NEIL MACCORMICK

Donald Neil MacCormick
1941–2009

Donald Neil MacCormick was born in Glasgow on 27 May 1941, the son of John MacCormick, a lawyer and leading Scottish nationalist, and of Margaret (née Miller), who was a social worker. He had an elder brother and two younger sisters. Neil showed academic promise at Glasgow High School and went on to obtain First Class Honours in Philosophy and Literature (MA 1963) at the University of Glasgow. He obtained a Snell Exhibition to Balliol College, Oxford in 1963, where he read Jurisprudence (BA First Class Honours, 1965; MA, 1969). He was President of the Union in 1965. Soon after graduation he accepted a teaching post in Jurisprudence at Queen's College Dundee (then part of the University of St Andrews), intending to use it as a stepping stone to legal practice in Edinburgh. However, in 1967 he was elected to a Fellowship in Jurisprudence at Balliol (with a Lectureship at Corpus Christi College). He was called to the English Bar (Inner Temple) in 1971. In 1972, at the age of 31, he was appointed to the Regius Chair of Public Law and the Law of Nature and the Law of Nations at the University of Edinburgh, a position he held with great distinction until his retirement in 2007. Shortly after that he fell ill and was diagnosed with terminal cancer. He died at home in Edinburgh on 5 April 2009 after a long illness during which he saw through the press the last volume of his quartet of books on *Law, State and Practical Reason* (1999–2008) that constitutes the summation of his thought in legal philosophy. In 1965 he married Caroline Rona Barr. They had three daughters. After a divorce in 1992, he married Flora Margaret Britain (née Milne), who survives him. Among numerous honours, including several honorary degrees, he was elected as a Fellow of the British Academy in 1986,

knighted in recognition of 'services to scholarship in Law' in 2001 and was awarded the Royal Society of Edinburgh's Gold Medal for Outstanding Achievement in 2004.

This bare outline says almost nothing about his personality, his achievements or his activities beyond legal philosophy. Nevertheless, it is quite revealing. First, MacCormick's initial grounding in philosophy focused on the Scottish enlightenment, traditional forms of moral theory (including neo-Kantianism), and logic and informal reasoning. This is crucial in interpreting his distinctive place in legal and political philosophy. Second, he studied and taught English law in Oxford. He never formally studied, practiced or taught Scots law (except incidentally), but, largely self-taught, he wrote about it with acumen. Thus, although he was imbued from early on with Scottish history, politics, literature, and philosophy, his legal background was mainly English. Third, his Edinburgh Chair with its sonorous title provided him with a prestigious platform and a congenial and secure base from which he could move out to engage in a wide range of activities—politics, university administration, public service, as a visiting speaker in many places in Europe and North America, and not least as a public intellectual. Neil MacCormick's academic reputation rests largely on his teaching and writing in legal philosophy, but he was highly visible and widely liked and respected as a public figure not only in Scotland but also in the rest of the United Kingdom and in Continental Europe. He was, as one obituarist expressed it, a popular Scottish internationalist.

The many eulogies that poured in after Neil's death tended to emphasise several traits: his energy, formidable intelligence, conviviality, humour, openness to other points of view, and generosity of spirit. In personal relations, with students, colleagues, and politicians of different persuasions, he was much liked, even loved, for his warmth and sympathetic interest. He earned praise for his many contributions to university administration. Popular anecdotes tell of a kilted MacCormick playing the bagpipes at many events, including the funeral of his lifelong friend, John Smith; of instances of professorial absent-mindedness; and of his Scottish accent bewildering foreigners when he waxed eloquent. I was a close personal friend and I witnessed how often, in his own phrase, he 'added to the gaiety of nations'. My first memory is playing energetic Frisbee with the newly appointed Regius Professor of the Law of Nature and the Law of Nations in the grounds of Belfast Castle during a symposium on constitutional law; later, of equally light-hearted games of ping pong, disquisitions on

single malts and Scottish history, and prolonged conversations about jurisprudence.

Of course, he had faults. The most commonly voiced criticism was that he was sometimes 'too nice', 'too reasonable', 'too accommodating'. Such generosity of spirit might indeed be a weakness in a captain of a ship or a prison governor or even a vice-chancellor. It could also be a fault in a legal philosopher, so the question arises: was he too accommodating, too generous with his praise, too ready to see other points of view? Or, worse still, was he eclectic? In a posthumously published paper Neil acknowledged that his temperament tended towards the constructive-collaborative rather than the critical-dialectical or confrontational (MacCormick, 2011). He favoured charitable interpretation of other thinkers, openness to differing views and to criticism, sometimes himself presenting a moving target. That he was a synthesiser is not in doubt—his attempts to reconcile Kant, Hume, Smith, and Stair are a prime example. His institutional theory of law is broad enough to accommodate non-state law, supranational law and even some forms of 'soft law'. When I co-examined with him over many years in Edinburgh, Belfast, Warwick and London, I found him concerned to be fair and consistent, willing to listen carefully to contrary opinions, but not soft. Rather he was brisk and decisive. As one of his Ph.D. students put it, as a supervisor he was gentle, but not lenient. As a political speaker, while engaging, he could be robustly critical. Part of his appeal as a philosopher was his willingness both to adopt forthright positions and to change his mind, if persuaded: Hume was wrong about reason being slave of the passions, but many of his insights are worth preserving. Neil's rejection of will theories of rights, his emphasis that state law is only one kind of law, that self-determination is a relative matter, and his initial rejection and later partial defence of Ronald Dworkin's 'one right answer' thesis[1] are all equally robust. His commitment to a gradualist, non-violent form of Scottish nationalism was unequivocal. Throughout his final quartet Neil is concerned to assert clear, coherent positions and to justify them with vigorous arguments. Those positions are nearly always moderate, reasonable and reasoned, but, for the most part, they are neither eclectic nor equivocal.

