

# Imagined Communities: Failure and the Jurisprudence of National Identity

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*Draft*

## Identity, Constitutions and Legal Thought

The position of Scots legislation under the Scottish Parliament, it is fair to say, will be significantly different to its position under the current legislative regime at Westminster. As Himsworth and Munro have pointed out, it is clear that the Scottish Parliament will have powers to ‘amend and perhaps codify the private law and the criminal law of Scotland’, and that these powers will enable the corpus of private and criminal law to develop in ways it has not done so previously.<sup>1</sup> What these ways might be is difficult to predict; but if the arguments over the crowded and unsatisfactory position of Scots legislation at Westminster are right, then we can reasonably expect output of Scottish legislation, on all matters except for those reserved to Westminster, to increase in quality and quantity under the Scottish Parliament.

From the point of view of administrative law, too, things will be significantly different. Falconer and Jones have outlined some of these: the relationship between the new Scottish civil service and Whitehall, and between civil servants in Edinburgh and their new political masters, now also to be ensconced in Edinburgh; relationships between MPs, MSPs, and among executive departments; relationships between Edinburgh, Westminster and Europe; and the process of electoral mechanics in the new Parliament.<sup>2</sup>

However, when we think about how Scottish *legal thought*, the subject of this seminar, might change in the context of a Scottish Parliament, we encounter a problem. It is a problem in some ways remarkably like the situation in 1707: nothing like this has happened before to a mixed jurisdiction with a history such as Scotland has, and its effect, gradual but real enough, will only be clear in retrospect: Walter Benjamin’s angel of history, catastrophe piling up around her feet, looks only backward.

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<sup>1</sup> C.M.G Himsworth and C.R. Munro, *Devolution and the Scotland Bill*, Edinburgh, W. Green, 1998, p.60

<sup>2</sup> Peter Falconer & Alastair Jones, ‘Electoral Politics in the New British States’, *Contemporary Political Studies* 1998, vol. 1, Proceedings of the Annual Conference, University of Keele, April 7-9, 1998, edited by Andrew Dobson & Jeffrey Stanyer, pp.458-472, p.466. For comment on the Bill from lawyers, see Mike Dailly, ‘A Reform Revolution’, *Lawyer*, 1997, 11(35), 17; Mark Lazarowicz, ‘A Scottish Parliament: The Implications for Lawyers’, *Journal of the Law Society of Scotland*, 1997, 42 (9), 349-50

To explore some aspects of this large question, I would like to take the subject of legal thought as an aspect of national identity, and the extent to which investigations of our identity might contribute to the future direction of legal thought. In doing so I shall take an interdisciplinary view both of national identity and jurisprudence, and shall argue that there could be a jurisprudence, in character interdisciplinary, and both critical and historical, of legal and national identity.

Interdisciplinarity within the discipline of law is the key here. Constitutions, even what might be called subordinate constitutional legislation, such as the Scotland Bill, arise out of the *imperium* of governmental command: ‘There shall be a Scottish Parliament’, the first clause of the Bill. But the felt need for a constitution is a complex historical and cultural nexus which shapes the form of the constitutional settlement, and which arises not only from the domain of legislation (‘unfinished business’, ‘democratic deficit’ are key popular phrases which have expressed this). It also arises from a sense of identity, particularly national identity. Substantive law says little about the processes of its own formation and the change this identity undergoes: to understand it we require historical, jurisprudential and cultural perspectives.

The question of identity has been raised recently by a number of commentators – in law, J.M Thomson, Alan Rodger, Hector MacQueen, Attwooll, in her recent study of Scottish legal culture, and the collection of essays which present the Claim of Right for Scotland.<sup>3</sup> Interdisciplinary perspectives are used to a greater or lesser extent in these and other discussions of national identity and law in Scottish legal literature. Knud Haakonssen, for instance, has argued convincingly that eighteenth and nineteenth century natural law jurisprudence was a form of interdisciplinary inquiry within which there were attempts to combine ‘jurisprudence, civic humanism and practical ethics in a coherent moral and political outlook’.<sup>4</sup> However, in some of the literature there is a clear separation of legal identity from other concerns. In their discussion of Scotland in the Union, for instance, Himsworth and Munro declare that

[i]f the separateness of the Scottish legal system owes something to the moral force of ... considerations which were in mind in 1707, when some thought was given to maintaining its identity, there are other spheres such as education and aspects of arts and culture (such as architecture, or the press) and social and economic practice (such as patterns of domestic housing) where Scottish distinctiveness owes little or nothing to the union legislation as such. (p.8)

