

Scotland's 'Mixed' Feelings About Mediation

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Abstract

This paper considers Scotland's lack of receptivity towards mediation in the light of its 'mixed' legal heritage of both civilian and common law influences. It contrasts the approach to mediation in England and Wales with that of France, where litigation acts like an 'attracting magnet'. The paper draws on public pronouncements about mediation by senior Scottish judiciary to support its hypothesis that Scotland's disputing culture retains civilian attitudes despite centuries of common law jurisprudence.

When I studied law at Glasgow University in the 1970s it was a truth universally acknowledged that Scots Law was a 'mixed system'. This, explained our professors, meant that it had its roots in the European Civil (or Roman) Law, but that this tradition had been overlaid with English Common Law, principally because of legislation from an English-dominated parliament and jurisprudence from an English-dominated House of Lords (the highest court of appeal in civil matters for the whole of the UK). Lacking its own Parliament to legislate, Scots law had been in danger of assimilation during the high-water mark of Unionism in the 19th Century, when it was fashionable in some quarters to call the country North Britain. Even today (the 1970s), went the story, this anglicising corruption was proceeding unabated because Scotland, being a country of a mere five million inhabitants, could not generate enough disputes to advance the law. Over the border, the fifty million souls of our larger English neighbour were litigating furiously, providing Lord Denning and other crusading judges with ample opportunity to set, and break, precedents. And, as we were taught, the Common Law is judge-made law.

To a hammer everything looks like a nail: and to litigators most cases look ripe for litigation. But my generation entered the Scottish legal profession with an additional motivation: if a case runs its full course, it is not just good for our pockets, it is good for the law and good for the country.¹ Justice is served and the shackles of English cultural domination are thrown off at the same time.

Thanks to Douglas Osler² and Kenneth Reid³ I am now aware that this story, like so many cherished myths, serves some interests more than others. It was most powerfully articulated by TB Smith, one

¹ Although, as Robert Dingwall and Emilie Cloatre point out, '*the creation of precedents and the creation of law, through the civil justice system, is not perceived by government as contributing to the general welfare in the same way as state-provided education or health care*' see Dingwall & Cloatre, 'Vanishing Trials: An English Perspective' *Journal of Dispute Resolution*, [2006] 51-70, p.67

² Douglas J Osler 'Fantasy Men' *Rechtsgeschichte Vol 10* [2007], 169-193

³ Kenneth GC Reid 'The Idea of Mixed Jurisdictions' *78 Tulane Law Review, Vol.5* [2003-2004], 5-40

of Scotland's foremost legal scholars, in his Hamlyn Lecture of 1961.⁴ Unsurprisingly this view appeals to Scottish nationalists, who also tend to articulate their campaigns in terms of plucky little Scotland shaking off the yolk of English imperial domination. It may appeal to South Africans too, for according to Osler, *'In South Africa Smith found what he was looking for: a people who, incredible though it may seem, had succeeded in hating the English even more than do the Scots.'*⁵

However, it was a story that seemed to lack practical consequence for most of my career. Scottish academics may teach about Civilian roots, but as far as day-to-day lawyering goes, Scotland very closely resembles a Common Law system.⁶ There is no Civil Code; the courts are staunchly adversarial; our judges are bound by *stare decisis*. Equally significantly, great tranches of contemporary law are shared with the rest of the UK: employment, tax, company and commercial, insurance, administrative and consumer protection law for example. In these areas precedents can be and often are set in London or Leeds.

So the Civil/Common Law debate⁷ was not something to which I had devoted much thought, particularly as, for the last twenty years, I have practised as a mediator rather than litigator. However, I did often puzzle over what I had come to think of as a form of 'Scottish exceptionalism'.⁸ Why, in contrast to almost all other Common Law jurisdictions, is Scotland so resistant to mediation? The USA, Canada, Australia, New Zealand and, latterly South Africa, Hong Kong and India seem to be leading the charge. In the late 1990's England & Wales had its 'Woolf Reforms', contributing to London's development as an international mediation centre. In contrast, Scotland's 2009 'Gill Review' of civil justice was lukewarm.⁹ Considerably fewer than 1% of civil matters are dealt with by mediation, and if family matters are discounted this number looks closer to 0.1%.¹⁰ Scottish judges frequently take the opportunity to speak out publicly against mediation (see below).