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[1] His final position on this last issue was equivocal; for example, in *Questioning Sovereignty* (1999, p. 6) he suggests that 'sometimes or maybe even often' there is an answer that is objectively better than its rivals.

It is my impression that Neil read, then thought, then wrote largely from his head. Once, when we were collaborating on a joint paper, he came to stay the night. I had struggled for some weeks to produce the first half of a draft. That evening, we discussed what we thought and wanted to say over a bottle of single malt—I think Glemorangie was in favour that year. Next morning I had an appointment. As I was leaving he asked for some rough paper. By the time I returned two or three hours later he had completed the draft—scribbling over forty pages in longhand. When I revised it, I had occasionally to restrain his exuberance, and quietly edit out Scottishisms, but otherwise I altered very little. Many of his essays started as public lectures or conference papers and retain the style of oral delivery. The footnotes tend to be sparse, though carefully constructed. His prose is direct and clear, the mode argumentative rather than expository or interpretive.

One aspect of Neil's outside activities bears directly on his theoretical ideas: his involvement in politics. He was a life-long Scottish nationalist, he stood for election as a Scottish National Party (SNP) candidate in five Westminster elections—showing the flag in hopeless constituencies—and then, more seriously, he served as an SNP Member of the European Parliament from 1999 to 2005. There is ample material for a full-scale biography or even a detailed account of his political career. I shall deal with his ideas on nationalism and sovereignty below. Here his political involvement is immediately relevant in three general respects. First, he developed a theory of social democracy largely through his studies of the political and intellectual history of Scotland. This theory was continuously tested, refined and adjusted through experiences of practical politics. It found expression in many papers,[2] and it pervades all four volumes of *Law, State and Practical Reason*. His political and legal philosophy is all of a piece. Second, his involvement with nationalist politics and the European Union required him to explore fundamental questions about both sovereignty and nationalism. He was often asked how he reconciled his general philosophic position and his enthusiasm for the EU with his involvement in nationalist politics, especially in view of the unhappy history of nationalism in twentieth-century Europe. Third, a concern for 'practicality' underlies all of MacCormick's work: jurisprudence must be about law, not just abstract concepts; law is not merely an inert body of norms; how it is operationalised is a crucial part of understanding legal phenomena

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[2] Some of his early essays are collected in *Legal Right and Social Democracy* (1982).

(MacCormick, 2011); legal reasoning is a practice, not just a form of argumentation; sensitivity to both social and political context is crucial.

Intellectual development 1963–1981

Neil's academic career was remarkably stable—he occupied the same Chair for thirty-six years—but the development of his ideas was more complex. In some brief autobiographical notes he summarised his intellectual development as follows:

> Reduced to stages, I would say that 1965–81 was for me a period in which I was most closely engaged with Hart's work, as a follower of his, though one with independent connections derived from other influences. 1981–1995 was a period of re-consideration of main themes and steady distancing from Hart, especially the later Hart. Since 1995 I have developed a rounded account of my own mature thought, having at its centre the post-positivist institutionalism developed in *Institutions of Law*, and ultimately to be underpinned by my book on practical reason in morality and law.

This is a useful rendering, but I shall suggest later that it over-emphasises his relationship with Herbert Hart and the significance of his shift to 'post-positivism'.

Neil first arrived in Oxford as a student in 1963. His main tutors were Donald Harris, a New Zealander, who taught him English law and subsequently became the Director of the Oxford Centre for Socio-Legal Studies, and Alan Watson, a fellow Scot, a specialist in Roman Law and Comparative Law. Oxford was then the home of ordinary language philosophy, which was very different from what Neil had encountered in Glasgow, where W. D. Lamont's lectures on political philosophy had been especially influential. In 1952 H. L. A. Hart had moved from a Fellowship in Philosophy to the Corpus Chair of Jurisprudence. By 1963 Hart's *The Concept of Law* (1961) had become, and has remained ever since, the starting-point for the study of Jurisprudence in Oxford and far beyond. As a student Neil attended two series of Hart's lectures. When he returned to Oxford in 1967 he had quite a lot of contact with him, but they never established a close personal relationship. He also had a close association with John Finnis, Richard Buxton, Brian Simpson, Joseph Raz, and, after Hart resigned his chair in 1968, with his successor Ronald Dworkin. Thus for about twenty years Neil moved in Hart's circles, defended his positivist views, and was considered to be one of his leading disciples.

