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The Scottish Law Commission and the glistering code — Does codification simplify and modernise the law?

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Introduction

The modern reformation of law by code and statute presents an epistemological problem for Scots law, one which requires investigation before the common law disappears entirely. Theory by example vs. example by theory. Here condensed is the root struggle of this essay. There are two opposing maxims which anchor the two great legal systems of the Western world—common and civil law.[1] The example-led common law system relies on the doctrine of precedent or *stare decisis*.[2] This doctrine holds that an authoritative rule decided in a previous case is binding on subsequent cases with indistinguishable facts. The judiciary is the custodian and reformer of this system. By contrast, the theory-led civil law system is served by the code, a singular source of law which purports to legislate *exclusively* in its area of concern (e.g. a criminal code listing all crimes). The two orders may also be contrasted thus: the common 'bottom-up' vs. the civil 'top-down' approach to law-making. In Scotland, and other 'mixed' legal systems, the two forms of law are entangled but remain independently defined—they are like oil and water. The current law within Scotland endorses "codification"[3]—i.e. the process by which law is reformed into a legal code. In other words, Scotland has picked a side in the struggle. The purpose of this essay is to determine if it is the right side, thus it addresses

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[1] University of Ottowa, 'Alphabetical Index of the Political Entities and Corresponding Legal Systems' (*JuriGlobe Research* Group) <http://www.juriglobe.ca/eng/sys-juri/index-alpha.php> accessed 12 July 2018.

[2] Translates from Latin as "to stand by cases decided". The longer form, "*stare decisis et non quieta movere*", translates as "to stand by decided cases and not to disturb settled points".

[3] Law Commissions Act 1965 ('LCA 1965'), s 3(1).

codification in the context of Scottish law reform—though the applicability of the conclusion is certainly independent of its Scottish setting.

The Scottish Law Commission (SLC) is the body best equipped to undertake legitimate, large-scale codification projects, thus providing the basis for the Scottish Parliament to pass codes into law. Law Commissions are councils of legal experts charged with advising the governments to which they report of changes they believe would improve the law. They exist independently of government and though they hold no coercive power over the state, their influence is plain to see in the statute books—particularly in Scotland.[4] As will be established, it may be useful to consider the Law Commission as the 'wise old man'[5] to the protagonist of state, valued for sound judgement based on reflection and experience.

Alongside the comparison of common and civil law, this essay compares the two methods of problem-solving which are inherent in these respective systems, i.e. inductive and deductive reasoning. Bertrand Russell explains the problem of inductive reasoning:

> "The man who has fed the chicken every day throughout its life at last wrings its neck instead, showing that more refined views as to the uniformity of nature would have been useful to the chicken."[6]

The chicken's assumption was wrong and cost it dearly. Inductive reasoning (or induction) is an argument from the particular (I have been fed every day) to the universal (I will probably be fed every day).[7] This will be returned to later, suffice it to say that the chicken's view is the same view that is fundamental to the common law system. In opposition to induction is deductive reasoning (or deduction)—i.e. an argument from the universal to the particular.[8] A method of reasoning no less flawed, as will be demonstrated later in this essay. For now, it may be said that deduction is fundamental to the civil law system.

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[4] For a concise appraisal of a law commission's role see Lord Hope of Craighead, 'Do We Still Need a Scottish Law Commission?' [2006] 10 Edinburgh Law Review 10; For general commentary on the legitimacy of law reform see Geoffrey Sawer, 'The Legal Theory of Law Reform' [1970] 20 The University of Toronto Law Journal 183.

[5] Carl Gustav Jung, *Two Essays on Analytical Psychology* (London 1953) 108. Also known as the 'Senex' – which translates as 'the old man' in Latin.

[6] Bertrand Russell, *The Problems of Philosophy* (first published 1912, Dover Publications 1999) 43.

[7] This form of reasoning is used by the empiricists including Francis Bacon and J.S. Mill. Empiricism is the view that *experience* is the source and test of all knowledge. Its adherents include the Stoics and Epicurus in the antiquity and Hobbes, Locke and Hume in the 17th and 18th centuries.

