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Harmonisation of company law

Lessons from Scottish and English legal history

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Abstract *Company law harmonisation is considered to be necessary for the achievement of the European Union's (EU) aim of a single market and the free movement of goods and services throughout member states. This paper aims to contribute to understanding of both business and accounting history by considering whether UK legal history can offer any insight into the process of harmonisation. First, approaches to company law in the United Kingdom and the remainder of the EU are outlined in order to identify key differences and to explain why harmonisation is desired. Secondly, the UK position is considered and historical attempts to lessen legal differences between Scots and English mercantile laws are then examined, focusing on harmonisation attempts. Finally, by reflecting on the UK experience, implications for the EU company law harmonisation programme are drawn.*

Introduction

Harmonisation is a process that is commonly associated with the European Union's (EU) efforts to provide an environment in which its aim of achieving the free movement of goods and services and a single market can be achieved (Nobes, 1990; Paisey, 1991; Smit and Herzog, 1990; Van Hulle, 1992). Harmonisation has been defined as a process of increasing the compatibility of practices by setting bounds on their degree of variation (Nobes, 1990). Importantly, harmonisation is not the same as standardisation or uniformity (Roberts *et al.*, 2002). Thus, harmonisation implies a reduction in the scale of differences to the extent that there is a broad similarity between systems, but nonetheless some differences may remain. This definition is crucial and its implications will be addressed later in this paper.

Several benefits are claimed for harmonisation in the business field. Given the global nature of trade and commerce, firms are required to engage worldwide and it is in their interests that there is some commonality in underlying business systems (Nobes and Parker, 2002). International investment analysts, investors and business analysts will be assisted if there is a broad comparability between systems (Roberts *et al.*, 2002). Other users of business information, such as governments, quasi-governmental bodies and trade unions will also be aided in their decision-making if they can broadly understand systems in different countries (Nobes, 1990). Within the EU, the Treaty of Rome (1957) envisaged a common market and established the free movement of persons, capital, goods and services (Paisey,

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1991). This concept was extended with the passing of the Single European Act in 1986 which sets the aim of removing all barriers between states, whether physical, technical or fiscal, and the resultant single market was in place by 1992 (Roberts *et al.*, 2002). Harmonisation is seen as crucial to this process since a truly single market cannot be achieved if significant underlying differences remain between member states that would act as barriers to trade (Nobes and Parker, 2002).

The plethora of regulations, directives, decisions, recommendations and opinions passed by the EU covering all areas of life have focused attention on the process of harmonisation. Similar work is performed in specific areas such as the International Accounting Standards Board's pursuit of accounting harmonisation through the issue of standards to be applied worldwide (Nobes and Parker, 2002). However, the idea of harmonisation is not new. When recent harmonisation efforts have been researched, there has been no recognition of earlier moves to achieve harmonisation (Dine, 1998; Goeltz, 1991; Hermann and Thomas, 1995; Nair and Frank, 1981). This paper seeks to address this omission.

There are many potential areas of difference between countries, whether in their cultures, business environments, providers of finance, taxation, professional, economic and political environments (Paisey, 1991). This paper specifically focuses on legal differences in order to determine whether these constitute a barrier to harmonisation. It considers attempts to bring the mercantile laws[1] of Scotland and England at the beginning of the 20th century closer together, a process driven by the desire to simplify the law as a means of facilitating trade.

The aim of this paper is to consider whether UK legal history can offer any insight into the process of harmonisation. First, approaches to company law in the United Kingdom and the remainder of the EU are outlined in order to identify key differences and to explain why harmonisation is desired. Secondly, the UK position is considered and historical attempts to lessen legal differences between Scots and English mercantile laws are examined, focusing on attempts to harmonise. Finally, by reflecting on the UK experience, implications for the EU company law harmonisation programme are drawn.

Approaches to company law in the EU

The United Kingdom

The earliest companies in the United Kingdom tended to be set-up for specific ventures and began to be formed in significant numbers in the 18th century. One notorious example is the South Seas Company, described as "a company calculated for scheming rather than trading" by an unknown pamphleteer cited in Schmitthoff (1987, p. 1009). Indeed, such was parliament's disquiet at the prevalence of fraudulent corporate ventures that it passed the so-called *Bubble Act* of 1720 which prohibited the establishment of new companies unless authorised by an Act of Parliament or Royal Charter (Edwards, 1989).