Neil was a prolific speaker and writer. Until the late 1990s his academic reputation rested largely on his lectures and papers delivered in many countries and on four books that drew heavily on prior oral performances. *An Institutional Theory of Law: New Approaches to Legal Positivism* (with Ota Weinberger, 1986) developed his general theory of law, first expounded in his inaugural lecture in 1973, and most fully developed in *Institutions of Law* in 2007. This was the stable starting-point of his legal philosophy. In *Legal Reasoning and Legal Theory* (1978, 2nd edition 1994) he advanced a general theory of legal reasoning that he claimed was compatible with Hartian positivism. Some viewed it as presenting the kind of view Hart might have developed had he paid more attention to legal reasoning. This was one of MacCormick's most successful works. It was clear, accessible, concrete, taking moderate, reflective positions on a wide range of issues. Students found it accessible and it attracted a lot of attention in Continental Europe. In 1982 he published a collection of essays on *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, which advanced a rationalist liberal democratic ideology that steered a middle path between 'individualist Whiggery and Marxist collectivism' (MacCormick, 1982: 8). This explored important ideas on social justice, legal rights and obligations, nationalism, the Scottish Enlightenment, and coercion. It was recognised as a significant contribution to political theory. This book foreshadowed several of the central themes in *Law, State and Practical Reason*. Indeed some perceptive commentators suggest that some of these more discursive essays help to make the quartet more accessible.

Towards the end of what MacCormick described as the first phase of his intellectual development, he published an introduction to Hart's ideas. The first edition of *H. L. A. Hart* (1981) was very well-received and for a long time was considered the standard reference. It contained some criticisms on points of detail, but was essentially sympathetic. However, Hart thought that it depicted him as closer to natural law than his own self-perception and he hardened his positivist stance in the Postscript to *The Concept of Law* (1994). The second edition of MacCormick's book (2008), while remaining scrupulously exact and fair, engages with controversies about Hart's works and provides some rather clear clues about MacCormick's own intellectual trajectory.

1981–1997

By the time he was elected to the British Academy in 1986 these four early books, together with his lectures and essays, had established a considerable international reputation for him as a very substantial legal philosopher. In them he had set out carefully argued positions on the nature of law, legal reasoning, political theory, and Scottish nationalism. From 1981 to 1997 he devoted most of his energies to academic administration and nationalist politics. This was hardly a fallow period intellectually, for he continued to lecture and write, but his intellectual agenda was less clear. There were, however, two significant developments in his perspective on legal philosophy. First, he invested a great deal of time in studying and teaching about the thinkers of the Scottish Enlightenment, deepening his study of Hume, Stair and Adam Smith and extending his knowledge of several other figures. Second, largely through the World Congress of Social and Legal Philosophy, he came into contact with leading jurists in Continental Europe. He had met Chaim Perelman (Brussels), the pioneer of 'the new rhetoric' and the precursor of modern argumentation theory. Neil was attracted by his ideas on informal logic and translated some of his work. In 1979 he invested time in improving his command of German. He collaborated with Ota Weinberger (Graz) and worked closely, among others, with Robert Alexy (Germany), Aulis Aarnio (Helsinki), and Aleksander Peczenik (Lund). Later he flirted with the systems theory of Niklas Luhmann and Gunther Teubner. In the late 1970s and early 1980s, in collaboration with Robert Summers and Zenon Bankowski, he became involved in comparative work on legal reasoning and interpretation. This culminated in two outstanding edited volumes of essays on precedent and statutory interpretation, based on a series of workshops, known as the '*Bielefelder Kreis*' (MacCormick and Summers, 1991 and 1997). Thus during this period he returned to his intellectual roots in the Scottish Enlightenment and added a distinctive European and comparative dimension, while experiencing what he called a 'steady distancing from Hart'. In 2008 he summed up his view of Hart as follows:

> Hart's greatest and most enduring insight concerns the need to understand rule-governed conduct from the 'internal point of view'. This is essential to developing a clear and convincing theory of norms—but rules are only one kind of norm. The analysis of law as a union of primary and secondary rules, though full of valuable insight, is in the end incomplete and unsatisfactory. A fresh start is needed. A version of a 'basic norm theory' is more satisfactory than a 'rule of recognition' theory in explaining how a legal system comes together in the

framework of a constitutionalist state (Rechtsstaat, Estado de derecho). Legal institutions interface with politics and economics and are foundational for the state and also for civil society. Criminal law is one essential part of the foundations of social peace and thus of civil society. All this takes one quite far from the Hartian conception of law, though the development out of a Hartian position is easily traced. Law and morality are indeed conceptually distinct, but it remains also true that minimal elements of respect for justice are essential to the recognition of a normative order as 'legal' in character.   (Autobiographical Notes, unpublished, 2008)

The quartet: *Law, State and Practical Reason* (1999–2008)

In 1997 Neil shed his administrative load and started again to concentrate on legal philosophy. He planned to reconsider his position on the main themes of legal, political and moral theory and to develop 'a rounded account of my own mature thought'. He formulated a hugely ambitious project for a work in four volumes on *Law, State and Practical Reason* and applied for and obtained a five-year Research Professorship from the Leverhulme Trust. He completed *Questioning Sovereignty* in 1999, before his tenure of the Leverhulme Fellowship was interrupted by his election as an SNP Member of the European Parliament. From 1999 to 2004 he had almost no time for academic work. Fortunately, when he stepped down as an MEP his Leverhulme Professorship was revived and thereafter he was able to concentrate on *Law, State and Practical Reason*. He did this with renewed enthusiasm and commitment. Two further volumes were completed before his formal retirement in 2007. Shortly after that he fell ill and the final volume was mainly written during that last illness.

This is not the place to attempt a detailed analysis or evaluation of each book in MacCormick's impressive quartet. Instead, I shall briefly describe three of the volumes, give a more detailed account of his ideas on nationalism, sovereignty and self-determination, and then advance an assessment of the distinctiveness and significance of his contributions as a whole.

