

## BOOK REVIEWS

### MacCormick's Scotland

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Neil Walker (ed.), *MacCormick's Scotland*, Edinburgh Studies in Law Volume 10, Edinburgh: Edinburgh University Press, 2012, 288 pp, hb, £60, ISBN 978-0748643806

Although it is published as Volume 10 of Edinburgh Studies in Law, *MacCormick's Scotland* is a collection of essays as varied in content and interest as the career of one of the greatest Scotsmen of our time, the late Professor Sir Neil MacCormick. Not only was he a scholar of deep learning and an exceptionally talented teacher, he was a skilled bagpiper, a wonderful conversationalist and, above all, a very kind and generous man. In everything he did he brought to bear the fruit of his inheritance and upbringing – what Robert Louis Stevenson called ‘a strong Scots accent of the mind’ – and that is the theme of the book.

The book is arranged in five sections with two essays in each, showing what Scotland has still to learn from Neil's unique combination of practical wisdom, rigorous intellectual analysis and emotional commitment.

In the first section, ‘Scotland's MacCormick’, Hector MacQueen surveys Neil's work as a legal and constitutional philosopher. His aim is ‘to show how Neil's Scottishness played a part in the intellectual path that culminated in the ‘Law, State and Practical Reason’ quartet’<sup>1</sup> – the four books that set out the essentials of Neil's philosophy, the last of which was completed in the closing months of his life. The theme of ‘Scottish independence, devolution and nationalism’ focuses especially on *Questioning Sovereignty*; ‘Scots law

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and the Scottish legal system' focuses on *Institutions of Law*; and 'The legal philosophy of Stair, Smith, Hume and Kant' focuses on *Practical Reason in Law and Morality* and Neil's earlier *Legal Reasoning and Legal Theory*. The survey is an excellent introduction to the range of Neil's work, with affectionate sidelights relating it to Neil as a teacher, colleague and friend.

Maksymilian del Mar then provides a comprehensive bibliography of Neil's astonishing output of books, articles, lectures and book reviews. He lists them all chronologically – the list runs to 33 pages! – and then groups together those that deal with Scottish thinkers (Stair, Hume and Smith) and those that deal with Scottish issues – issues internal to Scotland and those concerning Scotland's relationship with England and the European Union.

In the second section, 'Enlightened Scots', John Cairns discusses the work of John Millar, Regius Professor of Law at the University of Glasgow, on the issue of slavery at a time when many Scots, particularly in the west of Scotland, were involved in slavery and the slave trade. Millar, a pupil of Adam Smith, developed Smith's condemnation of slavery on the ground both of morality and of economics (Neil always insisted that Smith's *Theory of Moral Sentiments* was of equal importance to *The Wealth of Nations*). Slavery was both a denial of the slave's natural right to freedom and depraved the morals of the slave-master. It was also economically inefficient since it tended to stifle innovation and, through its very brutality, to depress productivity. Millar, through his lectures to generations of future lawyers and statesmen, had an incalculable influence among influential sectors of British society.

Next in this section, Alexander Broadie examines the classical republicanism and 'enlightenment' values of Adam Ferguson, who was, as Neil said, 'not the least enlightened member of our Enlightenment, from whose *Essay on the History of Civil Society* spring many of the ideas essential to a discussion of civil liberties and the law.' Ferguson, the son of a minister in Gaelic-speaking Perthshire, was principal chaplain of the Black Watch and may or may not (according to one's taste for strict historical accuracy) have fought, sword in hand, at the battle of Fontenoy. Although he was a staunch supporter of the Hanoverian succession, he wrote in favour of republicanism and supported the French Revolution because he believed in the virtue of active participatory citizenship – a belief that was one of the foundations of Neil's commitment to Scottish autonomy.