In a strict sense this view of the Union is correct, but there are two criticisms which can be made of it. First of all, it does not express the historical or cultural experiences which are the result of Union politics. It is true that there are no provisions in the Act of Union for regulating the press or housing development; but it is certainly the case that the Act of Union profoundly affected almost all aspects of Scottish history, culture and law. Secondly, Scottish distinctiveness from, and Scottish uniformity and conformity with,

<sup>3</sup> These authors shall be referred to later in the paper. Owen Dudley Edwards, editor, *A Claim of Right for Scotland*, Edinburgh, Polygon Press, 1989

<sup>4</sup> Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*. Cambridge, Cambridge University Press, 1996, p. 5

England are part of the construction of Scottish identity by means of representational signs and structures. As Stuart Hall has commented, ‘a nation is not only a political entity but something which produces meanings -- a system of cultural representation’.<sup>5</sup>

These words are quoted by Brown, McCrone and Paterson in their study of Scottish politics and society.<sup>6</sup> In their chapter on ‘Ethnicity, Culture and Identity’ they note that in the early years, the Union ‘did not, by all accounts, much affect the lives of ordinary people or their immediate masters’, and draw a distinction between the high politics of London politics and the low politics of civil society in Scotland, adding that a constitutional settlement which allowed for the continuation of the latter in Scotland would have been the only one acceptable to Scots. At first glance this view would seem to support the quotation from Himsworth and Munro above. But they then ask the key question: why, then does the Union matter so much almost 300 years later?

Put simply, it set the institutional infrastructure on to which Scottish national identity was grafted. ... Identifying oneself as Scottish was not simply some memory trace of pre-Union independence, but a reflection of the governing structures of Scottish civil society. It both derived from, and laid the basis for, nationhood

It is in this sense that the constitutional arrangements underpinning the Scottish Parliament will gradually but fundamentally alter our sense of what it is to be Scottish, in much the same way as did the Act of Union. It will do so partly because, however much we may wish it otherwise, law is, as Boaventura de Sousa Santos has characterised it, made up of ‘porous legality or of legal porosity of multiple networks of legal orders forcing us to constant transitions and trespassings’.<sup>7</sup> Santos refers here to the porosity of different legal orders within and around legal systems; but it is significant that his concept springs from his application of Harold Bloom’s literary critical theory of misprision (an application which is in itself a good example of law’s porosity). Constitutional arrangements are always open to misprision: examples are the endlessly creative debates around the First Amendment. As legal texts, they tend to be more open to arguments of public policy, rights-based arguments and pleas based upon communitarian motives. As such, they become shaping texts which, quite apart from the legislative authority they bear, are heavily symbolic of the self-identity of a nation.

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<sup>5</sup> Stuart Hall, ‘The Question of Cultural Identity’, in S. Hall, editor, *Modernity and Its Futures*, Cambridge, Polity Press, p.292

<sup>6</sup> Alice Brown, David McCrone and Lindsay Paterson, *Politics and Society in Scotland*, London, Macmillan Press, 1996

<sup>7</sup> Boaventura de Sousa Santos, ‘Law: A Map of Misreading’, *Journal of Law and Society*, 14, 1987, 279, quoted in Elspeth Attwooll, *The Tapestry of the Law: Scotland, Legal Culture and Legal Theory*, Law and Philosophy Library, vol 26, London, Kluwer Academic Publishers, 1997, p. 180. Bloom’s approach has been applied a number of times to legal reasoning and textual interpretation, specifically by Paul Gewirtz, David Cole and Kenji Yoshino. There isn’t space here to examine their interesting uses of Bloom, all of which, I would hold, are creative misreadings of Bloom. But what I would like to say here is that if we take Bloom’s concept of the genealogy of textual reading together with a view of intertextuality derived from Kristeva, then we will find that literary theory can give us insights into the problem of open texture in law. For an interesting account of trespassing as a method of cross-disciplinary research see David P. Ellerman, *Cultural Trespassing as a Way of Life: Essays in Philosophy, Economics and Mathematics*, Rowman and Littlefield Publishers, London, 1995

In one sense, a new and developing identity under a Scottish Parliament is easier to construct precisely because the UK identity is so weak and because sovereignty does not lie with it, but remains at Westminster. Both of these points require a little unpacking. UK identity is bound up with being British. But what 'British' actually means is by no means clear. Many commentators, in one way or another, point to what Linda Colley has articulated in her study of Britishness, namely that UK identity was forged out of the eighteenth century wars with France and developing imperialism.. The term 'Britons' is usually used to identify UK citizens in distinction to other nationalities, but as Tom Nairn rightly puts it, 'there have never been "Britons" ... any more than there were "Austro-Hungarians" before 1917'.<sup>8</sup> In this sense there has been a conspicuous failure since the Union to define what British-ness might actually be. Scottish, English, Welsh and Irish all have quite different defining myth-structures and narratives: their representations of nationalism did not merge prior to 1707, and have not done so since.