Institutions of Law

Institutions of Law (2007) was the third in time of the quartet to be published, but it was conceived as its lynchpin in that it set out his theory of law as a contribution to general jurisprudence, with the other three volumes as elaborations of the underpinnings of his philosophy of law and of

particular aspects, such as sovereignty, practical reasoning, and a theory of justice.

He first expounded his institutional theory of law in his inaugural lecture at Edinburgh (MacCormick, 1973). Later he developed it in collaboration with Ota Weinberger (MacCormick and Weinberger, 1985, 1986) and he refined and adjusted it over the years in many papers. His central idea, that law is institutionalised normative order, remained constant, but *Institutions of Law* is much more than a restatement and elaboration of his early ideas.

The starting-point for MacCormick's theory was a distinction between 'brute facts' and 'institutional facts', advanced by Elizabeth Anscombe and John Searle (especially in Anscombe, 1958, and Searle, 1959) as part of speech act theory. 'Brute facts' appear to exist in the world entirely independent of human thought or values; they are 'sheer physical facts': 'institutional facts' also exist, but their existence presupposes human thought and institutions. A credit card, a system of scoring in sport, courts, the Scottish law of obligations, and a particular contract all exist—they are facts—but they exist by virtue of human norms.

For MacCormick law is one species of the genus normative order, viz. institutional normative order. This is an 'explanatory definition' which requires the elaboration of three elements—'normative', 'order', and 'institution'. MacCormick uses the example of queuing to illustrate these concepts and to introduce some central themes. In some cultures queuing is a practice that is well-understood by nearly all participants even if they are total strangers. In some contexts, for example waiting for a bus or at a supermarket checkout, people form a line in an orderly way in order to take turns. This is a form of activity that is a mutually coordinated practice, a social-moral institution that is governed by norms. The existence of the practice depends on a fairly high degree of understanding and compliance by the participants. There are norms for turn-taking and against 'queue-barging', with possible exceptions, for example in emergencies or for particular classes of people. The norms may be implicit or they may be informally or formally articulated. They can even be formalised and managed by authority. Queuing is an institutionalised practice, a particular queue is an instance of that practice. In some cultures queuing is a relatively stable normative practice with many variations. The Scottish law of contract and a contract under that law are both institutional facts:

> The existence of the institution as such is relative to a given legal system, and
> depends upon whether or not the system contains an appropriate set of

institutive, consequential and terminative rules. If it does, then the occurrence of given events or the performance of given acts has by virtue of the rules the effect of bringing into being the existence of the institution.   (MacCormick and Wienberger, 1986: 66)

Legal phenomena as institutional facts are of different kinds: they can be institution-agencies (e.g. courts, legislatures), institution-arrangements (e.g. property, criminal law), or institution things (e.g. contracts, rights to futures). All are normative, institutionalised, and concerned with ordering relations.

Institutions of Law is presented in four parts: Part 1 analyses the central concepts of the theory. Part 2, 'Persons, Acts and Relations', focuses on basic legal concepts (persons, property, rights, powers etc.). This looks rather like a revival of the kind of particularistic English analytical jurisprudence that gave way to the more philosophical approach of Herbert Hart, but it also has echoes of Roman and Scottish institutional writings. Part 3, 'Law, State and Civil Society', explores the constitutive role of law in relation to law and politics, fundamental rights, criminal law and law and economy. Part 4, 'Law, Morality, and Methodology', revisits legal positivism, the relationship between law and justice, and the methodology of analytical jurisprudence. MacCormick claimed that *Institutions of Law* brought his general theory of law up to date in an avowedly 'post-positivistic' form (see below), developing an interpretative approach to analytical jurisprudence that is fully in tune with some major recent developments in the sociology of law and socio-legal studies more generally.

MacCormick uses the example of queuing to introduce some general themes. First, the implicit formalisation by authority, for example in managing a checkout, represents a second tier of institutionalisation of a pre-existing normative practice. Humans are norm-users before they are norm-givers (*Institutions*, 284–8). Second, implicit norms are not the same as hard-and-fast rules. They come into existence in complex ways through human interactions involving expectations, practices, values and mutual understandings. Third, Hart had illuminatingly distinguished between the concepts of 'a habit' and 'a rule'. The former is used to describe actual behaviour, the latter is normative. MacCormick emphasises that rules can exist as institutional facts independently of the extent to which norm users habitually comply with them. There may be a gap between our expectations of queuing and participants' actual behaviour. In respect of the familiar 'gap' between law in books and law in action, a central concern of the sociology of law, he distinguishes between a 'knowledge gap' and an

'efficacy gap' (p. 71). For practising lawyers, knowledge of the law in books is rarely enough and existence of rules is independent of their efficacy or enforcement. Understanding law cannot be solely a matter of rules.

The institutional theory of law addresses basic ontological and epistemological issues about the nature of law and claims explicitly to transcend any sharp divide between analytical and empirical jurisprudence and between doctrinal and socio-legal studies. MacCormick acknowledged to me that it was quite close to the law-jobs theory of the American jurist, Karl Llewellyn. Some of the ideas are controversial (for example, I have reservations about the concept of 'institution' in this context), but the claim is justified. MacCormick's main approach is conceptual, but without espousing extreme versions of 'naturalism' in philosophy, he insisted that analytical, moral, and empirical studies are all necessary to understanding law and are interrelated. He strongly rejected Ronald Dworkin's view that empirical questions about law are neither philosophically interesting nor of practical importance. (e.g. Dworkin, 2006: 98; MacCormick, 2009: 187–90).

