Law Reform in a Mixed 'Civil Law' and 'Common Law' Jurisdiction

T. B. Smith
LAW REFORM IN A MIXED 'CIVIL LAW' AND 'COMMON LAW' JURISDICTION*

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It is high honour indeed to deliver the fourth Tucker Lecture on the Civil Law and to follow the three previous scholars of the highest distinction for whom I feel warm affection as well as admiration.1

Mixed Jurisdictions

A mixed jurisdiction such as Quebec, Louisiana, South Africa and Scotland, is one which, though basically civilian or romanistic, has been influenced to some extent by the Anglo-American common law. In 1963 at the Louisiana State Law Institute's Colloquium on Civil Law, I talked about "The Preservation of the Civilian Tradition in Mixed Jurisdictions;" in a sense, that lecture,2 serves as a preface to the present discussion. Some of the points may bear re-examination in the light of events since 1963 and in the new dimension of law reform with which I am now concerned. In 1965 the Law Commissions Act3 set up two Law Commissions: one for England and Wales; and the other for Scotland, the Scottish Law Commission. I served on the Scottish Law Commission as Commissioner on a part time basis since 1965, but from 1972 this has been my main work. In describing the various aspects of law reform in Scotland, some passing consideration will also be given to the other "mixed jurisdictions" such as that of Louisiana from which we receive enlightenment from time to time.

* The expression, "common law" is used with some regret in the Anglo-American sense. In Scots Law, "common law" has a different meaning corresponding to droit commun, diritto commune, etc. in European systems. This article is an expansion of the fourth of the Tucker Lecture Series, delivered at the Louisiana State University Law School on February 20, 1975.

** Honorary Professor of Law, University of Edinburgh, Scotland; member of Scottish Law Commission.


3. Law Commissions Act 1915, c. 22.
With the exception of Scotland, it seems that the mixed jurisdictions have resulted from double colonisation or its close equivalent.\textsuperscript{4} There has normally been colonisation by a state with a civilian system—France, Spain or the Netherlands—followed by annexation or purchase by a state governed wholly or mainly by the Anglo-American common law. Ascendancy of common law influence is then secured, at least for a time, by establishing an ultimate appellate jurisdiction and the control of legislation; by introducing, where necessary, English as an official language; and by investing the judges with a special prestige. The role of the bureaucracy in forcing through uniform solutions has been hitherto underestimated. Procedure and the style of administering justice tend to follow the common law pattern rather than a civil law pattern. Certain branches of law—especially criminal law, commercial law, constitutional law and fiscal law—may well be grafted more or less completely from common law stock. As the role of judge and judge-made law gains ascendancy, the roles of the jurist and of indigenous legal literature tend to decline in importance. However, those mixed systems which have their private law in codified form, or use a language other than English, can probably more easily resist undue influence from the common law—though they do not always or completely succeed. One tends to find in all the mixed systems three legal attitudes among practitioners and jurists: first, those (mainly practitioners supported by commercial interests) who favour so-called law reform by increasingly importing common law style solutions; secondly, those who are prepared to introduce carefully selected and comparatively evaluated common law type solutions; and thirdly, those (including a strong element of jurists) who react emotionally against any common law type of legal influence.

\textit{Constitutional and Governmental Problems}

Scots law, one of the uncodified “mixed systems,” has somehow managed to survive despite pressures for assimilation to English law which have no real counterpart

elsewhere. For example, I know of no other unitary state other than the United Kingdom with a plurality of legal systems but with only one centralised executive and legislature serving these systems—and that legislature and executive overwhelmingly dominated by representatives of one country in that state. Moreover, the policies of the very large central Government Departments, including those concerned with foreign affairs, trade, industry, natural resources and employment are primarily concerned with legislation of a form and content which seem appropriate for the larger country. Though the Scottish Law Commission has the will and the capacity to recommend sound reforms and has achieved a good number, the whole constitutional and bureaucratic structure related to law reform for Scotland is at present so ill conceived as to provoke mirth or tears according to the viewpoint of the observer. For this situation, the Scots themselves are to some extent to blame.

However, we seem to be on the threshold of radical constitutional changes—which could have important consequences for legislative reform in Scotland and Britain. The former Prime Minister, Mr. Heath, of the Conservative Party, took the United Kingdom into the European Economic Communities (E.E.C.) almost certainly against the wishes of the majority of the electorate—who in any event had a minimal grasp of what was involved. Subsequently, Britain has been shaken by the general economic blizzard. Prices of food, for example, have risen steeply, and the average voter probably concludes that the ills which have befallen the country are due to her accession to the Treaty of Rome. Mr. Wilson, the present Labour Prime Minister, pledged himself and his Government to hold a referendum in June 1975 on the issue whether Britain should withdraw from the European Communities. Mr. Wilson and a number of his Ministers were in fact anxious to stay in, while other Ministers were vehement in their opposition to such an idea.

The holding of a referendum in Britain was a novelty, and the main issue—or ostensibly the main issue—of adhesion to the E.E.C. was to a large extent obscured by a power struggle within the Labour Party itself and by attitudes towards devolution within the United Kingdom. Eventually on 5 June the country as a whole decided by 67.2% to 32.8% (on a 64.6% poll) to adhere—but the Scottish “No” vote was significantly higher than that in England, and in Scotland, two
electoral regions actually voted “No” by a substantial majority. Had Scotland’s political and economic status within the United Kingdom and within the Communities been determined before the referendum, many Scottish voters would have felt more confidence in their choice. It is one thing to reassert Scotland’s traditional legal, economic and cultural ties with Western Europe, but quite another to accept remoter controls mediated through London. Moreover, the so-called “Europe of the Nine” excludes Norway and Sweden which have probably much more significance for Scotland than for England. How Mr. Wilson (or his successors) will in the future seek to face the legal challenges of continued membership of the Communities is for prophets rather than for lawyers.

It is not necessary, however, to peer into the crystal ball to appreciate that, for the time being, the law-making powers of the European Communities affect the legal systems of the United Kingdom in a variety of ways. Some matters justiciable in British courts and in the European Court in Luxembourg—where the present British judge, Lord MacKenzie Stuart, is from the Scottish legal profession—result directly from the Communities’ own legislation, while in other cases the United Kingdom Parliament is bound to give effect to the policies of Community legislation or conventions through British Acts of Parliament. Even such internal law reform measures as are under active consideration—such as the Scottish law of bankruptcy—have to take into account E.E.C. activity in the same field. Since the leading partners in the E.E.C. are countries of the civil law, and common lawyers for the first time find themselves in a minority, Anglo-Saxon attitudes in law-making may have to give way to civilian solutions. Due to its background, Scots law should be easier to harmonise with European solutions in the private law field and, certainly one can envisage a progressive programme of harmonisation in the main areas of commercial law—sale and perhaps contract more generally, for example—a theme to which I shall return. With this new European dimension, the arguments for assimilating the laws of Scotland and England may no longer be relevant in a number of contexts.

Other important constitutional changes are anticipated which could have important consequences for Scottish law reform—in particular the establishment of a legislature for Scotland, for the first time since the Union of 1707. By the Union Agreement of that year, the kingdoms of Scotland and
England and their respective Parliaments were superseded by the new State of Great Britain and the new Parliament of Great Britain.\(^5\) However, although the Agreement contained safeguards for Scots law, the organization of this new Parliament followed, on the whole, the English model. So long as the Westminster Parliament was reluctant to legislate—especially for Scotland—unless there was obvious need for intervention, the inconvenience of one Parliament making laws for two legal systems was more or less tolerable, but from about the mid 19th century successive British governments have increasingly intervened by Acts of Parliament in all aspects of public and private law. The legislative programme is crowded, and the general attitude has been that, if a measure is good for England, it must be good for Scotland too. Even if the policy of reform would be good for both countries, to save Parliamentary time a measure is only too frequently drafted for Britain in English form, and Scotland is “brought in” by a number of application provisions at the end.

