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Whigs, Tories and Scottish Legal Reform c.1785-1832

Jim Smyth¹ & Alan McKinlay²

Au début du XIX^e siècle en Écosse, un débat sur la réforme du système légal se déroula dans l'ombre du débat sur la réforme du système politique. D'un côté, les jeunes Whigs de la Edinburgh Review plaidaient pour l'adoption du système légal britannique, en particulier en droit civil, qu'ils percevaient comme un moyen de moderniser et de civiliser l'Écosse. De l'autre, on trouvait les juristes Tory, qui répliquaient en défendant le droit pénal écossais jugé plus humain. À la différence de l'Angleterre, il n'était pas nécessaire d'abolir les nombreuses lois relatives à la peine capitale, car en Écosse, les juges jouissaient depuis longtemps d'un large pouvoir discrétionnaire. Ces débats mettaient en cause non seulement des conceptions procédurales rivales, mais également l'identité écossaise. Toutefois, chacune des parties était contrainte par ses propres impératifs politiques: les Whigs n'avaient d'autre choix que de passer sous le boisseau le Bloody code anglais, tandis que les Tories ne pouvaient pousser leur défense du droit écossais jusqu'à remettre en cause l'Acte d'union de 1707.

In early nineteenth-century Scotland the debate over political reform occurred alongside a shadow debate over legal reform. On the one side the young Whigs of the Edinburgh Review argued for the adoption of English legal practice, particularly in civil law, as the means to modernise and civilise Scotland. On the other side stood the Tory jurists who responded by

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Both authors have a joint research interest on the history of crime and especially capital punishment.

defending Scotland's more humane criminal law. Unlike in England, there was no need to repeal the numerous statutes detailing the death penalty, since Scotland had long been used to judge-made law. These debates reveal rival notions not just of legal procedure but also of Scottish identity. Both sides however, were constrained by their own agendas; the Whigs had little option but to ignore England's 'bloody code', while the Tories could not push their defence of Scots Law as far as questioning the value of the Union of 1707.

INTRODUCTION

In Scotland in the late eighteenth and early nineteenth centuries, reform of the Law, both civil and criminal, was the focus of a prolonged and bitter debate between Whig and Tory, and between rival notions of 'Scotland', and 'Britishness'. This controversy occurred parallel to and influenced the wider political debates of the time, and legal reform can be seen as one of the main elements of the new settlement represented by the Reform Act of 1832. The main protagonists were the younger Scottish Whigs of the *Edinburgh Review*, whose influence was felt throughout the United Kingdom. The *Review*, edited by the lawyer Francis Jeffrey and ably supported by other lawyers such as his close friend Henry Cockburn, played an important role in advancing the cause of parliamentary reform, while, at the same time maintaining a consistent polemic on the failures and general backwardness of Scots Law. Furthermore, figures associated with the *Review* such as Henry Brougham (another Edinburgh trained lawyer) played a central role in the criminal law reforms in England in the 1830s. The Whig argument was that English law was superior and that English practice should be emulated as the route to progress and modernity. This critique, however, was challenged by a stout Tory defence which concentrated upon the criminal law and which based much of its moral authority on Scotland's lack of a bloody code.

For the Tories, the attack on Scots Law was part of the Whig programme of Anglicisation which threatened the civil institutions of Scotland, and indeed Scotland's very identity. The Scots Tory position was limited, however, by their own embracing of Enlightenment notions of progress and improvement, as well as their political commitment to the Union³. Even Walter Scott, for all his romanticism, nonetheless supported the ethic of improvement, and shared the Whig view that it was the Union which allowed Scotland to share in modern progress⁴. For the Whigs, on the other hand, committed as they were to English constitutionalism and English liberty, defending the legal practices of their southern neighbour was problematic when that model, in terms of criminal law, was significantly more sanguinary than Scotland's own practice⁵. What was consistent from the Scottish Whigs was a clear understanding of the needs of a commercial society, and it was this that informed their views on reform of the civil and criminal law north and south of the border.

³ Michie (1997, pp. 3-11).

⁴ This was also the viewpoint of the *Edinburgh Review*, see Kidd (1993, p. 266, and chapter 11 generally).

⁵ North Britishness was a Scottish version of English Whig identity, based on a commitment to English constitutional history. Kidd (1993, p. 214).

Because the Scottish Whigs could not attack the 'bloody code' directly without implicitly criticising English practice, it was not until around 1830 that a clear critique of capital punishment emerged in the *Edinburgh Review*. This was focused particularly over the penalty for forgery, a crime of major importance to commercial interests⁶.

The abolition of most capital offences in England and concomitant decline in capital punishment coincided, more or less, with the 1832 Reform Act and the triumph of the Whigs. After years in the political wilderness those associated with the *Review*, for whom legal reform had been central to the reform discourse, became prominent in Grey's Ministry: Brougham became Chancellor, Francis Jeffrey was made Lord-Advocate, and Henry Cockburn was appointed Solicitor-General⁷. Jeffrey and Cockburn had the responsibility for drafting the Scottish legislation, not only for parliament, but also the municipal reform of 1833. If anything marked the triumph of the Scottish Whigs it was Jeffrey's return for one of Edinburgh's seats in the first reform election⁸. Their victory was not only ideological, but highly personal.

**'THE NEARER WE CAN PROPOSE TO MAKE OURSELVES
TO ENGLAND THE BETTER.'
THE SCOTTISH WHIGS, THE LAW AND REFORM**

In Scotland the long battle over parliamentary reform had to a great extent been one waged between lawyers, and had been shadowed by the complementary struggle over reform of Scots Law. Nearly all the leading Whigs were lawyers, and Edinburgh lawyers at that, and it was they who dominated 'the political, social and intellectual life' of the Scottish capital⁹. The Faculty of Advocates was the centre of the profession, from which body were drawn the candidates who went onto the bench. The abolition of the position of Secretary of State after the Jacobite Rebellion of 1745 left Scotland effectively administered by two law officers, both advocates, the Lord Advocate and the Solicitor General who were answerable to the Home Secretary. The 'Dundas Despotism', by which Scotland was administered by the Westminster Government, operated through this system; Henry Dundas became progressively Solicitor General, Lord Advocate and, finally, Home Secretary¹⁰.

Credited by one historian as being the 'father' of the Tory party in Scotland¹¹, Dundas mobilised the conservative reaction against the reform movement of the 1790s, crushing the Friends of the People, and effectively suppressing radicalism north of the border. The Whigs were not republicans, but, nonetheless, they were included in this all-out assault. It was the French Revolution, which hardened the

⁶ For a recent study of forgery and the 'bloody code', see Handler (2005).

⁷ Lobban (2004, p. 976); Fontana (1985, p. 148).

⁸ Miller (1975, p. 37).

⁹ Phillipson (1990, p. 1).