This identity weakness is apparent in the constitution itself, which requires the glue of the Crown to bind it together. As Nairn has pointed out,

Anyone who buys an elementary textbook on the British Constitution to read it (rather than pray before it) knows that the Crown is a crucial element in Constitution, Law and Government. Were it to disappear, these would require both theoretical and practical reconstruction, not a few adjustments with a spanner.<sup>9</sup>

If Nairn is right that there would be significant constitutional problems in abolishing the Crown, one reason for this is the importance of the Crown as a focus for UK centralist conventions and ideologies. As a lynch-pin of these ideologies, the Crown is a bar to the development of alternative identities as these might be developed *via* constitutional reform. This idea, of course, is not new. Over a century ago, and contemporaneous with the debates on primitive society, there was a similar concern with constitutional reform, one which was first raised publicly in Gladstone's Midlothian campaign.

Gladstone's campaign in 1879, masterminded by two Scots lawyers under Lord Rosebery, shrewdly took the lead in a mounting popular protest against a number of issues, humanitarian and political. He saw his campaign as 'an occasion, when the battle to be fought was a battle of justice humanity freedom law, all in their first elements from the very root, and all on a gigantic scale'.<sup>10</sup> It was in his second Midlothian speech that

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<sup>8</sup> Tom Nairn, *The Break-Up of Britain: Crisis and Neo-Nationalism*, second edition, London, Verso, 1981, p.369. This quote comes from the additions to the second, expanded edition, aptly entitled 'Postscript 1981: Into Political Emergency'.

<sup>9</sup> Tom Nairn, *The Enchanted Glass: Britain and its Monarchy*, London, Radius, 1988, p.89. It is interesting to observe that the name of our country is curiously empty of significance: a nameless united kingdom. In a similarly negative way, powers have been given to the Scottish Parliament through a process of abstracting power from it by means of reserving matters to Westminster (clauses 28 and 29 and Schedule 5 of the Scotland Bill. There is a method, *via* statutory instrument, by which matters can be withdrawn or added to the reserved list -- clause 29(2), (3). This would require assent from both Westminster and the Scottish Parliaments, though, and requires to be made by Westminster

<sup>10</sup> *The Gladstone Diaries with Cabinet Minutes and Prime-Ministerial Correspondence*, 14 vols, London, 1968-94, vol ix, 24 Nov. 1879, quoted in *Gladstone 1875-1898*, H.C.G. Matthew, Oxford, Clarendon Press, 1995, p.41

Gladstone set out the rationale for legislative, as opposed to administrative, change to the current constitutional arrangements. This would, he declared, encourage 'local government', it would take much of the weight from an overburdened Westminster Parliament, and could 'deal with questions of local and special interest ... more efficiently than Parliament now can'.<sup>11</sup> Gladstone's ideas thus stretched as far as devolution, but not to Home Rule. It is clear that he favoured a Diceyan form of unity under an imperial parliament, however much he disagreed with Dicey's ahistorical analyses of the constitution.<sup>12</sup> As such, his problems in framing and attempting to implement devolutionary legislation were similar to those faced by the draughters of the Scotland Act 1978 and the more recent White Paper and Scotland Bill.<sup>13</sup> His proposed solutions were not far removed either. That such a coincidence exists over a period of a century and more is eloquent not only of the constitutional problems inherent in the Westminster model, then as now, but also of the chronic unease we have with our identity within it.

## Failure and Reconstructions

The aftermath of the failure of devolution in 1979 posed a Scottish society with a particular problem, one which affected everyone -- apart from unionists -- interested in the devolutionary and independence debate. What does one do after such bitter failure of expectations? What reaction could there be to the political failure of the legal solution to constitutional change in Scotland? Broadly speaking, there were two responses. The first was political, and based on ground-up initiatives, while the second was cultural, and analysed the failure of political life in Scotland. Both, I would argue, were attempts to reconstruct of alternative identities, not only national identities in the cultural sense, but legal solutions to the political impasse of the eighties and early nineties.

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<sup>11</sup> W.E. Gladstone, *Midlothian Speeches 1879*, introduced by M.R.D. Foot, Victorian Library edition, Leicester University Press, 1971, p.87

<sup>12</sup> See Matthew, *op.cit.*, pp.248-51. For further discussion of this and related matters in Gladstone's concept of devolved powers, see R. Kelley, 'Midlothian: A Study in Politics and Ideas', *Victorian Studies*, 4, 1960. Dicey published a reply to Gladstone in *England's Case Against Home Rule*, London, 1886, when the debate regarding Home Rule in Ireland was at it most intense.

