Law Reform, Legal Transplants and Developing the Law of Defamation

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Lawyers and legislatures do not like to think about private law. Governments – even those famed for efficiently reforming law – often do not care about the precise content of legal rules, but instead care only for loftier goals such as 'modernisation', 'clarification' or the homogenisation of rules across a particular geographical territory.[1] Although there has been something of a burst of legislation in Scotland (and across the other jurisdictions of the United Kingdom) in recent decades,[2] to the extent that it is no longer possible to say that the canon of Scots law is pockmarked only with islands of statutory provision, it remains the case that the governments of Holyrood and Westminster alike have shown little interest in legislating on (often important) matters of private law. Many statutes passed are functionally redundant and exist only to 'send a message' about a particular 'issue of the day'. The Defamation and Malicious Publications (Scotland) Bill, which currently before the Scottish Parliament,[3] seems typical of this trend against innovation through or in legislation.

Throughout history and across legal jurisdictions, when legislative intervention has occurred it has rarely been a spontaneous or creative affair. Most usually, law – whether in the form of legislation or in that of other materials referred to in court and legal practice[4] – is not imagined anew, but is rather borrowed from across time or space. In other words, lawyers and legislators do not typically think up new law, but rather they transplant law from other juridical systems from other countries, or from the past,[5] into their own.[6] Scots law, then, is not, as Professor Willock thought, wholly 'an authentic emanation of the Scottish spirit – a Scottish *Volksgeist*, the spirit of the people',[7] but rather exists in large part merely by accident and quirk of circumstance.[8] Since the Middle-Ages until the beginning of the Nineteenth Century, our

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[1] See Alan Watson, *Failures of the Legal Imagination*, (Philadelphia, 1988), at 47

[2] Tony Blair's New Labour Government, for instance, was accused of creating new statutory criminal offences at a rate of one for each day it spent in office – when in fact it, and the later Coalition Government comprised of Conservatives and Liberal Democrats – created more than one new offence per day spent in office: See James Chalmers and Fiona Leverick, *Criminal Law in the Shadows: Creating Offences in Delegated Legislation*, [2018] Legal Studies 221, at 223

[3] Of which, see the Defamation and Malicious Publication (Scotland) Bill [As Introduced]

[4] *I.e.*, law books or treatises, judicial opinions and case law.

[5] I shall not here comment on the old adage that the past is another country.

[6] For this thesis as originally presented, see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (Scottish Academic Press, 1974)

[7] See Iain Willock, 'The Scottish Legal Heritage Revisited' in J. P. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland*, (W. Green, 1976), 1-14, at 3-6

[8] That is not, of course, to downplay the importance of the Scottish legal system and the independence of Scots law to the existence of Scottish national identity. Such was expressed by Lord President Cooper, who noted that 'so long as the Scots are conscious that they are a people, they must preserve their law'; 'Nothing would more effectively contribute to the swift obliteration of the individuality of the Scottish people than the loss of the legal system under which we have lived since the dawn of history'. Lord Cooper of Culross, *Selected Papers 1922-54*, (Oliver and Boyd, 1957) at 199; 144

lawyers were educated in the Continental European Universities. Thus trained, our lawyers brought back to Scotland with them materials and ideas which were used and discussed throughout the Continental *ius commune*. Native Scots law consequently developed in line with the Civilian legal tradition and as such the law which our institutions borrowed was principally Roman (and particularly from the 17th century Roman-Dutch).[9]

In borrowing law, few lawyers or legislatures take time to consider whether the law which is being transplanted is a good 'fit' with the system (nor indeed the social conditions of the system) to which it is transplanted. Legal practitioners cite what they know, or what materials they are able to find, in their submissions before the court. They do this in line with their training and understanding of what is likely to persuade the decision-maker(s), not with a view to the betterment of the abstract 'law'. Governments and legislatures do not typically care what is borrowed because, as indicated above, they have little interest in the actual content of their jurisdiction's legal rules. Their concerns are principally political and neither politicians nor the public have much interest in technical matters of law reform, save in the face of agitation from (*e.g.*) pressure groups.