It was not, however, due to any real appreciation in London that Parliament at Westminster was not the most suitable organ for legislating on Scottish affairs which led to recent grudging proposals to establish a legislature in Scotland for such matters. The twin phenomena of the rise of the Scottish National Party, and the discovery of rich oil resources off the north east coast of Scotland, made rapid converts of the two large political parties at Westminster. It is not yet clear what precisely the Labour Government’s proposals for devolution and a Scottish Assembly amount to in terms. Significantly there has been no suggestion of consulting the British people on this issue by referendum—though it would seem to be as practicable to do so as on the Common Market issue, and indeed might have been practicable to do so at the same time. Neither the Royal Commission on the Constitution,\(^6\) which reported in 1973, nor the Labour Government supported the idea of a federal solution which many might regard as the acceptable minimum—for the altogether unsatisfactory reason that the English do not wish a Parliament of their own while they can dominate a United Kingdom


\(^6\) ROYAL COMMISSION ON THE CONSTITUTION, Cmnd. 5460-61 (1973).
Parliament, and control through London of Scottish resources is deemed essential for the viability of that kingdom as a whole.

After the June Referendum, leading "pro Marketeers" in the Government construed the results to indicate that political expediency no longer constrained them to continue with the proclaimed policy of establishing an effective devolution of legislative power to a Scottish Assembly. Those Ministers who were more astute politically—though possibly equally unsympathetic to devolution from London—eventually prevailed after what seems to have been a hard-fought Cabinet decision. The motives for conceding devolution are grudging, self interested and have little to do with the well-being of Scotland. For this reason politicians probably find the implications of ill considered promises both embarrassing and fundamentally perplexing. The package which is being prepared is a closely guarded secret—and when opened may prove a Pandora's box. Unlike what happened during the negotiations for the Union of 1707, leading legal institutions and personalities have not so far been consulted by those entrusted with drafting the new constitution for Britain.

Though one alleged reason for giving Scotland a legislature is the fact that Scotland has a separate legal system, it is very doubtful whether, at least initially, the legislative powers transferred to Scotland will be nearly as extensive as those conferred on Louisiana within the American constitution or on the Northern Ireland Parliament at Stormonth by the Government of Ireland Act 1920. Moreover, without transfer of real power over revenue and resources—including executive as well as legislative devolution—there could be grave dangers that a Scottish Parliament would become a mere "talking shop," a danger which is increased by the fact that the Conservative Government in 1973 passed the Local Government (Scotland) Act creating regional and district councils, on the assumption that there would be no devolution of governmental powers to Scotland as a whole. As matters stand, one of the new Regions established by this Act, Strathclyde, comprises about half the population of Scotland. Meanwhile it is envisaged that despite devolution of certain

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7. 10 & 11 Geo. 5 c. 67. The powers of the Stormonth administration are, of course, currently curbed during the state of emergency in Northern Ireland.
legislative powers to Scotland, Parliament at Westminster will continue to legislate both for British and English matters.

**Law Reform in Scotland**

Clearly all concerned with law reform in Scotland will be obliged to take into account new dimensions in the future—looking outwards to the E.E.C. and at the potentialities of putting the home front in order in areas where Scottish legislation is expedient. One cannot take for granted, however, that a Scottish Parliament, if it models its procedure and style of legislating on the Westminster House of Commons, will have “lawyers’ law” high on its list of priorities.

To what extent does Louisiana's civil law tradition stir a quasi-religious enthusiasm in the bosom of the average white-collar or blue-collar worker in the State or in that of the average housewife or student outside of law school? Do they manifest the same devotion to it as, say, their chosen baseball team? So far as Scotland is concerned, though the country in a sense survived the Union because of her separate legal system, and that system is part of the total cultural heritage, the average man and woman regard certain elements in the profession of law with some reserve, while the legal system, like a drainage system, tends to attract lay interest mainly when it obviously works badly. The Scotsman in the street would no doubt back Scots law against English law for much the same reasons as he would back a Scottish team in an international contest—but not if he thought that he might miss out on some financial or other benefit such as a tax concession which was offered as political attraction. Your own present law of trusts seems to indicate similar thinking.

On the other hand, any Scottish Parliament might be expected to contain substantially more Scots lawyers than the Scottish legal profession's very thin representation at Westminster. In time the legal element could become an effective pressure group for law reform in a Scottish Parliament, although they would have to contend with those who consider that lawyers are the natural enemies of reform and that sociologists alone hold the nostrum for the relief of society's ills; they would also have to contend with strong commercial interests.

Pressures for assimilation of Scots and English law in the
commercial field have been formidable since the mid 19th century. Some of this has arguably been beneficial, while in other respects so called reform by anglicisation has clearly been unfortunate, to state the position at its lowest. The interaction between civil law (in the sense of private law) and commercial law is of great importance. Commerce in a sense knows no frontiers, and the comprehensive economic interests of nation-states comprising different types of legal systems in their component "states," "provinces" or "countries" tend to take priority in the legal domain. Thus, of the "mixed systems," probably South Africa alone would be theoretically free to restructure her commercial law on basically civilian lines—though this seems a most unlikely development for historical and practical reasons. As is well known, the federal or national law of the United States may have repercussions in the commercial field notwithstanding the Louisiana Civil Code and State legislation. Similarly in Quebec the civil law may have to give way to federal law in the commercial field; the economic interests of Canada as a whole take priority. The respective limits of civil and commercial law are not, however, easy to define; there seems to be an inexorable principle that where central power can extend its influence at the expense of a local civil law by invoking jurisdiction over commercial matters, that power will be extended.

If this is the case in Louisiana and Quebec which have their civil codes and State or Provincial legislatures, it is readily understandable that in a unitary state such as Britain with two legal systems and one Parliament for both, Scotland's opportunities for securing reform of the law in the areas of, say, corporeal moveable property and obligations, confront formidable difficulties. These difficulties are not eliminated by the probability that the reforms proposed would accord more closely with the solutions of neighbouring civil law states—though it would be rash oversimplification to imply that this would always be so. Who can say what the political future holds regarding the United Kingdom and the European Communities? Two things at least are sure: first, in legal negotiations in the Communities, the United Kingdom will seek to maintain the maximum influence of English law;

and secondly, that a separate effective presentation of Scotland's position cannot be envisaged in the present system.

For the avoidance of doubt, however, it should be made clear that there is no ill will between the peoples of Scotland and England—though there may from time to time be resentment against the insensitivity and complacency of some elements in a London-based or controlled bureaucracy and political machinery.

**Legislative Devolution**

Those responsible for law reform in Scotland would not be using time and resources wisely by planning for the consequences of more than limited legislative devolution—falling short of a federal solution. The safeguards for our legal system provided by the skeletal written constitution of 1707 have proved inadequate. Whatever the extent of devolution which is eventually conceded to Scotland, considerable thought will have to be given to the problems of how possible conflicts between the powers of Westminster and Whitehall on the one hand, and a Scottish legislature and administration on the other, can be resolved. The present unsatisfactory state of the relationship in legal matters between London and Edinburgh and of the legislative machine was scrutinised and criticised in a trenchant address by the Chairman of the Scottish Law Commission, Lord Hunter, in the spring of 1975 shortly after the Fourth Tucker Lecture had been delivered. In its published form this address not only identifies present difficulties in the operating of the legislative machine but sign-posts at least by implication their aggravation in a situation of devolution. As yet no one can predict with confidence how or by whom control will be exercised over potential conflicts between the powers of the Westminster Parliament and the Scottish Assembly—in which, party alignments may well not correspond with each other.