<sup>13</sup> This analogy has been made by a number of commentators. Neal Ascherson, for instance, made the following observations in his *Devolution Diary*, extracts of which were reprinted in *Cencrastus*, 22, 1986, 3-14 & 49-54, and which are worth quoting in full:

**Tuesday 15 November 1977**

Went to the British Museum and read the 1886 Home Rule debates. How elastic and sovereign Gladstone was, compared to politicians today! The problems were so similar. But the confidence in change and innovation was so much greater. The central doctrine of the sovereignty of Parliament was of course an obstacle to Gladstone. But I saw, as I read on, that what was only a general principle in 1886 has become a fixed taboo today, an institution as sacred and encrusted as a Coronation ceremony. Once again, it's vital to remember that things presented as immemorial British ceremonies and traditions are very often quite new and unhistorical. The 'encrusting' process, like giving false patina to a new bronze statue, is the most subtle of the techniques by which British society is managed and radical change evaded... (p.53)

### **The democratic deficit campaigns**

Throughout the eighties and early nineties there were a number of important initiatives which enabled the debate about identity and politics to continue. In March 1980, the Campaign for a Scottish Assembly was founded. In party politics, there was the short-lived '79 Group in the SNP (August '79 till August 82), and the Labour equivalents, Campaign for Nationalism and Scottish Labour Action (February 1988). In 1988, a *Claim of Right for Scotland* was published by the Campaign for a Scottish Assembly which, amongst other proposals, suggested the setting up of a Constitutional Convention. In March 1989 the Constitutional Convention met, and in November 1990 published its foundational document, *Towards Scotland's Parliament: A Report to the Scottish People by the Scottish Constitutional Convention*. In April 1992, Scotland United was formed, and in the same month a vigil was begun outside the Royal High School, initiated by a movement called Democracy for Scotland. In December 1992 a Democracy demonstration was held in Edinburgh to coincide with the European Union Summit held in the city. In 1993 the Scottish Constitutional Convention founded a Scottish Constitutional Commission, while in June 1994 a Civic Forum was held in the Royal High School to discuss the future shape of a Scottish Assembly.

Viewed collectively and historically -- albeit they were rarely integrative with each other -- these initiatives were a form of *cahiers de doléances* which were persuasive of the widening gap between democratic principles in Scotland and the constitutional reality. All of these initiatives -- and this list contains only the better-known of them -- were predicated on variations of the same argument, namely that the case for constitutional reform rested on inadequate democratic controls given to Scotland. The Scottish Constitutional Convention, for example, sought 'a constitutional settlement in which the Scottish people, being sovereign, agree to the exercise of specified powers by Westminster, but retain their sovereignty over all other matters'.<sup>14</sup> All of them, to greater or lesser effect, presented alternatives to the current constitutional regime, so that the case for democracy, put by many public figures in many different forums and debates, was arguably a powerful force in the creation of the Scottish Bill. It is ironic that this argument supported the claims for both independence and devolution, but it was part of the appeal of the argument to those who were not wholeheartedly in either camp that it did so.

### **The cultural response**

The other reaction to political and legal failure was the effort to construct imagined communities. Following the '79 debacle, it is now a fairly common view that the arts and humanities in Scotland played a significant part in this reconstruction. In painting, sculpture, architecture, in history especially, and in literature and drama, there was a

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<sup>14</sup> Scottish Constitutional Convention, *A Constitutional Framework for Scotland*, 1989, para 10.3

sustained criticism of the status quo in British politics, and presentation of alternative Scotlands.<sup>15</sup>

Academic disciplines exemplify similarly vigorous responses to the '79 debacle. In Scottish history. The *Scottish Historical Review* recently published the papers from a symposium entitled 'Writing Scotland's History', and which aimed to explore the recent reconstructions of Scottish history. As John Stevenson put it, discussing twentieth century Scottish history, 'Our greatest difficulty is that the narrative of current Scottish history is still dominated by the unfinished political identity of Scotland'.<sup>16</sup> Other historians have been actively interrogating this identity. Michael Lynch's well-received one volume study of Scottish history begins by posing the question about the identity of Scots and Scottish culture. Hector MacQueen recently analysed the 'modern [*ie* twentieth century] myth of Scottish legal history', that medieval law contributed 'almost nothing to Scots law, which had essentially begun anew and on a Civilian basis with the writings of Stair'.<sup>17</sup> In Enlightenment studies, the Pocockian revolution signalled by *The Machiavellian Moment* has contributed significantly to our understanding of key concepts and ideas in the Enlightenment formation of identity. In the work of John Cairns and others in recent decades, for example, this form of enquiry has opened up the history of legal education to a remarkable extent. Other studies such as David Allan's have opened up the richness and complexity of earlier Scottish historiographical debates.<sup>18</sup>