It was therefore something of a jolt to read Adrian Borbély's description of French legal attitudes to mediation. It is worth quoting Borbély's words: *'The French judicial system works like an attracting magnet: once a case enters, it has a 95% chance of finishing by a court decision (or legal bargaining aiming to anticipate the said decision). In America, the system works like a repelling magnet: when a court is seized, the case has a 95% chance of being settled outside the courtroom and the system has*

⁴ See Osler, 2007

⁵ Osler, 2007, p.175

⁶ Alan Rodger 'Roman Law Comes to Partick' in Robin Evans-Jones (Ed.), *The Civil Law Tradition in Scotland* (Edinburgh, The Stair Society, 1995) p.209 *'Nowadays the courts have to grapple with Roman law only rarely.'*

⁷ Or *'bellum juridicum'* Osler, 2007, p.175

⁸ A term originally plagiarised from 'American exceptionalism' to describe our cultural or literary history – *'Wherefrom, then, the origin of this Scottish exceptionalism? Simply put, we were the first literate nation. The men and women of Scotland could read and write when the overwhelming bulk of European society could not. No wonder, then, at the scale of our impact on literature. No wonder that we created the first secular mass culture.'* See <http://www.arts.gla.ac.uk/ScotLit/ASLS/SWE/TBI/TBIIssue1/Editorial1.html>

⁹ Charlie Irvine, 'The Sound of One Hand Clapping: Gill Review's Faint Praise for Mediation' *Edinburgh Law Review*, Vol. 14, No. 1, pp. 85-92, 2010

¹⁰ See Charlie Irvine 'Civil or Common Law: What are the sources of Scottish judicial attitudes to mediation?' <http://kluwermediationblog.com/2011/10/13/civil-or-common-law-what-are-the-sources-of-scottish-judicial-attitudes-to-mediation/> *'In 2008/9 the number of court actions raised with a value exceeding £5,000 (5713 Euros) was just over 50,000. At the same period Scotland's leading commercial mediation provider (Core Solutions) reported being involved in 130 mediations over two years between 2007 and 2009. Even if some additional mediations were taking place, the total still represents a tiny fraction (less than 0.1%) of the courts' caseload.'*

*integrated numerous tools to do so (mediation, conciliation, pre-trial conferences, mini-trials, etc).'*¹¹ Perhaps Scotland's civilian roots are significant after all. Or rather, given that the empirical reality of our court system is more like America (with fewer than 5% of cases ending in a formal hearing¹²), might the story I describe above be acting as an ideology¹³, a set of beliefs about the world that make mediation a bad idea and litigation good?

A few choice judicial comments illustrate where we are. In 2007 four of Scotland's Sheriffs Principal (senior judges of the second civil tier) published a response to a consultation on court rules designed to encourage mediation. Their opposition was trenchant. They said: *'What is the mischief or failing in our current system that requires to be addressed?'*, before adding this swipe at another jurisdiction: *'in America the volume of litigation was so high that the only way the courts in some states could cope with the number of cases was to restrict access to the courts by requiring that parties endeavour to mediate their disputes'* [Emphasis added].¹⁴ They then turned their sights on England and Wales, contrasting its clogged justice system with the minimal delays, costs and inconvenience in Scotland and describing mediation as an *'expensive barrier'*¹⁵ to access to the courts.

What of more senior judges? In England and Wales Lord Woolf provided significant leadership in encouraging the use of mediation following the reforms that bear his name. Scotland's two most senior judges are those who sit in the UK Supreme Court, the final court of appeal in civil matters. One of the first two, now deceased, was Lord Rodger, a noted Civil Law scholar. Addressing a conference in 2008 he said: *'society actually needs litigation... Unless there continues to be a stream of litigation with decisions of high quality from the courts, then individuals and businesses will lack guidance on all kinds of everyday situations.'*¹⁶ He spoke of two farmers who had taken a case worth £3,000 all the way to the House of Lords (it is hard to imagine their combined legal expenses being less than £1,000,000): *'The parties actually deserved not criticism for failing to settle, but the gratitude of anyone who advises consumers... Whether they realised it or not, the parties were performing a considerable public service.'*¹⁷ We hear echoes of the story that permeated my legal training: our courts need good, meaty cases to develop the law.