[8] This is the reasoning of Aristotle, and later the rationalists, which found its way to Ancient Rome (a synonym for civil law is 'Roman law')—the birthplace of civil law. Rationalism is the view that considers *reason* the primary source and test of knowledge. Its adherents include Plato and Aristotle in the antiquity and Spinoza, Descartes and Leibniz in the 17th and 18th centuries.

This essay proceeds along three lines of analysis. First, outlining the current state of law reform in Scotland together with a brief description of its history. This is necessary to establish the Scottish position on codification. Second, considering the curious Scots law 'mix' of common and civil law with a focus on the forms of legal reasoning each employ. This is required to present the methods of deductive and inductive reasoning which are essential for an understanding of the arguments for and against codification. And third, considering the arguments posited for codification against those for retention of the common law. This line identifies the main points on both sides of the debate, allowing for a conclusion to be drawn on the merits of the arguments. The prime question that this essay seeks to answer is whether codification fulfils the aim of achieving the "simplification and modernisation"[9] of Scots law. The conclusion arrived at, contrary to the view of the legislature, is that codification does not simplify and modernise the law—instead it builds a façade of simplicity which may indeed prove a hindrance to the achievement of this aim.

I. A brief history of modern Scottish law reform

The Law Reform Committee for Scotland

Before the SLC, law reform was under the auspices of the Law Reform Committee for Scotland, set up by Lord Clyde in 1954.[10] This body was concerned with smaller tasks than its successor—such as an evaluation of "certain aspects of the law of diligence".[11] But, however comparably small these tasks were, the Law Officers regarded well the committee's work; Lord Wylie, then Norman Wylie MP, spoke in Parliament of the "great deal of valuable work in law reform"[12] and the government's failure to utilise this work.[13]

Purpose and process

The SLC, along with the Law Commission of England and Wales, was created by the Law Commissions Act 1965 (LCA 1965 or the 1965 Act). Section 3 of the LCA 1965 states:

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[9] LCA 1965 (n.3), s 3(1).
[10] While in his capacity as Lord Advocate.
[11] Law Reform Committee for Scotland, *Fourteenth report of the Law Reform Committee for Scotland* (Cmnd 2343, 1964).
[12] Hansard, HC Deb 8 February 1965, vol. 706, cols 140-146.
[13] ibid.

> "It shall be the duty of each of the Commissions to take and keep under review all the law…with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law…"[14]

To aid in interpreting these general aims it is worth defining the following terms:[15]

> 'Simplification': "The process of making something simpler or easier to do or understand."
>
> 'Modernisation': "The process of adapting something to modern needs or habits."

The definition of 'codification', in the sense used by the LCA 1965, is trickier to ascertain. The commissioners themselves have noted this ambiguity[16] and this has led to inconsistencies in the use of the term.[17] There are two generally accepted definitions. First, the more radical—from a common law perspective— 'continental-style codification';[18] this is the creation or conversion of otherwise constituted law into a clearly written, labelled, and comprehensive text. The resulting 'code' covers a wide area[19] of legal concern to the exclusion of all other law purporting to legislate in that area.[20] Second, the less radical 'codifying statutes',[21] in which the law relating to a narrower subject area is reconstituted into a single statute. This involves the consolidation of older statutes or restatement of the common law sources. However, codifying statutes do not purport to legislate exclusively in their area of concern and leave existing common law rules in force if there is no contradiction. Thus, they can be termed 'quasi-codes'.