¹⁰ Fry (1992).

¹¹ Fry (1987, p. 18).

differences between Whigs and Tories and, once cast, these hostilities proved to be permanent.

Socially there was little to distinguish between Whigs and Tories, which may in part explain the bitterness between them. They came from the same background and inhabited the same world. Which group an individual would end up in was not readily apparent. Henry Cockburn was related by marriage to Dundas and could have expected rapid advancement through family connection, but he rejected his father's Toryism and became a Whig. Archibald Alison (see below) was on friendly terms with the *Edinburgh Review* group as a young man, but turned Tory. Although mutual hostility became entrenched, there were areas of contact, if not agreement; for instance a common respect and admiration for Walter Scott¹².

Any ideological difference between them was one of degree rather than fundamental principles. The Whigs had no intention of overthrowing the rule of property but they did realise that an accommodation had to be made with the middling orders, now rapidly becoming the middle class, who could not be expected to accept the presumptions of privilege for ever¹³. In Scotland, prior to 1832, the Tory defence of the status quo had not gone beyond Braxfield's infamous summing up at the trial of Thomas Muir in 1793, "A government in every country should be just like a corporation; and, in this country, it is made up of the landed interest who alone have the right to be represented"¹⁴.

The Whigs were not only lawyers, but they were regarded – and certainly regarded themselves – as representing the brightest and the best. For a generation, however, they found that they were excluded from the process of promotion and advancement; the top legal offices of the land, even a seat on the bench, were denied them¹⁵. The Scottish Whigs would constantly hark back to the behaviour of the Bench in the sedition trials of the 1790s, as self-evident proof of the need for legal reform. Given the significance that the law had in the governance of Scotland, it was clear that this campaign mirrored the call for political reform. Indeed, the two were linked together inextricably. For the Whigs reform meant not only a more representative electoral system for national and local government, but also the extension of English civil liberties to Scotland, in particular through the improvement of civil and criminal law. Once all this had been achieved then, as Henry Cockburn put it in 1831, Scotland would have "a constitution for the first time"¹⁶.

The Whig critique of Scots Law had two main targets: reform of the Court of Session, in particular the introduction of juries in civil cases; and the removal of the power of judges to 'pack' juries in criminal cases tried in the High Court. The former was clearly part of a conscious anglicising tendency on the part of the Whigs. The Scottish civil court – the Court of Session – sat as a body in the French style, and all fifteen judges or, Senators of the College of Justice, deliberated on cases and gave their judgements without the inconvenience of a jury. The introduction of juries in civil trials, therefore, as well as providing valuable opportunities for talented advo-

¹² Miller (1975); Michie (1997).

¹³ Fontana (1985, p. 149).

¹⁴ Fry (1987, p. 13).

¹⁵ Miller (1975); Fry (1987); Phillipson (1990).

¹⁶ Phillipson, (1990, p. 36).

cates, assimilated Scottish practice into that of England. And, as Cockburn, bluntly put the matter, 'the nearer we can propose to make ourselves to England the better'¹⁷.

The beginning of a sustained call for reform can be located in the 1780s when the Lord Advocate called for a reduction in the number of judges on the Court of Session. That proposal provoked an immediate virulent response from, among others, James Boswell who, somewhat confusingly, defended the constitution and prerogatives of the Court while at the same time demanding the re-introduction (as he saw it) of juries in civil cases¹⁸. While war with revolutionary France pushed all questions of reform, political and legal, to the side, the early years of the new century saw a strengthening opinion that the Court of Session could not continue its current practices indefinitely, a view, of course, which was expressed forcefully in the pages of the *Edinburgh Review*¹⁹.

Out of office for so long, the first opportunity for the Whigs to secure reform came in 1807. The so-called 'Ministry of all the talents' under Grenville introduced the first changes by proposing that the Court of Session be split into three chambers and creating a Court of Review, though it dropped jury trial in civil cases²⁰. The Ministry fell before it could introduce the intended Bill, but the process was continued under the Tories and a civil Jury Court eventually was introduced in 1815²¹. Thereafter, pleased as they were with this breakthrough, the Whigs would press for the Court of Session to be re-assembled as a single entity with jury trials predominant²². The basic premise of the reform argument was that the existing system was sclerotic, too slow and had a huge backlog of cases to deal with. Despite the resentment at English influence, civil jury trials were seen to work, and can be regarded as a typically Whig adjustment to the rapidly expanding legal needs of an increasingly commercialised society. An indication of this social change was the rapid growth in the number of lawyers. Phillipson has shown that the membership of the Faculty of Advocates (who alone had the right to plead in the Court of Session) grew from 200 as late as 1794, to 300 by 1810, and 442 by 1832. At the same time its social composition was changing, with fewer advocates coming from the greater gentry and more from the 'new prosperous bourgeoisie'²³.

With the call to end the judge's perceived ability to pack a jury, the Whigs were dealing with something much more contentious and personal. In the 1820s the Tories had more or less reconciled themselves to civil juries, but they did continue to oppose criminal jury reform²⁴. The principal advocate for reform was Henry Cockburn who wrote a seminal article on the subject for the *Edinburgh Review* in 1820, published subsequently as a pamphlet in 1822. Cockburn was providing public support for the Bill of his old friend and fellow Whig, Thomas Kennedy of

¹⁷ Cockburn (1874, p. 33).

¹⁸ Willock (1966, p. 247).

¹⁹ Willock (1966, p. 251); see article by Francis Jeffrey reviewing various 'Pamphlets on the Proposed Reform of the Court of Session in Scotland', *Edinburgh Review*, January 1807.

²⁰ Phillipson (1990, p. 110).

²¹ Willock (1966, p. 256).

²² Cockburn in *Edinburgh Review*, April 1830.

²³ Phillipson (1990, p. 9).

²⁴ Phillipson (1990, pp. 163-164).

Dunure, MP for Ayr Burghs. The proposed Bill was intended to remove from the Bench the entitlement to select the jury, or in Cockburn's words, to relieve the Scottish judges, "from one of the most painful duties that they are called upon to perform ... TO SELECT THE INDIVIDUALS OF WHOM THE JURY SHALL CONSIST!"

"Many of our readers will start at the very mention of such a custom. Nevertheless, a practice, of which we cannot discover the origin, but which was introduced long before the blessings of the British Constitution were opened to us, still continues; and at this day *the Judge names the Jury*,"²⁵

Notwithstanding the mock outrage, Cockburn's substantial point was that the system in Scotland was based on 45 persons being named as potential jurors, with the final 15 being chosen by the judge. In Edinburgh, where the High Court sat, the counties and the burghs of Edinburgh and Leith submitted the names of those qualified and the clerk of the court made the initial selection of a pool of 45. This was bad enough, but on the circuits it was the judge who also named the original 45 as well as choosing the final 15. The lists given to the judges contained 'designations or additions quite sufficient to let each individual to be distinguished and known'²⁶. In an earlier letter to Kennedy, Cockburn had spelt out his practical complaint that the system encouraged manipulation that "may leave out Whigs"²⁷.