Another Scottish judge, Lord Hope (then the Supreme Court's Vice President), pitched in as well. In a 2011 speech he endorsed Lord Rodger's suspicion of mediation's proponents, asserting *'our courts*

¹¹ Private correspondence with the author, 2011. Borbély has revised this view: he conceded that the true figure is that, once a court or tribunal has been seized, a decision will be made in 45% of cases. This still contrasts strongly with the widely accepted figure of 5% or below for Common Law jurisdictions: see, for example, Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Other Matters in Federal and State Courts' *Journal of Empirical Legal Studies*, Vol.1, (3) [2004] 459–570, (citing a rate in the US of 1.8%); although see Dingwall and Cloatre, 2006 (suggesting that, by 2004, the rate in the English High Court was approaching 12%, while that in the County Court was nearer 4%).

¹² Jury trials for civil matters are extremely rare in Scotland

¹³ *'the set of beliefs by which a group or society orders reality so as to render it intelligible'* Collins English Dictionary, accessed from <http://www.thefreedictionary.com/ideology> on 7/7/12

¹⁴ http://www.scotcourts.gov.uk/sheriff/rules_council/consultation/docs/ADRDocs/Response_Sheriffs_Principals_Bowen_and_others.pdf p.2

¹⁵ *Ibid*, p.5

¹⁶ Lord Rodger 'Civil Justice in Scotland: Where Have We Come From, Where to Next?' on file with the author, p.4

¹⁷ *Ibid*. p.4

and tribunals do indeed provide the best vehicle for obtaining justice.’ In support of this he cited ‘the risk of under-settlement’ and the older chestnut of ‘developing the law... Where would we have been without *Donoghue v Stevenson*?’¹⁸

Lord Rodger’s replacement on the Supreme Court, Lord Reed, has taken a similar line, describing the ‘undue pressure’ applied by English courts to get litigants to mediate and the negative impact on judicial precedent. He also stressed that ‘it would not be right to require persons who wish a legal solution of their dispute to participate in a process which is far from pure in its application of legal principle.’¹⁹

These few examples may indicate nothing more than slightly conservative judicial attitudes: so far so normal. Noting a similar phenomenon in parts of the USA, Frank Sander has proposed a ‘*Mediation Receptivity Index*’ to understand why some states seem much more receptive to mediation.²⁰ A mediator friend who moved to New York was told that it is ‘*not a mediation state*’.

Nonetheless, the influence of local legal culture, and in particular our allegiance to the idea of a Civilian heritage, seems to provide a deeper and more plausible explanation for the anti-mediation sentiment in my jurisdiction. When it comes to the kind of radical innovation presented by mediation, it appears that the instincts of Scotland’s lawyers place them closer to Borbély’s France than either the USA or England & Wales.

If this hypothesis is correct, where does it leave us? In one sense exactly where we were before. Some jurisdictions (in the USA as well as Europe) seem deeply disinterested in mediation’s attractions. Enthusiasts may find this frustrating, but the precise cause is difficult to pin down. The incentives to use mediation seem to exist in similar measure in most jurisdictions: litigation’s costs, delays and general frustrations are hardly unique to the USA.

To use the language of empirical research, if we have broadly similar inputs (people’s disputes) and background conditions (the limitations of legal systems) leading to very different outputs (the rate of use of mediation), in seeking an explanation we need to look at other variables. To date, mediation research has typically focused on structural factors such as cost, availability, awareness and the role of lawyers as gatekeepers.²¹ Little consideration has been given to the background ideology of legal systems. Borbély suggests that a Civilian view of litigation may account for the minimal use of mediation in France.²² While this is an attractive hypothesis, there are numerous other differences

¹⁸ Lord Hope of Craighead, speech at official opening of Digby Brown Solicitors’ Glasgow Office (6 September 2011) www.digbybrown.co.uk/index.php/site/news_main/glasgow_opening

¹⁹ Lord Reed, “The Civil Court and the Future of Dispute Resolution” (November, 2007) available at http://www.scottish-arbitrators.org/z_pdf/articles/the_civil_court.pdf