The respective roles of legislature and administration are not the same in Britain as in the United States, but in the context of devolution it may be hoped that in Britain as in the United States the Judiciary will be entrusted with the ultimate policing of competing legislatures—rather than resort-

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ing to the crude (and politically hazardous method) of allowing the central executive to exercise an ultimate veto in legislative form. At all events, one urgent problem to be solved when devolution comes in Britain is how legislative powers reflecting two different basic legal traditions can be harmonised.

Another problem of legislative devolution may well be if legal reforms are accepted by international convention or are required within the structure of the E.E.C., but the legislative implementation of the policy of these reforms is left to states bound by the international obligation to determine how and to what extent such implementation could be left in Scottish hands? What, moreover, would result if an internal proposal for Scottish law reform represented a policy which corresponded to a continental pattern but was unacceptable to English lawyers? Certainly foreign affairs would be reserved in the United Kingdom to the central government, but in practice it is not the Foreign Office but certain important Whitehall Departments which formulate policy regarding proposed international agreements on such matters as protection of bona fide acquirers of real rights over moveables, penalty clauses in contracts, "products liability" and so forth. If the Departments advising the Foreign Office opposed particular solutions on an international level, is it likely that they would remain inactive if the same solutions were proposed by Scottish law reform agencies as reforms in Scottish domestic law?

"Law" and the Executive

One must stress the relevance of an expanding and powerful centralised executive as a potential curb on what in a very loose sense could be called "lawyer's law." In fact, virtually no reform measure—even of clarification and restatement—is without social, economic or political implications of some kind. Any agency proposing law reform measures has, if its proposals are to succeed, necessarily to find support from the executive—especially the very experienced permanent bureaucrats who have their own esprit de corps. Lord Justice Scarman’s Hamlyn Lectures11 make clear that the former Chairman of the Law Commission (for England and Wales) is deeply concerned with the relationship between

the law which lawyers regard as their proper domain and the executive. Marcel Berlins wrote

Cassandra's punishment was to be disbelieved when she correctly prophesied the gloomy future of her society. Lord Justice Leslie Scarman has taken the risk of assuming that mantle. Sir Leslie's argument is that if the influence of law and the rule of law continue to decline, the administrative authorities will become dominant. Control over their decisions will be exercised by the Government itself, not by the Courts. There would be no effective way for the citizen to challenge governmental or administrative acts.\(^{12}\)

Sir Leslie himself observed

To satisfy the conscience of the nation the state has had to move into the empty spaces of the law, the deserts and hill country left uncultivated by distributive justice, and there to make provision for society as a whole .... Thus the welfare state is challenging the relevance, or at least the adequacy of the common law's concepts and classifications. Fault, trespass, property, even marriage are now seen to be an insecure base for the development of a law suited to the needs of our society.\(^{13}\)

So much from the cradle of the "common law." Sir Leslie's reflections on the E.E.C. depend—as do mine—on imponderables. He seems almost to pronounce a *viaticum* over the private law which has been cherished by civil lawyer and common lawyer alike. Lord Justice Scarman calls on English lawyers for a radically new way of thinking, concentrating on new sources and fields of law. How this could curb the administrative juggernaut is not clear. I accept that in some fields fault liability may be superseded by insurance, that in certain circumstances a public authority may be a necessary substitute for parental responsibility and that in some cases the consumer on credit needs protection from exploitation, and so forth. Of course I believe in social justice—but not in hirsute social workers under every bed; sociologists in places of judges on the bench; and the regulation of each detail of work and leisure by an anonymous administrative machine. My desire is for good law: from too many laws, good Lord

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deliver us. Planning law, laws protecting the environment, regulating the economy and providing for social welfare are necessary aspects of modern society. Such laws affect all aspects of daily life, but they often bear as little relation to law in the jurist’s sense as does a railway timetable bear to a work of literature.\(^\text{14}\) It is obvious that public health—control of epidemics, the ensuring of sound water supply and drainage system, and so forth—is vital to the community. However, this public domain does not oust the surgeon and physician from the more traditional concern with patients entrusted to their professional skill and care. May there not be an analogy with the various functions of law and lawyers in society today?

**Scarman Proposals**

Lord Justice Scarman’s proposals for the country’s ills are largely based on the Law Commissions which should be specifically requested to conduct a feasibility study of a programme to move the law from its present basis to a statutory basis—a code or set of interlocking codes—and should consider the implications of statutory drafting and interpretation in going over to a law grounded on statute. He would propose *inter alia*\(^\text{15}\) a new constitutional settlement enacted by Parliament after consultation with the judges, nationalist interests, trade unionists and others; the establishment of entrenched provisions (including a Bill of Rights) and restraints upon administrative and legislative power, protecting it from attack by a bare Parliamentary majority as at present. He also favoured the establishment of a Supreme Court of the United Kingdom with the duty of protecting the Constitution including the powers of legislatures established by devolution from Westminster. Special attention should be given to problems of codification and reform especially in relation to administrative law. A number of these proposals appear admirable. The pivot of his very ambitious scheme which has implications for the United Kingdom as a whole seems to be the Law Commission (for England and Wales) and the Scottish Law Commission. However, regretfully, I doubt whether the Law Commissions even in collaboration—at least as staffed, financed and constituted as at present—are really capable of coping with all Sir Leslie’s projects. We in Edin-

\(^{14}\) **Lord Cooper,** *Selected Papers* 174 (1957).

\(^{15}\) **L. Scarman,** *English Law*—The New Dimension 76 (1975).
burgh tend to have our feet on the ground and to tackle feasible objectives within our somewhat limited resources.

Scottish Law Commission

Now I wish to speak from the viewpoint of a Commissioner of the Scottish Law Commission—indeed as its only foundation member still serving. A professor in his closet may disregard the harsh realities and uncertainties of life, and plan great reforms according to his vision. Such is not the role of myself or of my four colleagues nor of the Scottish Law Commission's supporting legal staff. We are not jurisprudential monks—nor again have we political power to carry our proposals into effect. The first Chairman of the Scottish Law Commission, Lord Kilbrandon, who now sits as one of the two Scottish judges in the House of Lords, summarised our functions under the Law Commissions Act 1965, succinctly as follows:

The general duty of the Commissions is to take and keep under review the law of their respective countries with a view to its systematic development and reform. We are directed to consider, among other things, the possibilities of codification, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, and in general the simplification and modernisation of the law. We have to receive and consider, in addition, any proposals from whatever source, for the reform of the law which may be made or referred to us. Our functions may be described under two heads. First, we have to prepare and submit to the Government, from time to time, programmes for the examination of different branches of the law, with a view to reform. After these programmes have been approved, it is our duty to prepare the background work leading to legislation, or to submit draft bills prepared by ourselves. Secondly, it is our duty to provide advice and information to Government Departments and other authorities or bodies who may be concerned in the amendment of any branch of the law.16

The statute creating the Scottish Law Commission and the Law Commission (for England and Wales) requires them

to obtain information on the legal systems of other countries likely to facilitate performance of their functions; and also, in the exercise of their functions, to consult with each other. Though matters which give rise to social, political or economic controversy (e.g., no-fault liability or constitutional devolution) are likely to be referred to an ad hoc Royal Commission or Departmental Committee with a wide spectrum of membership, we have in fact had remitted to us certain socially controversial matters—such as divorce law reform and liability for ante-natal injury. On the whole it is with the traditional categories of the law that the two Law Commissions in Britain—commissions of lawyers only—are concerned, and within the Scottish Commission my particular areas of primary responsibility are Obligations and Corporeal Moveable Property which in Scots law are basically civilian in content.