Juries, therefore, could contain – indeed one might say they were intended to include – the unprincipled, the prejudiced, and the politically biased with judges likely to select those with whom they were in agreement²⁸. The evil was compounded by the fact that there was no right to peremptory challenge to juries in criminal trials, and that in Scotland, a bare majority was sufficient to secure a conviction, even in capital cases. Cockburn's solution was selection by ballot and the accused being given the right to peremptory challenge. The main opposition came from the existing County Freeholders who argued that they, as prospective jurors, would be inconvenienced by having to make themselves continuously available for possible jury service. For Cockburn, however, lapsing into the language of radicalism, the Freeholders, who were also the main opponents of franchise reform, preferred the present system because it preferred 'gentlemen', exactly the type 'to lord it over the humble drones by whom the box may be encumbered'²⁹. Given that the Lord Advocate and the Court of Session were hostile to the Bill, Cockburn looked south, to English practice and English constitutionalism; as he put it to Kennedy, 'I think you must succeed in a parliament of Englishmen'³⁰.

It is revealing that Cockburn chose to illustrate his case not so much with current or recent criminal trials, but with older cases and especially the sedition trials of the 1790s. Thus Cockburn referred back to the 1752 trial of Stewart of Ardshiel for the murder of Campbell of Glenure, which saw the Duke of Argyll, in his position as Lord Justice General, select eleven Campbells to sit on the Jury and not a single

²⁵ Cockburn (1822, pp. 5-6, emphasis in original).

²⁶ Cockburn (1822, p. 14).

²⁷ Cockburn (1874, pp. 3-6).

²⁸ Cockburn (1822, p. 42).

²⁹ Cockburn (1822, p. 51).

³⁰ Cockburn (1874, pp. 3-6).

Stewart³¹. Cockburn also made much of the trial of Gerrald, one of the Friends of the People, in 1794. When one juror attempted to excuse himself on the grounds that he was strongly opposed to the political beliefs of the accused, the judge remarked that this was no reason as he would be surprised to find any man who was not of a similar opinion. This example clearly made the point that under the Scottish system, the jury was not an independent part of the tribunal, but "is made, in a certain degree, the image of one individual Judge"³².

If there was one particular judge whom Cockburn had in mind, it was the same judge who presided over the Gerrald trial, the infamous Lord Braxfield. When Cockburn published his two volume study of the Scottish sedition trials, he explained his purpose in a prefatory note, dated 17 August 1853, less than a year before his own death; "On now revising the following pages, I am still of opinion that, from the interest of the subject, and the duty of never letting Braxfield and the years 1793 and 1794 be forgotten, they are not unworthy of publication"³³.

What this brings us back to, as it constantly drew Cockburn back, was the defining moment that was the French Revolution, and the political and personal fallout it provoked. In his biography of Jeffrey, published in 1852, Cockburn wrote,

Everything was influenced by the first French Revolution. ... Never, since our own Revolution, was there a period when public life was so exasperated by hatred, or the charities of private life were so soured by political aversion³⁴.

If this was the case in England, then it was so much worse in Scotland where there was "no popular representation, no emancipated burghs, no effective rival of the Established Church, no independent press, no free public meetings, and no better trial by jury" than the system whereby the judge selected the jurors, and with no right of peremptory challenge. "Thus, politically, Scotland was dead."³⁵ Furthermore the 'great personal bitterness', which the Revolution engendered, had direct consequences for Whig lawyers, as they were no longer seen as oppositional, but as rebellious. "There was no place where it operated so severely as at the bar. Clients and agents shrink from counsel on whom judges frown."³⁶

A recent study of Braxfield accuses Cockburn of 'over-egging his pudding'. Braxfield was a reactionary, and proud of it, but he was not a 'hanging judge' in the mould of England's Jeffries; apart from anything else, the Scottish courts hung fewer convicted felons. Moreover, other judges gave similar sentences and juries were not always subservient, but at times acquitted the accused against Braxfield's clear instructions³⁷. Cockburn's own very personal bitterness towards Braxfield, and his reference to English practice as a model of constitutionalism, meant that, in his political and legal polemics, he was partially blind both to the merits of Scots law and the demerits of English law.

³¹ Cockburn (1822); Miller (1975, p. 233).

³² Cockburn (1822, pp. 46-48).

³³ Cockburn (1888, p. i).

³⁴ Cockburn (1852, i, pp. 73-74).

³⁵ Cockburn (1852, pp. 74-76).

³⁶ Cockburn (1852, pp. 79-80).

³⁷ Osborne (1997, pp. 24-26).

Braxfield and the Tories generally may have packed and directed juries to secure guilty verdicts in sedition trials, but the only death sentences passed in Scotland for political offences were in the treason trials which were held under English law. The appointment of the Special Commission of Oyer and Terminer had been used in Scotland after the risings of 1715 and 1745 and the Dundases decided to implement the process again in the case of Robert Watt and David Downie who were charged with treason in 1794. Part of the rationale was to take sole control of the trial away from Braxfield, who was now one of nine judges on the Commission. The case then proceeded with due English process; a jury of twelve and the accused exercising the right to challenge the jurors³⁸. Although the accused received a 'fair trial' Watt was still hung, the only Scottish political prisoner of the 1790s to be so punished. Similarly in 1820, in the aftermath of the radical rising, the three death sentences were handed down by the once-again assembled Commission of Oyer and Terminer³⁹.

By prosecuting other radicals under sedition rather than treason, there would be no death penalty, but Cockburn was unwilling to recognise this point or to offer Braxfield any credit. Cockburn argued that had treason been the charge, then Braxfield would have been superseded as head of the court, and the accused would have had the benefit of challenging hostile jurors, as well as enjoying the protection of a unanimous verdict: "and, after all, a single and speedy death was at least not worse than the many deaths that were then implied in the unnoticed and humiliating agonies of New South Wales."⁴⁰ It is tempting to wonder what those radicals who managed to return from Botany Bay, such as Gerrald's colleague Margarot, and indeed Thomas Muir (another lawyer and member of the Faculty of Advocates), would have made of such logic.

This elision in Cockburn's argument is doubly surprising since he and Jeffrey acted as counsel in the trials of the accused in the 1820 radical insurrection, and both attempted to delay the proceedings by refusing to serve in an English court, and then insisting upon being aided by an English barrister⁴¹. As we shall see, Cockburn did recognise the merits of Scots law, and would even defend its superiority, but the wider Whig reform project, at least until 1832, was predicated upon the constitutionalism of English practice and traditions. In the world view of Cockburn and his fellow Whigs it was not until 1747, with the abolition of hereditary courts, that feudalism was seen as coming to an end in Scotland. As Kidd has commented, "Scottish sociologists conceived the reforms of 1747-1748 as a caesura between a backward feudalism – Scottish history proper – and an Anglicised modernity"⁴².