The work of the SLC proceeds as follows: the five Law Commissioners—selected by the Scottish Ministers—pick an area, or areas, of the law of Scotland, and submit a programme of reform to government for consent. They then discuss this area, or areas, and attempt to reach a

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[14] LCA 1965 (n.3), s 3(1).
[15] *Oxford English Dictionary Online,* OUP 2018 <https://en.oxforddictionaries.com/definition/modernization> accessed 9 February 2018.
[16] Leslie Scarman, 'A Code of English Law?' (Lecture, University of Hull, 1966) 3.
[17] Michael Kerr, 'Law Reform in Changing Times' (1980) 96 LQR 515, 527. cf Alexander Elder Anton, 'Obstacles to Codification' 1982 Juridical Review 15, 19-20.
[18] Shona Wilson Stark, *The Work of the British Law Commissions Law Reform…Now?* (Bloomsbury, 2017), 154.
[19] E.g. criminal law or civil law.
[20] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, Oxford University Press 2017), 78.
[21] Stark (n.18), 155.

unified view, before finally publishing a report. The reports produced are passed to government who may then choose to implement the suggestions partially or fully with legislation, or simply reject or ignore them. Originally, the SLC reported to the Secretary of State for Scotland and the Lord Advocate; the Scotland Act 1998 has since devolved that responsibility to the Scottish Ministers.[22]

Codification

The new Commissions set up by the 1965 Act were initially given the duty of codification for several reasons. These included: discontent with the common law, a wish for reform and codification to occur simultaneously, and the impending accession to the then European Communities. However, the SLC's record of accomplishment in codification since then has been poor. Large-scale continental-style code projects were rejected in criminal law[23] and property law.[24] The SLC's *First Annual Report*[25] states that codification for its own sake should be rejected; instead favouring areas of law which appear to need a code.[26] An effort to codify the law of evidence proved foolhardy and was divided into gradual piecemeal reports.[27] [28]

Further recent attempts have been made to codify Scots criminal law. A group of legal academics drafted a Criminal Code for Scotland under the auspices of the SLC but the Scottish Government did not implement it.[29] However, in the same draft code, the Commission set out both its attitude toward, and what it meant by, codification.

> "At the same time we continued to believe that there may be a place for codification in the wider traditional sense, that is a comprehensive legislative re-statement of the general principles underlying some unified area of the common law."[30]

The Criminal Code discussed was not a mere quasi-code but ventured to alter Scots criminal law in the continental style.

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[22] Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820), Art 4 and Sch 2, Pt I, para 36(2).
[23] Scottish Law Commission (SLC), *The Mental Element in Crime* (Scot Law Com No 80, 1983) para 2.2.
[24] SLC, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011) para 1.18.
[25] SLC, *First Annual Report* (Scot Law Com No 3, 1966).
[26] ibid para 11.
[27] SLC, *First Programme of the Scottish Law Commission* (Scot Law Com No 1, 1965).
[28] SLC, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (Scot Law Com No 149, 1995).
[29] Eric Clive, Pamela Ferguson, Christopher Gane and Alexander McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (Scottish Law Commission 2003).
[30] ibid 8.

Despite the general rejection of continental-style codification, there have been a few successful quasi-code projects. Notably the Bankruptcy (Scotland) Act 1985[31] and Sexual Offences (Scotland) Act 2009[32] acted as codifying statutes. In its most recent *Tenth Programme of Law Reform*,[33] published in 2018, the SLC does not mention codification. However, the likely continuation of quasi-code reformation does not eliminate the possibility of the continental-style returning to the fore—particularly with the academic drive for the Criminal Code. Indeed, since the use of the word codification in the 1965 Act can mean either style, it is likely future Commissioners with a preference for continental-style reform will bring it back into favour.

Signs of growing importance

The Scottish Parliament created the Delegated Powers and Law Reform Committee (DPLRC)[34] which is partly dedicated to scrutinising Scottish Law Commission Bills.[35] The changes streamline the process of approval that SLC reports must complete, from Commission table to statute book. This move reflects the Scottish Government's trust in the SLC and of the importance they place on law reform and, by extension, codification. Indeed, the establishment of the DPLRC is expressly stated to be with the intent to "…improve the rate of implementation of reports from the Scottish Law Commission."[36]

