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## The Scottish Legal System – What Next?

### Scots Law as a Civilian System: A Response

Jonathan Brown

Lord Gill's account of *Scots Law as a Civilian System* begins by accepting that the 'Scottish romantic school of jurisprudence', with its emphasis on Roman law, paints 'an affecting picture', but it certainly 'not going to see us through the trials that lie ahead'. Such seems to provide a fair assessment of the present state of Scots law. The idea that Scots lawyers, when faced with a challenging or novel legal problem, might turn first to Justinian's Digest may give some pleasure to scholars and teachers of Roman law, but it is utterly unrealistic. Contemporaneously, practitioners who are faced with a seemingly novel problem (of whatever stripe) are unlikely to make recourse to the principles of Roman law in any attempt to find a solution; rather, their first port of call will be to altogether more recent precedent.

Should they find that there is no Scottish precedent, they are likely to turn to precedent from outwith Scotland. Practically, for a variety of reasons (chief among which is simple convenience, given that such materials are readily and, seemingly, linguistically and culturally accessible), this means harkening to English law. In such circumstances, the idea that the Scots law retains its character as a quintessentially Roman – and therefore learned and principled – legal system, even if legal practice diverges from this ideal, is instinctively attractive. After all, 'Scots lawyers have always been fond of claiming that their system is one derived from principle rather than practice'.<sup>1</sup>

With that said, however, it should be noted that the principles espoused by the Roman jurists were neither cloistered from day-to-day life, nor abstracted from commercial practice, but rather were expressly designed to afford guidance in the most prosaic of circumstances. The Roman jurists were pre-eminently pragmatic men; their hard-headed, realistic mind-set led them to explain the operation of law by reference to practical (though generally hypothetical and perhaps far-fetched) cases or examples. They did not start by considering an abstract concept and working out the implications which derive from that concept; indeed, their methodology is so distinct from other sophisticated processes of reasoning that observing it in action 'can be unsettling for those with other Western intellectual traditions, such as ancient Greek philosophy or, for that matter, modern physics and economics'.<sup>2</sup> Rather than first defining principally academic 'high-level principles'<sup>3</sup> and applying them to facts (whether concrete or abstract), the jurists simply presented a factual problem and thereafter determined the appropriate legal answer to the problem posed in those facts.<sup>4</sup> The jurists who utilised this case-based method (*casus*) clearly espoused the law mechanically and paid no thought to ephemeral conceptions.<sup>5</sup> Their own learned opinion was sufficient authority for any

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<sup>1</sup> See Kenneth McK Norrie, *The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?*, in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013), p.49

<sup>2</sup> James Gordley, *Ius Quaerens Intellectum: The Method of the Medieval Civilians*, in John W. Cairns and Paul J. du Plessis, *The Creation of the Ius Commune: From Casus to Regula*, (Edinburgh: EUP, 2010), p.79

<sup>3</sup> To use the words of Lord Hoffman in the case of *Wainwright v Home Office* [2004] 2 AC 406 at 419.

<sup>4</sup> James Gordley, *The Jurists: A Critical History*, (Oxford: OUP, 2013), p.12

<sup>5</sup> Marcia I. Colish, *The Stoic Tradition from Antiquity to the Early Middle Ages*, Volume 1 (Leiden: BRILL, 1985), p.348

proposition; as Professor Gordley notes, ‘when they cited authority for their conclusions, it was nearly always the opinions of other jurists’.<sup>6</sup>

*Regulae* – general rules – flowed from cases; per Paulus, ‘the law may not be derived from a rule, but a rule must arise from the law as it is’.<sup>7</sup> In many respects then,<sup>8</sup> their process by which the Roman jurists determined the answer to legal problems can be compared with the process by which the judiciary in Common law states decide cases, since (in the Civil and Common traditions respectively) like the Roman jurist, the judge is taken to be so distinguished as an authority on the law that their pronouncements may be regarded, on their own merits, as authoritative.<sup>9</sup> Judge or jurist may err, but *communis error facit ius* (common error makes the law) and even a blatant mistake made by one of eminent distinction can take a long time to eradicate,<sup>10</sup> if such excision is indeed at all possible.<sup>11</sup>