Cast out into the political and professional wilderness post 1794, the younger Whigs were forced into an oppositional role that could make them appear more radical than they actually were. Since they were not going to be elevated to the bench, they had ample opportunity to practice their skills of advocacy in court, and, as their fame spread so did the demand for their services. If, earlier in their careers, the young Whig lawyers suffered for their political affiliations, in their mature years

³⁸ Osborne (1997, pp. 203-207).

³⁹ Ellis, Mac A'Ghobhainn (1970, p. 233).

⁴⁰ Cockburn (1888, p. 92).

⁴¹ Ellis, Mac A'Ghobhainn (1970, p. 233).

⁴² Kidd (1993, p. 208).

they were feted and there was hardly a prominent trial in which they did not feature; the infamous case of the body snatchers Burke and Hare saw Cockburn appear as the defence counsel for Burke's mistress, Helen MacDougall, securing a 'not proven' verdict for his client. The fellow Whig, Moncrieff appeared for Burke, and Jeffrey later acted for the family of one of the victims, 'Daft Jamie,' in a private case against Hare who had been given immunity having turned King's evidence⁴³.

Towards the end of the French Wars there were an increasing number of industrial and political trials, and it was here that young Whig lawyers really made their names. From the 1813 weavers' case in Glasgow, through the various sedition trials of 1817, 1818 and 1819, to the treason trials of 1820, Cockburn and Jeffrey were actively involved in virtually every incident; they became the preferred briefs for political defendants. Jeffrey, in particular, had been noticeably unsuccessful at the bar, but his involvement in these trials transformed his reputation as a skilled advocate. At the same time, Henry Brougham, one of the most prominent of the contributors to the *Edinburgh Review*, although he sat in the Commons for an English seat, achieved lasting fame through acting as counsel to Queen Caroline⁴⁴. From 1820 the *Review* became more openly political and Jeffrey "launched himself more vehemently into reform politics"⁴⁵.

While these events certainly inspired Jeffrey and the *Review* to more definitely nail their colours to the mast of reform, their aims remained quite distinct from the radicals they had defended in court. A democratic suffrage was never part of the Whig agenda, and Cockburn in 1820 had assembled with the Edinburgh Armed Association in order to repel the expected assault on the city by the radical army⁴⁶. Nonetheless, their activities during these years would cement their reform credentials. In his electoral campaign for Edinburgh in 1832, Jeffrey was able to base much of his appeal on his activities during this period; in favour of reform, helping to expose the Castlereagh spy system in Scotland, and his opposition to the 'unconstitutional' treason trials of 1820⁴⁷. In Jeffrey's view the insurrectionists had been 'misguided and seduced', and one of the first acts of the new parliament was to issue retrospective pardons to those involved, and the first memorial to the 'martyrs' of 1820 was erected in 1832⁴⁸.

'OUR CUSTOM OF PUNISHMENT IS EMINENTLY GENTLE': THE TORY DEFENCE OF SCOTS LAW

For the Whigs Scots Law lagged behind its southern counterpart and needed to be brought into line. This was a constant refrain of Whiggish Unionism where English constitutionalism with its attendant protection of civil liberties was to be imported into Scottish institutions. For the Tories the matter was quite different. Just

⁴³ Edwards (1993, pp. xi, 135, 152).

⁴⁴ Lobban (2004, p. 976; Stevenson, 1977).

⁴⁵ Ellis, MacA'Ghobhainn (1970, p. 283).

⁴⁶ Ellis, MacA'Ghobhainn (1970, p. 33).

⁴⁷ *Scotsman*, 11 July 1832.

⁴⁸ *Scotsman*, 11 July 1832; Ellis, MacA'Ghobhainn (1970, p. 233).

as Unionist as the Whigs, nonetheless the Tories wished to preserve many of the peculiarities or distinctiveness of Scottish institutions, especially as regards the Law. This, after all, was where so many of them made their living and, in this period, it was Tories who dominated the bench and the major offices of state. The Tory predicament was that of Walter Scott himself; celebrating, even trying to preserve Scottish identity, while, at the same time, defending the means whereby what was distinctively Scottish would be superseded and surpassed, that is the Union of 1707.

Exactly one hundred years later the proposed changes to the Court of Session provoked furious debate amongst Scotland's lawyers, particularly within the Faculty of Advocates who devoted two sessions to the issue in February and March⁴⁹. For Scott, the Bill represented nothing less than 'Anglomaniya – a rage of imitating English forms and practices'⁵⁰. Moved to tears, he famously admonished Francis Jeffrey: "Little by little, whatever your wishes may be, you will destroy and undermine until nothing of what makes Scotland Scotland shall remain."⁵¹ Tory defenders of Scots Legal practice argued that it was perfectly adapted to Scotland's needs and culture, and, in addition, was in many ways superior to English law. While it would be easy to dismiss their stance as a case of special pleading and the instinctive reaction against change by the conservative-minded, this would be to ignore what was a powerful and coherent argument.

The first great 'institutional' writer on Scots law was Stair whose *Institutions of the Law of Scotland* was published in 1681, though written during the Cromwellian Union and, it has been argued, was intended as much as a defence of Scots law as it was a systematisation of the law⁵². In the second half of the eighteenth century, however, Scottish legal writing diverged from the predominant 'natural law' school to something that was both more historically located and more akin to a social science. And this was a perspective shared by Whig and Tory⁵³. Such works were not unique to Scotland but, due in part to the relative lack of actual case law in comparison to larger jurisdictions such as England or France, the Institutional writers gained a particular influence with their texts regarded as "an authoritative source of Scots law, coming after legislation and judicial precedent"⁵⁴. While still referring to the historical origins of the law, these authorities were not bound by precedent. In systematising the law they also referred to contemporary social mores. They were not simply commenting on the law, but attempting to determine current and future principles.

This can be seen most clearly, and most cynically, in the work of the Whigs dealing with the poor law and labour disputes where actual precedent was simply denied in order to re-fashion the law into what they regarded as more appropriate for modern commercial society. The Whig supporters of Thomas Chalmers effectively rewrote the history of the Poor Law so as to deny that there ever had been any assessment of parishes, or that the 'able-bodied poor' (the unemployed) ever had an entitlement to relief, or been granted the same⁵⁵. This 'reinterpretation' of the past

⁴⁹ Phillipson (1990, p. 102).

⁵⁰ Quoted in Willock (1966, p. 253).

⁵¹ Harvie (1977, p. 132).

⁵² Cairns (1983, p. 90).

⁵³ Stein (1970).

⁵⁴ Cairns (1983, p. 98).