II. The curious Scots 'mixed' legal system

Mixed legal systems are neither rare nor simple to categorise; they vary in mixture and origin. For instance, Scotland is a mixture of civil and common law tradition, similar to South Africa, Louisiana, and Quebec among others. Indonesia is a mixture of civil and customary law, while India employs elements of civil, common, customary, and religious law. But even the civil-common distinction is not enough to define the 'Scots mix'. Within the collection of civil-common law systems there are those that are the result of successive colonial powers imposing their own legal order on their subjects and there are those, like Scotland, which are the result

[31] Implemented from: SLC, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot Law Com No 68, 1982).
[32] Implemented from: SLC, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007).
[33] SLC, *Tenth Programme of Law Reform* (Scot Law Com No 250, 2018).
[34] Scottish Parliament Standing Orders, Rule 6.11(g) and (h).
[35] ibid, Rule 9.17A.
[36] Scottish Government, *The Government's Programme for Scotland 2014-15* (Scottish Government, 2014), 72.

of consensual union of political entities which leaves legal orders, as it were, squashed side-by-side.

Influences on modern Scots law

Elements of the *ius commune*—Roman and canon law—of Continental Europe and the *ius proprium* of certain countries of study were imported to Scotland by Scottish students educated at European universities in the late middle ages. Before the union of Scotland and England in 1707, the 'Scots mix' already existed in some form. The imported *ius commune* had met, and greatly replaced the existing Scottish, and, to a lesser extent, English common law. The Treaty of Union, given effect in 1707, expressly preserved the separate Scots law from that of England. Subsequently, there was an increase in influence of the common law and statutory *corpus* of England on Scots law. Principal reasons for this include the fact that the highest civil court for Scotland was the House of Lords in London. As well as the fact that the UK Parliament was responsible for passing all laws relating to Scotland until devolution in 1999.[37] Harmonisation of areas of public and commercial law, both pre- and post-devolution, also affected Scots law.

Deductive reasoning

As civil and common law clashed and melded in Scotland, the method of legal reasoning changed due to English influence. The civil law system generally relies on the method known as 'deduction'. This approach is characterised by the technique of applying a general principle (also called a major premise) to a specific situation (minor premise) to reach a logically inferred conclusion. For example, in the German Civil Code under section 145, regarding the law of contract, it states that: "Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it."[38] The lawyer working in Germany uses this principle as their starting point when they are investigating a point of law. They apply the code provision to the facts of the specific case on which they work. Thus, if the facts of their case fit into the ambit of the provision then the argument is sound; or in other words if the minor premise fits into the major then the conclusion is necessarily logically inferred.

Legal reasoning in this way is powerful in its simplicity, particularly due to its use in legal codes. It is relatively simple for the deductive lawyer to find their major premise, like section 145 above, and apply it to their relevant minor premise. However, the soundness of the

[37] See, e.g., W. David H. Sellar, 'A Historical Perspective' in Michael C. Meston, W. David H. Sellar and Lord Cooper (eds), *The Scottish Legal Tradition* (revised edn., Saltire Society, 1991).
[38] Bürgerliches Gesetzbuch (BGB) (Germany), § 145 (Federal Law Gazette I p 3719).

conclusion reached by deduction relies on the major premise(s) being true and this can produce absurd results. E.g., in 'Monty Python and the Holy Grail'[39] a knight explains to a village mob how to tell if a woman is a witch:

> Knight (K): "What do you do with witches?"
> Mob (M): "Burn them up!"
> K: "And what do you burn apart from witches?"
> M: "Wood!"
> K: "So, why do witches burn?"
> M: "B--... 'cause they're made of... wood?"
> K: "So, how do we tell whether she is made of wood? Does wood sink in water?"
> M: "No, it floats! It floats!"
> K: "What also floats in water?"
> Arthur: "A duck!"
> M: "If... she... weighs... the same as a duck,... she's made of wood."
> K: "And therefore?"
> M: "A witch! A witch!..."[40]

The conclusion of this paraphrased argument is valid, i.e. exhibits internal logical consistency, but untrue (or unsound). This rigidity translates into codes and statutes which frequently require judges and lawyers to employ interpretation to apply the major premise.