The remainder of this article is confined to the traditional areas of the civil law with which the Scottish Law Commission is at present concerned; very relevant to these reflections are the three Tucker Civil Law Lectures17 which have already been delivered and also two papers published recently in the Louisiana Law Review. These are Colonel Tucker's Au-delà du Code Civil, Mais Par le Code Civil18 and A Renaissance of the Civilian Tradition in Louisiana19 by Justice Barham of the Supreme Court of Louisiana.

Professor Zepos in his lecture The Legacy of Civil Law20 has demonstrated convincingly that that legacy, though mediated through codification, has also been transmitted otherwise. Professor Jacques Vanderlinden of Brussels has also traced the elusive definition of “a code” in his impressive thesis Le Concept de Code en Europe Occidentale du XIIIe au XIXe Siècle.21 Scots law, like the Roman-Dutch systems, has not been codified—and I shall touch on the prospects of its codification. Professor René David doubts the wisdom of attempting again at this time the general revision of the Code Civil—but contemplates the practicability of separating the law of obligations and commercial law from the rest of the

17. See articles cited at note 1, supra.
Code as has been done in Switzerland. Early unification of law in these areas is anticipated in implementation of E.E.C. policy. Professor Crépeau, President of the Commission for the revision of the Civil Code of Quebec sees his task as re-vision,\textsuperscript{22} and a number of the new developments which he contemplates will doubtless be grafted on to most enlightened civilian systems even if not onto their civil codes. The Code for Quebec, as I think the Louisiana Code and our own uncodified system in Scotland as stated in the institutional writers, are prized as symbols of our separate cultural identities as well as for jurisprudential reasons. But law must react to social and economic change. Our clients and our fellow citizens care little for our private devotion to a traditional tree, however deep its roots, unless it grows acceptable fruit for contemporary consumption. I must confess also my shameless green-eyed envy of the encouragement given by Executive and Legislative alike in Quebec and Louisiana to the comprehensive proposals of law reform agencies in these jurisdictions.

As we shall see, the two Law Commissions in Britain find that the actual legislative enactment of their proposals can create unresolved problems. The problems of oil and gas law are new to Britain, and, though the oilfields already discovered are off the Scottish coast, London has so far maintained control of the law relating to its exploitation. The civilian approach to these problems as expanded by John Tucker may become relevant if eventually Scotland assumes control. At present on the level of obligations, Anglo-American styles prevail—often with references to arbitration in London or according to the laws of an American common-law state. This infiltration of common law techniques cannot, however, avail where real rights such as servitudes are concerned, and I await with interest the reactions of some oil exploiters when the right to run pipes under land is challenged by a singular successor of the original grantor of a contractual “wayleave.”

The Scottish Law Commission formulates proposals in Programmes submitted to the Lord Advocate, and, once they are approved, no one can stop us working on these and reporting publicly—except indirectly by flooding us with other ur-

gent work. Among the matters which we have undertaken at our own request are Judicial Precedent, Obligations in general, Exemption Clauses in Contracts, Prescription, Title to Corporeal Moveables and Security Rights over them, Family Law, Succession and Capacity of Minors and Pupils. Our Third Programme—the most recent—is concerned with Private International Law matters mainly arising from European Economic Community Conventions or Hague Conference proposals—most of which have a civil law element. As our Annual Reports show we have made steady rather than spectacular progress in these fields—one of our most successful achievements being in the reform of the law of prescription.

At the outset, so far as our First Programme was concerned, we were in a state of enthusiastic innocence—our main worry probably being the very limited manpower and resources at our disposal compared with our English opposite numbers. We consoled ourselves with the quip that they had much more to reform in their law than we did in ours—a somewhat foolish quip, admittedly, when there was clearly so much to do. We envisaged that we would prepare Memoranda for consultation—identifying the area for reform, analysing the existing law and comparative solutions and indicating our provisional conclusions. Then, in due course, after full consultation, a Report would be prepared with draft clauses, and we trusted that our proposals would be duly implemented in legislation. We had no illusions that thorough preparation and consultation would take a lot of time. Instant law reform is almost ex hypothesi bad. Well, some of our work progressed propitiously and other aspects were to labour in troubled waters.

Precedent

In Scots law a limited doctrine of the binding single precedent has operated since about the mid 19th century, but is always qualified in Scotland by the rule that a single judge cannot prescribe a precedent and by the principle that the highest courts sitting in Scotland are in theory collegiate and can set aside a precedent which is later considered unsound. However, in civil matters only, an appeal lies from the Scot-

23. SCOT. LAW COM. No. 29 (1973).
24. SCOT. LAW COM. No. 1 (1965).
tish Courts to the House of Lords where it had been held, in an English appeal in 1898, that the House was absolutely bound by its own precedents. Whether this doctrine of inescapable infallibility applied to Scottish appeals had never been decided. The Scottish Law Commission recommended that legislation should make clear that it did not—and it was agreed with our English opposite numbers that, if they so wished, they should recommend that the relevant Bill should extend to England. In July 1966 the result was achieved in respect of all House of Lords appeals by a different procedure, which originated, however, from our proposal. Though we retain Judicial Precedent on our Programme for further consideration, the appropriate time will probably be when we have to consider the doctrine in relation to draft codification. A further problem will be the relation between judicial precedent and the works of our institutional writers such as Stair, Erskine and Bell which Madame Helène David in her *Introduction à l’Etude du Droit Écossois* aptly described as having an authority comparable in ecclesiastical terms to that of the Fathers of the Church. Further, she rightly discerns that these works might well have been the basis for codification of Scots law but for the Union with England. That foundation for codification remains a potent source of law at present and for any future codification comprehending Obligations and Moveable Property.

It is unlikely that we shall express in the immediate future any further views on the virtues or defects of judicial precedent. There is, for example, the question of multiple judicial opinions in appellate courts. A distinguished former member of the Law Commission (for England and Wales), Vice Chancellor Gower, has criticised strongly the practice of the House of Lords of delivering a series of lengthy speeches (i.e., ‘opinions’) in appeals, instead of a single speech specifying the grounds of decision. Only too often an appeal is decided by a 3:2 majority for divergent reasons. On the other hand Lord Reid (the Scottish judge who for many years presided over the Judicial Committee of the House of Lords and

who died shortly after retiring this year at the age of eighty-four after twenty-six years service as Lord of Appeal in Ordinary) strongly supported the value of having several speeches (opinions) by judges in deciding important appeals.\textsuperscript{28} Admittedly Lord Reid also considered that the expenses of House of Lords appeals should be met from public funds—but, even so, his preference for multiple speeches does not seem calculated to promote clarity in the law, though it may be of help to those who wish on a future occasion to reverse the majority's conclusion or give judges in lower courts more room for manoeuvre. The fundamental problem facing the British Law Commissions concerns the relation between precedent and codification. The views of Justice Barham on the judicial role in construing code provisions in relation to case law have interested me greatly.\textsuperscript{29} Within the European civilian systems there is considerable divergence in practice.

One of the outstanding books published in our times is Dawson's \textit{Oracles of the Law};\textsuperscript{30} I felt that he failed to emphasise sufficiently the fundamental concern with "the law" in the sense of a written provision which constitutes the point of departure in the codified civilian systems.\textsuperscript{31} He has particular praise for the modern German approach to judicial development of the law—which he concludes is not dissimilar to that of the United States, though cooperation between legal scholarship and the judiciary is not so close in America as in Germany. Dawson holds that

Now emancipated at last from excessive control of Roman law and Romanists, or Pandektists, and from the conceptual structure of the B.G.B. the development of German law is safe in the hands of judges who, though "learned men" themselves and supported by established legal scholarship, use and have used advanced case law techniques to develop the law.\textsuperscript{32}

He contrasts the position in France where, though the judges—especially in the highest courts—have disclaimed law making powers, they have in fact assumed it by adopting a

\textsuperscript{28} Reid, \textit{The Judge as Law Maker}, 12 J.S.P.T.L. (N.S.) 22, 28-29 (1972).
\textsuperscript{31} T.B. Smith, Book Review, 82 HARV. L. REV. 490 (1968).
\textsuperscript{32} J. Dawson, \textit{Oracles of the Law} 490 (1968).
cryptic style of opinion writing whose main purpose was to prove their dutiful submission, but which left them in fact more free.

