Scots law and Scottish national identity

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In 1949 the Saltire Society, whose aim is to promote awareness by Scots of their heritage, published a small book, *The Scottish Legal Tradition*, by Lord Cooper – Lord President of the Court of Session and Scotland's senior judge. In it he advanced the view that Scots law was a badge of Scottish identity and that Scotland had survived as a nation since the Act of Union of 1707, in part at least, through its distinctive legal system. He wrote: "Scots Law is in a special sense the mirror of Scotland's history and traditions and a typical product of the national character, and it is just as truly a part of our national inheritance as our language or literature or religion." (Cooper 1991, 65)

Cooper was a prolific writer on Scottish legal history and his work, though largely superseded, had a profound influence on some academic lawyers who were beginning to rise to prominence in the 1950's. One of these was the late Sir Thomas Broun Smith, a former occupant of the Chair of Scots Law in Aberdeen University and destined to re-establish the serious study of law in the Scottish universities. Smith, reflecting Cooper, saw Scots law as "an authentic emanation of the Scottish spirit – a Scottish Volksgeist". (Willock 1976, 3) In the preface to his major work, Smith insisted that "since her Union with England in 1707 Scotland has in a sense survived as a nation by and through her Laws and Legal System." (Smith 1962, vii)

Perhaps this perception of Scots law was conditioned by the resurgence of interest in Scottish culture in the first half of this century. Whatever the catalyst, this juxtaposition of law and nationality (one should not say 'nationhood' since Cooper was a staunch Unionist) which sees Scots law as emblematic of Scottish identity is still held in some quarters today. In a postscript to the 1991 edition of Cooper, another judge, Lord Dervaird, predicted that the future of Scots law depended, ultimately, "on the respect and affection it engenders in the people of Scotland. It is a symbol, and I venture to think the pre-eminent symbol, of the existence of Scotland as a separate nation." (Cooper 1991, 93).

The Cooper-Smith school are legal nationalists and represent the

civilian tradition of Scots law. Scholars of this mindset adhere to at least two beliefs. The first, is that English law exerts a malign influence over indigenous principles: and the agencies which facilitate this are the Westminster Parliament and the judiciary, primarily, though not exclusively, the House of Lords. The second, is that our lawyers fail to nurture Scots law. Writing of commercial law, my own discipline, Gow, another civilian, upbraided us for our "indifference to the present and future needs of the community whose interests we profess to serve." (Gow 1964, vii) Both Cooper and Smith saw Scots law as a mixed legal system: *i.e.*, one which has been influenced, though not necessarily in equal measure, by English law and, more importantly, by the civilian legal systems of Europe through which principles of Roman law have percolated down to the present day. They also made a virtue of this perception of Scots law. Much could be learned by looking at the laws of other mixed systems, such as South Africa, when considering the formulation and development of Scottish legal principles. However, being a mixed legal system was not a passive condition, not merely "a seat on the fence", (Cooper 1957, 201) Scots law could forge a bridge between these two major legal traditions, the Common Law and the Civil Law. (Cooper 1991, 87; Levy-Ullmann 1925, 390) But being a mixed legal system poses dangers, and both Cooper and Smith were pessimistic about the future of Scots law. The former professed himself hostile to the spirit of legal integration already abroad in 1949. He equated (and one has some sympathy here, for English law does not always readily accommodate other viewpoints) assimilation with the annihilation of Scots law. (Cooper 1957, 199) Smith's prognosis that by the year 2000 Scots law would no longer be in a position to "claim acceptance as a Civilian system" (Smith 1962, 72) has indeed been shown to be substantially accurate. (Thomson 1996).