This act was not entirely successful however. Following a period of relative paucity of new ventures, new forms of organisation which were essentially large partnerships but with corporate overtones were established. In England, these commonly took the form of deed of settlement companies where a deed was drawn up by specifying the shareholders of the company, the amount of capital, the company name and clauses covering the running of the company (including the appointment of directors to

manage the concern) and where the shareholders appointed a trustee to oversee the deed. Although having some characteristics of a modern company, these companies were in fact legally regarded as large partnerships with the shareholders possessing unlimited liability (Van Caenegem, 1988). Joint stock companies were also gaining a foothold in England. Such companies were popular in Scotland. These too were effectively large partnerships, but with a capital base and shareholders independent of the management of the concern (Meston *et al.*, 1991).

The early history of UK company law reflects the economic impetus for the formation of the large-scale concerns inspired by the industrial revolution. It also shows that the legislative framework lagged behind commercial pressures. These pressures resulted in 1855 in the recognition of limited liability, but there remained a general reluctance to formulate a rigid and prescriptive body of law. Mindful of the economic doctrines of the time, the legislature did not wish to thwart the overriding principle of *laissez-faire* whatever the commercial pressure for new business forms (Edwards, 1989). By the mid-19th century then, the essential elements of UK company law were in place; companies were flourishing, but statutory regulation was kept to the minimum necessary to protect shareholders and creditors whilst allowing business to proceed in a relatively unrestricted fashion. Thereafter, the early elements of company law were fleshed out following the recommendations of a series of government appointed committees. Examples of this extension in company law were the audit requirement, the truth and correctness, and later fairness of financial statements, filing requirements, provisions regarding group accounts and a modest increase in disclosure requirements (Edwards, 1989). There appeared to be a general recognition that the professional institutes of accountants were themselves acting as instruments of change in financial reporting matters (Edwards, 1989) and this allowed the essentially self-regulatory accounting environment to flourish. It was not until the incorporation of EU law into the 1980 and 1981 Companies Acts that the law came to exert significant influence on accounting requirements (Dine, 1998).

Other EU countries

All the EU countries apart from the UK and Ireland have codified legal systems. Although the Greek legal system is not entirely codified, it displays many of the characteristics of a codified system (Paisey, 1991) (Scots law is difficult to place and will be considered later). It is thus difficult to refer to European law, for Europe can refer to non-EU as well as EU countries, continental Europe, and – given ever changing political circumstances – can comprise different nations at different times. In the context of this paper, however, European law is used to refer to the type of legal system found in the EU countries other than the UK, Ireland and Greece, characterised by codes and charts of accounts.

Codified systems lay down a set of principles that should be followed in all circumstances. As citizens can discover the law in any area and apply the underlying reasoning to situations not necessarily envisaged when the codes were originally enacted, new situations can be catered for, at least until codes are modified and updated. Theoretically, therefore, codified systems make the law reasonably certain (Frommel and Thomson, 1975).

In codified systems, judges interpret the codes but they do not initiate law. Interpretation of the law does involve judgements, however, and it has been argued

(Paisey, 1991) that the very process of interpreting the law is a form of law-making, because, over time, the interpretation given to law develops and defines it. Indeed, since the 1970s, judges throughout EU countries seem to have become more willing to consider earlier judgements as well as the codes themselves when deciding cases (Frommel and Thomson, 1975).

Codes are formulated by legislatures but are influenced by academe in EU countries, in contrast with the UK situation (Frommel and Thomson, 1975). As Van Caenegem (1988) shows, much of the codified laws of Europe have its roots in Roman law, which was heavily based on principle. Study of Roman law was central to the work of the medieval European universities where European lawyers were educated. Law in EU countries also moves "theoretically by deductive reasoning, basing judgements on abstract principles" according to Van Caenegem (1988, p. 88), a relic from the Roman legal tradition.

An important manifestation of the centralised, codified type of legal system, adopted widely throughout EU countries, is charts of accounts. Double-entry bookkeeping gave rise to the earliest charts of accounts, which broadly correspond to ledgers and the trial balance. During the 19th century, more structured charts of accounts were developed, their format is governed by the needs of individual firms and the chosen method of presentation of financial reports. Nobes (1986) describes how uniform formats for charts of accounts probably first appeared in Germany in 1911, in order to provide more meaningful data for national cost accounting purposes. These were used during World War I and developed in the post-war period to provide data for controlling the economy.