If historical commentary has provided us with valuable critiques of political culture, literary criticism has not been far behind. A number of critics have developed a sophisticated critique of the place of Scottish literature with a British context. In a series of important articles and edited books, Cairns Craig has developed arguments concerning the relation of Scottish literature to the political literature relating to Scotland, and this has helped to clear a discursive space for others to explore the subject in more detail.<sup>19</sup> Gordon Turnbull, for instance, has interpreted James Boswell's perennial preoccupation in his diaries and papers as one aspect of the Scottish Enlightenment's 'great revisionary interrogation of British identity and its making from the perspective of the post-Union

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<sup>15</sup> Amongst the many examples we could take, a novel by Alastair Gray entitled *1982, Janine* is typical of this late twentieth century revival. Gray's novel is an extraordinary mixture of political discussion and sex, where one becomes a metaphor for the other. It is recognisably a 'condition of Scotland' novel, though one that bears almost no resemblance to the tradition which begins with Disraeli's *Coningsby*. In place of the English class elites of Disraeli and Meredith, we have a Scottish middle-class security supervisor, Jock McLeish, addicted to pornography as well as alcohol, meditating on the state of his life, and that of Scotland, the one reflecting the other, and finding redemption of a kind through the acknowledgment of his own failures. See Bruce Charlton, 'The World Must Become Quite Another: Politics in the Novels of Alastair Gray', *Cencrastus*, Autumn, 1988, pp.39-41

<sup>16</sup> 'Writing Scotland's History in the Twentieth Century: Thoughts from Across the Border', *Scottish Historical Review*, LXXVI, 1, No 201, April 1997, p.112

<sup>17</sup> 'Regiam Majestatem, Scots Law and National Identity', *Scottish Historical Review*, LXXIV, 1, 197, April 1995, p.25

<sup>18</sup> David Allan, *Virtue, Learning and the Scottish Enlightenment: Ideas of Scholarship in Early Modern History*, Edinburgh, Edinburgh University Press, 1993

<sup>19</sup> 'The Body in the Kitbag: History and the Scottish Novel', *Cencrastus*, No.1, Autumn 1979, pp.18-24; *Cencrastus*, No 19, Winter 1984, *Towards a Cultural Politics*, Cairns Craig, 'Nation and History', 13-17; *The History of Scottish Literature*, general editor, Cairns Craig, 4 vols, Aberdeen, Aberdeen University Press, 1987-8

Scot'.<sup>20</sup> Perhaps the most important influential of current criticism has been that of Robert Crawford, whose *Devolving English Literature*, and his most recent, edited collection, *The Scottish Invention of English Literature*, are archaeological investigations into the historical development of our modern concept not only of Scottish literature, but of English and British literature, too.<sup>21</sup> In its scope it is nothing less than a deconstruction of the notion of British literature, and as such, an investigation into the British establishment along the same lines as, for example, Linda Colley's analysis of the concept of British historical development.<sup>22</sup> It is worthwhile examining how this is happening, for the literary exploration of native identity provides, I would argue, one useful model for the development of a jurisprudential model of enquiry into the identity of Scots law.

From the outset Crawford makes it clear that he is not writing a conventional chronological history of Scottish Literature. Instead, he follows a particular line of critical argument, namely that, to cope with a number of problems of identity and national culture posed by the union, 'the Scots' solution to them was to develop a "British Literature" throughout both the eighteenth and nineteenth centuries, before a more explicitly nationalist, post-British literary consciousness came to the fore in the twentieth century'.<sup>23</sup> In doing so, Crawford abandons versions of the core-periphery model of cultural development in Scotland, a model in which the core dominates and oppresses the peripheral cultures at its margins.<sup>24</sup> Instead, he posits a model where

while for centuries the margins have been challenging, interrogating and even structuring the supposed 'centre', the development of the subject 'English Literature' has constantly involved and reinforced an oppressive homage to centralism. As such, English Literature is a force which must be countered continually by a devolutionary momentum. (p. 7)

