COMMENT

THE COMMON AND THE CIVIL LAW — A SCOT'S VIEW †

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ONE of the many debts which we owe to the German school of jurists of the 19th century is the distinction between lawyers' law and professors' law. The terms are self-explanatory. They express a difference as old as that which distinguishes *jus* from *lex*. Since it is in active practice that my experience has been gained, it is from the standpoint of lawyers' law that I propose to discuss my subject: the influence of Roman and canon law in the modern world. The legal system which it has fallen to my lot to administer — the law of Scotland — occupies a special position amongst the legal systems of the modern world. These systems, as is well known, tend to fall into one or the other of two great categories, (a) the Anglo-American or common law systems, and (b) the Roman, civilian, or Franco-German systems. But Scots law sits on the fence, Roman in origin, doctrine, and method, but now largely infiltrated and overlaid by the later developments of Anglo-American law and by statutory changes enacted by a legislature predominantly English. It has been well said that Scotland has never yet been successfully invaded except by Christianity and Roman law; but in these later days Scots law, like the law of Quebec and Louisiana and the Roman-Dutch systems of South Africa and Ceylon, has tended to become a hybrid system.

A seat on a fence may not be a very secure seat, but it offers the conspicuous advantage of a view on both sides of the fence. Half a civilian and a half a common lawyer, accustomed to thinking of law functionally as an applied science and not dogmatically

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as an aspect of sociology or of political philosophy or of the history of human culture and institutions, the practising Scots lawyer ought to be able to form some estimate of the comparative excellences of the two great rival juristic schools of thought and their adaptability to the needs of a changed and changing world.

When we speak of a continuing influence being exerted in the modern world by the Romanist and canonist legal tradition, what precisely is the nature of that influence? It is best to begin by stating what that influence is not. The truly significant part of that influence no longer resides in the conscious appropriation by Romanist systems of detailed doctrines or remedies borrowed from the *Corpus Juris Civilis* or the *Corpus Juris Canonici*. There was a time — and it lasted for centuries — when it was second nature to the lawyers of Scotland and of other countries which followed the civilian tradition to turn to Roman law (or what they thought was Roman law) for an answer to every question which their own system left unsolved. But that time has passed. Borrowing still goes on; but under the impact of the new interest in comparative jurisprudence the lawyer in search of new ideas has now the civilized world at his disposal and is not confined to Justinian or Gregory IX. It is no longer in the provision of ready-made rules and doctrines to fill the gaps in an imperfect legal system that the continuing and abiding influence of Roman and canon law is to be found.

There are two points bearing upon this matter which are worthy of a brief digression. The first is that Roman and canon law have latterly shifted from the domain of lawyers' law to that of professors' law. As a result of the researches of modern scholars it is now known that few of the distinctive principles of Roman law were not fundamentally transformed during the centuries throughout which the law of Rome was slowly evolving, and many of them have substantially changed their accepted content within living memory. If we take as an example the Roman law of sale, it is a solemn reflection that the works by Mackintosh and Moyle on *emptio-venditio*, which were studied at British Universities by the present generation of lawyers, have had to be replaced by yet a third work on the same subject recently published by Professor Zulueta. These and other admirable specimens of professors' law have had the unintended consequence of depriving Roman law for the working lawyer of much of its splendid isolation, and of converting it into little more than one chapter in the history of

comparative jurisprudence, suitable like Greek law, Hindoo law, and the oriental systems as a subject of research by specialists, but exhaling an atmosphere too rarefied for the ordinary practitioner.

The second point is related to the first. The Roman law which deeply affected the Romanist systems during their formative period was not the Roman law of Mackintosh or Moyle or Zulueta, nor even the Roman law of Justinian. It was Roman law as our forefathers accepted it at second or third hand from the civilian commentators of the 17th and 18th centuries, and the civil law as taught by them was conceptual in a sense that the law of Rome never was. Here in Scotland we took our Roman law less from the fountainhead than from such French lawyers as Cujacius, later from Voet, Vinnius, and others of the Bartolist tradition, and finally from the French Pothier; and these names bulk far larger in our early works and reports than that of Justinian. Similarly with canon law. The canon law which has left its mark upon the law of Scotland and other kindred systems is not the developed law of the Roman Catholic Church, but the 12th and 13th century law of Gratian's *Decretum* and Gregory's *Decretals* and the practice of the Curia Romana and its "judges delegate" in the halcyon days of Pope Innocent III.