Modern Scots civilians, unsurprisingly, now query the concept of the mixed legal system: regarding it as one in which the junior partner (Scots law) does not borrow from the senior jurisdiction (English law) but has the latter's rules foisted upon it. Indeed some (Evans-Jones 1998) object to referring to the 'genius' of Scots law lying in its old-established practice of "willing borrowing and adaptation". (Sellar 1988, 87; Forte 1994, 383) They see nothing wrong, however, in urging us to look to the Civil Law jurisdictions for inspiration; and they have eagerly embraced the idea of a pan-European *ius commune* in which lawyers will be free to borrow from a (civilian) gene pool of ideas and principles. Some idea of how the *ius commune* is seen from a Scottish per-

spective may be gained from the following passage: "It is at one and the same time a convenient shorthand for a reference to a general code of ideas as being relevant to any system of private law and a reminder of a common inheritance in a tradition of thought". (Blackie and Whitty 1996, 66)

That Roman law and the civilian principles created during the process of its reception in Europe have influenced some areas of Scots law is undeniable. This is observable in the medieval period (Stein 1988, 269; Gordon 1995, 15-23) and in the transitional world of the sixteenth century, where it was used to plug gaps in the indigenous law. (Lesley 1596, 119-120) During the seventeenth century Scots often pursued legal studies abroad (Dutch universities were a popular destination) where Roman law formed the cornerstone of legal education. It is unremarkable then to find Roman law being regarded as a source of ideas (Gordon 1995, 28-33) and being referred to in legal argument. Civilian influences are also readily observable in the works of the institutional writers (so-called because most modelled their works on Justinian's *Institutes*) of the seventeenth and eighteenth centuries. But these influences are not so prevalent as Scottish civilians would like us to believe: Scots criminal law and the law of succession, for example, have remained largely immune. (Thomson 1997, 20) Just how Scots law might have developed had political conditions remained unchanged is a matter for conjecture because changes did occur and with profound repercussions for contemporary Scots law.

Article 18 of the Treaty of Union of 1707 stated that union would not result in change to Scots private law except where this was for the "evident utility" of the Scots. Article 19 preserved the College of Justice as the supreme court *in* Scotland and restricted judicial appointments to members of the Scottish Bar. The language of both articles is, however, opaque and Article 19, in particular, was not couched in terms which clearly precluded appeals to the House of Lords. It did not take long for Scots to exploit this opacity and, although the House declined to entertain appeals in Scottish criminal causes, it did accept jurisdiction in civil actions. This has been the subject of complaint both past and present. Until the mid-nineteenth century no Scottish judges sat in the House of Lords and Scottish appeals were heard by English judges sitting with lay peers. There was scope for misunderstanding arguments, an element of ignorance in some judgments and a measure of studied arrogance in others. Take, for example, the case of the mid-nineteenth century Scottish miner killed in a work accident caused by

a fellow employee's negligence. His widow sued for compensation: arguing that the company was liable for its employee's negligence. At this time Scots law recognised the principle of vicarious liability and the Court of Session judges found for the widow. The mine-owners then appealed to the House of Lords who reversed this decision. At the time, English law subscribed to the view that employers were not vicariously liable to employees harmed by co-employees. After reviewing the English cases Lord Chancellor Cranworth opined: "If such be the law of England, on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application ... I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south". (*Bartonshill Coal Co.* v. *Reid* (1858) 3 MacQueen 266, at 285) Such pronouncements were, of course, intolerable and would never be made today. But what is objectionable here is not the notion that it might be desirable to treat English and Scots workers equally, but rather the arrogant assumption that the English model was inherently superior.

By convention there are now two Scottish law lords. And, although there is no rule that these must sit in Scottish appeals, the English judges frequently defer to the Scots' opinions. Despite these changes, dissatisfaction is sometimes expressed with decisions of the House in Scottish appeals and the Scottish judges sometimes accused of anglicising Scots law. It is important to realise, however, that despite arguments that the civilian purity of Scots law has been (and is being) corrupted by the House of Lords, the influence of the Common Law has only infrequently been exerted by crude oppression. Just as Roman law, Canon law, French and Dutch law have all played some part in the formulation of some principles of Scots law, so too Common Law ideas have been borrowed and adapted. Nor has this process been confined to the period after the Union of 1707. The Cooper-Smith axis, naturally, sees things differently. (Cooper 1944; 1952; Paton 1958, 18; Smith 1984) Admitting that Norman penetration of Scotland in the twelfth and thirteenth century brought with it English legal ideas which Scottish monarchs willingly adopted, Cooper maintained that the Wars of Independence (roughly 1296-1346) had ended the influence of the Common Law. (Cooper 1991, 68) However, recent research has demonstrated the debt owed by later medieval Scots law to that of England. (Sellar 1988; Forte 1990; MacQueen 1993) Take for example the Scottish legal treatise known as *Regiam Majestatem*, which was composed sometime af-