The Germans introduced charts of accounts in France during World War II and these were retained by the French in the post-war period. As Nobes (1992) argues, the influence of charts of accounts and accounting plans was all-pervasive since published financial statements and tax returns, as well as management and cost accounts, used them as a recognised format.

The charts of accounts favoured in much of Europe not only have an economic role but they also stem from the traditions of the underlying legal systems (Paisey, 1991). The accounting rules throughout most of Europe are law-based. As part of the legal system, they can be changed only by that system. This gives them a degree of formality and heightens accountancy's relationship with the legislature and the courts. While the legislature makes laws, accountants apply them or check that they have been applied by others and the courts deal with deviations from the law. The UK situation is quite different. Traditionally, accountants have been largely self-regulating, applying mainly procedural laws and being guided by professional pronouncements that specified best practice, not law. This has given UK accountancy a role largely independent of the legislature and the courts.

In summary, the style of accounting relying on codes, accounting plans and detailed (especially prescriptive tax) legislation is already prevalent in most of Europe and appears to be well-established as a workable framework. The result is that the UK model looks increasingly isolated.

This paper has so far outlined, in broad terms, the differences between the legal systems of the UK and the other EU countries and shown that these differences have been matched by differences in their respective accounting environments. The

remainder of this paper examines historical attempts to lessen legal differences within the UK with a view to facilitating trade and commerce.

The UK experience

It is important to remember that UK law comprises the laws of different jurisdictions and that, in particular, the laws of England and Scotland possess deep-seated differences. These are currently considered in order to show why attempts have been made to lessen differences.

Differences between Scots and English law

Texts on the history of UK law (Van Caenegem, 1988; Walker, 1992) clearly show that the differences between Scots law and English law are historical. Early Scottish legal history is characterised by the influences of English and Canon law. English legal practices and feudal law were introduced in Scotland by David I (1124-53). These influences were strengthened in the early 14th century during English occupation after the war of independence. Through the application of Canon law, ecclesiastical courts in Scotland introduced Roman law to Scotland. The Roman influence was reinforced by the fact that a large number of Scottish scholars went to universities in France, and later Holland, where Roman law was studied widely.

The 18th century saw a number of eminent Scottish legal writers, including Bankton, Erskine, Miller and Kames, who, like their predecessors, were strongly influenced by Roman law. Like Roman law, Scots law was developing as a legal system based on principle not precedent. This may account for the relative paucity of reported legal cases at this time. Clearly, Scottish legal history displays an affinity with both English and continental European law, with the latter becoming more important as the centuries unfolded.

The influence of English law has arguably eroded some of these continental features. As early as 1707, the Act of Union between England and Scotland had provided that laws regulating trade, customs and excises should be standardised. Modern company and tax laws are currently basically uniform throughout the UK, although some differences do exist, as outlined by Marshall (1992), particularly in the field of receivership and in companies legislation where specific provisions relate only to Scotland. More fundamentally, as Marshall notes, company legislation is superimposed on the common law as it is consolidating rather than codifying, leaving open the possibility of Scottish courts reaching different judgements from English ones even though, for the most part, the law is the same in both jurisdictions.

Differences between Scots and English law are not as marked in the commercial field as in other fields, such as family and criminal law. Nonetheless, they are potentially important, for even if statutes apply throughout the United Kingdom, there is a difference in approach between Scotland and England. The increasing influence of statute law has partially eroded the Scots lawyer's devotion to principle but it still survives. It is Walker's (1992) belief that if Scotland had preserved her independence, Scots law would have followed the European pattern of codification in the 19th century because of its Roman influence and the work of two of Scotland's foremost legal writers, Erskine and Bell. It follows that European accounting practices, being a logical adjunct to the codified systems from which they sprang, may be more in keeping with

the Scottish legal and historical traditions than the anglicised practices which have been adopted by Scottish accountants (Paisey, 1991).

While principles occupy a position of importance in much of European and Scots law, English law has been more influenced by case law. In England, judicial decisions have binding authority. While there is some evidence that they are becoming more influential in Europe, their status is less secure there.

Manson (1903) traced the early development of UK company law and showed that legislation was introduced when judge-made law (custom) was found to be lacking but that legislation had not totally supplanted custom. Throughout the 20th century the bulk of company legislation has increased substantially but case law is still referred to in certain areas such as legal entity, minority protection and conduct of meetings.