This argument enables Crawford to claim that the "provincial" energies so important to Scottish writing, and the anthropological viewpoint developed by Scottish writers, fed into American writing and into the essentially 'provincial' movement we know as Modernism'.<sup>25</sup> It is an original approach entailing, as Crawford readily admits, a 'provocative rereading of a wide variety of texts'.<sup>26</sup> It is also an approach which Scottish jurisprudence could learn from on two counts. First, from a methodological point of view, Crawford's critique is eclectic and interdisciplinary yet (unlike deconstructive and poststructuralist approaches) grounded in modes of historical inquiry. Second, his treatment of nineteenth century Scottish literature takes into account the extent to which

<sup>20</sup> 'James Boswell: Biography and the Union', in Andrew Hook, editor, *The History of Scottish Literature*, vol ii, 1660-1800, Aberdeen, Aberdeen University Press, 1987, p.157

<sup>21</sup> *Devolving English Literature*, Oxford, Clarendon Press, 1992; *The Scottish Invention of English Literature*, Cambridge, Cambridge University Press, 1998.

<sup>22</sup> Linda Colley, *Britons: Forging the Nation, 1707-1837*, New Haven, Yale University Press, 1992

<sup>23</sup> *Devolving English Literature*, p. 9

<sup>24</sup> For the classic statement of this, see Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966*, London, Routledge & Kegan Paul, 1975. There have been a number of important critiques of this, notably in Nairn, *op.cit.*, and Christopher Harvie, *Scotland and Nationalism: Scottish Society and Politics 1707-1994*, London, Routledge, 1994

<sup>25</sup> Crawford, *op.cit.*, p.9

<sup>26</sup> *Ibid.*

traditions of thought altered throughout the last two centuries, yet retaining coherence – identity and *difference* are key themes.

It is of course necessary to be cautious about analogising from literature to law, and generalising on the relationship of jurisprudence to law generally and constitutional law in particular. The historical complexity of constitutional thinking in Scotland, and the debates regarding identity require close study. Yet there is in Scotland, as Attwooll describes it, a dialogue between ‘aspects of its constitutional law and the recurrence in its wider culture of certain ideas about the proper location and use of political power’<sup>27</sup>. This dialogue has persisted since well before the Enlightenment, taking shape in different texts, used on different occasions, and serving different purposes.<sup>28</sup> In the later nineteenth century this dialogue was influenced by a specific historical and cultural circumstances. It was then that home rule movements took root in Scotland.<sup>29</sup> At the same time there was, according to Alan Rodger, a tendency ‘for Scots [lawyers] to see themselves as part of a larger English speaking family of lawyers scattered throughout the Empire; a vision which began to speak of the white races of the Empire and the United States being linked by a unique heritage of law’.<sup>30</sup> If Rodger is right about this, and there is no reason to believe otherwise, there are several competing models of constitutional thinking in the later nineteenth century: one cadre of lawyers arguing for variations of home rule, and another, supporting the historical reception of English law and imperial constitutionalism. We could attribute these stances to party politics only. But this is to reduce a cultural nexus to politics only. In fact, the closer we look at what advocates and lawyers were doing in the later nineteenth century, the more complex the picture becomes. We can appreciate this if we consider as a case study the writings of another group of Scottish lawyers who wrote upon what would now be regarded as anthropological subjects, but which then formed a bridge between law and ethnology. They are a good example of the type of interdisciplinary projects that might be carried out into Scottish legal thought.

### **Anthropology, Constitution and Law: a case study**

In the latter half of the nineteenth century a number of writers throughout Europe and the USA became interested in the concept of primitive society. The most famous and influential of these included Bachofen, Maine, Fustel de Coulanges, P. Lubbock, J.F. McLennan, Robertson Smith, Morgan, William Tylor and J.F. Frazer. The tradition did not spring fully-formed in the later nineteenth century. It was partly a product of the enlightenment traditions of comparative history, whose own roots, as David Allan has so comprehensively demonstrated, lie within the earlier legal and historiographical traditions

<sup>27</sup> Attwooll, *op.cit.*, p.xiii, summarising especially chapter III.

<sup>28</sup> David Allan charts many of these in his book, *op.cit.*

<sup>29</sup> For information on the later nineteenth century home rule movements, see Harvie, *Scotland and Nationalism, 1707-1994, op.cit.*; James Mitchell, *Strategies for Self-Government: The Campaigns for a Scottish Parliament*, Edinburgh, Polygon, 1996, chapter entitled ‘Home Rule Pressure Groups’

<sup>30</sup> Alan Rodger, ‘Thinking about Scots Law’, *Edinburgh Law Review*, 1, 1996, p.3

of the sixteenth and seventeenth centuries.<sup>31</sup> As ethnology, this discipline grew partly from the study of classical antiquity – the German ethnologist Jakob Bachofen, for instance, intended his seminal ethnological work *Das Mütterrecht* as an analysis of classical society.

