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THE BIBLE AND SCOTS LAW

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At one time Scotland was known as the land of the Book. It was said to have the highest literacy rate in Europe with evident results in philosophy, theology, law, science, engineering and medicine. Voltaire wrote, “It is to Scotland that we must look for all our ideas of civilisation.”

Why should this have been so? Is there a connection between a national respect for the Bible, a high literacy rate and an advanced civilisation? Did one flow from the other or did these features of the Scottish identity develop independently?

The effect of the Bible on education is well documented and recognised by all who take an unbiased view of history. Our Solas Director has written of how Scotland was once known as “the land of the people of the book, and exported engineers, military leaders, politicians, doctors, teachers and missionaries all over the world. And it was not just Scotland – everywhere Christianity... brought education. The Reformation resulted in the establishment of universities and schools wherever it was successful” (Solas Magazine Winter 2015/16, p.19).

What is possibly not so frequently recognised in the influence of the Bible on the law of Scotland, and the purpose of this Solas Paper is to examine the roots of the Scottish legal system, and to consider the laws which are still part of Scottish criminal law which owe their origin to the Bible.

BACKGROUND

In medieval Europe, there were strong social, political and commercial links between Scotland and the mainland of Northern Europe. There were fewer friendly links between Scotland and her immediately southern neighbour whose territorial demands had been halted by the combined Pictish-Scottish victory at Dunnichen in AD 685. After Queen Margaret introduced the discipline of the Roman church to what had developed through the previous eight centuries as Celtic spirituality, thirteenth and fourteenth century students from Scotland went to study law and the humanities in European universities. They brought back with them ideas on jurisprudence from countries that were developing the European civil law system.

As Scotland’s parliamentary and legal system developed, particularly in the reign of James IV (1488-1513), these civilian ideas came to be adopted into our

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legal system. In this context a system is not a collection of rules but a general understanding of the rule of law, the sources of law and the philosophy of law known as jurisprudence.

To say that Scots law was founded on Roman-Dutch law is not to say that Scotland adopted pagan Roman law as it was practised in Rome at the time of Julius Caesar, but that she did adopt the principled or deductive (top-down) approach being favoured by Renaissance Italy. This approach looked to the Institutes of the Roman jurist Justinian to find logical precepts on which to base a new economic and mercantile system.

James IV set up the College of Justice whose law lords still have the emblem of Christianity (the cross) on their red gowns. It was in James' reign that free legal aid was introduced in fifteenth century Scotland. The Scottish Parliament at that time began to introduce statutes for the governance of Scotland and the courts were influential in shaping the law by interpretation and application both of statute and of the "Institutional Writers". Precedent was less important, as it was understood that the law in any particular case should be seen in light of the relevant principle, rather than by comparison with another case in which the individual circumstances could be very different. England, by contrast with Scotland and the rest of Europe, developed a common law system based on precedent and an inductive or "bottom-up" approach, which in the eighteenth and nineteenth centuries during the development of the British Empire, was effectively imposed on most of the British colonies and still applies today.

It would be misleading to suggest that Scotland had a purely civilian system, akin to that of France, Germany or Holland. During the occupation by Edward 1, prior to the Declaration of Arbroath, and especially after the Union of the Crowns in 1603, the influence of the English/Norman system also came to bear, especially in relation to feudal tenure.

Scotland's legal system is the child of a mixed marriage: the common law system of England and the civilian system of Europe. These combined to create what is known as a "mixed or hybrid legal system" and perhaps if its position could be properly understood, it would be all the more vigorous for that. Scotland is one of just five jurisdictions

in the world to have this mixed system, the others being Quebec, Louisiana, Sri Lanka and South Africa. All of these have had both European and English legal influence.

INSTITUTIONAL WRITERS

In Scotland the principles of law were enunciated by the Institutional Writers such as Mackenzie, Erskine, Stair, Bell and Hume. These five had produced something akin to a codified body of law for Scotland by the eighteenth century, in books published as collective Principles or Institutes of Scots Law. They looked for their principles not only to their European, particularly German/Dutch neighbours, but also to the Bible (especially for ideas of evidence, procedure and substantive criminal law).