The Scottish Law Commission was established in 1965, in part to combat governmental indifference to important matters of technical law reform. The Commission is statutorily bound 'to prepare and submit to the [Scottish] Minister[s] from time to time programmes for the examination of different branches of the law with a view to reform'.[10] These programmes are not (at least not obviously)[11] constrained by political considerations and resultantly the Scottish Law Commission has, throughout its history, produced reports, discussion papers and draft legislative Bills on technical matters of law reform which are unlikely to excite any voter-minded politician. Still, as any lawyer knows, the content of private law rules is of the utmost importance to society; the work of the Scottish Law Commission is vital and through its efforts significant law reform such as the abolition of feudal tenure has been effected.[12]

The existence of the Scottish Law Commission ought to militate against the tendency of legislatures to uncritically 'borrow' law, or provisions of law, from other jurisdictions and illogically transplant them to an unfamiliar system. Although the Commission is indeed duty-bound 'to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions',[13] there is no temporal or geographical constraint placed on the comparative purview of the Commission. The Commission is as free to consider material from Scottish legal history alongside developments in jurisdictions as diverse as England and Wales, Poland and Sri Lanka, should it so choose. If a legal concept, or provision of law, is found to exist (or to have existed at a particular time) in a foreign jurisdiction, the Commission can – through its reports – critically assess the desirability of transplanting that concept or provision into our jurisprudence and, in

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[9] For comment on the parallels between Scotland and South Africa, see Alan Watson, *The Birth of Legal Transplants*, [2013] 41 Ga J Int'l & Comp L 605, at 606

[10] Law Commissions Act 1965 c.22, s.3 (1) (b)

[11] The lofty duties which burden the Scottish Commissioners and Commission, as well as that of England and Wales, of course outweigh the resources with which they are provided: See Shona Wilson Stark, *The Work of the British Law Commissions: Law Reform... Now?*, (Bloomsbury Publishing, 2017)

[12] See, *e.g.*, the *Report on the Abolition of the Feudal System* (Scot Law Com No 168) and resulting Abolition of Feudal Tenure Etc. (Scotland) Act 2000

[13] Law Commissions Act 1965 c.22, s.3 (1) (f)

doing so, the Commission may consider whether or not the receipt of this would in fact be a good 'fit' within Scots law.

It is worth noting, at this juncture, that the legislation which set up the Scottish Law Commission was not originally intended to do so. The provisions for the Scottish Law Commission were rather 'tacked on' to the 1965 legislation designed to create the Law Commission for England and Wales.[14] This was not the case due to indifference on the part of the legislature, but rather because 'Scots law was generally believed to be in less need of reform than English law, due in particular to its partially Civilian heritage'.[15] This Civilian heritage is rich and affords Scots lawyers and jurisprudents a considerable advantage over those schooled only in the Common law tradition. Scots law, unlike that of England and Wales, has been rationally systematised since at least the Seventeenth century and has historically comprised a coherent body of law, rather than a series of discrete rules of law. The traditional Scots focus on 'principle' rather than pure precedent has, in the opinion of many commentators from outwith the system, served to distinguish the Scottish legal system as a model from which much can be learned.[16] There is, as Professor MacCormick observed, 'real virtue in a concentration upon basic principles in the working of the law'[17] and, as we are reminded by the title of the recent Festschrift for Professor Gretton, there is 'nothing so practical as good theory'.[18]

Such is of course not to say that there are no aspects of Scots law which are in need of reform. There are a great many inconsistencies, absurdities and problems within the system, which really ought to be stamped out or resolved. The work of the Scottish Law Commission over the past fifty-five years has been invaluable and the reports that the Commission have produced, even if never enacted into law through legislation, make for excellent resources which might be fruitfully mined by practitioners, academics and law students alike. That the Commission recently set their sights on the law of defamation and verbal injuries, which is in a particularly sorry state and has been since at least the Nineteenth century,[19] was thus, *prima facie*, a development to be welcomed. Alas, the Bill ultimately proposed by the Commission[20] – and adopted for consideration by the Scottish Parliament – is largely in its scope and application a carbon copy of the English Defamation Act 2013.