MacCormick's principal focus of attention was liberal democratic constitutional states (the *Rechstaat*). They embody the most important form of law and the one that offers the best prospect of realising the Rule of Law, human rights, and other liberal democratic values. However, his conception of law was very broad and explicitly allowed for non-state law. The institutional theory provides conceptual space for treating as 'legal' many different forms of coordination and ordering that are becoming salient at supranational, transnational and subnational levels in an era of 'globalisation'. MacCormick acknowledged, although he did not pursue in detail, the existence and significance of the complex phenomena of legal pluralism, that is the co-existence, from the point of view of norm-users, of two or more legal orders in the same time-space context. Accordingly, his approach to jurisprudence fits modern concerns arising from increasing transnational interdependence far better than narrower, state-centric theories of law.

Rhetoric and the Rule of Law

MacCormick regularly stressed 'the arguable character of law'. He believed strongly in the importance of reason in both morality and law. *Rhetoric and the Rule of Law* is in part a successor to *Legal Reasoning and Legal Theory*, marking a shift from a Hartian towards a Dworkinian view on some much-debated issues. Perhaps because considerable space is

devoted to replying to critics, some commentators still prefer the earlier work as being more approachable for non-specialists. However, the changes are significant. First, MacCormick shifts from a robust positivism to a position close to Ronald Dworkin's, notably that there is often a single right answer to a disputed question of law even in the hardest cases and that answer is based on deep probing of underlying moral principles.[3] MacCormick, however, did not go as far as Dworkin in commitment to an objectivist morality. Second, in the later book he clarified his views on the role of deduction in legal reasoning and fruitfully expanded his analysis of three types of argument used in second-order justification—coherence, consistency and consequences. Third, under the influence of the new rhetoric of Chaim Perelman and associates, he gave more attention to the persuasiveness of non-demonstrative arguments and their role in legal justification. He also devoted two chapters to coherence and narrative, important topics which he might have explored much further if he had lived.

Practical Reason in Law and Morality

This last book in the quartet was published shortly before his death. It does not show signs of haste, but he would probably have preferred more time to work on it. The book is the vehicle for the fullest statement of his moral philosophy and the underpinnings of what he called 'post-positivism'.

Practical Reason in Law and Morality can be read as a sequel to *Legal Right and Social Democracy*. It builds on but does not replace the earlier work. Its emphasis is more moral than political and it explores in greater depth issues relating to individual autonomy, universalism and particularism in moral judgements, empathy, objectivity, and the role of reason in public life. It is a contribution to ethics, linked specifically to his legal theory through a comparison of moral and legal reasoning and further probing of the relationship between law and morality. The central question of the book is: can reason be practical? MacCormick (2008: 4; cf. p. 209) answers: 'Most certainly it can!' This book returns to his early engagement with the Scottish Enlightenment and Kant. MacCormick seeks to reconcile Smith's moral sentiments with Kant's categorical imperative and to outline a theory of justice that goes beyond his Scottish precursors to address issues of distributive justice, the environment, and future generations, topics that have engaged late twentieth-century philosophers. A

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[3] See above, n. 1.

notable feature of the book is a lengthy examination of the Scottish nat-
ural law tradition, exemplified by Stair. MacCormick prefers Stair's version
of natural law to Benthamite utilitarianism, but he still rejects the label of
'natural lawyer' for himself.

Nation, nationalism and sovereignty

> My own father used to be set on his grandmother's knee in a humble house in
> Mull and asked, 'Co tha thu (Who are you?)'; 'Cha n-eil fhios agam (I don't
> know)'; 'Is tu Iain mac Dhomhunuill 'ic Neill 'ic Iain 'ic Dhughaill... (You are
> John, son of Donald, son of Neil, son of John, son of Dugald'—and so on went
> the genealogy up to thirty-three generations).   (MacCormick, 1982: 252)

Neil MacCormick's quartet is written in a clear, uncluttered style. However,
it is mostly of specialised interest to jurists, political theorists, and moral
philosophers. *Questioning Sovereignty* is an exception because it deals
with contemporary political issues of general interest and great impor-
tance—self-determination, Scottish nationalism, democracy, the decline
of sovereignty, and the future of Europe. It is underpinned by Neil's life-
long commitment to Scottish nationalism and his extensive experience of
practical politics. I share the view that this is his most important and
original book.

   Neil was born and bred a nationalist. The MacCormicks came from
Mull. Although her husband's exploits sometimes worried her, his mother
was also a committed nationalist. But it was his father who was the sem-
inal influence on his politics. John MacCormick (1904–61), popularly
known as 'King John', is an iconic but controversial figure in the history
of Scottish nationalism. Born in Glasgow, he became involved in politics
while he was a law student. He was a founding member of the National
Party of Scotland in 1928 and of the Scottish National Party in 1934. In
1942 he split from the SNP to found the broader, non-party Scottish
Convention which produced the Scottish Covenant, a moderate document
supporting self-government rather than full independence. The Covenant
obtained over two million signatories and helped to raise the profile and
broaden the base of Scottish nationalism. In 1950–1, while Rector of the
University of Glasgow and a respected lawyer, John MacCormick took
considerable risks by involving himself in the 'repatriation' of the Stone
of Destiny from Westminster Abbey and the aftermath.[4] In 1952–3, with

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[4] See J. MacCormick (1955) and Hamilton (2008).