In particular David Hume (not the philosopher of the Enlightenment but his nephew, an enlightened jurist) provided much insight into the moral content of criminal law and what a system of justice might look like. His work can be identified readily as having been inspired by biblical content and understanding. Overall, the belief that God is an all-seeing, all-knowing, all-powerful and all-loving supernatural Being with a perfect standard of truth and justice gave rise to the motto of the courts of Scotland, "In my defence God me defend".

In writing his version of the "Institutes", Stair took as his cardinal rule the biblical Golden Rule (Matthew 7:12) that in relations between individuals we should "do unto others as we would have them do unto us".

THE BIBLE AS A SOURCE BOOK

The influence of the Bible as the foundational source book for the legal system, as interpreted by the courts, parliament and the Institutional Writers, may be seen historically in the laws relating to:

1. evidence and procedure
2. jurisprudence
3. the body of criminal law
4. private law

Before examining these areas, we should note that so far as biblical laws are concerned, we need to differentiate between, on the one hand, ceremonial laws and food and hygiene laws (both of which were given to a particular people at a particular time) and, on the other hand, the moral law which is of universal application to mankind.

It should also be noted that while we have abolished capital punishment, this departure from Old Testament law can be justified on the grounds that we do not have a good enough system of justice to bear this responsibility; too often we get things wrong. More significantly the teaching of Christ emphasises how much we all rely on the mercy and forgiveness of God. Christians are taught that in asking for forgiveness we must also forgive one another.

1. EVIDENCE AND PROCEDURE

i. The Bible teaches that judgment by one person of another person's behaviour is a serious matter and should never be done lightly. The concept of bringing a dispute before a Judge for determination may be seen as universal. However the Bible also teaches (Deuteronomy 17:6; Numbers 35:30) that an accusation of wrongdoing should only be entertained where there is corroboration of evidence.

ii. In Leviticus 5:1 the message is that anyone who has evidence to bring to a court should do so. It is wrong to know something relating to a case and not to come forward and tell the truth of the matter. In Scots law this is acknowledged by the compulsory citation of witnesses.

iii. Contempt of Court in our law may be sourced back to Deuteronomy 17:10-12 where the emphasis is on accepting the judgment of the court.

iv. In biblical law, the witness takes an oath in God's name to acknowledge that he will tell the truth. In Scotland the same applies, although the courts allow a solemn affirmation to tell the truth for those Christians who believe that James 5:12 – "Do not swear, either by heaven or by earth or by any other oath, but let your 'yes' be yes and your 'no' be no" – prohibits all such oaths, and also for those witnesses who do not believe in God. This is a matter for individual conscience, but the oath to acknowledge the presence of

God in the proceedings is an element that is still seen as important, and a comfort to those who believe that God is an invisible witness in every court.

v. Fabrication of evidence or perjury is taken very seriously – Exodus 23:1-3. In the Bible truth is paramount, and we are all familiar with the concept of "The truth, the whole truth and nothing but the truth". That is the biblical standard.

vi. Legal Aid was introduced to Scotland in the fifteenth century and the Bible teaches (Exodus 23:6) that no-one should be deprived of a fair trial by reason of poverty. This is now translated into the European Convention of Human Rights, but it has for centuries been acknowledged in Scots law.

2. JURISPRUDENCE

i. Everyone is equal before the law just as everyone is equal before God (Deuteronomy 16:18-20). Racial equality also was one of the early principles – the foreigner in the land is to be treated fairly. Disability rights are also protected (e.g. Leviticus 19:14-15, 33-34; Exodus 22:21). In Scotland as in the UK generally we aspire to the standard of equality set in the Bible, but this has been corrupted in recent years so that we end up discriminating on the basis of protected characteristics by our very obsession not to discriminate.

ii. Appeal courts were available from biblical times for difficult cases (Deuteronomy 17:8-9). So in Scotland we have appeal courts. The Treaty of Union of 1707 particularly reserves to Scotland the Scottish court system, and Scots private law (the law governing relationships between individuals).

iii. Civilian legal systems permit an inquisitorial approach in which the Judge can ask questions to investigate a matter, but Scotland (like England) has a common law accusatorial system in which the Judge does not become involved in the discovery of evidence but only in the evaluation of evidence and judgement. Perhaps the civilian system is more akin to the biblical model in this matter.