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[14] Though, here, I refer to the 'Law Commission for England and Wales', rather like the 'Football Association', 'Rugby Football Union' and various other such bodies, the geographical purview of the Anglo-centric Law Commission is not eponymously specified.

[15] Shona Wilson Stark, *The Work of the British Law Commissions: Law Reform... Now?*, (Bloomsbury Publishing, 2017)

[16] See, for instance, the comments recorded in Hansard in the course of the debate (*e.g.*, HC Deb 8 February 1965, col.56, *per* Sir Eric Fletcher) and recall, of course, the remarks of the French jurist Henry Lévy-Ullmann, who in 1924 held that 'Scots law as it stands gives us a picture of what will be, someday, the law of the civilised nations': F. P. Walton (trans.), *The Law of Scotland*, [1925] Jur. Rev. 370, at 390

[17] D. Neil MacCormick, *"Principles" of Law*, [1974] Jur. Rev. 217, at 226

[18] This quotation is attributed to the social psychologist Kurt Lewin – see *Psychology and the Process of Group Living*, [1943] Journal of Social Psychology 17 113. For George Gretton's *festschrift*, see Andrew J M Steven, Ross G Anderson and John MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton*, (Avizandum, 2017)

[19] See John Blackie, 'Defamation' in Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations*, (Oxford University Press, 2000) and Kenneth McK. Norrie, 'The Scots Law of Defamation', in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: Dundee University Press, 2009)

[20] The Defamation and Malicious Publications (Scotland) Bill 2019

This is, as I recently argued in a short article in the Scots Law Times,[21] regrettable for a host of reasons. Prime amongst these is the fact that the Bill as introduced would eradicate an effective means of protecting the non-patrimonial (*i.e.*, dignitary) interests of persons in Scotland. The Scottish delict of defamation has historically been, like 'assault',[22] properly speaking a tertiary sub-category of the delict of 'Injury' (*iniuria*) received from Roman law in the Institutional period. Although the term *iniuria* may be familiar to lawyers who recall discussion of the Aquilian *damnum iniuria datum*,[23] the word used here has a discrete and technical meaning however. In this context, 'injury' does not mean 'bodily wounds',[24] but rather 'contumelious wrongdoing' which inflicts affront (rather than causing *damnum*, *i.e.*, 'loss').

The historical basis of the Scottish delict of defamation is thus fundamentally distinct from the law of slander and libel which developed south of the Tweed. Indeed, the Scots law of delict, more broadly speaking, is not at all like the Anglo-American law of torts, which is not itself concerned with a general principle of reparation for wrongdoing but rather with discrete 'torticles' into which specific forms of wrongdoing must be found to fit if they are to be actionable.[25] The Scots law of obligations was neither influenced nor hampered in its development by the English forms of action;[26] conversely, English law did not develop an analogue to the Roman *actio iniuriarum*. Absent statutory intervention, there is no 'torticle' quite like *iniuria*.[27] The concept of 'dignity' has not traditionally been regarded as an interest which is worthy of legal protection in England; by contrast, the *actio iniuriarum* expressly exists, in Roman law and modern Roman-influenced systems, to afford *solatium* to those who have suffered dignitary affront.[28] The advantages of the latter position over the former are readily apparent: while legislative intervention was required, in England, to introduce an '*iniuria*-like tort',[29] a properly developed *actio iniuriarum* has the potential to afford redress, at common law, in cases of egregious wrongs which have not resulted in patrimonial (*i.e.*, monetary) loss – as in cases of, to take but one example, 'revenge porn'.[30]

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[21] Jonathan Brown, *The Defamation and Malicious Publications (Scotland) Bill 2019: An Undignified Approach to Law Reform?* [2020] SLT (News) 131

[22] In the delictual sense, though the *actio iniuriarum* legacy of the wrong does, to a lesser extent, remain relevant to the modern crime: see Jonathan Brown, *When the Exception is the Rule: Rationalising the 'Medical Exception' in Scots Law*, [2020] Fundamina: A Journal of Legal History (forthcoming).