Broadie insists that the Scottish Enlightenment was not a transitory phenomenon that came and went in a rather poor country on the fringes of Europe. 'What happened to the Scottish Enlightenment at the end of the eighteenth century is that it neither stopped nor even slowed down, but instead just kept marching on, and I think it demonstrable that it has not yet

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stopped. We are still living though *the* Scottish Enlightenment, and talk about a second Scottish Enlightenment is therefore premature. . . . “Enlightenment” refers to a process, a dawning, not the static brilliance of high noon.’

The third section, ‘What’s in a Legal System?’, is devoted to one of Neil’s most important contributions to legal philosophy – the analysis of what makes a legal system. Gerry Maher approaches the concept from a national and specifically Scottish point of view and Julie Dickson from a social point of view. The title is significant – ‘What’s *in* a legal system?’, rather than ‘What *is* a legal system?’.

Neil did not assert a single theory that can define and explain what the essential characteristics of a legal system are – not least because the coexistence of the distinctively different English and Scottish systems within the ‘British’ system eludes such an attempt at definition. What constitutes a legal system depends not only on its substantive content but also on the nature, beliefs and aspirations of the society in which it operates.

Legal theorists, seeking to explain what ‘law’ is, have tended to focus on public law and criminal law which concern the nature and governance of the state and the relationship between the state and the individual. Neil drew on his knowledge of Scots and English law to stress the equal importance of private law which regulates the relationships between individuals and the way they use the procedural opportunities that are offered as a way of resolving disputes. His interest in what judges actually do and the way they work was reflected in his role as coordinator of two collections of studies by scholars from different countries on *Interpreting Statutes* and *Interpreting Precedents*.

In the fourth section, ‘Sovereignty and Beyond’, Neil Walker takes up an issue to which Neil MacCormick latterly devoted a great deal of thought – the meaning and relevance of ‘sovereignty’ in today’s world. He discusses the question in its United Kingdom context, drawing on Neil MacCormick’s writings to urge a more nuanced approach to the conventional nationalist/unionist dichotomy. Joanne Scott looks at Neil’s contribution to the work of the Convention on an constitution for the EU and the problem of finding a place for the ‘stateless nations’.

The last section, ‘The Scottish Public Intellectual’, looks at Neil MacCormick in the public sphere – not as a nationalist politician, but as one who participates in and stimulates public debate. Drew Scott asks what a public intellectual is, but insists that ‘Neil was more than the public intellectual. He was a teacher who recognised the importance of equipping those for whom ethical questions would arise in their daily lives with the intellectual resources they would need.’

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Will Storrar writes of Neil's contribution to the public spirit of Scotland: 'Personal attention. Moral conviction. Convivial luncheon! Here are the characteristic features of Neil's style of engagement in the public sphere. It was as if he could perform all the noble characters in the medieval *Satire of the Three Estates* simultaneously on the stage of contemporary Scottish public life.'

Finally, Zen Bankowski gives us a very personal reflection of Neil as a moral and spiritual influence. 'He did not see what he did as a job, but as a vocation, and that he was lucky to be paid for pursuing it. He was relentlessly optimistic and always able to find worth in someone or something because he always thought there was.'

As a way of bringing together the many strands of Neil's intellectual and practical activity, we might begin with Alexander Broadie's idea that the Scottish Enlightenment was not something that happened in the past but a process – a 'dawning' – that continues. New perspectives open and accepted ideas are shown to be wrong or at least inadequate. As Neil showed in his life and teaching, paradox, scepticism and constant enquiry – leading inevitably to some apparent inconsistency over time – are all elements in what 'enlightenment' is about.

Neil was a fervent Scottish nationalist who was proud to have been an Oxford don, a member of the English Bar and an English QC, a passionate upholder of liberal values who recognised 'the dark side of nationalism' and welcomed the wider perspectives offered by membership of the European Union. The legal philosopher of world stature was at the same time a practical academic administrator and a very effective Member of the European Parliament who made nationalism respectable in that assembly.

His intellectual position developed through, and because of, his wide-ranging practical experience. As Joanne Scott says, 'He was one of the only legal theorists I have known who was as happy discussing the intricacies of the Water Framework Directive as he was theorizing about European constitutional law.'