⁵⁵ Mitchison (1979).

was exactly the same as the Whig lawyers had done in the case of protective legislation for workers such as apprenticeship laws and the right to appeal to Justices of the Peace to establish 'fair' wages⁵⁶. In both cases the motive was the same; to secure the triumph of *laissez faire* and the free market over the older system of regulation and (partial) protection.

It is interesting to note that the Whig Jurists tended to concentrate on and become recognised experts on civil and commercial law, for instance see J.G. Bell's 'epoch making' *Commentaries*, first published in 1804⁵⁷, the full title of which is *Commentaries on the Law of Scotland And on the Principles of Mercantile Jurisprudence*⁵⁸. Bell consciously sought to establish a middle way between English and Scots law, but his approach was historically grounded in the common Whig perspective that England was more advanced than Scotland:

During the troubles which agitated and depressed this country, England was triumphantly proceeding in her greater career of commercial prosperity; and the progress of her jurisprudence, which might naturally be expected to accompany that of her trade, was happily directed by the successive wisdom and learning of many great men⁵⁹.

In contrast, the two leading Tory Jurists of this period, Hume and Alison, focused on criminal law. Baron David Hume, a nephew of David Hume the philosopher, was both a judge and professor of Scots Law at Edinburgh. He first published his *Commentaries* in two volumes in 1797 and 1798, which were subsequently re-issued at various times in a single volume. Hume's work was followed a generation later by Archibald Alison who published two volumes on the 'Principles' and 'Practice' of Scots Criminal Law in 1832 and 1833. Recognising that Hume remained "the foundation of our Criminal Jurisprudence" Alison intended that his volumes should accompany and update his predecessor's work. In essence a new treatise was necessary because of "the extraordinary increase of crime of late years":

The change of manners has consigned to oblivion a great variety of crimes ... while the same cause, joined to the vast increase of criminal business, has brought prominently forward a complete new set of delinquencies, of which little is to be found in the records prior to the last twenty years⁶⁰.

Alison served as one of the Advocates Depute under The Lord Advocate who had responsibility for the public prosecution of all crimes in Scotland. In the normal course of affairs Alison would have expected eventual political promotion to the bench or even to become Lord Advocate, but the fall of Wellington in 1830 and the ultimate triumph of the Whigs put paid to that ambition and Alison decided to forego a political career, settling for the post of Sheriff of Lanarkshire⁶¹. Alison had entered the public debate with the Whigs over Scots Law some years earlier when

⁵⁶ Fraser (1988b, pp. 81-99).

⁵⁷ Phillipson (1990, p. 106).

⁵⁸ Bell (1870).

⁵⁹ Bell (1870, p. xii).

⁶⁰ Alison (1832, p.v).

⁶¹ Michie (1997, pp. 51, 60-61).

he responded to Cockburn's attack on the control of the judge in selecting juries in criminal trials (see above). Having taken up the position of Advocate Depute in early 1823 Alison was asked shortly afterwards by John Hope, the Solicitor General, to pen a defence of the Scottish criminal justice system. In his response Alison was at pains to defend the role of the Lord Advocate, especially as the current incumbent, Sir William Rae – who was Alison's mentor – had been forced to answer to the House of Commons twice against allegations of complicity in prosecutions. Rae had been directly involved in creating and subsidising a particularly scurrilous pro-Government Tory press, and the fact that he only escaped a resolution of censure by six votes indicates the dissatisfaction with his behaviour and array of powers⁶². While this provoked the "immediate context of the ... exchange", Alison set himself the larger task of defending Scots Law against English pretensions⁶³.

Both Hume and Alison were firm Tories and both made it clear that their treatises were directed against an unthinking importation of English ways. Alison, in his *Practice*, included an introduction intended for a lay readership rather than the professionals:

which, while it shows in striking manner the wisdom of ancient Scottish Legislation, and the admirable effects, both to the administration of justice, the liberty of the subject, and the interests of the prisoners, with which our practice has been attended, may possibly contribute to moderate, in this particular, that passion for transplanting into Scotland the institutions of a neighbouring kingdom, which, however well adapted to their character and habits, are certainly not fitted for our customs, or calculated to effect any practical improvement in the Criminal Jurisprudence of this Country⁶⁴.

Hume explained in his introduction why he had been moved to bring out his work sooner than he would have preferred to:

I mean the desire of rescuing the law of my native country from that state of declension in the esteem of some part of the public, into which, of later years, it seems to have been falling... This disposition, in particular, appears in those multiplied references to the Criminal Law of England, and these frequent and extravagant encomiums on the English practice, in preference to our own; which, in any point where the two differ, is calumniated as rude and barbarous, nay is sometimes even spoken of as grievous and oppressive. This is an opinion, which, for my part, I am unwilling to learn..."

Hume then paid a back-handed compliment to the advanced state of English criminal law:

That the law of England respecting crimes is a liberal and enlightened system... what reasonable person will dispute? ... But... how should we expect to find the case otherwise in comparing our law with that of a country, where, owing to the much greater number of dissolute and profligate people, and to the greater pro-

⁶² Omond (1883, pp. 274-284).

⁶³ Michie (1997, p. 46).

⁶⁴ Alison (1833, p. vi).

gress of every refinement, and of every sort of corruption, crimes are both more frequent, and far more various in their nature, than among ourselves...⁶⁵.

Hume went on to provide a detailed defence of Scots Criminal Law, which, he pointed out, had fewer capital offences and actually executed fewer people. Referring to Blackstone, who had regretfully remarked three decades earlier on the 160 capital offences extant in England, Hume pointed out that Scotland had barely one quarter of that figure. Furthermore, during that same period, Scotland's rate of executions "had not exceeded six in a year. ... Such is the law, which, by ill-informed persons is reproached as sanguinary and tyrannical in comparison of others"⁶⁶.

If, in Scotland, the prisoner had no right of peremptory challenge, in England, other than in treason trials, the accused did not see the indictment or the charge against him before he appeared in court. Until then he was kept ignorant of both the jury members and the witnesses against him. In Scotland the charge and the list of witnesses had to be delivered fifteen days prior to the trial, which allowed the prisoner time to prepare his defence and any objections. A further contrast was that Scots Law ensured that the accused, even the poorest, would have counsel to defend them and address the jury. Again, in England, this right was restricted to cases of treason.

The English practice of demanding unanimous verdicts may have appeared more humane than Scotland's bare majority. However, English juries could convict on the evidence of a single witness even in capital cases, whereas this was not allowed in Scotland, even on lesser charges. The accused in Scotland had the same right as the court in compelling witnesses to appear. Witnesses were interviewed separately in order to avoid any combination against the prisoner, witnesses were free to change their previous testimony once they had taken the oath, and they could not be recalled after giving their evidence. All of this, Hume argued, was contrary to English practice and, furthermore, the written verdict of a Scots jury had to be accepted as it stood, whereas an English jury could be "questioned and instructed by the Court, without any manner of restraint"⁶⁷.