To the extent that judges abstain from candid disclosure, the load is cast on others, outsiders [i.e., commentators]; being outsiders they must search out clues, speculate, surmise. This is the posture of French legal science, through the tradition that inhibits French courts in exploiting the modern resources of the reasoned opinion.33

It is well worth noting that very recently the Procureur Général près la Court de Cassation and Professor André Tunc of the University of Paris have—citing the practice of Louisiana—urged that French judgments should be more explicitly reasoned.34

Code Law and Case Law

The relation between code and precedent has greatly concerned the two British Law Commissions—though the occasion for actual resolution of the problem has not yet come. Judicial precedent in some form is an indispensable device in law making—but a rigid doctrine of stare decisis is intolerable in any viable legal system. My personal view is that the decisions of higher courts and of the higher judges are of importance—basically second only to the code itself—in any mature system. The higher the degree of generality in the code—the greater the role of the judicial interpreter. However, "the law" rather than judicial interpretation must in the end prevail. This is one of our particular problems in Britain. The Acts of the pre-Union Scottish Parliaments deliberately left to the judges a creative role, and one of our outstanding jurists, Mackenzie, in the 17th century could

33. Id. at 430-41.
justifyably write:35 "The easiest and plainest Part of our law are our statutes."

By contrast, the English tradition—which has now seeped into Scotland in construing British legislation—is that legislation is an encroachment on the common law, and therefore to be grudgingly and narrowly construed. Accordingly the draftsman of legislation resorts to a technique36 which is often incomprehensible to the ordinary man and is wearisome for court and counsel. Were any code to be drafted as are current statutes, or to be construed according to English notions, reform would be in large measure frustrated.

There is an added factor of difficulty when a code aims at reforming and unifying the laws of Scotland and England in an area where one system derives from the civil law and the other is of common law provenance. It would seem that codification in Franco/British (English) form can probably be effective—as witness the projected Seychelles reform37—but only if the relation between codification and judicial law making has been first resolved. In a situation where Scottish law and English law are to be codified, it seems to me that the code must necessarily exclude reference to pre-code case law, which would have different jurisprudential and doctrinal bases in the two systems, and that the gloss of subsequent case law should not obscure the precedence of the enacted code.

Codification

No Tucker Civil Law Lecture could be envisaged without some mention of the merits of codification. Reform by codification was expressly prescribed by the Law Commissions Act 1965. Since the Scottish Law Commission had selected reform of the law of Obligations in its First Programme and the English Commission had selected reform of the law of Contract, it was assumed that this provided a splendid opportunity to codify contractual obligations on a Great Britain basis. I was involved in this exercise from the outset until the Scottish Law Commission withdrew from it and, as a serving

Commissioner, protocol precludes me from twitching aside the veil of confidentiality and revealing Truth starkly naked. However, my former opposite number of the English Commission, Professor Gower who is now Vice Chancellor of Southampton University, is more free to expose her to a modest extent. I shall quote from an article published by him in the University of Toronto Law Journal and if I comment on his text this cannot be regarded as breaching confidence. My good friend the Vice Chancellor observed:

Another painful lesson that we learnt—and this certainly has relevance in the Canadian context—is that the difficulties of law reform are enormously increased if one is attempting to unify or harmonize two or more systems of law with different traditions, such as the common law and the civil law. We faced this in our joint projects with the Scottish Law Commission—notably in relation to our proposed codification of the law of contract. This project seems to me immensely worthwhile; at a time when we are going into Europe surely we should unify the contract laws of our small island, for the law of contract is the basis of commercial law? We embarked on it with goodwill and enthusiasm on both sides; but at present as a joint enterprise it has run into the ground. The difficulties have not arisen because the English and the Scots disagree on results, but because we speak different legal languages and arrive at the results by a different process of reasoning. And to those trained in the more philosophical 'civilian' school the process of reasoning is more sacred than it is to the common lawyer. If I may give an example: both we and the Scots agreed that, in certain circumstances at any rate, a unilateral promise not supported by consideration should be enforceable—as indeed it already is in both systems. I wanted to achieve this by defining a contract so that it would include such promises. But my opposite number on the Scottish Law Commission would have none of that. A pollicitatio, he said, was an enforceable voluntary obligation but it was not a contract and to pretend that it was would sap the very foundations of sound principle. To me that did not matter so long as we achieved the desired result; to him it was unthinkable. These differences in thought processes and vocabulary make unification extraordinarily difficult
even if the difficulties are not further aggravated, as they were in our case, by the difference in place of the two bodies and by the inevitable fear that the legal system of the majority would swamp that of the minority. Despite these difficulties a first draft of a Uniform Code has been completed by the Law Commission, but not one which is acceptable to the Scottish commissioners.\footnote{38}

From an English viewpoint that is a fair enough statement, though it should not be assumed that the joint English-Scottish team differed only regarding questions of presentation, nor that in matters of substance views were necessarily divided on national lines. I would perhaps question Dr. Gower’s priorities regarding unification of British contract law before entering the E.E.C., since harmonization with the majority might involve precisely the same conceptual difficulties for English lawyers as in dealing with Scottish lawyers but with English law in the minority vote. Actual formal presentation did, of course, raise fundamental differences of approach—the English school favoring “codification” in a style resembling the American Restatement, and the Scots on the whole favoring a style comparable with that of the Quebec or Louisiana Codes. I can in all honesty assert that there was little if any chauvinism among the representatives of the minority (i.e., the Scottish system) but there was a preference for civilian solutions. I doubt whether anyone who had not been closely concerned with a joint exercise such as that described by Dr. Gower has any real appreciation of the extent to which the doctrine of consideration has crept into the interstices of the English law of contract.

One of the first appointments to the English Commission was Dr. Andrew Martin Q.C., an able commercial lawyer in busy practice who had been associated with Mr. Gerald Gardiner Q.C. (later Lord Chancellor Gardiner) as joint author of Law Reform Now.\footnote{39} Dr. Martin has been trained in the European legal tradition as well as in English law, and I myself had studied and practiced both Scots law and English law. Having the advantage—or disadvantage—of being legally bilingual we were near despair whenever unilateral obligations (in the civilian sense) and unilateral contracts (in the common law sense), came up for discussion. Nor were these

\footnote{38. Gower at 264-65 and note 25.}
\footnote{39. G. Gardener & A. Martin, Law Reform Now (1963).}
the only topics on which there was misunderstanding rather than disagreement. The misleading approximation of "void" and "voidable" in common law contract law with absolute and relative nullity in the civil law is another source of mutual bewilderment. When it is said—as it often is said—that, apart from consideration, third party rights and specific implement (anglice “specific performance”), there is no great difference between the Scottish and English law of contract, the statement overlooks the fact that most western systems agree generally on the results which the law should achieve, but may differ greatly as to the techniques whereby these ends are to be achieved.

Especially in the honeymoon period when the two permanent Commissions had just been established by statute, there was enormous good will between the Scottish and English Commissioners. We regarded our opposite numbers as personal friends—not just as professional counterparts. If warmth of friendship could have fused two systems of voluntary obligations into a draft code we should have succeeded. Dis aliter visum.

The Scottish position is summarised in the Scottish Law Commission's Seventh Annual Report:

While recognizing that considerable advances had been made by our participation in joint discussions on the Codification of the Law of Contract we were becoming increasingly concerned at the area of disagreement that still existed on fundamental issues. Although a joint meeting was held in October 1971 to try to resolve the disagreements we continued to have reservations on the proposed structure of the Code, the method of its preparation and presentation, and the consequences it would have on our aim to secure beneficial harmonisation for Scots law. We have withdrawn from the exercise.