Neil's combination of theoretical analysis and practical insight is shown in his writings about nationalism and independence. In 1970 he wrote that he was 'unconvinced that independence would be the best course for Scotland or for the rest of Britain' and that 'if devolution worked well we could abandon the notion of proceeding to independence.' The choice lay between devolution within the single 'sovereign' entity of the United Kingdom and the 'independence' of a new 'sovereign' Scotland.

In his later writings Neil questioned this simplistic, 'either/or', way of looking at the problem. He brought his skills as a legal philosopher to bear on the

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Scottish independence debate and, at the same time, used the example of Scotland to illuminate the theoretical problems discussed by legal philosophers.

Taking Scotland as the example, he showed that there is no necessary correlation between the concepts of 'law', 'legal system', 'state', 'nation' and 'sovereignty'. There is undoubtedly a Scottish legal system, distinct from other legal systems, and the Scots are a 'nation': yet Scotland is not a 'state'. As Neil put it, the United Kingdom is often represented as the archetype of the 'sovereign' nation state, yet it works in a markedly federal way: the development of the Scottish Parliament merely makes more visible the anomaly inherent in the United Kingdom's conception of its own sovereignty. Looking more widely, in what sense, in the twenty-first century, can the United Kingdom, as a member of the European Union bound by the Convention on Human Rights, be said to be 'sovereign'? In reality, we now live in a 'post-sovereign' world, and the question is not how to regain sovereignty but what comes 'after sovereignty'.

So, Neil argued, the independence issue should be seen, not in terms of the separation of 'sovereign' entities, but rather as a matter of adjusting the political, civic and social relationships that currently exist and giving them a fresh institutional structure. Pluralism need not stop at the parceling-out of power between the EU and the member states, but can be generalised and extended to a diffusion of authority below the level of the state. 'Choices between claims of different nations can cease to be choices between rival claims to sovereign statehood . . . and become choices about allocation of levels of political authority within a transnational commonwealth embracing many nationalities and cultural traditions or groupings.'

The key to this approach is subsidiarity – allocating power of decision as close to those affected as is consistent with efficiency and equity. Given full and proper expression, it is a powerful sword against an over-reaching EU *and* against an over-reaching member state. It can help to guard against 'monolithic democracy' or the silencing of peoples under the ideological banner of the so-called nation state.

Neil was not starry-eyed about the EU or about politics and politicians in general. Whereas Adam Smith was relaxed about the fact that there is a class of professional politicians who spend their time being political and have therefore become efficient at it, Adam Ferguson believed that a political class poses a permanent threat to our civil liberties. Law is both the principal means of defence of those liberties that enable us to flourish as human beings, but it can also be the means by which civil society is corrupted till a hoodwinked

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citizenry discovers too late that it has lost liberties that it had not perceived to be under threat.

Neil did not take this pessimistic view of politicians but, addressing the legal philosophers' question of what 'law' is, he warned that 'Law ought to be just and ought to serve the common good for all within the jurisdiction. But law frequently fails to be as it ought to be. (...) There can indeed be unjust laws, and what is alarming about this is *that they are perfectly genuine laws*, upheld and enforced through the coercive power of the state. "An unjust law is a corruption of law" – yes, but it is real law that is thus corrupted.'

As Julie Dickson puts it, 'He did not wish to smooth away or claim as not law any law that fails to be as it ought to be. Instead, legal systems as they ought to be, and legal systems as they are, are both vitally important matters to explore, and it is in the combined investigation of both these facets of legal systems that we work towards a successful explanation of their character, purpose and value.'

These are only a few of the themes that this many-faceted book evokes. Most of all, it enables us to relive what Neil MacCormick meant to those who knew him. In the words of Will Storrar: 'Neil was always the sun at midday in the midst of that Scottish gloom, shedding intellectual light and personal warmth wherever he spoke. Decade on decade, he illuminated the Scottish and European constitutional debate and expanded its circle of conversation to bring many opponents in from the cold.'

## Note

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

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