writings: for instance, the abusive drunk successfully turned off the bus by a determined Edinburgh lady passenger, both of them immediately recognisable characters who together illustrate the positive morality of the group in Neil's account of the jurisprudence of H L A Hart;⁵ or, again, the brilliantly sustained analysis at the opening of *Institutions of Law* of the managed queue in the booking hall of Edinburgh's Waverley railway station as an institutionalised normative order.⁶ This sort of thing was also a feature of his lectures to Edinburgh undergraduates; and I have put on the Law School's web page tribute one example which has stayed vivid in my mind for thirty-five years and which I suspect I will always recall, not only for its extraordinary theatre, but also for the substance of the point that Neil was addressing, namely, the difference between legal and social norms.⁷

Discourse of this kind was never ostentatious even when, as in the lecture, it aimed primarily to amuse; never was conversation forced to take a Scottish turn so that the speaker's knowledge could be put on show. Neil enjoyed some of the more obvious aspects of what the world knows as Scottish – wearing

teacher Dr William D Lamont (1901-1983): see e.g. especially Lamont's *The Principles of Moral Judgment* (1946); also *The Value Judgement* (1955) and *Law and the Moral Order* (1981). Neil is acknowledged and his work discussed in the last of these books, while in the first Lamont demonstrates the technique of using reported case law to illustrate moral problems later used extensively by Neil. He also makes frequent reference to *Gloag & Henderson*, the standard survey work on Scots law, for discussion of concepts such as promise, real, personal and basic rights, obligation and duty. No doubt reinforcing his appeal to Neil's sensibilities, Lamont was also a scholarly historian of early and medieval Islay: see e.g. his *The Early History of Islay* (1970).

3 N MacCormick, "Doubts about the 'Supreme Court' and reflections on *MacCormick v Lord Advocate*" (2004) *Juridical Review* 237 at 238.

4 MacCormick, *Flag in the Wind*, xi.

5 N MacCormick, *H L A Hart*, 2nd edn (2008) 67; cf 1st edn (1981) 50.

6 *Institutions of Law: An Essay in Legal Theory* (2007) 1-2, 14-37.

7 See <http://www.law.ed.ac.uk/neilmaccormick/condolencesandtributes.aspx> (last checked 25 July 2011).

the kilt, playing the bagpipes,⁸ drinking whisky and performing vigorously at Burns Suppers, for example – but mostly, so far as I saw, these performances took place when foreign visitors needed to be entertained in the way they expected from the country they were in. In the ordinary daily routines and social exchanges of law school life, the fact that Neil was imbued with Scottishness emerged simply because that was how it was. He could no more have avoided it than breathing.

This contribution will suggest that Scottishness is apparent in the same way in Neil's writings and the development of his thought. This is not to argue that Neil's work is essentially Scottish, or that only Scots with the same range of reference about their country that Neil had can truly understand it. Such claims Neil himself would have emphatically and rightly rejected. The suggestion here is rather that Scottishness emerges in his writings in the same way as it did in his conversation and teaching, naturally and appropriately to the point under discussion, and as un-self-consciously as is ever possible in the act of serious writing. Sometimes the point of departure was Scotland in some aspect or other (usually political), and quite frequently what he wanted to say was about and for Scotland; but it was all part of a wider picture in the end at least European in its overall scope and ambition. Scottishness is thus part of the texture, the woof and warp, of Neil's work: not to be over-emphasised, but, equally, not to be overlooked or underplayed. I do not know whether this observation has any wider significance than as an aspect of Neil's contribution to legal thought; it is not customary, I think, to ask whether Englishness is important for Hart's jurisprudence or what being Austrian meant for Kelsen, although perhaps for both men their Jewish identities might present more questions similar to those raised here about Neil and Scotland.⁹ But I do think that it reveals something about why Neil's contribution to jurisprudence took the form it did.

Most of this present piece is derived from repeated readings of the mighty quartet on "Law, State, and Practical Reason" in which Neil brought his life's

8 For Neil's account of how he was taught to play the pipes by two great-uncles on Mull, see *Practical Reason in Law and Morality* (2008) 83.