In Scotland, law was both the source of analysts and a fertile field for analysis, and had been for some time. David Hume's *History*, for example, dealt with changes in ownership of property, and dwelt upon the cultural shifts wrought by these changes.<sup>32</sup> Throughout the eighteenth century, Gilbert Stuart, John Millar, William Robertson, Lord Hailes and others all focused upon constitutional issues, an area of concern and interest in the wake of the parliamentary union with England. William Hamilton trained as a lawyer, as did Walter Scott. In the later nineteenth century so too did John Ferguson McLennan (1827-81), whose article in the eighth edition of the *Encyclopaedia Britannica* on 'Law', as well as his book *Primitive Marriage* (first edition, 1865) were written partly to define the concept of primitive society, and partly to correct what he regarded as Maine's mistaken view of that society in *Ancient Law* (1861). The *Britannica* article, like *Primitive Marriage*, clearly owes debts to the Scots enlightenment tradition of historical, sociological and constitutional enquiry.<sup>33</sup> McLennan's interest in marriage law did not remain in the context of primitive society: in an article entitled 'Marriage and Divorce: The Law of England and Scotland' published in the *North British Review* he defended what were then seen as Scotland's 'barbarous' marriage customs.<sup>34</sup>

*Primitive Marriage* is a seminal text, not only for other early Scots anthropologists such as Robertson Smith (whom knew McLennan, and whose own *Kinship and Marriage in Early Arabia* (1885) is indebted to McLennan) and J.G. Frazer and, but for other early ethnologists such as Maine, William Tyler and Lewis Henry Morgan. While he studied for entry to the bar, for instance, Frazer read Maine's *Ancient Law*. His copy survives, filled with comments against Maine, and citation of McLennan in support. He also writes,

Language, spoken or written, is a species of signs. Signs are modes of conveying thought between intelligent beings by means of sensible impressions. Signs are of two kinds: representative and symbolical<sup>35</sup>

And so he goes on. It is a remarkable passage, contemporaneous with Saussure, and undeniably semiotic. But it relies, as does all Frazer's method, and indeed as does the whole comparative method, upon the concept of parallel evolution. McLennan's and Frazer's comparative and interdisciplinary jurisprudence (and perhaps the same could be said, too, of the comparative jurisprudence of other later nineteenth century Scottish legal

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<sup>31</sup> Allan, *op.cit.*

<sup>32</sup> Hume, it should be noted, was Librarian of the Faculty of Advocates

<sup>33</sup> For McLennan, as much for William Tylor, Dugald Stewart was a key influence. Stewart's epistemology, which also influenced Carlyle as well as Darwin, gave them both a conception of scientific law as a form of myth-making

<sup>34</sup> *North British Review*, August 1861, 187, 198. For more information on the differing perceptions north and south of the border of the Scots law of marriage see Leah Leneman,

<sup>35</sup> Quoted in Robert Ackerman, *J. G. Frazer: His Life and Work*, Cambridge, Cambridge University Press, 1987, p.

thinkers such as James Lorimer and Cosmo Innes) is based upon the model of comparative philology. As Robert Ackerman, Frazer's biographer, points out,

That the mind of man, under whatever circumstances and at whatever period, works in pretty much the same way was a conviction Frazer derived in the first instance from his empiricist forebears and in the second from Victorian evolutionary theory. His naiveté is that he applies the first to the second, as if a commonality of logical processes somehow guarantee a common course of cultural development.<sup>36</sup>

This case study proves that there was, therefore, a continuity between ethnological thought and legal thought, the dimensions of which, sketched out briefly above, require to be analysed in much greater detail. Each of these writers, of course, interpreted primitive society differently, and each was influenced by different traditions of nineteenth century thought: Darwinist evolution, Scots enlightenment historiographical traditions, English constitutional historiography, Germanic philology and the interest in the history of legal customs and institutions, Comtean positivism, utilitarianism. However, as Adam Kuper perceptively points out, all of them held similar ideas about primitive society: that such societies ordered themselves according to kinship relations and descent groups which were based upon marriage exchanges; that like fossils, fragments of these practices were preserved in modern societies untouched by industrialism; that private property abolished kinship groupings and led to territorial land holdings.<sup>37</sup>