[23] The Latin terminology, in this sense, continues to find use in court – see, *e.g.*, *Docherty v Secretary of State for Business, Innovation and Skills* [2018] CSIH 57, at para.6 (*inter alia*).

[24] Ironically, within terms of the All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015, the Sheriff Personal Injury Court does not in fact have jurisdiction to hear cases of 'injury' in the sense used here (see, particularly, art.3 of that Order).

[25] See Bernard Rudden, *Torticles*, (1991-1992) 6 Tul. Civ. L.F 105

[26] Niall R. Whitty, *The Development of Medical Liability in Scotland*, in Ewoud Hondius (ed.), *The Development of Medical Liability*, (Cambridge: CUP, 2010), at 57

[27] See the Protection from Harassment Act 1997 and François du Bois, 'Harassment: A Wrong Without a Right?' in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013)

[28] Affront to reputation is but a facet of affront to 'dignity' in the wide sense of the sum of one's personality interests: see Jonathan Brown, *The Defamation and Malicious Publications (Scotland) Bill 2019: An Undignified Approach to Law Reform?* [2020] SLT (News) 131, at 132

[29] See du Bois, *ibid*.

[30] See Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems'*, [2018] Legal Studies 396

In light of the notable jurisdictional differences between Scotland and England, it is disheartening to see the Scottish Law Commission recommend the importation of an overtly English framework to govern 'defamation'. Other than (very briefly) noting that the Roman division between *iniuria* in the sense outlined above and *injuria* in the sense of the Aquilian *damnum injuria datum*,[31] the Scottish Law Commission's review of the law of defamation and verbal injury paid scant attention to the history of Scots law in this area. Instead, we have here a recommendation that the legislature borrow a legislative enactment from a jurisdiction with which the present law has little in common. With the rich Civilian history of Scots law to draw on, alongside developments in comparable jurisdictions such as South Africa[32] and the innovations of Continental European jurisprudence,[33] the Scots law of defamation could, as it stands, readily be reformed in an innovative manner which is not only consistent with the wider norms of Scots law, but which might stand, in turn, as a source of inspiration to other borrowers of law. At one time, as discussed above, Scots law was held in high esteem by comparative commentators and lawyers from other jurisdictions. Unfortunately, the Defamation Bill suggested by the Scottish Law Commission, which will likely be passed by the Scottish Parliament, stands as merely a borrowed object, rather than one which other jurisdictions – particularly non Anglo-American jurisdictions – may be inspired by and ultimately wish to borrow from.[34]

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[31] Scottish Law Commission, Discussion Paper on Defamation (Discussion Paper No.161), para.2.2

[32] See, *e.g.*, *Mineworkers Investment Co. (Pty) Ltd. v Modimae* 2002 (6) SA 512 (W), at 525E *per* Mr Justice Willis, who described the *amende honorable* (partly analogous to the Scots remedy of palinode) as 'little treasure lost in a nook of our legal attic'. See also Jonathan Burchell, 'Retraction, Apology and Reply as Responses to *Iniuriae*', in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013) at 206 and 212

[33] Consider, for example, the *Allgemeines Persönlichkeitsrecht* of German law (discussed in Reinhard Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition,* (Clarendon Press, 1996), at 1092), or the remedy of 'correction' present in Art.167 of the Dutch Civil code.

[34] As Watson notes, even 'a country whose laws are largely derivative may itself show great originality at times'. The example that he gives is of Scotland itself, noting that 'the Scottish Act c.45 of 1424 was the earliest statute in Europe to introduce free legal aid for the poor in civil cases'. Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (2nd Edn.) (Georgia University Press, 1993), at 78