²⁰ Frank EA Sander ‘Developing the MRI (Mediation Receptivity Index)’ 22 *Ohio State Journal on Dispute Resolution* (2006-2007) 599-618

²¹ Jane Lewis *The Role of Mediation in Family Disputes in Scotland*. (Edinburgh: Scottish Office, 2007); Gwyn Davis et al, *Monitoring Publicly Funded Family Mediation* (London: Legal Services Commission, 2000); Lisa Webley, Abrams, P & Bacquet, S, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme*, (London: Department for Constitutional Affairs, 2006); Prince, S & Belcher, S (2006) *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts*, available from www.dca.gov.uk/civil/adr/fasttrack-mediation-guildford-exeter.pdf; Genn, H, Fenn, P, Mason, M, Lane, A, Bechai, N, Gray, N & Vencappa, D, *Twisting Arms: Court referral and court linked mediation under judicial pressure* (London: Ministry of Justice, 2007)

²² CITATION?

between England or the USA and France that may account for their distinctive approaches: not least their language, history and systems of government. If Scotland, however, with all its historical and practical similarities to England, displays a similar lack of enthusiasm for mediation, it becomes more plausible that the key variable is allegiance to the Civil Law tradition.

One way of understanding Civil Law and Common Law systems is as legal cultures. Of course 'culture' is a term with multiple and contested meanings.²³ Geertz defines it as '*the structure of meaning through which men give shape to their experience.*'²⁴ Here I use the term 'legal cultures' descriptively, to convey the distinctive features and practices associated with particular countries. Silbey, citing Friedman, speaks of 'legal culture' as '*emphasizing the fact that law was best understood and described as a system, a product of social forces, and itself a conduit of the same forces.*'²⁵ This article seeks to propose two related hypotheses: first, that countries influenced by the Civil Law tradition are indeed less tolerant of alternatives to the formal legal system; and second, that a legal culture's approach to mediation (in effect an alternative to itself) shines a light on its underlying ideology, in particular the place of legal norms in governing social relations.

Also neglected is the fact that mediation has its own culture. While there is a considerable body of work on the importance of culture in negotiation,²⁶ when it comes to mediation the literature tends to focus on cultural differences between the parties, or between the parties and the mediator.²⁷ Little attention has been paid to the cultural significance of mediation itself,²⁸ a factor that may be particularly overlooked when cultures share the same language: the exponents of mediation may take less care to ensure its applicability where there is no need for an actual translation.

This leads me to speculate about other elements of Scottish culture that may work against the use of mediation: a concern with privacy ('we don't want strangers involved in our private business'); a Presbyterian rejection of emotionalism; simple conservatism; and another factor identified by Genn and Paterson – a '*general sense of powerlessness*' much more pronounced in Scotland than in England and Wales.²⁹

I must confess to raising questions rather than offering answers. It is human nature to try to make meaning from inexplicable events. The challenge for the academic community is to look more closely at the impact of local legal culture, in particular allegiance to the Civilian or Common Law legal family, when attempting to account for differences in 'mediation receptivity'. It is beyond the scope of this article to consider other legal traditions: the reception given to mediation in, say, Islamic or Chinese legal cultures is also likely to vary according to their underlying ideology.

²³ Terry Eagleton, *The Idea of Culture* (Oxford: Blackwell Publishing, 2000)

²⁴ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 2000) p.312

²⁵ Susan S Silbey, 'Legal Culture and Legal Consciousness' in *International Encyclopedia of Social and Behavioral Sciences* (New York: Elsevier, Pergamon Press, 2001), p.8624

²⁶ Hofstede, G, *Culture's Consequences: International Differences in Work-Related Values* (Thousand Oaks, California: Sage, 1980); Kimmel, 2000; Docherty, 2004; Wanis-St. John, 2005

²⁷ Augsburg, 1993; Shah-Kazemi, 2000; LeBaron, 2003

²⁸ Although see John Paul Lederach, *Preparing for Peace:*

²⁹ With 23% accepting a judgement for this reason compared to 6% south of the border, Genn and Paterson, 2001, p.254

'How we do things round here' is a compelling argument for most lawyers. The myths we are taught at Law School have a lasting grip on our imagination. Whether Scotland is in fact a mixed, still less a Civilian, system may matter less than that it believes it to be so.