The extent to which case law and legislation can co-exist is shown by the Scottish situation. Prior to the founding of the Court of Session in 1532, no record was kept of Scottish case law. While appearing to have been of little influence initially, cases do seem to have assumed greater importance by the end of the 17th century (Gardner, 1938). Erskine (1773, 1, i, p. 47) states Scottish opinion on the issue at this time when he says:

> . . .judgments ought not to be pronounced by examples or precedents. Decisions, though they bind the parties litigating, create no obligation on the judges to follow the same track, if it shall appear to them contrary to law.

This view, refusing to accept wholeheartedly the doctrine of judicial precedent, but recognising its growing importance, is reinforced by the opinion of Mackenzie quoted in Gardner (1938, p. 122):

> Our unwritten law comprehends the constant track of decisions passed by the Lords of Session which is considered as law, the Lords respecting very much their own decisions, and though they may yet, the use was not to recede from them except upon grave considerations.

Since the late 17th century, these views have gained ground.

Case reports became more detailed allowing readers not only to learn the decision but also the reasons for it. The *ratio decidendi*, as the reasoning is known, is vital if the doctrine of judicial precedent is to prevail, for the reasoning must be known. At the present time Scottish judges apply the doctrine to a considerable extent, though a distinction is made between the importance of previous Scottish cases and English ones, English ones often being persuasive but not binding.

The Scottish adoption of the doctrine of judicial precedent has implications for the Scottish legal system and the doctrine itself. First, it has been said that the Scottish method of judicial precedent may be regarded as constituting a compromise between the continental and Anglo-American methods (Gardner, 1938). Thus, it is not impossible that codified and custom-based legal systems can co-exist. Secondly, it shows the strength of the doctrine. While judicial decisions as a source of law were welcomed by Fraser of Tullybelton (1988), because they offer flexibility and room for development in changing circumstances, they are also open to criticism. They depend on which cases come before the courts, an obvious but important fact, which can result in rather fragmented, ad hoc law. Moreover, they can be revised by parliament and thus present a potentially more ephemeral legal base than principle.

In commercial cases, English judgements have assumed considerable importance in Scots law in the circumstances where the underlying principles are the same in both

jurisdictions (Henderson, 1900). The influence is not wholly one-sided however. Raleigh (1890) notes that, even in a time when the two systems were only beginning their co-existence and mutual influence, English courts respected Scottish decisions.

This section has highlighted the considerable differences that exist between Scots and English law. The next section considers UK attempts to lessen legal differences. Most, though not all, examples refer to commercial law codification but all highlight the benefits and problems associated with moves to lessen legal differences.

Codification was a much discussed topic in legal circles at the end of the 19th and beginning of the 20th centuries. The events causing the upsurge of interest were, first, the passing of a variety of statutes which effectively codified small branches of the law and, secondly, increasing calls for an Imperial (Empire-wide) code which would follow from a codification of English and Scots law.

Statutes effectively codifying small branches of the law included the *Mercantile Law Amendment Act 1856*, the *Bills of Exchange Act 1882*, the *Partnership Act 1890*, the *Sale of Goods Act 1893* and the *Companies Act 1900*. These statutes show that a "succinct, authoritative and tolerably plain" statement of the rules within a relatively closely defined area, such as partnership, is possible (Kerly, 1891, p. 44). They also act as an aid to both the general public and legal advisors, for as Kerly (1891, p. 48) stated of partnership:

> the act will enable a man of ordinary understanding to readily acquire an acquaintance with the general outline of the law of partnership, and, by solving many disputed questions and filling up some gaps, will enable his advisors to tell him with greater confidence and facility what, in detail, the law on any particular matter is.

This extract shows both some of the advantages and disadvantages of such a codification. While it makes the law more accessible it also necessitates, even if only to a limited extent, the making of new law. Certainly the above-mentioned acts did basically put together and collate existing legislation. However, this process necessitated the making of a new statutory structure. Structural changes cannot be ignored because they impact on the way statutes are interpreted.