Inductive reasoning

'Induction' is the opposite of deduction; it involves starting with a specific (minor) principle and extrapolates it to propose a general (major) principle. This approach is rooted in the common law system as can be seen in the doctrine of *stare decisis*. The lawyer working in Scotland or England, in the absence of statute,[41] must find a case in point from a binding court that arrives at the conclusion they require. In contrast to deduction, the conclusions reached by induction are not logically required by their supporting syllogistic premises, e.g. Robert is rich and wears a suit; William is also rich and wears a suit, therefore all rich people wear suits. There is a reliance on the predictability of the world, that the specific premises hold true

[39] Monty Python, 'Monty Python and the Holy Grail' (EMI Films 1975).
[40] 'Monty Python and The Holy Grail, Scene 5: Witches and How To Build Bridges Out of Them' (*Another Bleedin' Monty Python Website*, 11 February 2016) <http://montypython.50webs.com/scripts/Holy_Grail/Scene5.htm> accessed 14 July 2018.
[41] The starting point from a statutory provision is deduction.

universally until they are proven wrong; this is the wider foundation of Baconian method,[42] and of John Stuart Mill's inductive method in "*A System of Logic*".[43]

It is true that both lines of reasoning are used in both civil and common law systems, there is no perfect separation. Indeed, it would be nigh on impossible to measure the proportional use of the respective methods. However, the use of induction is both the foundation of, and pervasive throughout, the common law, as deduction is to and throughout the civil. Therefore, a valid comparison can be made between the methods of reasoning in the context of common and civil law systems.

III. Codification: the case for

"Codification"[44] has the status of an established legal practice, the Parliamentary assent, and the expert bodies—in the form of the SLC—in place to affect its execution. The scales, at present, weigh in its favour against retention of the common law. Thus, the question becomes: how does codification satisfy this burden of proof? Does codification orientate the law in such a way that renders it simpler and more modern? The arguments that the proposal for codification—with respect to the Scottish context—rest on can be presented in four points.

1) *Re-statement*

If the common law was codified generally it would necessarily lose, in transition, the essence of common law. However, it would not necessarily lose its value. Its essence is the doctrine of *stare decisis* and judge-made law; however, its value is in the principles it has produced laid out in its cases, this can be retained. It is desirable to retain because common law has, for one reason or another, proved effective for centuries and resisted external pressure from the conventional[45] civil law system to convert. It would be short-sighted to miss the opportunity to siphon such tested knowledge.

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[42] Sir Francis Bacon, a jurist among his polymathy, laid out inductive reasoning in his works *Cogitata et Visa de Interpretatione Naturae* (Thoughts and Conclusions on the Interpretation of Nature) (first published in 1607) and *Novum Organum Scientiarum* (New Instrument of Science) (first published in 1620). These works countered Aristotelian deductive logic directly, the latter book's title being a reference to *Organon* (Instrument), the collections of works containing Aristotle's thoughts on logic.
[43] John Stuart Mill, *A System of Logic* (first published 1843, 8th edn, Harper & Brothers Publishers 1882).
[44] LCA 1965 (n.3), s 3(1).
[45] Since the intellectual developments of the Enlightenment (tentatively placed in the 18th century but with beginnings in the 17th – or perhaps earlier – and with its end debatably around the French Revolution) the

Codification may be the best way of preserving common law jurisprudence. For an example of valuable preservation, one should look to the Justinian code, which contained an account of Roman law following its dissolution into Eastern and Western Empires. The code survived long enough for it to be taught at the first medieval university at Bologna[46] from which it was exported to become the foundation of many European civil law systems.[47] Another notable example is the Indian Penal Code of 1860 which elegantly, though broadly, presented elements of the English criminal law in code-form and is still in force as amended today.[48]

Therefore, it is not necessarily towards the destruction of the common law that codification marches. It is possible to eschew importation of civil law concepts, or creation of new ones, in favour of a re-statement of common law principles. The SLC can restate the common law instead of replacing it.