9 The index to Nicola Lacey's *A Life of H L A Hart: The Nightmare and the Noble Dream* (2004) contains numerous references under the entry "Hart, Herbert – Jewish identity" but there is no similar entry for English (or British) identity. The only book-length biography of Kelsen of which I am aware, but which has not been available to me, is R A Métall, *Hans Kelsen: Leben und Werk* (1969). See however N B Ladavac, "Hans Kelsen (1881-1973): a biographical note and bibliography" (1998) 9 *European Journal of International Law* 391. Kelsen's Jewish origins were of great significance in the events of his life, notably in 1930s Germany, but he had converted to Catholicism in 1905 and was, in Ladavac's words, "resolutely agnostic" in his spiritual beliefs. National identity may not have mattered much to someone born in Prague, raised in Vienna and thereafter working in, successively, Austria, Germany, Switzerland and the USA.

work and thought together in what turned out, alas, to be a grand finale.¹⁰ But the paper tries to place itself in relation to Neil's claim, made throughout the quartet, that over the course of his career his intellectual position shifted from the positivism he took from Hart at Oxford in the 1960s to what he called "post-positivism".¹¹ This built from his delineation of law as institutional fact and as a normative order characterised by an institutional commitment to practical reason as well as formal reasoning. He was led on to challenge the view that there was any necessary correlation between law and state as institutions; and the development of European Union law as a legal order, with its claim to supremacy over the laws of its member states, however contested, reinforced that perspective. The member states were no longer, if they ever had been, complete masters of the law in their own houses, while the Union, although a legal order, was equally clearly not a state in its own right. These post-sovereign entities pointed to the need for a post-positivist theory of law. Finally, while law's institutional character continued to differentiate the phenomenon from the normative orders of morality (which depended instead on the judgement of the autonomous individual actor), law's parallel commitment to practical reason meant that its content was not arbitrary or dependent solely on the will of the law-making institution. Law being a normative order meant that there were limits upon what could be called law. It is perhaps not too much of an exaggeration to say that by the end of his life Neil was seeking a rapprochement between positivism and natural law.

In what follows, I will seek to show how Neil's Scottishness played its part in the intellectual path that culminated in the "Law, State and Practical Reason" quartet.

B. SCOTTISH INDEPENDENCE, DEVOLUTION AND NATIONALISM

The most obvious way in which Neil's work was Scottish was in his writing about Scotland's constitutional position in the United Kingdom and, later, in the European Union. Maksymilian Del Mar's bibliography in Chapter 2 of this volume shows that amongst Neil's earliest incursions into print was editing and contributing to a collection entitled *The Scottish Debate*, published in 1970. The editor explained his purpose:

10 *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) (henceforth *Questioning Sovereignty*); *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005) (henceforth *Rhetoric*); *Institutions of Law: An Essay in Legal Theory* (2007) (henceforth *Institutions*); *Practical Reason in Law and Morality* (2008) (henceforth *Practical Reason*).

11 The shift in Neil's thinking can also be perceived in the second edition of his book on Hart (MacCormick, *H L A Hart* (n 5)).

This book is founded on the supposition that the present demand for greater political independence in Scotland is not merely a nine days' wonder but will remain a live issue in British politics in the foreseeable future. The objectives which the book is aimed at are ... to facilitate rational judgment of the issues at stake by presenting a debate on the arguments for and against home rule in one form or another ... No doubt politics is in the end founded in large part upon prejudice and emotion, but these ought to be tempered and tested in the fire of critical discussion.¹²

Neil went on to declare his own "editorial bias":

I am myself convinced by the arguments in favour of creating some sort of parliament and government in Scotland, but I remain unsure as to what sort would, on the whole, be best ... Despite being unconvinced that independence would be the best course for Scotland or for the rest of Britain, I am a member of the Scottish National Party, since it seems to me abundantly clear that neither of the two large parties is likely to take the smallest step towards any worthwhile form of self-government for Scotland ... unless they are subjected to powerful electoral pressures of a quite unequivocal kind. The Liberal Party, whose policies are at least as attractive to me, seems likely to remain a minority party; and Liberal successes are not unequivocal pointers to a demand for home rule, as those of the National Party are.¹³

He added, summarising the thrust of his own contribution to the volume:

[I]t seems perfectly obvious that devolution would have to precede independence, so that if devolution worked well we could abandon the notion of proceeding to independence.¹⁴