Various writers (Kerly, 1891; Murdoch, 1909) have commented that the drafting of the codifying statutes was not an easy task. Besides setting out detailed rules, the statutes set out principles to be applied meant that the task moved beyond mere collation of the law. Furthermore, where the statutes were intended to apply to Scotland as well as England, differences in the underlying legal systems of each country had to be accommodated. Sometimes, it was possible simply to substitute Scottish legal terms for English ones in a section specifying the applicability of the law to Scotland – a method adopted in the *Partnership Act 1890* for example – but the solution was not so simple where the underlying legal principles differed. Such principles existed in the laws of contract, partnership and sale. Brown (1903) showed that some activities in English contract law had no Scottish counterpart while Murdoch (1909) argued that in areas where Scots law was heavily influenced by Roman law, as in sale of goods, then differences of principle existed. In other words, although a statute is intended to apply in two jurisdictions, it cannot be divorced from its context, which influences the interpretation of the statute.

Following the introduction of individual statutory codification, the late 19th century saw calls for a widespread English-Scots law codification as a prelude to Empire-wide codification. The calls were also prompted by the success of the Anglo-Indian codes,

described by Graham (1895). These codes had been suggested as early as 1829 in response to the chaotic state of Indian law. A penal code was established in 1860, followed by a Criminal Procedure Code in 1862. Further codes, on succession, contract, property, negotiable instruments and trusts, followed. The tidiness of the codes seems to have been welcomed by the public given the previous chaotic state of the law. However, this success must be qualified. The codes seem to have been drawn from decisions in the English Law Reports. It may be easier to establish a successful set of codes where they are imposed by a stronger power on a very much weaker one[2]. Thus, codification of UK with EU law, or Scots with English may be more problematic.

At empire level, a memorandum adopted by the Congress of the Chambers of Commerce of the empire on 11 June 1896 proposed that the common law should be codified throughout the empire and that a commission of lawyers and merchants from the United Kingdom should be set-up with the power to consult parliamentary counsel and employ editors, draughtsmen and revising counsel to perform the task of codification. The key feature was that the codification should begin by setting out English law, modified to incorporate Scots law and that the codes thus prepared should then be communicated to each colony or dependency for suggested revisions. Once revisions were incorporated, the codes could be resubmitted to the empire.

As had happened with the Indian codes, English law was to predominate. The plan was not implemented, however. As Rodger (1992) describes, the movement for UK codification in the 19th century was led by a number of highly colourful and influential individuals. The most notable were Levi, a legal writer of distinction, two professors, Dove Wilson and Muirhead and two senior lawyers, Lord Advocate Moncrieff and Solicitor-general George Young. This esteemed group was, however, opposed by other powerful characters, particularly Lord Chancellor Selbourne and Lord Halsbury. Opposition was also aided by the need to address international pressures, particularly war in South Africa. Nonetheless, many countries of the empire "virtually copied" many English statutes (Hogg, 1914, p. 154).

These examples show that the idea of codification has, historically, not been dismissed out of hand in the United Kingdom. The major advantages and disadvantages of codification were also debated by a number of Scots lawyers at the turn of the century (Graham, 1895; Hutton, 1935; Kerly, 1891; McMillan, 1928; Murdoch, 1908; Wilson, 1896). The major advantage was that codification would avoid overlaps, gaps and contradictions in the law. Other advantages were that the law would be more accessible and easier to find, especially for non-lawyers unfamiliar with the abundance of statutes and delegated legislation; that it would be easier for students to learn; and that the state could lay down general rules for decisions rather than relying on the discretion of individuals.

The disadvantages tended to focus on the difficulties of drafting codified law. Codes would be very complex to produce. Nonetheless, as Graham (1895, p. 331) points out, the Napoleonic codes were formed from a mass of conflicting decisions far outnumbering the masses of the English, Irish and Scottish Law Reports. Thus, this problem may not be insurmountable. Codes would also be difficult to draft because of the need to try to limit subsequent problems of interpretation. Some branches of law would be more difficult to codify than others. For example, as Kerly (1891) states, the task is easier where branches of law are relatively self-contained, but more difficult where there are complex relationships between laws, particularly if each area is

founded on different principles. Even lawyers might find it difficult to understand subtle differences in national laws for, as Lord Justice-Clerk Hope in the Scottish case of *McCowan* v *Wright*[3] said:

> The more I am able to collect of English law, I am only the more confident that we do not understand nine out of ten of the cases which are quoted to us, and that in attempting to apply that law, we run the greatest risk of spoiling our own by mistaking theirs.

This, in turn, might lead judges to be more willing to modify procedures than substitute law, according to McMillan (1928).