2) *Efficiency*

A central argument for the code is that it makes the law more efficient. An efficient set of laws enhances the ease of practice for the courts and lawyers. Simplicity is posited as an achievement of the efficient code as well as of the regimented structure which is discussed below in the third argument for codification.

This point is predicated on the assumption that it is easier to look to a provision in a code than to a case-in-point. It may be more difficult to search for, and find, the relevant case. One must compare the facts of each case and check that the case is binding. Whereas the lawyer working with a code has the easier task of locating the relevant code provision. Although it may be argued that any good common lawyer should be able to locate the correct case or statute with supplementary case law promptly. It is certainly reasonable to suggest that the code is a simpler tool to work with, at least before any interpretation is required.

It is in the interpretative dimension that the two systems seem to draw level in efficiency. The common lawyer finds their case in point and no further interpretation is required, if the facts between the cases are indistinguishable. By contrast, the code lawyer, may be uncertain as to

practice of codification in the context of a civil law system has become the predominant legal system in the world.

[46] The so-called "glossators of Bologna" (legal scholars) interpreted the Justinian Code and provided versions of it to fellow scholars – as well as teaching it themselves – in the earliest Italian universities (notably Bologna founded in 1088, Vicenza 1204, Padua 1222, Naples 1224, and Siena 1240) from which it spread to the Iberian Peninsula (at Palencia 1212 and Salamanca 1218) and subsequently around the continent.

[47] This includes Scotland's civil law tradition.

[48] The Indian Penal Code, 1860. <lawmin.nic.in/ld/P-ACT/1860/186045.pdf> accessed 20 February 2018.

whether a word in a provision applies in their case. They then look for interpretative aid to textbooks or cases or in publications, e.g. the Neue Juristasche Wochenschrijt in Germany. This entails a similar search which the common lawyer earlier had to undertake.

Therefore, it is unclear whether, when the problem of interpretation is at play, the code makes the job of a lawyer or a judge either simpler or more efficient. However, in clear cut cases, which take up a vast amount of the legal profession's time, where there is absolute clarity over the applicability of a code provision, the code will likely be a faster means to a conclusion.

3) *Skeleton*

The third axiom: the code provides an articulate 'skeleton' for the law. This skeletal structure is desirable for its simplicity and accessibility, to both the lawyer and the layperson. Compared to the bundle of cases that make up the common law, which are not necessarily confusing but can easily become so,[49] the code is to be preferred in terms of making sense at a glance.

However, how long it will take for the skeleton to be given flesh? What happens in this period of uncertainty? It is uncontentious that the law will consist of 'bare bones' and that accordingly decisions will have to be taken without sufficient reference to academic commentary or previous case decisions. The exegesis of the Napoleonic Code of France lasted for a considerable time and not until François Gény introduced the concept of applying free scientific research to the interpretation of the code could the bones be fleshed out.[50] "Reform and rationalisation…", argue Topping and Vanlinden, is the benefit of the skeleton and even with the duration it takes to settle down into an effective structure—they propose it is worth the wait.[51]

4) *Translation*

The last point for codification is that the price of one of its main hurdles, i.e. translation or creation, is worth paying in the long term, as opposed to the price of retaining the common law. The law is never the product, it is always on the assembly line. Amendments to a code are inevitable, as they are to uncodified law.

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[49] By, e.g., contradictory decisions by judges with no clear precedent being set.
[50] François Gény, *Science et technique en droit privé positif : nouvelle contribution à la critique de la méthode juridique* (Société du Recueil Sirey, 1913).
[51] M.R. Topping and J.P.M. Vanlinden, "Ibi Renascit Jus Commune" (1970) 33 MLR 170, 175.

The feasibility of codification is well evidenced. Tribonian and his fellow commissioners completed the *Codex Iustianus* (or *Codex Vetus*) in one year,[52] and the *Digest* (or *Pandects*) in three years.[53] These were vast projects calling upon centuries of Roman jurisprudence to be distilled in codes in relatively short amounts of time and, thus, the law commissioners of today could reasonably be expected achieve a similar feat to a similar standard.