The likelihood of a mere mistake becoming enshrined in law is worrying and reveals a particular deficiency with both the Common law and the Roman reliance on *casus*. The deficiency is not as great in the Civil law as in the Common, however, since ultimate aim of jurist was always only to refine and to clarify, and through this to guide future practice. Subsequent jurists could readily depart from the views of one who appeared to have guided practice in the wrong direction. In the Common law, however, the aim of the judge is to resolve the dispute between the two litigants before them within the bounds of the law, yet as the old adage goes ‘hard cases make bad law’. Compounding this, of course, is the fact that the judgment of a Common law court cannot be overturned until a real case, raising an analogous point, calls before court once again.

The reliance on the calling of real cases reveals that the essential process of the Common law is unsuitable in a small jurisdiction such as Scotland. The incremental development by means of precedent requires a steady stream of litigants in possession of time, knowledge<sup>12</sup> and funds to routinely access the courts. Further than this, for the law to develop, these litigants must also possess a temperament which allows them to fight those law suits to the (all too often bitter) end, since negotiation and settlement do not develop legal doctrine. All of these personal features must be further embodied in an individual who happens to be embroiled in a dispute of sufficient legal import as to give rise to a reported case and, naturally, the solicitors and advocates involved in the ensuing litigation must be sufficiently versed in

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<sup>6</sup> James Gordley, *The Jurists: A Critical History*, (Oxford: OUP, 2013), p.7

<sup>7</sup> Dig.50.17.1

<sup>8</sup> It is worth noting Professor Gordley’s caution that ‘it would be a mistake to think that the **method** of the English judges who founded the Common law was like that of the Roman jurists. They were using their cases in very different ways. The Roman jurists used cases to clarify the meaning of general concepts... English judges used cases to determine the boundaries of the writs recognised by the Common law courts’: James Gordley, *The Jurists: A Critical History*, (Oxford: OUP, 2013), p.21

<sup>9</sup> Such was recognised by Professor Stein: See Peter G. Stein, *Roman Law, Common Law and Civil Law*, [1992] *Tulane Law Review* 1591

<sup>10</sup> On which, see T. B. Smith, T B Smith, *Designation of Delictual Actions: Damn Injuria Damn* 1972 SLT (News) 125 and its reprise over a decade later: *Damn, Injuria, Again*: 1984 SLT (News) 85

<sup>11</sup> See the discussion in James Edelman, *Property Rights to our Bodies and their Products*, [2015] *University of Western Australia Law Review* 47, p.65

<sup>12</sup> For the law, in any uncodified jurisdiction, is likely to ‘condemn in innocence [and] also in ignorance’: consider the frustration of ‘K’ in Colin Munro’s homage to Kafka *K. in Scotland*, in Hector L. MacQueen, *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), pp.138-145

the area of law so as to ensure that the judiciary arrive at the ‘right’ outcome.<sup>13</sup> If there are few litigants, then the law must stall, and if those decisions which are handed down contain legal errors then the law, to borrow Professor Wilson’s infamous phrase, must drift.<sup>14</sup> Better, then, to have recourse to the principled writings of learned jurists, who can, through their knowledge of the law, suggest reasonable and equitable resolutions to novel issues.

The Civilian heritage of Scots law means that Scottish jurisprudence is not beholden to precedent for the development of her legal doctrine.<sup>15</sup> The fact, therefore, that those Civilian doctrines discussed by Lord Gill ‘*have produced more articles than cases*’ can be regarded as a feature of Scots law, not a bug. Any superiority of Civilian to Common jurisprudence, if such might be purported, does not lie in the substantive rules of the former, but rather in the fact that those substantive rules were separated from procedural forms at a relatively early stage in the development of Roman jurisprudence.<sup>16</sup> This, in turn, readily allowed for shift from *casus* to *regulae*<sup>17</sup> and for the development of basic, yet sophisticated, legal concepts such as possession, fault and consent to similarly emerge at an early stage, which in turn allowed for coherent, rigorous and logical analysis of those concepts. By contrast, in spite of the superficial similarities between Common law judge and Civilian jurist, ‘*Common lawyers took [a long time] to arrive at the point that the Romans had reached centuries before and they only did so by borrowing from Civil law*’.<sup>18</sup> Since Scots law has a direct connection to the Civil law, it must be concluded that this connection should be exploited to the full, if only to avoid the absurdity of borrowing concepts from a borrower (and so, running the risk of garbling the message) rather than directly from the source.