The unavailing effort to combine reform in detail of two divergent systems simultaneously with unifying codification had taught us all lessons of value. Both the (English) Law Commission and the Scottish Law Commission intend meanwhile to circulate independently—though in consultation with each other—Memoranda or Working Papers on particu-

41. SCOT. LAW COM. No. 28 par. 16.
lar aspects of the law of voluntary obligations or contracts to elicit, as is customary, the views of those most experienced and concerned. As I see it, the main English problem concerns the ramifications of the doctrine of consideration and the main Scottish problems probably concern the law of evidence—but many more problems have been identified as a result of the joint exercise which is now at an end. One may forecast that the English reforms will draw extensively on American and British Commonwealth materials, while Scottish reforms will take account of European, Quebec, Louisiana and South African solutions as well. Eventually, after a number of statutory reforms of the law of obligations in each system and after considering European perspectives, it may be thought appropriate ultimately to codify at least the law of Voluntary Obligations and Unjustified Enrichment.

From what has been stated earlier in this article—about Britain's relationship to the European Communities and about the extent of devolution of legislative powers to Scotland—it is impossible at present to determine the wisest policy for ultimate reform or codification of contract law.

One reason at least for not codifying Scottish criminal law has been that the pressures to accept the English semi-codifying criminal law statutes would have been formidable. Yet we have probably more control over our criminal law than over other branches of law. Within the present political framework of Great Britain it is almost impossible to envisage separate codification of the Scottish law of contract—especially if the English put forward a version of their own. It may be that if we remain in the E.E.C., the United Kingdom may in time have to adopt unifying continental style codes at least for commercial contracts—which could provide more satisfactory solutions from the viewpoint of the Scots lawyer than of the English lawyer. At present the Departments of Trade, of Prices and Consumer Protection, of Industry and of Energy—all Whitehall Departments with no Scottish legal element—exercise effective control over British trade and industry. They claim to dictate policy on Scottish commercial law, and, if one excepts contracts in respect of land, all contract law can by sophisticated argument be subsumed under the category "commercial" and therefore be controlled from London.

The Department of Trade and Industry—as it was then
designated—argued before the Royal Commission on the Constitution that economic efficiency required retention in Whitehall (London) of control over commercial law, and that serious inconvenience would be caused if devolution resulted in substantial disparities in that law on different sides of the Anglo-Scottish border. Their evidence was seemingly accepted by the Royal Commission (presided over by Lord Kilbrandon who had been the first Chairman of the Scottish Law Commission) whose 1973 report asserted

Any disparities in the law regarding industry and commerce in different parts of a single market area are inconvenient and damaging to efficiency . . . and there is recognition on both sides of the border that opportunity should be taken where possible to remove them. Thus we observe from the annual reports of the Law Commissions that a draft code of the law of contract, for application throughout the United Kingdom, has for some time been in preparation. There is a tendency internationally to move towards the adoption of uniform codes in several commercial fields so as to facilitate international trade, and the policies of the Department of Trade and Industry will in the future be developed within a European framework. This group of the Department’s functions would therefore offer little scope for devolution.42

What I find unacceptable is the assumption that not only policy but the manner of its implementation for Scotland should be denied to Scottish organs of government.

I cannot leave the topic of codification of voluntary obligations without noting two further matters of significance—the problem of the actual enactment of a code such as we envisaged and the related problem of hostility among influential members of the legal profession to the whole idea. Vice Chancellor Gower has again obliged me by lifting the veil to a modest extent. He observed

[S]ince reforms will be implemented, if at all, by legislation, it is essential that the Commission should have a close relation with the legislative process. This has two facets, the first of which was realised by those who estab-

42. ROYAL COMMISSION ON THE CONSTITUTION, Cmnd. 5460-61, par. 723 (1973).
lished the Law Commission, the second of which I think was not clearly foreseen.\textsuperscript{43}

The first facet concerned the drafting of legislation to implement the recommendations of a Law Commission. Dr. Gower is concerned with the position in England which is rather different from that of the Scottish Law Commission— but, of course, affects that Commission where "joint exercises" such as those on contract law and exemption clauses. The English draftsmen—"parliamentary counsel"—tend to take the view that they alone have the right to determine how any policy shall be expressed in statutory language and claim to be answerable only to the Prime Minister. Mr. Commissioner Gower, as he then was, was told by a former head of the British Civil Service: "You'll never achieve anything; the parliamentary counsel will defeat you." Gower was, however, a man of exceptional gifts of heart and mind and he recorded of his Commission's dealings with these experts: "Up to the time when I left I think that I can say that we had won more battles than we had lost—but the war still continues." Since he forbore to disclose the war map on the Contracts exercise I can only leave you to infer how it would have struck the draftsmen of, for example, the Code Napoléon or of the Louisiana Civil Code.

The second facet of the legislative problem which no one really foresaw and which no one has yet solved is how legislation such as a code could be enacted in Britain. The Vice Chancellor commented

In most of the countries of the New Commonwealth this is no problem; if the Government backs the bill it goes through like a dose of salts. Not so in the Old Commonwealth; certainly not in the case of the United Kingdom Parliament.\textsuperscript{44}

It is, of course, true that if a Government with a majority wishes to use three line whips and march its troops through the lobbies like sheep, legislation can be forced through in quick time and without much discussion. The European Communities Act 1972 which was of enormous constitutional importance was carried through somewhat in this manner. It would, however, be unthinkable that the United Kingdom Parliament would enact a Codification of Obligations Bill—

\textsuperscript{43} Gower at \textit{260}. \textit{Cf. REPORT OF RENTON COMMITTEE ON PREPARATION OF LEGISLATION (1975).}

\textsuperscript{44} Gower at \textit{261}.
say of three clauses with the Code itself as a Schedule. There would be a veritable field day for the lawyers in both Houses of Parliament and every law Member who had ever made a bad bargain would have his amendments to propose.

The Law Commissions' proposal to codify the law of Contract—in the case of the Scottish Commission as part of a more comprehensive project to codify Obligations—was not greeted with an enthusiastic response from the practicing profession. It is fair to observe that few people were very clear as to what exactly was envisaged, but early drafts were circulated for comment to a cross section of experienced and influential lawyers. The general English legal attitude to codification—unless semi-codification of the existing common law—is not encouraging. Lord Reid, the Scottish judge who became the ageless oracle of the English common law, was at first opposed to codification—but later modified his views to "proof before answer." In his Maccabaeanc Lecture "The Law and the Reasonable Man" delivered before the British Academy in 1968 he commented

> It is a delusion that codification will bring about any substantial saving. A competent counsel can find the relevant cases very quickly, and it would be folly to encourage people to rely on a code if they did not know the background.45

However, when I was President of the Society of Public Teachers of Law of Britain and Ireland I persuaded Lord Reid to come to an Edinburgh meeting in 1971 and address the Society on "The Judge as Law Maker." On this occasion he said

> I must confess that I distrust codification, but I am willing to be convinced that I am wrong. The Law Commissions may make a success of it. Let us wait and see. . . . What we shall do if we are forced into the Common Market and have to deal with Continental legislation and decisions I just do not know. We shall have to learn a lot about not only European law but more important about the habits of mind of European lawyers, which I suspect are more theoretical and less practical than our own.46

Well, forced in we have been now, and Community law is a "growth industry" in British law schools today. Lord Den-

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45. 54 PROCEEDINGS OF THE BRITISH ACADEMY 194 (1966).
ning M.R., who might not be offended by the sobriquet "the dons' delight" has pronounced on the impact (of the Treaty of Rome) on English law as follows:

But when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the treaty is henceforth to be part of our law. 47

A somewhat unexpected assault on the idea of codifying the law of contract came in 1967 from a scholar of great versatility, my good friend Professor H. R. Hahlo, then Professor of Law at the University of the Witwatersrand (South Africa) and now Director of the Institute of Comparative Law at McGill University (Canada). An authority on Anglo-American common law and the uncodified Roman-Dutch law, he has more recently been active in connection with the revision of the Quebec Civil Code. Under the somewhat emotive rubric "Here lies the Common Law" he wrote of the British Law Commissions' codification project:

Acting within the letter and spirit of its mandate the Commission is taking the bull by the horns by embarking upon an extensive scheme of codification. High on the list of its projects stands the codification of the general part of the law of contract...which is inextricably mixed up with the law governing special contracts, torts and "restitution." By tackling the "truly enormous task" of the codification of contract, the Law Commission has nailed the flag of wholesale codification of private law and, possibly, the commercial law as well, to its mast. In any case, once there are comprehensive codes of the law of the family and the law of obligations there is not much of private law left. 48

48. 30 MODERN L. R. 241, 242 (1967). See also his replications Codifying the Common Law Protracted Gestation, 38 MODERN L. R. 23 (1975), which does not take into account Gower's article, nor sufficiently the fact which the learned author probably underestimated that the exercise which he criticised originally was not to codify the English common law alone. Indeed on Gower's account the English Commission might have been reasonably satisfied with the completed draft. Vanderlinden and Topping (now deceased) had given more weight to the European factors—which remain imponderables.
In Dr. Hahlo's opinion the differences between Scots and English law were not of such magnitude as to justify the "heavy guns of codification" nor were there other grounds justifying this step. This article in the Modern Law Review attracted rejoinders from the redoubtable Mr. Commissioner Gower,49 from Professor Vanderlinden (now of Brussels) and from the late Mr. Topping of Edinburgh. The latters' joint contribution published in 1970 is appropriately entitled "Ibi Renascit Jus Commune." They conclude

When the *hic jacet* or rather the *ci-git*—has been inscribed over the policies of General de Gaulle, and Britain has joined the European Communities, the laws of an enlarged community will inevitably converge; the codification of English law will be a birth rather than a death: the birth (the rebirth a Scots lawyer would wish to say) of a common law of Europe. *Ibi renascit jus commune.*50

It is an interesting but sombre reflection that all concerned as outsiders or insiders with the British Commissions' project for codification of contract have, to a greater or lesser extent, misappreciated the situation which would develop—and also that, in the last resort, political rather than doctrinal factors will probably prevail.

I confess to having been enthusiastic for the idea of codifying the Law of Obligations in 1965—but in the light of subsequent developments have concluded that the time is not now propitious. There have been momentous changes in this area of the law in recent years and we are going through a period of what in air flights is called "turbulence." Professor René David considers that the time is not suitable for a fundamental revision of the French *Code Civil*; Professor Crépeau considers that the Quebec Civil Code can be modernised now. Most codified systems today have a substantial overlay of case law and legislative supplementation to deal with situations unforeseeable to the original codifiers. Quebec may be spared some of the factors of turbulence which concern us in Britain—and revision of the code may take care of such new developments as so called "products liability," consumer pro-

49. Gower, A Comment, 30 MODERN L. R. 259 (1967).
tection, control of penalty and exemption clauses, and no-fault liability."

Is this, however, a time to codify Obligations in Scotland? A British Royal Commission under Lord Pearson's chairmanship is currently studying liability for death and personal injury. Professor André Tunc, Chief Editor of the *Torts* (Delict) Volume of the International Encyclopaedia of Comparative Law has wisely written

In most industrialised countries the law of torts at the moment is in a paradoxical situation. On the one hand there has been a great increase in civil liability suits... and an "abrupt change" in the rules which govern them.51

—and, again

The need for tort liability is, therefore, smaller than it used to be. In fact in the industrial countries, tort liability is no longer the main source of compensation for personal injuries.

I am not quite sure whether the American expression "products liability" implies an aspect of delict or of contract, or whether it is *sui generis*—or perhaps all three. At all events, its various elements are being scrutinised with a view to uniform legislation by legal specialists at the E.E.C. in Brussels, by the Council of Europe at Strasbourg, and by the Pearson Commission in Britain. These are only a few illustrations of why I think codification in Scotland of the delictual aspects of Obligations would be premature to say the least.

So far as Contract law is concerned very many aspects are being considered by international bodies and conferences—again with a view to uniform legislation—in Brussels, Strasbourg, The Hague, and at the Institute for the Unification of Private Law (UNIDROIT) in Rome. These various aspects range from special topics or special types of contract to consideration of the general principles of contract as a whole. At an even wider level, certain aspects of private contract law are being considered by organs of the United Nations. In Europe at least it seems wise to eschew a fresh codification of contract law until some of the work in progress has been accomplished. Nor can one exclude the possible impact of inflation on contract law. Lawyers as well as

51. Gower at 262.
economists in Britain may well reflect on the German experience in the Weimar Republic.

Professor Hahlo is probably right that codification of Obligations and Family Law and related matters would largely exhaust the field of private law. The Scottish Law Commission's posture on Family Law illustrates yet another frustrating aspect of the British Constitution. In codified civilian systems the titles on Family Law have generally required to be brought up to date. However, before one can deal effectively with Matrimonial Property and Succession, it is virtually essential to settle the problems of dissolution of marriage otherwise than by death. The Law of Bankruptcy is the pivot on which Commercial law revolves. Dissolution of marriage is a central issue in Family Law and Succession. Indeed, it is almost more desirable to have a settled though imperfect law of divorce than chronic uncertainty. Unfortunately, here again Scots law is, through no fault of the Scottish Law Commission, in an unhappy situation. As a chain reaction to rethinking of divorce by the Church of England—an established Episcopal Church—the question of divorce law was remitted to the two British Law Commissions by their respective ministers. Each Commission reported separately in favour of a "breakdown of marriage" solution, but the Scottish Law Commission was doubtful about the desirability of some of the proposed English safeguards and proposed what I still consider wiser reforms. The established Church in Scotland is Presbyterian and our law of divorce goes back to 1560. Unfortunately, as Vice Chancellor Gower has noted, no Government in the United Kingdom will promote legislation on controversial social issues such as divorce "unless it thinks that votes are to be won thereby." Such measures are left to private members and the most that can be hoped for by way of Government help is the allocation of Parliamentary time. In England, Lord Chancellor Gardiner and others influential in Parliament gave a fair wind to the English proposals. Accordingly, the English law of divorce was reformed by the Divorce Law Reform Act, 1969. As Gower comments

It took us two sessions to get the Divorce Law Reform Act through and we should not have succeeded then if the Labour Government had not been unusually generous in its provision of time.

52. Id.
No such generosity was granted to an equivalent (and I think superior) Scottish measure, and to date six successive private members Bills with which our Commission has been associated have foundered on the rocks of Parliamentary procedure. Another has been launched by Lord Selkirk in the House of Lords in July, 1975 with more courage than hope and forthwith attracted opposition from an English law lord. Meanwhile our work on Matrimonial Property and Succession is somewhat stultified. In Scots law we have had a long tradition of legal rights of succession conferred on surviving spouses and children; but current fiscal policies, if pursued to their logical conclusions, may well render that tradition of little value except possibly to surviving spouses. Ceasar—in the shape of the Exchequer—is likely to be the main beneficiary of a deceased’s estate in the future, another aspect of Sir Leslie Scarman’s diagnosis of the waning of private law.