The legal profession would also have to relearn and readjust to the law. This is a process it continuously undertakes in any case but a pronounced change such as codification outweighs comparatively less extreme legislative and precedential changes. The extent of disruption depends on the nature of the codification. If the common law is restated then it is form, and the implications of this form, that must be considered. The substance will be similar. However, if the law is altered substantively, i.e. in terms of its fundamental principles, then there is the question of whether the legal profession would need a period of adjustment or a staggered approach to the transition. The fact that the character of an area of law is altered in its entirety should not be understated. Though the profession would undoubtedly be able to meet this challenge in the same way as the Commissioners must in drafting these codes.

IV. Codification: the case against

Professor T. B. Smith, a Scottish Law Commissioner from 1965-1980, stated: "My desire is for good law: from too many laws, good Lord deliver us."[54] A sentiment hopefully shared by proponents of both sides of the argument surrounding codification. The pursuit of good law can, and often does, take those in pursuit down the route of codification, but not necessarily. There are many virtues of having uncodified law, the advocates of common law argue, as well as a few fallacious claims of proponents of codification.

1) *Simplification illusion*

First, the code cannot simplify the law for the layperson. The point was partly addressed in the arguments for codification, but it remains to ask whether the law becomes clearer when it is codified. To the eye (trained or untrained) it is easier to comprehend rules laid out in front of

[52] Tony Honoré, *Tribonian 17* (Duckworth, 1978).
[53] ibid 141.
[54] T.B. Smith, "Law Reform in a Mixed 'Civil Law' and 'Common Law' Jurisdiction" (1975) 35 Louisiana. Law Review 927, 937.

one's eyes in a list, rather than in a nebulous range of cases; one could say that the law is in that sense clearer. However, the test is whether, when the layperson reads the code provisions, they are able to understand their rights and duties more readily. A constant of law is that the language used is rarely clear; it must be broad to attend to the complexity of modern society. The broad nature of this language lends itself to wide interpretation by different percipients of the law. Thus, the meaning of the text is fought over and rarely achieves a state of clarity. Therefore, even if the codification was a re-statement importing words and concepts from case law, the code cannot achieve clarity of the sort proselytized by seekers of the codification of common law.

2) *Fallacy of certainty*

Codes are purported to provide a level of legal certainty that the common law cannot. However, codes, as well as the common law, require interpretation. This stems from the need to adapt to changes in society and is facilitated by the flexibility of language used.

A problem which arises from this fact is that stated rules, when followed according to the logical structure of the code, do not always arrive at the same conclusion in different jurisdictions applying the same principles. This phenomenon is present in the civil law of Quebec, starting from an identical code provision to France (its juristic parent being the French Civil Code of 1804). Quebec has produced different expressions of the provision manifested as different areas of law that are as logical and consistent as their French equivalents. Identical provisions in the codes of Germany and Italy have been interpreted in separate ways and, as pointed out by Professor Rodolfo Sacco, the converse is true, namely that similar conclusions have been reached from different legal starting points.[55] Therefore, codification cannot provide the legal certainty that it purports to as the interpretation of code provisions determines their scope and effect.

3) *'The hydra effect'*

Another factor to account for in pursuing codification is the potential for the 'hydra effect'. When a code is introduced there is legal uncertainty in places it does not cover. Though it has eliminated one or two problems, more issues reveal themselves in practice. Legal certainty comes from commentaries or case law establishing themselves on top of the skeletal code.

[55] Rodolfo Sacco, 'Définitions savantes et droit appliqué dans les systèmes romanistes' (1965) 17 Revue internationale de droit comparé 827.