As the Del Mar bibliography amply demonstrates, Neil went on writing about these matters for the rest of his life. But whereas in 1970 his contribution was essentially designed to influence political discussion and events, later on he wrapped the issue more and more into his legal philosophy. Perhaps he would have argued that his evolving legal philosophy was more and more wrapped into his political beliefs. In *Questioning Sovereignty*, the first of the four volumes in which Neil drew together the threads of his life's work on law, state and practical reason, the case of Scotland and the United Kingdom was where he began to test his general arguments about the relationship between law and state.¹⁵ What exactly had happened at the Union of Scotland and England in 1707, when a single Crown and Parliament had been established at the head of the new United Kingdom but two laws and judicial systems had

12 N MacCormick (ed), *The Scottish Debate: Essays on Scottish Nationalism* (1970) 1-2.

13 MacCormick (ed), *The Scottish Debate* 2.

14 MacCormick (ed), *The Scottish Debate* 2. For Neil's own contribution, entitled "Independence and Constitutional Change", see MacCormick (ed), *The Scottish Debate* 52-64.

15 See MacCormick, *Questioning Sovereignty* ch 4.

very largely been left to carry on as before (the situation which had continued to prevail down to the present day)? “Scotland has been the anomaly that has made an ostensibly unitary state, an archetype of nation state in certain political-theoretical terms, function internally in a markedly federal way.”¹⁶ The great case of *MacCormick v Lord Advocate*,¹⁷ brought by Neil’s father in 1953 to test whether the new Queen could style herself “Elizabeth II” when her United Kingdom had never known an Elizabeth I, had at least raised, if it did not answer, the question of whether the Scottish legal system now subscribed in full to the English doctrine of sovereignty or supremacy of Parliament, or whether the Union of 1707 constituted some kind of fundamental law for the United Kingdom. At any rate, the continuing identity of Scotland, and the existence of Scots law and the Scottish legal system, demonstrated very clearly the lack of a necessary correlation between law, state and nation, the heart of Neil’s argument in *Questioning Sovereignty*. The development of the Scottish Parliament in 1999 merely made more visible the anomaly in the United Kingdom’s conception of its own sovereignty. Indeed, that conception was undermined not only by Scottish separateness but also by the United Kingdom’s membership from 1973 of the European Union and the entry into force of the Human Rights Act 1998.¹⁸

Questioning Sovereignty also shows Neil’s acceptance of the idea that in the pre-1707 Scottish constitution “sovereignty belonged to the people, to the community of the realm, rather than to Parliament, or, strictly, King or Queen in Parliament”.¹⁹ For that idea he could refer to the *De Iure Regni Apud Scotos* of George Buchanan (1506-1582), first published in 1579 but written in 1567 to justify the deposition of Mary Queen of Scots,²⁰ and, still earlier, the Declaration of Arbroath, addressed to the Pope in 1320 to support the argument that Robert Bruce had been made King of Scots by, amongst other things, “the due consent and assent” of the people.²¹ Alexander Broadie’s recent detailed argument that the Declaration here draws on the thought of

16 MacCormick, *Questioning Sovereignty* 60.

17 1953 SC 396. Neil defends the significance of the case in “Doubts about the ‘Supreme Court’ and reflections on *MacCormick v Lord Advocate*” (n 3).

18 The anomaly is further deepened by the advancing process of devolution in Northern Ireland and Wales as well as under the Scotland Bill before the Westminster Parliament at the time of writing.

19 MacCormick, *Questioning Sovereignty* 55; see also 59-60. The idea of the “community of the realm” springs from medieval sources and is most famously explored for Scotland in G Barrow, *Robert Bruce and the Community of the Realm of Scotland*, 4th edn (2005). See also A Duncan, *The Kingship of the Scots 842-1292: Succession and Independence* (2002).

20 See R A Mason (ed), *A Dialogue on the Law of Kingship among the Scots: A critical edition and translation of George Buchanan’s “De Iure Regni apud Scotos Dialogus”* (2004).

21 On the Declaration see E J Cowan, “For Freedom Alone”: *The Declaration of Arbroath, 1320* (2003); G Barrow (ed), *The Declaration of Arbroath: History, Significance, Setting* (2003).