iv. One procedural area in which we have not followed biblical teaching is in the area of imprisonment. The Bible introduced the "city of refuge" to protect the wrongdoer

from vengeance, and also provided for forgiveness and rehabilitation in a year of jubilee. Our system is much less forgiving. The 'police' in biblical times were apparently there to implement the decisions of the court, rather like sheriff officers in Scotland. (Matthew 6:25 - "Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the judge, and the judge may hand you over to the officer and you may be thrown into prison".) The concept that the police should investigate crime seems to be a relatively recent one, and bestows on the police a particularly high duty of honesty.

v. The overarching concept of justice in the Bible is one of judgement tempered into justice by mercy and proportionality. It is a comfort for those believers who become involved in the judicial process that a higher Power than any earthly court will ultimately determine the issues.

vi. Within the theory of judicial procedure, all power devolves from the Crown. This is a biblical concept, dating from the time when the people of Israel asked to have a king like other countries. In Scotland the other side of the coin is that sovereignty is vested in the people and this too is a biblical precept. The constitutional issues of the rule of law, the sovereignty of the people and the separation of powers were considered by George Buchanan in the sixteenth century in *De Jure Regni Apud Scotos* (1579), a treatise on the limitations of monarchical power, possibly laying the ground for Samuel Rutherford's work *Lex Rex* (the law is king) in the seventeenth century. This challenge to the pre-existing dogma of the divine right of kings led to a charge of treason against Rutherford in England and a death sentence in that country (which then had a separate Parliament from Scotland). Rutherford died before his execution. Conversely and ironically, Charles I (of Britain) was charged with high treason by the English Parliament and executed in England for having adhered to his belief that he was a divinely appointed steward of the people. In the eighteenth century these Christian Scottish writers may be seen to have influenced both the French and the American revolutions.

vii. If one accepts that the monarch is a trustee for the people, the people reciprocate with loyalty and obedience to the law, recognising that the rule of law is given under

God's providence for their good. In the theory of natural law, however, when the moral law of God contradicts the law of the state, it is God's law that takes precedence. This was the essential position of the prosecution at the Nuremberg trials of post-war Germany. This concept of natural law justified the civil disobedience of the people during the Highland Clearances, which was an attempt at genocide for the private gain of landlords.

viii. At her coronation, the Queen accepted the Bible as the Royal Law and is bound by solemn oath to have regard to its guidance. All authority of the Crown Office is constitutionally derived from this undertaking, continuing the pattern set by previous monarchs over hundreds of years. There is in the Treaty of Union of 1707 the recognition of freedom of religious practice in a distinctly Scottish context, and the Crown sustains that freedom.

At her coronation, these words were addressed to the Queen: "Our gracious Queen: to keep your Majesty ever mindful of the law and Gospel of God as the rule for the whole life and government of Christian princes, we present you with this book, the most valuable thing that this world affords. Here is Wisdom. This is the Royal Law. These are the lively oracles of God. Be strong and of a good courage; keep the commandments of the Lord thy God, and walk in his ways." Since the prosecution of crime in Scotland is at the instance of the Crown, these words taken from the Coronation Oath also serve as a reminder that the vital elements of justice and mercy are to be uppermost in the mind of the Lord Advocate as well as in the mind of the Judge.

3. CRIMINAL LAW

The ten commandments (Exodus 20 and Deuteronomy 5) provide a useful *aide memoire* for the duties we owe to God through the first four commandments and the duties we owe to other people in the others. Only four – murder, theft, perjury and bearing false witness – remain as crimes in our secular law of Scotland. The remaining six are no longer seen as crimes against the state, although it may be seen that breaking these laws does not lead to harmony in society. Truth gets a double mention as taking the Lord's name in vain may be seen as parallel (through the oath in court) to bearing false witness against our neighbour.

The Bible expands on these ten basic laws by way of explanation and example, and Jesus in the Sermon on the Mount (Matthew 5) sets a standard that is impossibly high without the help of the Holy Spirit.