This attitude is not so painfully unscientific as would at first sight appear. When the architects of a legal system are looking around for new material with which to fill in the blanks in their native legal philosophy, it matters little where the chosen principles originated, provided they are capable of being usefully adapted to meet the needs of the situation. The lawyer who wishes to learn civil law, as distinguished from the student who wishes to learn Roman law, would accordingly do well to concentrate chiefly on the later civilians, who reminted the coinage of classical Roman law and gave it in its new form an almost world-wide currency.

What then is the real essence of the contribution which has been made, and is still being made, to modern law by the civil and canon law? In the last analysis it is nothing more and nothing else than an idiom of legal thought and a guiding habit of mind — what Lord Macmillan once called "one of two ways of legal thinking" — and not merely of legal thinking but of philosophic thinking and scientific thinking as well. The distinction may be put in many ways. A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.

The above is, of course, a deliberate overstatement of the position, in which the shadows have been deepened and the high lights sharpened with the object of throwing an elusive object into high relief; and in the best traditions of the old scholastic dialectic many necessary qualifications have been temporarily ignored. But in the eyes of those who are in working contact with both the civilian and the common law tradition, the difference is unmistakable and persists strongly to this day, making itself felt not only in the fashioning of new law but in the day-to-day work of the courts, though the gulf which separates the two juristic methods has notably narrowed in the last half century.

Eminent representatives of the common law systems have recently laboured to minimize, if not to efface, the root distinctions between the civilian and the common law traditions by cataloguing the similarities in result which have been achieved by the two schools of legal thought in certain chapters of law. Whether it be that the seat on the fence offers a better view or whether (as is equally likely) we in Scotland are simply wrong, it is for others to judge; but I can only record the personal conviction that the differences in method are fundamental and far more significant than the apparent similarity of the end products of widely different processes of thought. No doubt the similarities prevail once you get back to the basic concepts common to all mature jurisprudence. But that is professors' law; and those who labour in the humbler field of lawyers' law become very sensitive to the difference in the legal climates which prevail in a civilian and in a common law state.

The most important and widespread product of the civilian legal tradition is, of course, codification. The Anglo-Saxon is instinc-

tively hostile to codification. The Latin is instinctively enthusiastic for codification. The Germanic and Slav races began by being suspicious, but were soon won over to the Latin side. The effort to codify, so characteristic of Romanist systems, is not merely the result of the civilian lawyer's familiarity from his student days with the legislation of Justinian, and indirectly with the innumerable *Summae* in law and in theology which appeared throughout the Middle Ages and later. It is the natural product of the civilian method of thought, which always aims at reason methodized and presented systematically and at the application of rationalistic science to law.

Whatever the abstract merits or demerits of codification, it is undeniable that it is the systems codified and applied on the civilian principle which have spread far and wide throughout the modern world as a result of voluntary imitation and free adoption, and they have carried with them the Roman idiom of thought into half the civilized world. Anglo-American common law by contrast has been imposed by conquest and has followed colonization, but it has rarely or never been freely chosen by any modern state. Even in the United States, the domicil of choice of the common law, the civilian method of approach has recently found remarkable expression in the unofficial Restatement of the Law, in much of which Scots lawyers feel perfectly at home — far more so than in the Reports of the English Chancery Division.

Despite our powerful Romanist tradition we in Scotland have never yet codified, but we possess in our great institutional treatises by Stair, Erskine, and Bell what are in substance codifications of the mass of our law as it was in the 17th, 18th, and early 19th centuries respectively. These remain to this day authoritative and deeply respected formulations of our foundational legal principles, and occupy a position in Scottish legal thinking to which a code is the nearest parallel. For us complete codification would present no insuperable difficulty; and, but for the political and economic consequences of the Union with England in 1707, we should unquestionably have codified long ago.

On the other hand, the most distinctive practical manifestation of the common law tradition is the doctrine of the individually binding precedent, still conspicuous in its most rigid form in England, but looked at askance by the Romanist school of legal thought. The doctrine formed no part of the classical law of Scotland but crept in unobserved some 150 years ago, and we are

now helpless in its suffocating grip. Up to a point we can still mitigate its rigour by submitting doubtful decisions for reconsideration by a court of seven or even thirteen judges; but that expedient is of no avail if the case is carried to the House of Lords, our final court of appeal in civil cases.