Hume was at pains to refute the charge that in Scotland a prisoner could be tried repeatedly for the same offence. On the contrary, the maxim, 'that no man shall thole an assize twice' remained sacrosanct. The confusion arose from the fact that where, at an early stage in proceedings, a charge was dismissed as inaccurate or defective, this did not protect a prisoner from being tried subsequently on a correct charge. But, once acquitted, the prisoner could not be retried.

In response to criticisms that in Scotland all power of prosecution resided with the Lord Advocate, a public officer, and that this allowed undue influence by the crown, Hume rather glibly responded that this would only be a concern under a system of 'arbitrary government', i.e. absolutism. But "in this country with its love of freedom and justice," this was not a concern, and no Lord Advocate would stain his own reputation or that of the crown by doing anything so corrupt. Hume was on more solid ground in his more general argument against the English system where

⁶⁵ Hume (1829, i, p. 4).

⁶⁶ Hume (1829, i, pp. 10-14).

⁶⁷ Hume (1829, i, p. 6).

the whole burden of prosecution and conviction lay on the offended party. In this matter, Scots law was clearly better suited “for repressing the growth of crimes”⁶⁸.

Hume’s conclusion, and that of Alison, was that “our custom of punishment is eminently gentle,” especially in comparison with England. The rights of the prisoner were much more fully protected, and “the country at large” was not burdened “with a numerous list of special and statutory rules”⁶⁹. Scottish judges could exercise discretion in the punishment of crimes, which was denied their southern counterparts, and in practice this had acted to the benefit of the accused. More than this, however, was the fact that Scottish courts could determine certain acts as crimes, that is, create new offences, whereas English courts had to wait until Parliament had decreed an action as a crime and determined the punishment. As Hume put it: “The Supreme Criminal Court have an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature.”⁷⁰

It is here that the ‘genius’ of Scots Law is meant to reside. This ‘declaratory power’ of the High Court has been the subject of intense debate for the past two centuries. If the defenders of Scottish legal practice no longer support declaratory power in the manner of Hume, they argue that the ‘native genius’ of Scots Law resides in the ‘administrative and judicial discretion’ that was so different to the legislative approach in England⁷¹. It was clear to Hume that the Scottish approach was superior because crime was censured and punished when it first arose, rather than after it had become more widespread and serious, which delay encouraged a more draconian response. Hume illustrated his argument with reference to the sending of incendiary and threatening letters, which, in England, Parliament eventually had decided constituted a capital offence. But, in Scotland, because judges were able to punish such acts when they first appeared, they did not become a major issue, and transportation was the appropriate sentence. This was the case also with some types of forgery offences, “alteration of bills, promissory notes and the like”⁷².

Even today Hume’s *Commentaries* is recognised as a ‘classic of that time’; a study, which superseded everything that had gone before it, and which “has won continuing recognition as the supreme one in its field”⁷³. The Whig Cockburn, while recognising much of the veracity of what Hume said about Scots Law, could not bring himself to give the Tory jurist any credit. In Cockburn’s opinion Hume’s purpose had been to vindicate the court’s handling of the sedition trials in the 1790s and the behaviour of Braxfield⁷⁴. This was undoubtedly true, though Hume approached the issue in an oblique manner. He admitted that Scots Law was “more vigorous than that of England in regard to certain articles.” In what ironically can be seen as a very Scots-Whiggish argument, Hume explained that the severity of the ‘ancient statutes’, which dealt with those unspecified offences, was due to the “factious and unruly temper of the inhabitants of this country”. One might have expected this

⁶⁸ Hume (1829, i, p. 9).

⁶⁹ Hume (1829, i, p. 11).

⁷⁰ Hume (1829, i, p. 12).

⁷¹ Gordon (1978, pp. 453-454); For a more critical approach see Farmer (1997).

⁷² Hume (1829, i, p. 12).

⁷³ D.M. Walker, Introduction to 1986 reprint; see Farmer, 1997, p. 39 on the ‘fundamental ambiguity’ of relying on Hume as an authority.

⁷⁴ Cockburn (1910, p. 156).

'vice' to have been corrected by "so long a period of increasing prosperity, and of mild and equitable government." Events, however, had shown this disposition to be still active among the population, and so it was fortunate that the Legislature had, in its 'wisdom', bestowed such powers on the Courts⁷⁵.

This constituted the political difference between reactionary High Tories (Hume has been described as 'the arch apostle of legal conservatism')⁷⁶, and younger reforming Whigs. Personal animosities, however, were nearly always involved. As it happened Cockburn thought very highly of the younger, and ex-Whig, Alison, but he detested Hume, who had been the leader of the opposition to the re-appointment of Henry Erskine as Dean of the Faculty of Advocates in 1796⁷⁷. Erskine was a well-loved figure among the Whigs, and this action seemed to exemplify the dominance of the Tories and the spite with which they chose to exercise their authority⁷⁸. The effective dismissal of Erskine was regarded as unprecedented and clearly linked to his reform activity. Although he had not joined the Edinburgh Friends of the People and actively dissuaded fellow Whigs from doing so, Erskine was tarnished by association. He was friends with Thomas Muir, who had dedicated his thesis (part of the qualification for entry to the Faculty) to Erskine. Though Muir chose to defend himself at his trial, it was common knowledge that Erskine had offered to act in his younger colleague's defence, and Erskine's brother Thomas, who enjoyed a successful career at the English bar had defended English radicals, including Thomas Paine⁷⁹. Once again, we can see the long shadow that was cast by the revolutionary years, not least upon Henry Cockburn.

'HOW MUCH MORE EFFICACIOUS WOULD A PENALTY OF A LESSER NATURE BE': JUDGES, FORGERY AND REPEAL OF THE DEATH PENALTY

If the Tories delighted in pointing out the superiority of Scots criminal law, the Whigs tended to keep quiet about English practice, other than in the selection of the jury. The multiplicity of capital statutes in England in this period, the creation of the 'bloody code' was simply ignored by the Whigs because it did not fit neatly into their schema of civilisation being imported from the South. Whether or not one agrees with Hay that the 'bloody code' was an upper class construct designed to terrorise the poor⁸⁰, or with Langbein that it operated to 'protect the interests of [all] the people who suffered as victims of crime'⁸¹, it remains the case that the 'bloody code' was very much an English construct⁸². It is also the case that even if most convicted felons were not hung, England still executed more criminals than any other comparable society, including Scotland⁸³.

⁷⁵ Hume (1829, i, p. 10).

⁷⁶ Philipson (1990, p. 95).

⁷⁷ Michie (1997, p. 62).

⁷⁸ Cockburn (1909, pp. 85-86; Phillipson (1990, pp. 20-22).