_Further Reflections on Law Reform_

The following are a few further reflections on problems of law reform in the civil law area of Scots law. First, I would observe that ours may be the only law reform body which has to deploy its very limited resources on two fronts—the one seeking to advance, the other seeking to hold the line. How happy would we be if we were free to concentrate on our own selected programme subjects. However, if a Whitehall Department or if our much better equipped and more strongly manned counterpart in London engages on work which is of general interest, we may inexorably become involved. We either have to show cause why Scotland should not be subjected to Great Britain or United Kingdom legislation fashioned in London, or—as in the case of considering liability for ante-natal injury or “breach of confidence”—switch our resources to offer what we consider preferable solutions. Again, in any joint exercise, such as that on “exemption clauses” we have to conform to the time scale of our better equipped partner. If we find their solutions difficult to harmonise with our own legal system, we virtually have the onus of establishing the case for a separate solution. Likewise, when Whitehall Departments—which keep their legislation plans to themselves until the last moment for tactical reasons—propose solutions, we have to react, abandoning our
own priorities, or accept unification without representation. The less time we are given to react, the more likely we are to acquiesce—but the formalities of consultation will have been observed. The more our forces are engaged reacting to the proposals of others, the less contribution we can make to our own system.

Another problem which is constant and incapable of complete solution is that of “pre-emption” of law reform, that is, proposals for reform on one level may be overtaken by different proposals regarding the same subject matter advanced on a higher level. This may be at United Kingdom or international level. Our own Ninth Annual Report contained the following:

We have in our work... noticed a tendency for ideas which are put forward in one international body to be reproduced in other such bodies considering the same or a similar subject matter, with the result that proposals may in this way be gradually formulated which, either directly or indirectly, will in due course come to affect or influence the law of Scotland.53

In 1966—before the E.E.C. was really relevant for Britain—I was deeply interested in the work of Jean and Anne Limpens of Brussels on coordination of proposals for unification of law at different levels—national, regional and universal. Their paper “Coordination des Unifications” is highly relevant ten years after its publication though much more could now be said on the interrelation of European and international proposals for unification or harmonisation of law.

The next reflection, for a mixed system seeking to reform the law in close association with a common law partner of greatly superior resources, is that the London government—in its measures to unify or harmonise British law—has too often treated Scots law as a fit subject for the bed of Procrustes. It was stretched or lopped to correspond with English requirements. Especially with devolution in the air it may be questioned whether this is the right approach. The American technique of drafting model laws which states can adopt and adapt provides one alternative. Another operates in relation to E.E.C. Directives aiming at “approximation of laws.” In this situation a policy is prescribed but legislative provisions

are enacted in the context of the laws of a member state. It will be seen that there is here a compromise between the powers of the Community and the right of member states to legislate as they wish, and the sovereignty of the member states to legislate as they wish, and the sovereignty of the member states has been carefully guarded. In Britain, where the Renton Committee has studied recently the whole question of The Preparation of Legislation, the “model law” and “directive” solutions might well have been considered as appropriate when policy requires cooperation of a common law and mixed jurisdiction within the same nation state. However, the possibility of devolution was withheld from the Committee’s consideration.

Justice Barham of the Louisiana Supreme Court stresses forcibly the role of the Law Schools of this State in keeping Louisiana within the civil law tradition. Rightly he gives weight to the contribution of the Louisiana State Law Institute, and has paid due tribute to the Institute of Civil Law Studies of Louisiana State University. As he discerns a vigorous legal literature—both in the form of legal treatises and in that of learned articles infused with civilian legal thinking—is essential for a civilian renaissance. Of this need in Scotland I am very well aware. Justice Barham comments

Part of the response of the law schools which has accounted for a resurgence of the civilian tradition in Louisiana has been the inclusion in the first year curriculum of an introductory course in the civil law.54

This course adumbrates the Romanistic tradition which lies behind your Civil Code, but does not give undue prominence to the more antiquarian and outmoded aspects of the Roman law.

Naturally I applaud this development. It has always been my view that, in Scottish Law Schools, the private law sector English law should not be taught at all in an expository manner, but only as an aspect of comparative law stressing divergences from the civilian approach. There was, and is, a constant need for an introductory course—civilian and comparative in character—to relate Scots private law both to its history and to the ius commune of the modern civil law. Indeed I sought for years to foster such a course in

Scotland—a course in which scholars from Louisiana, Quebec, South Africa, the Netherlands and France all made notable contributions. Though I hold in highest regard some of the distinguished scholars in the field of ancient Roman law, nevertheless, to my mind, a course in that law unrelated to the evolution of Scots law is not an essential preparation for every Scottish legal practitioner. To some extent, the antiquarians have now pre-empted civilian studies in Scotland—a development which, however much I admire the exponents, I regret if the price must be the exclusion of extensive required instruction in the “received” civil law as a foundation of Scots law.

Without some understanding of the background one cannot really understand the thought of the Scottish institutional writers, whose role with us is to give cohesion to the system as a whole—much as a code does in other systems. Their concern was with the evolved civil law of the 17th and 18th centuries. Scots private law could have been codified on the basis of their treatises. Of course, much of what they wrote on land law, family law and succession is out of date—as are the corresponding titles in the older codes. Sir Samuel Cooke, Sir Leslie Scarman’s successor as Chairman of the Law Commission (for England and Wales) once observed humorously

When the Scottish Law Commission have a problem to solve, their first reaction is to enquire what Lord Stair (who wrote in 1681) had to say on the matter. When, as like as not, they discover that Lord Stair had not anticipated their particular problem, they seek to conjecture what he would have written about it, had he thought of it.

In fact, the learned judge is not far wrong—at least where I am concerned—in many fields such as obligations and moveable property. However, my main point in this context is to echo Justice Barham’s concern for the laying of civilian foundations for the legal education of the practicing and teaching profession—judges, counsel and jurists—the responsibility of formulating, enacting and enforcing proposals for law reform ultimately rests.

It is certainly true that I have not been able to speak with the confidence and freedom of my predecessors in the
Tucker Civil Law Lectures. Of all the mixed systems, that of Scotland has survived longest under heavier pressures than might have seemed sustainable. I myself consider that civil law and common law can in many respects coexist—pursuing like ends of political, economic and social policy, but each system must use its own techniques. At supra-national levels—and in the case of Louisiana and Scots law—at national level, the systems may reasonably attempt a concordat, but as equal partners and by proper evaluation of comparative sources.

Professor David, in classifying legal families, stresses the desirability of taking into consideration the constant elements rather than the less stable rules important though they may be. David also notes that the Romano-Germanic family of law and the Common Law have tended, particularly in recent years, to draw closer together, and that the methods employed by each are not wholly dissimilar; as a result, very similar substantive solutions are often provided in each family. The concept of a “western family of law” is reinforced by the phenomenon of the “mixed jurisdictions” such as Louisiana and Scotland. However, both Professor David and Professor Tunc stress the essential structure or style of the civilian tradition. This is not lightly to be sacrificed in the interests of unification. The form in which law is presented is to my mind almost as important as its substance, a proposition which I shall strive to maintain—fortified by the example of tenacity with which Colonel John H. Tucker has maintained the civilian tradition here in Louisiana.

To conclude my thoughts I venture to quote a short passage from the paper I delivered here in Louisiana in 1963:

A few days before Appomattox that high minded Virginian, Robert E. Lee, observed to General Pendleton “I have never believed that we could, against the gigantic combination for our subjugation, make good in the long run our independence unless foreign powers should directly or indirectly assist us,” which he did not expect, “But,” he continued, “such considerations really made with me no difference. . . .” Something of this spirit may

56. Id. at 21.
inspire us in our less dramatic situations when reforming our mixed systems; but unlike Lee, we need not despair of our cause because we do not necessarily stand alone but may invoke if we wish the wide world of the civil law to correct a jurisprudential imbalance.57