Everyone will freely admit that in judicial administration a very large measure of consistency must be secured in order that the law affecting any given situation may be reasonably predictable. The utmost respect will always be conceded to a tract of similar decisions, or the settled opinion of jurists of weight, or the accepted practice and understanding of the profession. But such principles are far apart from the superstitious fetish of ancestor worship which inspires the rigid rule of the individually binding precedent. For practical reasons, if for no other, the rule is bound to be abandoned soon, because the crushing weight of centuries of law reports, digests, and indices has become all but overwhelming, and it is fast increasing every year. But, practical considerations apart, is there any answer to the protest of Holmes that it is revolting to act in blind imitation of the past and to magnify consistency at the expense of common sense? Too often the imitation of the past is a "blind" imitation, for the parallelism between cases is much less common than we lawyers pretend. Very slight differences in the facts — and these are not always recorded fully in the reports — may easily turn the scale; and even when the facts are to all appearances identical, the social, political, and economic background may be entirely different if the cases are separated, as often happens, by a long period of time. As Mr. Churchill has recently observed in a different connexion: "Past experience carries with its advantages the drawback that things never happen the same way again. Otherwise I suppose life would be too easy." In the eyes of the civilian the common lawyer has tried to make his professional life too easy by excessive reliance upon precedent and the ascription of infallibility to hierarchies of judges down the ages. The attempt has failed, and its abandonment will be joyfully received in Scotland by those who are ashamed to have to decide cases upon grounds with which they disagree simply because their remote judicial ancestors have decided another case long ago upon a rationale which it is impossible to distinguish. All legal systems require a cement to bind them into a coherent whole; and the question which the common

law systems will very soon have to face is whether a better cement than rigid precedent cannot be found in more codification and in methodized reasoning from clear principles in accordance with the civilian tradition. The judge should not be the parties' oracle, but he must be something more than an animated index to the law reports.

An important question for every lawyer today is which of the two contrasted methods of legal thinking should dominate the future. Is the civilian tradition a spent force? My belief is that the world of the future will be ruled to an increasing extent by codes administered on the civilian rationalistic principle, and that our successors will some day look back upon the great experiment of the common law as a brilliant improvisation, which served its day and generation and was then assigned an honoured niche in the Valhalla of governmental expedients.

The reason, I suggest, is tolerably clear, at least to those on this side of the Atlantic. In the spacious and leisurely days of the 19th century, when the dominant conception was the adjustment of private interests and not the regulation of state and social rights and obligations, it took judge-made common law all its time to keep abreast of the growing needs of a developing society. Remember Dicey's famous remark that in those days statute law reflected the public opinion of yesterday; and judge-made law, the opinion of the day before. Even then the vaunted flexibility of the English common law made a poor showing by comparison with the European codes. But today, whether we like it or not, the old outlook has gone never to return, and the individualistic background of the past is being swiftly replaced by transformed conceptions of social functions and state interests, conceived from the angle either of the Right or of the Left. Britain is now a trading corporation. The age is one of association in vast units aiming at the mass production of social results. The individual citizen is losing his identity. Statute and regulation, once the exception, are now the rule. We in these islands are already in the twilight of landownership and the afternoon of private property. Private law is receding all along the line and public law is taking its place.

Fundamental transformations like this cannot be worked out empirically by the Anglo-Saxon method with its reliance upon slowly developing tracts of judicial decisions evolved with infinite

caution by generations of elderly and timorous judges conditioned by Victorian ideals. Even if they could, many governments of the day have already made it plain that they have other ideas on the subject. Vast regions hitherto sacrosanct to the law courts have recently been taken out of their hands and entrusted to organs of the executive or administrative branches of government. We lawyers do not like it, but it must be so. Now that society is being forced by the pressure of relentless circumstances to assume a new look, it is inevitable that positive political and economic enactments should acquire increasing predominance in the definition and regulation of legal rights, and that the views of well-meaning judges, who lived and worked without dreaming of the situation which confronts us today, should be deprived of the verbal inspiration too often conceded to their casual utterances.

Under conditions such as these it is of supreme importance for the preservation of what remains of the last bulwark of individual freedom, the rule of law, that the transition should be accompanied by a conscious return to the civilian methods of legal thinking, if we are to avoid the ultimate disaster of witnessing our systems of law replaced by the opportunism of arbitrary dictatorships. This at least seems incontrovertible, that the lawyers of every modern state must recognize and take up the challenge presented to them by the social and economic revolution which is upon us and must not lag one inch behind the demands of a progressive society. What form these demands may yet take we cannot foresee, but they will certainly be demands for something different from what the legal profession has been supplying for generations. Public respect for law, without which law cannot exist and civilization itself is threatened, depends upon the law's ability to satisfy the average man's feeling for common justice visibly done; and we may have to forget a lot and discard much of our old legalism if we are to satisfy this test. The civilian will have to abate something of his worship of the Roman genius for jurisprudence, unexampled as that genius was; and the common lawyer will have to recognize that his methods and their fruit are not necessarily the final perfection of human wisdom. We shall need both the civilian and the common lawyer to tide us over the great transition; but if we are to preserve an even keel in the storms which are breaking, we shall need above all the ballast which only the civilian method of legal thinking can offer.