Ian Hamilton, he instituted a famous Scottish legal action (*MacCormick v Lord Advocate*), contesting the right of Queen Elizabeth to be styled Elizabeth II in Scotland. Although the petition was unsuccessful, it succeeded in challenging the idea that the Westminster Parliament could repeal or alter fundamental conditions of the Act of Union. Lord President Cooper in the Court of Session famously expressed the opinion that the principle of parliamentary sovereignty was an English idea that was not part of Scottish constitutional law. John MacCormick was a quiet pragmatic lawyer, deeply committed to an evolutionary approach to self-government rather than the more confrontational, fundamentalist politics favoured by many nationalists. When he had time he wrote poetry and painted. His detractors tended to write him off as an inconsistent compromiser and as a failure, but his role in widening the political base of Scottish nationalism and in furthering the cause of gradualism paid off in the long run. Devolution in 1999, and even aspects of the current policies and style of the SNP, owe much to his influence.

The MacCormick home in Park Quadrant, Glasgow was imbricated with Scottish history, Scottish literature and Scottish nationalist activities. Holidays were spent in the Scottish countryside. Neil was ten when the Stone of Destiny was 'liberated' from Westminster Abbey; he was 12 at the time of *MacCormick v the Lord Advocate*, and during his teens he listened avidly to many conversations about Scottish affairs and politics. It was 'a great political education in a very particular kind of politics'.[5] Later his elder brother Iain represented Argyll for five years as an SNP MP in Westminster. Neil added two dimensions to his political heritage: philosophy as a profession and engagement with Europe.

In politics Neil followed a similar trajectory to his father: he was passionately committed to Scotland, but he was a gradualist, willing to compromise and rejecting atavistic and destructive forms of nationalism. He was fond of quoting his father's friend, the novelist Neil Gunn of Inverness:

> We constantly reaffirmed our faith, not in any narrow and bitter nationalism, but in the capacity of the Scottish people, given the chance, to reconcile in their politics the freedom and human dignity of every individual with such mass organization as modern technocracy has made inevitable.[6]

His family was not the only influence on Neil's nationalism. In addition to his intellectual forebears he was part of a remarkable generation of

[5] Neil MacCormick, Introduction to J. MacCormick, *The Flag in the Wind* (2008)
[6] Cited by Neil MacCormick, *The Scotsman*, 20 Nov. 1974.

politicians and intellectuals, who are becoming recognised as a broader 'Scottish renaissance', that included Ken Alexander, Neal Ascherson, Donald Dewar, John P. Mackintosh, Tom Nairn, and John Smith. All of these have contributed to a climate of opinion that supports a distinctive literature, a sophisticated version of social democracy, and a moderate form of nationalism in Scotland and beyond.

From an early stage Neil had to confront tensions between his commitments to nationalism, political individualism, democracy, and the project for a European Union. In 1979 he published an essay on 'Nations and nationalism',[7] which introduced three themes that form the core of his later writings on the subject: first, explicit acknowledgement and rejection of 'the dark side of nationalism'—exclusive, parochial, playing on hatred of others; second, recognition that moderate love of family, country, colleagues and co-religionists are not only grounds of identity but are also the basis for recognition 'as equally legitimate (because the same in kind) the love others bear for their own' (MacCormick, 1982: 253); and, third, nationalism is historically and conceptually independent of the idea of the sovereign state—a late-comer that 'may have already had its day' (p. 264).

For the next thirty years Neil developed these themes in academic writings, newspaper articles, political tracts and speeches, culminating in *Questioning Sovereignty* (1999). This book weaves together twelve essays on constitutional and political themes, all written in the 1990s, a period that saw important—some would say revolutionary—developments within the United Kingdom and Europe, including moves towards devolution, the seeming abandonment of the doctrine of parliamentary sovereignty,[8] the Human Rights Act 1998, the Maastricht and Amsterdam Treaties (1992, 1997), the aftermath of the fall of the Berlin Wall, and a greatly increased consciousness of 'globalisation'.

Questioning Sovereignty is a philosophical work which intellectualises some heated political issues. A work of political imagination, it sets out a clearly argued vision of the constitutional future for the European Community, Scotland, the United Kingdom and for social democracies generally. It is informed by a passionate commitment to social democracy and the Scottish nationalist cause, but it is presented with remarkable detachment.

The book starts with a restatement of the theory of law as institutionalised normative order and ranges widely over important issues, many of

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[7] Reprinted as chapter 13 of *Legal Right and Social Democracy* (1982).
[8] *Factortame v Secretary of State for Transport* [1991] A. C. 603.

them controversial. The core of the book centres on the elucidation and analysis of the relations between five concepts that are captured by the full title: *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*. He summarised his mature philosophical position as follows:

> … To [the idea of 'liberal nationalism'] the idea of civic nationalism is strongly material. 'Civic nationalism' identifies the nation in terms of its members' shared allegiance to certain civic institutions. These are understood in broad terms to include, for example, legal norms and institutions, political representative organs, branches of public and local administration, the organization of education, churches and religious communities in their secular aspect, and other like institutions having an understood territorial location to which they refer. Institutions of civil society as much as of the state are relevant here. Territorially located civic institutions can be objects of allegiance, understood as 'ours' by the people among whom they perform their functions. As civic institutions, they are necessarily of great political significance to the community which, to an extent, they define.   (MacCormick, 1999: 120)

and

> Naturally, it is possible, and perhaps desirable, for such civic institutions to go the length of including a constitution and the full panoply of statehood. Perhaps without that the civic quality of civic institutions is too precarious. But it would be a mistake to require this by definition, for to do so is simply to endorse the in-principle challenged assumption that the states that currently exist comprise also the totality of nations, at any rate, the totality of nations that can be understood in the civic sense. Whether or not the civic nation is or has a state, or *a fortiori* an independent sovereign state, the point of the idea of a civic nation is that it is in principle open to voluntary membership. The community defined by allegiance to institutions is open to anyone who chooses to dwell in the territory and give allegiance to the institutions. Departure to a different place and different allegiances is also possible, and not traitorous. One is guilty of treachery only if one who remains in place and surreptitiously undermines the institutions of that place while ostensibly giving them respect and allegiance.   (MacCormick, 1999: 170)

Questioning Sovereignty addresses a wide range of topics, including: the changing nature of constitutionalism, sovereignty as an outdated concept, the European Union as a *sui generis* form of legal order, jurisdictional competence, legal pluralism, mixed constitutions, democracy, democratic deficits, subsidiarity, individual and national autonomy, self-determination, the *Rechstaat* and the rule of law, and Europe as a Commonwealth of Commonwealths. Highlights include a critique of the idea that the state has a monopoly on political and legal forms, coupled with endorsement of the importance of the democratic constitutional state (*Rechtstaat*), and

the relativisation of the concepts of sovereignty, independence and self-determination. His differentiation of four types of subsidiarity—communal, comprehensive, market and rational legislative—has also been widely recognised as a major contribution. The last chapter suggests a new form of Union within Europe with a Council of the British Isles, preserving those elements of cooperation and interdependence that 'have worked', to be achieved through peaceful negotiation and mutual good will. The book ends:

> General principles do not settle concrete cases, and the settlement of this kind of case is a matter for political process, in which the philosopher has no larger a voice than anyone else.   (MacCormick, 1999: 204)

Neil MacCormick was a politician as well as a philosopher. *Questioning Sovereignty* was published in 1999, the year in which he was elected to the European Parliament. By then some of his essays and lectures had aroused considerable interest in Europe.[9] So he entered full-time politics *after* he had articulated a coherent political and constitutional philosophy. This informed his activities and greatly enhanced his standing within the European Community. He entered into his role with both energy and enthusiasm. He loved the work and did not mind the acclaim. He served on several committees, represented the SNP on the Convention on the Future of Europe, and involved himself in many specific issues. He was particularly proud of his pamphlet *Who's Afraid of a European Constitution?* (2005). He nursed his constituency, which not inappropriately was the whole of Scotland, fought some important battles regarding ferries for the island communities, and was Vice-President of the SNP from 1999 until 2004. He was voted Scottish MEP of the Year three times. After five frenetic years he returned to academic life, partly because the experience had been exhausting, partly because he missed his students, but mainly to complete his *magnum opus*. However, he was delighted to be appointed Special Adviser to the First Minister, Alex Salmond, after the 2007 Scottish Parliament Elections. He was consulted frequently, but he would probably have been more active in that role had he not been ill.

How far did his political actions reflect his philosophical ideas? This is a complex question, not least because of the extraordinary energy that Neil invested in his role as an MEP. The inventory of the archive of his papers in the University of Edinburgh, which mainly documents his political activities, runs to over 200 pages. There is plenty of scope for detailed

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[9] Notably the Chorley Lecture of 1992, 'Beyond the sovereign state' (MacCormick, 1993), and his writings on subsidiarity.

research into how far his practice matched his theory. My general impression is that at a general level they were remarkably close. This is illustrated by some significant changes of position on the ultimate goal of Scottish nationalism: in 1970 he stated that he was 'unconvinced' that full independence should be the ultimate goal for Scotland, even in the long run (*The Scottish Debate*, 1970, Introduction). In 1989 Neil supported The Claim of Right that helped pave the way for devolution a decade later and he strongly opposed the SNP's boycott of a cross-party movement for self-government, thereby repeating his father's gradualism.[10] Yet over time he came round slowly to support the SNP's end goal of independence and was publicly associated with the SNP's draft constitution for an independent Scotland from the mid-1980s. He justified his gradualism on democratic grounds—the Scottish people needed to be persuaded—and he interpreted 'independence' in the relativist terms of his philosophical position on 'post-sovereignty' and interdependence. *Questioning Sovereignty* concludes by acknowledging that while MacCormick the politician had campaigned for independence for Scotland in the long run, MacCormick the philosopher recognised that this is one among a range of reasonable options that can be chosen by the Scottish people.[11]

Conclusion

Neil MacCormick was one of the leading legal philosophers of the twentieth century. His view of philosophy was broad and closely linked to the idea of liberal education in the Scottish University tradition.[12] In his Presidential Address to the Society of Public Teachers of Law in 1984 he endorsed this holistic view and was highly critical of those who restrict the idea of Jurisprudence to abstract philosophy, laying themselves open to the criticism 'that they lack any real interest in real law' (MacCormick, 1985: 181).