Like Professors Blackie and Whitty, the present author considers that ‘*the soul of Scots law is Civilian*’.<sup>19</sup> It could not be otherwise, or else the distinctiveness of Scots law as an institution and system would have long ceased to exist, whatever guarantees that the Treaty of Union may have provided. Lord Gill is, however, right to note ‘*it has never been the mission of the Scottish courts to preserve the purity of the Civil law for its own sake*’. Echoing Hume,<sup>20</sup> Lord Gill recognises that ‘*in Scotland we have never been thrilled to the Roman law*’. This is

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<sup>13</sup> Consider, for example, the case of *Ward v Scotrail Railways Ltd.* (1999) SC 255, in which counsel argued an action on the grounds of negligence in spite of the fact that mere emotional distress are not recoverable by means of a negligence action. As the court implicitly conceded, had counsel averred intent (*animus iniuriandi* being central to the Civilian *actio iniuriarum*, which affords *solatium* for non-patrimonial loss and is recognised by Scots law) the outcome of the case may have been quite different.

<sup>14</sup> William A. Wilson, *The Importance of Analysis* in D. L. Carey Miller and D. W. Meyers, *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC*, (Edinburgh: Butterworth, 1992), p.171

<sup>15</sup> It should be noted that text-books cited in Scottish courts have historically been considered ‘authorities’, while in England such material is ordinarily consigned to the far lesser status of ‘another sort of material’: See John W. G. Blackie and Niall R. Whitty, *Scots Law and the New Ius Commune*, in Hector L. MacQueen, *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), p.80

<sup>16</sup> See James Gordley, *The Jurists: A Critical History*, (Oxford: OUP, 2013), p.5

<sup>17</sup> On which, see Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, (Edinburgh: EUP, 1966)

<sup>18</sup> James Gordley, *The Jurists: A Critical History*, (Oxford: OUP, 2013), p.22

<sup>19</sup> See John W. G. Blackie and Niall R. Whitty, *Scots Law and the New Ius Commune*, in Hector L. MacQueen, *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), p.81

<sup>20</sup> ‘*The obeisance we pay to the Civil law is now, and always has been, a voluntary obeisance [which] depends, in the main, on its agreement with equity and reason*’: Baron David Hume’s *Lectures 1786-1822*, Vol I (edited by G. Campbell H. Patton) (Edinburgh: Stair Society, 1939), p.13

certainly true; in addition to departing from the letter of Civilian doctrine when such was expedient, so too is it clear that our forbearers did not hesitate to develop native actions and remedies (notably the actions of assythment and spuilzie) to meet the needs of the populace. The genius of Scots law (if, indeed, the system can lay claim to genius) lies, rather, in the fact that just as *'the obeisance we pay to the Civil law is now, and always has been, a voluntary obeisance [which] depends, in the main, on its agreement with equity and reason'*,<sup>21</sup> so too may we pay such voluntary obeisance to Anglo-American law, should the jurisprudence of that tradition appear to afford a solution, to a legal problem, which has *'the hallmarks of good law'*.<sup>22</sup>

It is fortunate, then, that *'we [all] have to accept the truth that Scots law is a mixed system'*. This turn of fortune does not arise because Scots law possesses some genius simply by dint of its being a blend of Common and Civilian doctrines.<sup>23</sup> As Professor Rahmatian recently posited in a memorable analogy, just as mixing red wine with white does not result in the concoction of a palatable, let alone pleasant, drink, neither does mashing Common and Civil doctrine together necessarily result in anything intrinsically 'better'.<sup>24</sup> Rather, the fact of Scotland's mixed legal system is fortunate because it allows our doctrines to develop with comparative reference to that which is best in two great legal traditions; to recall Lord Cooper's polemic on *the Future of the Legal Profession*, *'the Scottish lawyer has been first and foremost a comparative lawyer since the thirteenth century, and when he ceases to be a comparative lawyer Scots Law will die'*.<sup>25</sup>