However, the purpose of this Paper is to consider the laws which are still in place as part of the criminal law of Scotland and which owe their origin to the Bible. For example:

i. Accidental death may be culpable homicide, a lesser charge than murder, or may not be a crime. The mental intention to commit a crime is important, and used to be necessary (Deuteronomy 19:4-6) although a more recent change in Scotland introduced the statutory crime of causing death by careless driving. The traditional view in Scots law was that carelessness or negligence gave rise to a civil action for reparation but not to a criminal prosecution.

ii. Bribes are prohibited in Scotland, most recently in term of the Bribery Act and this was introduced in Exodus 23:8.

iii. Culpable and reckless conduct relates to behaviour that is so likely to cause serious injury that the element of mental intention is not required to be proved (Leviticus 19:16b).

iv. Culpable and reckless/accidental death is further explained in Numbers 35:22-25.

v. Diversion from prosecution (at instance of accused) is one concept which we do not yet have in Scotland – Matthew 5:25.

vi. Fraud is outlawed in Leviticus 19:13.

vii. Health and safety is introduced in Deuteronomy 22:8.

viii. The rules relating to incest may still be seen as being based on the rules of Leviticus 18:6-18.

ix. Independence of Judges is emphasised in Deuteronomy 1:16-17.

x. Leviticus 5:5-7, 11 allow for lesser fines for the poor. In Scots law the financial circumstances of the person convicted are taken into account when imposing a fine.

xi. Malice, such as would give rise to an untrue accusation,

is described in Leviticus 19:18.

xii. Miscarriage of justice – Exodus 23:7.

xiii. Murder/culpable homicide – Exodus 21:12-14; Numbers 35:16-21.

xiv. Perjury – Exodus 23:2; Leviticus 19:12; Deuteronomy 5:20.

xv. Preparation before trial – Psalm 37:5-6.

xvi. Purity of law – Deuteronomy 4:8.

xvii. Racial equality – Exodus 22:21; Leviticus 19:33-34; Leviticus 24:22.

xviii. Rule of Law – 1 Peter 2:13-17.

xix. Submission to authority – Romans 13:1-6.

xx. Theft and deception – Leviticus 19:11; Deuteronomy 5:19.

xxi. Weights and measures – Leviticus 19:35-36.

4. PRIVATE LAW

The law of property has developed according to mercantile standards and is less clearly connected to biblical law.

The law of succession provided protection for the family of deceased persons, so that a surviving spouse and children could not be disinherited. No direct source of these laws of succession has been traced but in the book of Job we see that daughters are treated equally with their brothers in their father's succession. In the New Testament we hear of the prodigal son asking for his "legal rights" – that is, what he would inherit on his father's death. Scotland has legal rights affecting moveable (cash) property, as do European countries, unlike England where this system is referred to as "forced heirship". Mercantilism has given rise to many of the rules relating to contract. Defamation of character and reparation may be seen as closely linked to biblical principle (Exodus 21:18).

CONCLUSION

In conclusion it is submitted that there is indeed a connection between the degree of civilisation in Scotland in the eighteenth century and the biblical faith of those whose work promoted the nation and its legal system to the elevated standard that it enjoyed at that time.

POSTSCRIPT

So much for the past; what about the present basis of Scots law? In theory the 1707 Treaty of Union protected Scots law as a separate system with its own jurisdiction and judiciary, but the reality is that over the years successive Westminster governments have increased the influence and impact of legislation. Although originally the Treaty provided for the Court of Session and High Court to be the highest courts of appeal for Scottish cases, the House of Lords has been able to hear appeals from the Court of Session. This has been established since 1781 as being a fundamental right rooted in the 1689 Claim of Right which allowed appeal to the Lords of Session (in the Scottish Parliament); after the 1707 Union, they were replaced by the House of Lords.

Since the passing into statute of the Human Rights Charter, criminal appeals also have been heard in the English-based Supreme Court. Scottish legislation received competent drafting through the Westminster system but little time was available for the timetabling of Scottish Bills. With the opening of the Scottish Parliament at Holyrood this changed, and now we are awash with swathes of new legislation.

This has coincided with cut-and-paste software, a change in culture and a decline in biblical Christianity. The worldview embedded in the legislation which we now see coming from Holyrood and Westminster on reserved matters is very different from that of the Institutional Writers. To analyse modern trends would require another Paper.