⁷⁹ Bewley (1981, pp. 8, 30, 67, 132).

⁸⁰ Hay (1977, p. 18).

⁸¹ Langbein (1983, p. 97).

⁸² Gattrell (1994); Spierenburg (1984).

⁸³ Gattrell (1994, p. 8).

In his *Commentaries on the Laws of England*, Blackstone referred to the earlier writings of Sir Edward Coke who recognised the ‘many diversities’ between the laws of England and Scotland which he saw as due to the differences “of practice in two large and uncommunicative jurisdictions, and from the acts of two distinct and independent jurisdictions”. But what was more remarkable was “how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws”. Coke, noted Blackstone, “supposes the common law of each to have been originally the same”⁸⁴. Blackstone drew specific attention to article 18 of the Act of Union. The laws governing trade and excise were to be common between the two countries, and Westminster was to have authority over changes in the law, north and south. Notwithstanding, “laws relating to private right are not to be altered but for the evident utility of the people of Scotland”⁸⁵. The practical devolution of this arrangement meant that while ultimate power resided in London, the Scottish legal system was permitted its effective independence. Moreover, since Westminster had little interest in internal Scottish affairs, the Scottish courts, rather than being diminished by the Union, became more important to the running of the country, and the law, both as an institution and profession, enjoyed increased power and prestige⁸⁶.

In his pre-Union work on the criminal law in Scotland Mackenzie had been clear that it was the prerogative of Parliament to establish what was and was not a crime: “none can make Laws but the Parliament.” He did recognise that there were situations, such as threat to public order, when an offence that was not actually designated a crime could be punished arbitrarily, and similarly crimes against nature, such as bestiality and sodomy, even though there was no statute against them⁸⁷. Notwithstanding these exceptions, Mackenzie was clear about the general principle:

That is a Crime, which is declared such by an express Statute... and it were to be wished, that nothing were a Crime which is not declared to be so, by a Statute, for this would make Subjects inexcusable, and prevent the arbitrariness of Judges⁸⁸.

Writing in the late seventeenth century Mackenzie was, of course, referring to the Scottish Parliament. His successor as a jurist of criminal law, Hume, writing at the end of the eighteenth century, had an almost completely opposite view. Hume had no fear of the ‘arbitrariness of Judges’; rather he saw it as a virtue that the Scottish courts, unlike in England, could determine actions as crimes and determine their punishment without the decree of parliament. Hume’s view that this explained why Scotland did not have the same lengthy list of capital offences as England was supported, at least indirectly, by Blackstone who saw the application of the death penalty to widely differing offences as ‘a kind of quackery in government’⁸⁹. Blackstone argued further that:

The enacting of penalties to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions and interests of a few, who upon

⁸⁴ Blackstone (1771, Vol. 1, p. 95).

⁸⁵ Blackstone (1771, i, p. 96).

⁸⁶ Lieberman (1983, p. 219); Michie (1997, p. 50).

⁸⁷ Fortunately both ‘were rarely committed in this Kingdom’, Mackenzie (1699, p. 2, 82).

⁸⁸ Mackenzie (1699, p. 2); Farmer (1997, p. 42).

⁸⁹ Blackstone (1771, iv, p. 17).

temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without compassion or prejudice how adequate they are to the evil⁹⁰.

If Blackstone was arguing for judges and lawyers to be given priority as experts in determining what constituted crime and how it ought to be punished, this was the situation that actually existed in eighteenth-century Scotland, courtesy of the practice of the settlement of 1707, which saw Westminster show little or no interest in Scottish affairs. The major Scots legal authorities were all affected by Enlightenment precepts and understood that the law had to change in accordance with the needs of a changing, and improving society. Perhaps the greatest of these writers was Lord Kames, whose main work was on civil law but who did publish a 'History of the Criminal Law', published in his Law Tracts in 1758.

Kames showed how changing forms of property, particularly money, which were inextricably related to economic development, were also linked to the identification of crime as both a personal and a social offence. Alongside this, punishment also became a social matter monopolised by the State. Within a historical account that presented society as continually developing and improving, and becoming increasingly stable, so Kames saw less and less need for sanguinary punishment:

... when a people have become altogether tame and submissive, under a long and steady administration punishments being less and less necessary, [they] are generally mild and ought always to be so⁹¹.

With a judiciary more or less free from parliamentary interference, ('the passions and interests of a few', in Blackstone's words), and saturated with the ethic of 'improvement', it is hardly surprising that Scotland did not develop its own 'bloody code', and saw virtue in not following the English example. Kames's writings on criminal law sit alongside the more famous arguments of Montesquieu and Beccaria and, if now largely forgotten outwith Scotland, did have a direct influence on the English penal reformers Eden and Bentham⁹².

The young Whigs of the *Edinburgh Review*, while close to and sympathetic with penal reformers such as Samuel Romilly⁹³, tended not to comment on the issue. To do so would run the risk of drawing attention to English barbarity and hence undermine their whole project. Moreover, the Whigs were not opposed to capital punishment per se. When a petty thief, Robert Johnston, was the victim of a botched hanging in Edinburgh in 1818, reformers used the scandal to berate the unreformed and reactionary town council. The complaint was not that Johnston was being hung, rather that avoidable errors had made his suffering prolonged and cruel. With the treason cases in 1820, there was a feeling that the state had overstepped the mark, particularly in the case of the elderly Wilson, but again punishment by death was

⁹⁰ Blackstone (1771, iv, p. 4).

⁹¹ Lieberman (1983, p. 214).

⁹² Lieberman (1983).

⁹³ Illustrative of the personal links between Whig reformers is the fact that Kennedy was married to the daughter of Samuel Romilly. Rigg (2004, p. 271).

accepted⁹⁴. By 1830, however, arguments against capital punishment were being heard increasingly, encouraged by the rise of the Whigs and the sense that the long night of Tory supremacy was ebbing away.

The issue that really cut through the impasse and allowed the Whigs to champion criminal law reform was the pressure to repeal capital punishment for the crime of forgery. Writing in 1831 in the *Edinburgh Review*, Brougham, while paying homage to Romilly as the pioneer in Parliament in questioning the death penalty, identified two lines of argument among the abolitionists; those who denied the right to take any life; and those who argued that capital punishment was ineffective and defeated its own ends. He found the first case ‘untenable’, but was sympathetic to the latter⁹⁵. The specific issue which Brougham addressed in this article, was not capital punishment generally, but ‘Reasons for abolishing the Punishment of Death in Cases of Forgery’. This was the bill that had recently passed the Commons, in spite of Peel’s opposition, but had been thrown out by the Lords. Although a number of offences had been made non-capital in recent years, these had been mostly minor crimes or obsolete statutes; there had been no real restriction of capital punishment, and the rate of executions were as high as ever⁹⁶. The matter of the appropriate punishment for forgery can be seen to be of vital importance in determining how far society was going to continue to rely on execution as the main defence of property.