ter 1318 and most probably before the death of Robert I in 1329. (Duncan 1961) Although this work reflects Romano-canonical influence, it is substantially derived from a late twelfth-century English text, the *Tractatus de Legibus et Consuetudinibus Angliae*, attributed to Ranulf de Glanvill, justiciar of England from 1180-1189. So at the height of the struggle between England and Scotland when, according to Cooper, "the legal cleavage between the two countries must be dated" (Cooper 1944, lxii), we find the Scots employing an English work in the composition of a statement of law which continued to be used during the fifteenth century. (MacQueen 1993, 85-98) Paradoxically, however, *Regiam* may afford the best example of a coincidence between Scots law and Scottish identity. For if we see *Regiam* as intended to represent the law of a sovereign state, then, although it is first and foremost an example of regal instrumentality, it may also have fulfilled a more populist role as a badge of contemporary Scottish identity. (MacQueen 1995, 3-19).

Since 1707, however, the single most important reference point for Scots law has been the law of England. Our modern law of reparation, the law of contract, and the criminal law all display its influence. In my own field of commercial law we ignore English developments at our peril. The volume of arbitration and litigation is greater in England than in Scotland and, consequently, English law frequently encounters new issues, and pioneers new solutions, well before these arise for consideration in the Scottish courts. This does not mean that we should suspend our critical faculties, but it does mean that we should not be doctrinally blinkered. And my views on the development of modern commercial law, far from being heterodox today, would have been quite acceptable to my eighteenth century counterparts.

Smith regarded the eighteenth century as "the classical age" of Scots law and identified several continental writers whose works he regarded as influential. (Smith 1962, 74) But in contemporary commercial causes there was a judicial perception that these writers were irrelevant. As Scots began to encroach on what had been English markets prior to the Union, it became apparent that our commercial law was unsophisticated. Insurance, for example, did not develop in Scotland as the normal means of protection against risk of loss until the mid-eighteenth century: some two centuries after it had become relatively commonplace in England. (Forte 1987) Consequently, although the process papers for insurance cases in Scotland throughout the eighteenth century reveal that continental writers and legislation were sometimes cited by coun-

sel, these progressively demonstrate that English cases had become the major source of influence. Nor were the judges content to rely on counsel drawing these cases to their attention. Their approach was more proactive.

In a substantial number of cases, when faced with an issue which had never arisen for consideration before, the court would stop proceedings and order both parties to obtain the opinions of English barristers and/or of Lloyd's underwriters. (Forte 1995) This practice was not confined to insurance but occurred across a wide spectrum of commercial issues and continued into the nineteenth century. The reason why this strategy was adopted is articulated by a contemporary judge, Lord Hailes, and this supplies a necessary corrective to Smith's blanket description of the influences at work in Scotland during the eighteenth century (Hailes 1826, 622-623): "We in Scotland are in the helpless infancy of commerce. On a mercantile question, especially concerning insurance, I would rather have the opinions of English merchants, than of all the theorists and all the ordinances of Europe ... Our Scottish insurances are copied from the English: for the interpretation of words in such a copy, am I to go to the original, or the ordinances of Amsterdam or Stockholm? I can have no doubt of the law it is the law of Mr Dunning, Sir Joseph Yates, Lord Camden, and Lord Mansfield." (These were eminent English counsel and judges.) I am sure that this perspective was conditioned by a suspicion, perhaps even an awareness, that Scottish commercial interests might be best served by forging a less distinctive system of commercial law than would have been the case had civilian ideas dominated judicial reasoning. It is unlikely that a Scottish underwriter, or an English one covering a Scottish interest, would have appreciated losing a case because some sixteenth century Spanish ordinance, or the view of some seventeenth century Dutch legal theorist, was against him: particularly if his argument was supported by current Lloyd's practice or there was an English case in point. By the end of the eighteenth century Scots commercial law had adopted an attitude of pragmatic realism and was moving rapidly away from exclusive dependence on civilian jurisprudence.