In addition to this, there was a general realisation in the latter half of the nineteenth century that modern society was undergoing astonishing transitions, the like of which had not been experienced before. Marx's definition of the move from feudal to capitalist society; Weber's description of bureaucratisation of society; William Morris' attempts to recreate the conditions of medieval craft guilds -- all of these forms of social action presuppose an earlier form of society, from which one can glimpse a primitive society. The need to do so is well documented in studies of Victorian literature and art, and what is true there is true of anthropology. As Kuper puts it 'in practice primitive society proved to be [the anthropologists'] own society (as they understood it) seen in a distorting mirror. ... They looked back in order to understand the nature of the present, on the assumption that modern society had evolved from its antithesis'.<sup>38</sup> What is remarkable about all of these books on primitive society is that there was no such primitive society as it is described by late Victorian anthropology. The historical referent is non-existent, as it is posited by Maine, McLennan and others; and if aspects of it ever did exist, it could not be generalised to all primitive society. As Kuper puts it, 'the history of the theory of primitive society is the history of an illusion. It is our phlogiston, our aether; or, less grandly, our equivalent to the notion of hysteria'.<sup>39</sup>

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<sup>36</sup> *Ibid*, p.

<sup>37</sup> Adam Kuper, *The Invention of Primitive Society: Transformations of an Illusion*, London, Routledge, 1988, pp.5-7

<sup>38</sup> *Ibid*, p.5

<sup>39</sup> *Ibid*, p.8

Kuper's conclusions, though, are too bleak. McLennan, Robertson Smith, Frazer and others wrote what came to be foundational texts for a range of disciplines; and they re-interpreted Enlightenment historical and jurisprudential theory of the origins of civil society in the context of evolutionary science and geological time. They represented to their society a narrative of the origins of law which explained, in terms which drew from traditional thought and contemporary science, how that society might have come to be what it was. Their society was deeply interested: accounts of Robertson Smith's trial for heresy over his claims concerning the status of Biblical narratives took up almost as much space in newspaper columns in 1879 as did accounts of Gladstone's Midlothian campaign.

The anthropological writings, exotic at first glance, are an important episode in Scottish nineteenth century legal thought. To what extent did anthropological enquiry influence patterns of Scottish legal thought in the nineteenth century? How did it carry through to other disciplines ideas concerning the constitution of societies which were derived from Enlightenment debates about the origin of civil society? How was it influenced by Darwinian and positivist ideas concerning the place of natural law and law in society? These are some of the many questions that still require to be asked of this transition in Scottish legal thought in order to clarify its meaning for us.

## Conclusion

It would appear that we have moved some way from a consideration of the Scottish Parliament; but I would argue that really, the jurisprudence of national identity and the Parliament are not that far apart, and that one will have an inevitable influence on the other. The phrase 'imagined communities' in the title of this paper is of course the title of Benedict Anderson's important study of nationalism. For him, the nation is 'an imagined political community -- and imagined as both inherently limited and sovereign', and his book explores the cultural roots of nationalism. The concept of a Scottish Parliament, even a subordinated Parliament, like the concept of the state, is 'not just a set of institutional arrangements but a set of purposes too'.<sup>40</sup> Philip Allott has made similar observations: we are, he observes, ineluctably influenced by previous views of constitutional theory: Montesquieu, Kant and Hegel, Savigny, Marx, Freud and Wittgenstein have all taught us that the constitution is not historically haphazard: it 'is also an organism, and programme which is also a personality. A constitution is not an arrangement of institutions. It is a dialogue between consciousness and circumstance'.<sup>41</sup>

Two things are necessary in our dialogue with the Parliament, both quite separate from the task of helping to resolve the structural questions I outlined above which will inevitably arise within the new constitutional arrangements. We must continue the

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<sup>40</sup> Norman D. Lewis, *Choice and the Legal Order: Rising Above Politics*, London, Butterworths, 1996, p.132

<sup>41</sup> Philip Allott, 'The Theory of the British Constitution', in *Jurisprudence: Cambridge Essays*, edited by Hyman Gross and Ross Harrison, Oxford, Clarendon Press, 1992

process of reconstructing a Scottish jurisprudence, historically and critically, which will place the institution and its powers within a context of Scottish legal thought and history. In many respects this means revising our view of nineteenth and earlier twentieth century jurisprudential thought in Scotland, perhaps along the lines of that interdisciplinary enquiry undertaken by Crawford and others on Scottish literature.<sup>42</sup> Secondly, such a jurisprudence could usefully inform and critique the evolving constitutional practice of the new Parliament. However we begin these tasks, and however far down the road we get, it is clear that the very presence of a governing institution in our midst cannot help but begin to clarify our sense of identity: a regional grouping no longer, but a political community.

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<sup>42</sup> As George Davie put it, 'the Scots perversely preoccupy themselves only with the side of their nineteenth-century history which shows their country to have been a failure'. George Davie, 'Scottish Philosophy and Robertson Smith', *Edinburgh Review*, no 69, p.96