The basic point Brougham made was that the death sentence was very hard to secure in cases of forgery; so much so that only one in eight or nine cases resulted in execution; in England and Wales between 1820-1829, there were 733 persons sentenced to death for forgery, of which 64 were executed⁹⁷. The reluctance to convict affected more or less everyone: jury, witnesses, even the victim. This encouraged criminals to commit the offence, since they were able to calculate their (good) chances of getting off. Thus, despite the terror that the statutory punishment seemed to threaten, the practice “makes the law anything rather than dreadful”. The logical conclusion was for a lesser but certain penalty: “How much more efficacious would a penalty of a lesser nature be, which was nearly certain to be always enforced”⁹⁸.

It has recently been argued that there was no ‘underlying consensus’ about whether or not the death penalty was the just punishment for the crime of forgery, but that the penal reformers were highly skilled in mobilising and manipulating public opinion on exactly that issue⁹⁹. Brougham was able to state that what made this Bill (or, to be more precise Mackintosh’s amendment) a more substantial proposal than simply the exertions of the committed was the support it received from the financial sector. It had always been assumed that ‘those in trade’ would be opposed to any change in the law, but ‘The memorable Petition of the Country Bankers put an end, at once and for ever, to this imagination’¹⁰⁰. These ‘plain, practical men of

⁹⁴ McKinlay, Smyth (2005, pp. 152-157).

⁹⁵ *Edinburgh Review* (January 1831, pp. 401-402).

⁹⁶ Radzinowicz (1948, pp. 606-607).

⁹⁷ Radzinowicz (1948, p. 594).

⁹⁸ *Edinburgh Review* (January 1831, p. 403).

⁹⁹ Handler (2005, p. 693).

¹⁰⁰ *Edinburgh Review* (January 1831, pp. 402-407).

business' were not seeking leniency, but greater protection for their property. It has been estimated that this Petition, which called for the abolition of the death penalty for all forgery offences, represented half the banking community of Britain. Although predominantly English, 16 of the 214 towns and cities listed were from Scotland¹⁰¹.

CONCLUSION

The political dominance of the Tories ended in 1830 with the fall of Wellington's government, and the retirement of the second Viscount Melville. No longer would Scotland be 'managed' in the same way; as Thomas Carlyle put it, the Dundas Despotism had 'become noisome in the nostrils of all men'¹⁰². The Whigs would soon enter their inheritance, but, in terms of legal reforms, considerable headway had already been made, indeed the battles had really been won: the Court of Session had been divided into two chambers in 1808; jury trials in civil cases had been introduced in 1815; by 1825 the criminal law had been reformed to permit both the balloting of juries and the right of peremptory challenge; and in 1830 the Jury Court was abolished as trial by jury became standard in the Court of Session itself; there was also a reduction in the number of judges and types of jurisdictions, such as the Admiralty Court¹⁰³. In addition to these changes, the Government had been unable to maintain its wholesale ban on Whigs from the bench, simply because the available talent from among the Tories was so poor.

In 1830 Henry Cockburn re-discovered the genius of Scots Law; what was now needed was reform of English Law. As the Scots Whigs got closer to power, so they realised just how insular Westminster really was. Ignorance of Scottish matters was almost absolute and, worse, attempts to raise issues were treated with contempt. 'The case is called Scotch; ... and there is an end of it'¹⁰⁴. In what was almost plagiarism of his old enemy Hume, and with breathtaking disregard for his own writings, Cockburn wrote, 'there has been of late a foolish disposition in certain quarters, to undervalue everything connected with [Scots law]'¹⁰⁵. Any further reforms needed in Scotland were essentially minor. Scots law, in Cockburn's words, was 'perfect', but English law was not. Cockburn, continuing his volte face, now argued the superiority of Scots Law over England, and concluded with an appeal that, once the minor administrative measures were introduced, 'we shall be let alone. Everything that will be then done will have been right'¹⁰⁶. A few years later Cockburn returned to this theme, 'the general excellence of our system... and especially in comparison with that of England'¹⁰⁷.

What allowed this new, positive approach to Scots practice, and criticism of English law, was the fact that the main planks of the Scottish Whig case had been

¹⁰¹ Radzinowicz (1948, pp. 730-731).

¹⁰² Fry (1992, p. 378).

¹⁰³ Miller (1975, p. 232); Phillipson (1990, pp. 157-162); Cockburn in *Edinburgh Review* April 1830. Savings in the number of judges were used to increase the salaries of those remaining on the bench.

¹⁰⁴ *Edinburgh Review* (April 1830, p. 122).

¹⁰⁵ *Edinburgh Review* (April 1830, p. 123).

¹⁰⁶ *Edinburgh Review* (April 1830, p. 142).

¹⁰⁷ *Edinburgh Review* (April 1833, p. 106).

won, and that the English 'bloody code' was in the process of being legislated out of existence. As Radzinowicz puts it: "The principle that no offence against property should be punished by death now held the field."¹⁰⁸ The Scottish Whigs could never have attacked the 'bloody code' directly since they were too deeply reliant upon the view that England, and English law, was the source of constitutionalism and liberty¹⁰⁹. On the other side, the Tories could complain about the slavish importation of English ways, but were unable to make political capital out of this for fear of threatening the basis of the Union, on which their own long dominance had been based. Even when the legal reforms of the 1830s left Scotland with more capital statutes than England, there was effectively no protest or little demand for similar legislation north of the border. The last executions in Scotland for theft or robbery occurred in 1831, and while that year witnessed one of the highest ever number of hangings, the level dropped permanently thereafter¹¹⁰.

The Whigs of the *Edinburgh Review* looked self-confidently to the future, convinced that the present was better than the past and the future would be liberal¹¹¹. In their own estimation, they were "the friends of good government, and of human improvement generally"¹¹². Reform both of the law as well as the system of representation was necessary for Scotland to become fully modern. While the Scottish Tories may have been more sceptical about grand projects, they were also influenced by the spirit of 'improvement', and had no fundamental objection to offer. Both groups shared a concern with managing change, of 'how to preserve the traditional community while adapting it to new knowledge and commercial pressures', and in that pursuit the role of the law was crucial¹¹³. The 'flexibility' or 'genius' of Scots law did not rely upon statute, and the Courts – civil and criminal – were used to acting in defence of commercial society. That was something both Whig and Tory ultimately did agree on.

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¹⁰⁸ Radzinowicz (1948, p. 607).

¹⁰⁹ Kidd (1993, p. 164).

¹¹⁰ Young (1998, pp. 105-106).

¹¹¹ Fontana (1985, pp. 176-178).

¹¹² *Edinburgh Review* (October 1832, p. 249).

¹¹³ Michie (1997, pp. 4-5).

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