The rejection of civilian principles as irrelevant to commercial law was vehemently expressed in the early nineteenth century by Lord Brougham in *Thomson* v. *Campbell's Trustees* (1831) 5 W. & S.16: "I not only deny the authority of the Civil Law as a direct authority; I deny the weight of it – the general deference to it – in a question of mercantile law, in mercantile times, and in a mercantile country." Only a few

year earlier, George Joseph Bell, whose work enjoys institutional status, declared English commercial law to be the most relevant source of ideas for Scots lawyers; and was dismissive of the utility of the works of earlier Scottish institutional writers, such as Stair and Erskine, in this context. (Bell, 1810) Bell does not advocate uncritical acceptance of English law and the Scottish judiciary have not taken English decisions on simple trust. (*McGowan* v. *Wright* (1852) 15 D. 229, per Lord Justice-Clerk Hope at 232) Nevertheless, the suggestion that commercial issues ought to be viewed from a Scottish perspective only was emphatically rejected. in the nineteenth century (*Strachan* v. *McDougle* (1835) 13 S. 954), and has a modern echo in *Sharp* v. *Thomson* 1995 S.L.T. 837, per Lord Coulsfield at 869: "Although weight should be given to the arguments that the purity of Scots law, as a system based on the civil law, should be maintained ... these arguments should not be overemphasised or treated as in themselves decisive." The nineteenth century perception of commercial law and directions for its development was not just a judicial one. Scottish business interests ardently supported assimilation with English law to create a system of 'British' commercial law. It is also rather ironic that some lawyers who advocated assimilation and codification were influenced in this view by periods of study spent in Germany. (Rodger 1992) Between 1882 and 1906 statutes codifying the law of negotiable instrument, partnership, sale and insurance were passed which applied to both England and Scotland and virtually created a uniform law which still endures. It is not without significance that under the Scotland Act 1998 large tracts of commercial law do not fall within the legislative competence of the Scottish Parliament, but are "reserved" to Westminster. The exigencies of a unitary economy require this.

The future of Scots law is currently being debated. This debate centres on the influence of English law upon Scots law (Forte 1994; Whitty 1996), and, though it should not be conducted in terms of the nostrum – "Scots law is worst. English law is best." (or *vice versa*) – this sometimes happens. But the real debate is that between two opposing philosophies – pragmatic realism and civilian purism. A recent example of the nature of the debate and of the way in which problems may be satisfactorily resolved is afforded by the case of *Smith* v. *Bank of Scotland* 1997 S.C. (H.L.) 111. Here, a wife was persuaded by her husband to grant a security over their home in return for a bank loan to his business. He misrepresented the purpose for which the security was needed and she subsequently attempted to set it aside. She was unsuccessful in

the Scottish courts which, following precedents, held that the bank was not under any duty to warn her of the risk she was running and to advise her to obtain independent legal advice. It was accepted that the industry code of practice to which the bank subscribed enjoined banks to issue such warnings; but the Court of Session observed that the code of practice was not a source of law. At this time, however, the House of Lords had already decided, in an English case on virtually the same facts, that banks did owe these duties to third party guarantors, and Mrs Smith's appeal to the Lords was upheld. But although the leading opinions were delivered by two Scottish judges, these provoked a hostile reaction from some Scottish commentators. We should, however, be very clear about what the objectors are condoning. Their views mean that the position of a wife would: (a) be different from her counterpart in England; (b) be inferior to her English counterpart; and (c) not reflect standards which the relevant industry itself regards as fair. Purity might have been maintained, but only at the sacrifice of socio-economic rationality. Lord Clyde (at 120) summed up the choices rather well: "In the present case we are dealing with an area of law whose development has for a long time been influenced by decisions on the other side of the border. I am not persuaded that there are any social or economic considerations which would justify a difference in the law between the two jurisdictions in the particular point here under consideration. Indeed when similar transactions with similar institutions or indeed branches of the same institutions may be taking place in both countries there is a clear practical advantage in the preservation of corresponding legal provisions." One may observe in passing that, in strictly legal terms, the case was determined on the application of the principle of good faith: a principle with which civil lawyers are familiar (though they cannot all agree that it exists) and English lawyers are not.