He was a prolific writer. Of his many publications, the quartet *Law, State and Practical Reason* stands out as his most distinctive achievement. It is one of the most extensive and intellectually ambitious contributions to jurisprudence in recent times. It advances a general theory of law as institutional normative order, an in-depth study of sovereignty, statehood,

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[10] Especially in 'Unrepentant gradualism' (1989).
[11] MacCormick (1999), p. 204.
[12] He greatly admired George Davie's seminal work *The Democratic Intellect* (1961).

and nationalism, a theory of legal reasoning and the role of rhetoric within legal argumentation, and an account of practical reasoning in law and morality. Some final statements at the end of a successful scholarly career add little to earlier work and can even be dismissed as 'old men's books'. MacCormick's quartet, by contrast, is intellectually ambitious, contains much that is new, including significant changes of position, and presents a coherent and distinctive vision of law in today's world. It is a masterly synthesis and much else besides. It does not entirely supercede his earlier works, some of which are more detailed or more ebullient, but it will almost certainly be the main focus of attention for commentators in the foreseeable future.

The institutional theory of law is a distinctive theory about the nature of law. Although it grew out of philosophical concerns, one of his aims was to lessen the divide between analytical and empirical jurisprudence. Herbert Hart had advanced a 'social fact' conception of law, but had retreated from its implications. Moreover he confined his attention to state law. MacCormick sought not only to build bridges with the social sciences, both personally and institutionally,[13] but he also recognised that the models of state legal systems constructed or assumed by most mainstream jurists sit uneasily with forms of law or law-like phenomena with which legal scholars and practitioners are increasingly concerned, especially public international law, regional law, religious law, customary law and various forms of 'soft law'. The institutional theory is one of the most developed attempts to provide an alternative model of legal ordering that is both empirically sensitive and broad enough to encompass ideas of non-state law and legal pluralism, and to provide a theoretical framework for viewing and studying a wide range of phenomena in this era of 'globalisation'.

It is ironic that having embraced an empirically oriented view of law as a species of social institution, the later MacCormick claimed to reject, or at least to move beyond, legal positivism. In the end he called himself a 'post-positivist'. By this he meant that he considered morality and positive law (state law is 'posited') to be conceptually distinct, but there are moral limits to what is conceptually reasonable about the idea of institutional normative order: 'Extremes of injustice are incompatible with law' (MacCormick, 2007: Preface). I have argued elsewhere that he exaggerated the significance of his defection from positivism and that his

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[13] He helped to found the Centre for the Social and Philosophical Study of Law in the 1980s and, as Provost, did much to encourage cross-disciplinary work.

post-positivist insistence on a moral dimension to law may fit participant-oriented perspectives suitable for a committed politician or jurist concerned to make her own system the best it can be, but it sits uneasily with outsider perspectives such as those of historians, comparatists or observers of foreign legal orders and regimes that are the products of other people's power (Twining, 2009).

MacCormick's theory of legal reasoning, as developed in *Rhetoric and the Rule of Law*, stands out in a crowded field both for its philosophical sophistication and for its closeness to the actual practices of appellate courts in the common law tradition through the detailed analysis of actual cases. His final position is close to both Ronald Dworkin and Robert Alexy, perhaps the two most prominent thinkers on the topic. Regrettably, he followed convention in restricting his attention almost entirely to reasoning about questions of law, but he did acknowledge that other kinds of reasonings in legal contexts—for example in relation to issues of fact and of disposition (e.g. sentencing)—also merit serious theoretical attention. His ideas on coherence, which he was still developing towards the end of his life, have particular relevance to inferential reasoning from evidence.

Law, State and Practical Reason also contains many specific insights. Of course, not all of MacCormick's moral, political, and jurisprudential ideas are original or distinctive, though even his more orthodox conclusions have a particular Scottish flavour. In addition to *Questioning Sovereignty*, many of his more specific writings on Europe, Scottish nationalism, constitutionalism, and rights are of general interest.

In his autobiographical notes MacCormick defined his intellectual development in terms of his relations with Herbert Hart. But there is a danger that the quartet *Law, State and Practical Reason* will be read and criticised in terms of the narrow perspectives and repetitious debates that have characterised much analytical legal philosophy since the publication of *The Concept of Law*. Neil MacCormick is very much more than a lapsed Hartian and a near convert to natural law. It is important to spell out the reasons for this. First, as we have seen, in Edinburgh he returned to his intellectual roots which were far removed from analytical positivism. Nationalism, the Scottish enlightenment, and, to a lesser extent, Kant and Kelsen were central to his concerns throughout his career. In my view, he was never a 'hard' positivist. Second, MacCormick and Hart were both social democrats with quite similar commitments to democracy, the rule

of law, and (Hart less clearly) to human rights. But they arrived at their views by different routes and MacCormick's ethical and political views are much more fully worked out and integrated with his legal theory than were Hart's. Third, MacCormick was much more in sympathy with socio-legal studies and empirical understandings of law than Hart, Raz, Dworkin, or Finnis. Hart shared Oxford's prejudice against sociology and was an ambivalent supporter of socio-legal studies; Dworkin dismisses sociology of law as marginal and philosophically uninteresting; all four take a quite narrow view of what is involved in understanding law. MacCormick, on the other hand, while not himself engaging much in empirical research, was not only strongly supportive of it in Edinburgh (e.g. MacCormick, 1976), but made it part of his institutional theory of law. This was not merely an example of his concern for inclusiveness; it is philosophically grounded in the Scottish Enlightenment, especially Adam Smith, whom he recognised as a forerunner of 'law in context' approaches (e.g. MacCormick, 1982: 116–17). Finally, there is an important European and comparative dimension, which is quite rare in legal philosophy. It was natural for a Scottish jurist educated in English law to transcend the common law–civil law divide.

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