Sir Thomas Talfourd, an English judge, stated in response to the proposed codification of the English criminal law in the mid-19th century:

> "…to reduce unwritten law to statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible adaptation…I do not think any greater certainty can be obtained by a Code of the unwritten law to compensate for the loss; but that on the contrary, new questions of the construction of the words of the same statutes will arise, unforeseen difficulties in construction would be suggested, and new decisions more unsatisfactory than those which expound and apply principles, would become necessary."[56]

If Scotland codified its law based on an importation, in part or whole, of continental judicial concepts originating from the Napoleonic or Germanic Codes, then the scholars and judges of Scotland could look to the jurisprudence of those respective jurisdictions for aid in solving interpretative problems. A solution apart from this would entail the aforementioned 'hydra effect'—thus undermining the assertion of the efficiency of codification.

4) *Transitional difficulties*

The legal uncertainty created by the introduction of a code of any type is beyond doubt. Uncertainty leads to amendment and a mistake in a code cannot be fixed without amendment unless the words are 'elastic' enough to bend to the meaning required. A code is based firmly in the time and place it is written and reflects the values of the people who draft it. Law tends to be repealed and replaced. Only those laws which can twist themselves to fit into the 21st century remain. Thus, evolutive interpretation is a feature of many constitutions, e.g. the U.S. Constitution and the European Convention on Human Rights.

The raft of amendments and interpretation which gather around the code would be aggravated by the full conversion of unwritten into written law. This is the price to be paid by opting for a more rigid structure.

Does codification simplify and modernise the law?

Rigid deductive reasoning, broad language-induced interpretative difficulties, lack of immediate legal certainty and the potential for the hydra effect render the code a façade of

[56] James Coolidge Carter, 'The Proposed Codification of Our Common Law: A Paper Prepared at the Request of the Committee of the Bar Association of the City of New York, Appointed to Oppose the Measure' (New York: Evening Post Job Print Office Print, 1884) 77.

simplicity and modernity. Once put into effect, the code is more likely to complicate that which is simple rather than the converse. Such a 'top-down' approach to law reform has its merits: primarily in its articulation and preservation of law. Undoubtedly it has been executed to some success in many nations. The code does not however, at least to the same extent as the common law, remedy one of the great flaws of law-makers and humans generally, which is to prefer to be right than to be effective.

Conclusion

The primary intention of this article is to consider whether codification simplifies and modernises the law—the conclusion is of relevance independent of the Scottish focus of this piece. However, the background of the Scottish Law Commission's duty[57] provides a curious lens through which to engage the arguments both for its mixed tradition setting and the recent, significant development of the DPLRC. Once the common law is codified, by definition, it ceases to be common law; the essence may be ostensibly retained in the code, but the essence is in the *stare decisis* doctrine and its emphasis on inductive reasoning. Those features would cease to exist.

Scotland's legal heritage contains many traits systemic to both common and civil law, to judicial precedent, as well as to the code and the institutional writer. The trend that Scotland has shown toward re-statement of common law in code form, as well as toward replacement of common law, is no consolation to those who advocate judge-made law through a powerful judiciary. This trend is symptomatic of parliamentary supremacy and seems to have been only spurred on by the devolution of power to Scotland.

Common law has its faults, confusing contradictions and unsettled points of law not least amongst them. However, weighing the advantages gained by codification against their counter-points, it is submitted that, on the balance of the arguments, the duty of the SLC to codify will give effect to the Commission's aim to achieve *prima facie* "simplification and modernisation"[58] of the law. But, the net result of such simplification and modernisation will be greater legal uncertainty in interpretation. The code relies too heavily, as a result of its use of deduction, on its explicit axioms in its pursuit for consistent and valid logical implications.

[57] LCA 1965 (n.3), s 3(1).
[58] ibid.

It is rigid to the point of risking its own alienation from the land it governs. This illusion of simplicity renders law in the form of the code a thin, friendly façade hiding all the depth and complexity that the Commission strived to eliminate. A law need not be complex but when it is baptised in modern society it is stretched and undermined to the extent that a clear, ‘simple’ line in a code is in no way superior—in terms of clarity, relevance and ultimately, simplicity—to a full and comparatively longer judgement in a case. All that glisters is not gold.