The pragmatic approach to Scots law is, unlike its civilian counterpart, neither doctrinaire nor ideological. It is one which, I think, has found favour with most judges (including the current Lord President (Rodger 1996, 24) and the greater part of the legal profession for over two centuries. At an intellectual level it does not deny the possible usefulness of reference to civilian material, as indeed happened in *Morgan Guaranty Trust Company of New York* v. *Lothian Regional Council* 1995 S.C. 151 (dealing with interest rate and currency exchange agreements – *i.e.*, swaps). It merely argues that the utilitarian demands placed upon a legal system which remains part of a larger political and economic unit are justifiably paramount; and that factors other than

purely legal ones must often be considered. No harm is done to the practical application of the law in Scotland, and no obvious hurt to the people who have recourse to that law, if it has borrowed or adapted an idea here and there from England, any more than if some principle of civilian jurisprudence has been utilised in its stead. Moreover, we no longer fully control our own destiny. Membership of the European Union has affected Scots law in ways which it might not have developed organically: *e.g.*, in relation to corporate and market regulation and consumer and environmental protection. It is now possible to speak of an 'EC consumer law' or 'EC environmental law' which is driven by social, political, economic and scientific considerations rather than by legal ideologies. The corollary of harmonisation in these areas is, of course, the subordination of the national law of each member state (Weatherill and Beaumont 1999, 1037) and it is not only Scots law which, in a European context, must periodically surrender systemic integrity.

None of this denies the existence of a Scottish legal system. It is simply a different system from that which the purists want us to have. It remains different from English law in that it still advocates the development of principles: and principles are something that English law deeply distrusts. It is not, unlike English law, inherently hostile to compromise: witness the willingness with which the Scottish Law Commission has recommended that the Scots law on contract formation might be modelled on provisions of the UN Convention on Contracts for the International Sale of Goods. (Scot. Law Com. 1993) Many English lawyers dislike the Convention which is the product of both Common Law and civilian thinking: one describes it as "a further erosion of our own excellent municipal law". (Wheatley 1990: *cf.* Forte 1997, 57-64) The Commission's proposal that we reform our municipal law in line with the Convention is based on factors such as the need for modernity, the advantages of having a uniform set of rules of general application, and Scottish responsiveness to global developments. This is a market-oriented approach to the problems of being a small jurisdiction. We must make Scots law attractive to foreign business and our courts and arbitration panels attractive *fora* for the resolution of business disputes. (Forte 1997, 55-57) Such imperatives are the operative, legal cultural stimuli found in Scotland today. As an agent for law reform, the Scottish Law Commission is now far less concerned with ideology than it was thirty years ago. The objective has become the creation of an efficient market in legal products and

services which meets the needs of both domestic and foreign users: hence the influence on the most recent proposals for reforming contract law of international and supranational models such as the UNIDROIT *Principles of International Commercial Contracts* and the *Principles of European Contract Law* prepared by the Commission on European Contract Law (chaired by Professor Ole Lando of the Copenhagen Business School).

It also remains possible to maintain the existence of a Scottish legal culture: we have our own courts, procedures, law schools, legal profession and judges. (Thomson 1996, 25) Indeed we even have our own legislature again. And, if it helps, we can say that Scots law has an identity: it is a mixed legal system. But to claim that, today, the substantive law is one of the things which defines one in any truly meaningful way as Scottish goes too far. And if the person in the street thinks that Scots law is something quintessentially Scottish, he or she is wrong in that belief. The content of Scots law is determined by those who make, interpret, and apply it; and they do this with an eye on modernity and socio-economic efficiency free from sentimentality. It may well be that in a devolved Scotland there will be opportunities to conduct surveys of popular opinion in areas such as crime and family affairs: but this will require funding and may reveal that there is little to distinguish perceptions north and south of the Border. In some areas, such as contract and reparation, extensive cross-border business may well act as a brake on any far-reaching changes. A further brake on legislative autonomy is represented by the European Union's long-term desire to create a European private law code, and its short-term objective of creating a European contract code, as adjuncts to the efficient functioning of the Single Market. Two things are worthy of comment. First, the driving force here is the facilitation of cross-border business. Second, the emphasis will be on solutions and not legal traditions. As we move into the twenty-first century pragmatic realism and utilitarian functionalism will increasingly come to dominate legal developments both within Europe and beyond. This already reflects the prevailing mood in Scotland's legal community and represents an approach which is entirely consistent with Scottish success both past and present. By maintaining this outlook it will serve us in the future also.