How, then, can modern Scottish lawyers best take advantage of our purported ability to make use of the best elements of the Civil law? It is clearly the case that the current trend of looking to English precedent for guidance is completely counter-intuitive to this case; such is not a recipe for anything other than the slow decline and death – facilitated by the acquiescence of Scots lawyers<sup>26</sup> – of Scots law as a distinctive system. As indicated at the outset of this piece, however, it is certainly too idealistic to hope that Scots legal practitioners might turn directly to the primary sources of the Civil law as a matter of everyday practice, though certainly they should be encouraged to engage with any academic literature which concerns the applicability of Civilian jurisprudence in the 21<sup>st</sup> century. Above and beyond this call however, what, then, is there to be done?

As far as day-to-day legal practice is concerned, it is here submitted that, when looking to non-Scots precedent, the jurisprudence of a more mature mixed system – South Africa being the obvious choice<sup>27</sup> – ought to be preferred to any English case law. Of course, South African

<sup>21</sup> *Baron David Hume's Lectures 1786-1822*, Vol I (edited by G. Campbell H. Patton) (Edinburgh: Stair Society, 1939), p.13

<sup>22</sup> As the resolution of *Shilliday v Smith* 1998 SC 725 is praised by Lord Gill for exemplifying.

<sup>23</sup> See Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, [1998] LQR 228

<sup>24</sup> Andreas Rahmatian, *The Political Purpose of the 'Mixed Legal System' Conception in the Law of Scotland*, [2017] Maastricht Journal of European and Comparative Law 843, p.844

<sup>25</sup> Lord Cooper, *Selected Papers 1922-54*, (Oliver and Boyd, 1957), p.133

<sup>26</sup> See Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, [1998] LQR 228, p.232

<sup>27</sup> It should be emphasised, of course, that though *'South Africa with its similar history and non-codified law has the potential to be particularly useful... the most potentially useful does not logically exclude the useful or even the fairly useful'*. The proposal that Scots practitioners look to South Africa for guidance is set forth as a *starting*

case law is not *as* readily accessible as English, given that the most commonly used databases collate case law for the United Kingdom as a whole. But nevertheless, much South African case law *is* readily available and can be accessed online with relative ease. The ‘pragmatic problem’ identified by Whitty and Blackie in 1996 has largely been circumvented by the establishment of the internet as a fact of life.<sup>28</sup> There is, then, little rational reason for Scots lawyers to eschew South African jurisprudence, which largely fits with the general framework of Scots law, in favour of English case law which generally does not.

Scotland and England may share a vernacular, but there is no common legal language, in spite of appearances. Scots lawyers who take up the task of looking to the southern hemisphere to find answers to novel problems will be struck to find a judicial system which makes use of concepts and terminology which are much more cogent with the norms of our legal system than are the alien notions of consideration, forms of action and ‘bundles of sticks’<sup>29</sup> which explicitly or implicitly underpin Anglo-American jurisprudence. With this in mind, it is clear that the Scottish law schools must stress the importance of comparative law in the curriculum. That many of the universities (undoubtedly enticed by the promise of the fees generated by English students) now offer dual-qualifying, or Common law qualifications is a source of danger, but also affords opportunity – provided, of course, that those who obtain Common law qualifications in Scotland are afforded a grounding in comparative Civilian jurisprudence. If Scots law is to survive, let alone thrive, then these future practitioners must be inculcated with an appreciation not only of the Civilian history of Scots law, but of the value of looking to comparators outwith the British Isles when seeking the answer to legal problems.

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*point*, not as the most desirable end: See John W. G. Blackie and Niall R. Whitty, *Scots Law and the New Ius Commune*, in Hector L. MacQueen, *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), p.78

<sup>28</sup> John W. G. Blackie and Niall R. Whitty, *Scots Law and the New Ius Commune*, in Hector L. MacQueen, *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of W. A. Wilson*, (Edinburgh: W. Green, 1996), p.75

<sup>29</sup> For the (limited) significance of the ‘bundle of sticks’ analogy as it subsists in Scots law, see Malcolm M. Combe, *Exclusion Erosion – Scots Property Law and the Right to Exclude* in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen: AUP, 2018), pp.102-140