Other disadvantages of codification centred around political issues. Importantly, success may depend upon the extent to which changes are imposed rather than negotiated. England certainly found it easier to produce Anglo-Indian codes than to make progress on Anglo-Scottish ones. Furthermore, codification would require a shift in lawmaking from parliament to lawyers, which could diminish the authority of parliament. Codes might also be less likely to be altered than statutes because of the cost and complexity of drafting. While this makes the law more certain, it may make it less relevant.

Anton (1982) has argued that codes require a universality of application, which the United Kingdom has traditionally resisted, preferring instead to fill statutory gaps with case law. Anton (1982, p. 19) regards this difference in philosophy as:

> ...the crucial obstacle to the codification on the continental model of any UK legal system. Such a style of codification would alter the hierarchy of its sources of law and in consequence would strike at the heart of its principles of legal reasoning.

In turn, he argues that this would also require the adoption of different roles of statutory interpretation and of different rules of precedent.

This section has so far considered examples, albeit limited in scope, of codification in a UK context and considered the advantages and disadvantages of codification as documented in the legal literature of the time. "Codification" has been used in a broad sense but it is clear that different writers define codification in a variety of ways. McLaren (1897) outlines three possible definitions. In a philosophical sense, he views codification as the preparation of an ideal, pure system of laws founded on notions of reason and natural justice. Realistically, as this approach is unlikely to find practical or political favour, he offers two more pragmatic definitions, which have been adopted by Anton (1982). A code could be developed based on existing legislation but with such amendments as are necessary to formulate a consistent, unambiguous statement of the law. Inevitably such a task involves legal draughtsmen in an element of law-making in that the law is clarified or anomalies removed. Such an approach is contrary to the deeply held UK notion of the supremacy of parliament, but was adopted in France when the Napoleonic codes were constructed. The alternative approach is to prepare a digest of principles extracted from existing law. The law is not amended as such, but rather distilled into key elements.

Of the two pragmatic definitions, the former is effectively a form of consolidation on a large scale; the latter may be more genuinely deserving of the description of codification. If this distinction is applied, then the statutes passed in the late 19th century concerning partnerships and sale of goods are small-scale examples of the consolidation approach. Historically, however, via the entrenchment of principles, the Scottish legal system has much in common with the codification approach.

A different distinction is made by Hogg (1914, 1916) who considers "uniformity" and "unification". By "uniformity" he means that different legislatures would pass statutes conceived in as similar terms as possible. EU directives, specifying a desired result, but allowing individual member states to pass their own statutes in order to achieve a common aim, are examples of such uniformity. Hogg also refers to "unification" by which he means the adoption abroad of statutes prepared in any one jurisdiction. Thus, if UK legislation had applied to the British Empire, unification would have been achieved.

It is clear that a multiplicity of types of legal systems is possible, based on consolidation, codification, uniformity and unification. The United Kingdom has incorporated some of these elements into its national legal systems. The setting up of the Scottish and English Law Commissions in 1965 is an example of such a move. These elements are perhaps easier to identify in the field of commercial law than other areas. Even here, however, unique features of the British legal background have led to a different types of consolidation/codification from that in the rest of Europe. Wilson (1896) recognised a reason for this that would still seem to apply today as it strikes at the heart of each system. He shows that UK commercial laws, however consolidated, tend to focus on transactions (such as sale and agency) while European ones focus more on persons. This distinction reflects the attention given to persons in Roman law. The historical basis of law therefore continues to have an impact.

Discussion

Much of Scottish and English commercial law has been assimilated through the passing of UK-wide legislation. Such statutes do, however, frequently contain supplementary provisions adapting certain legal requirements to Scottish circumstances. This approach seems to imply a high degree of harmonisation though it clearly falls short of total uniformity. As such, it appears to have much in common with modern European ideas of harmonisation.

The passing of UK-wide commercial legislation at the end of the 19th century was prompted by economic and societal changes. Rodger (1992) shows how Scottish businessmen of the time pressed for a modern, standardised, set of commercial laws in order to ease trade with England and the empire. He further shows that UK-wide statutes were by no means an English attempt to subsume Scots law; they were specifically wanted by Scottish businesses to aid trading relations and to help ensure that Scottish business did not get overlooked outside Scotland. There was thus a positive attitude on the part of Scottish business to UK-wide commercial codification, channelled through the Chambers of Commerce and legal societies. The UK experience shows that a high degree of comparability is possible where warranted, and supported by, commercial pressures. The result is a workable co-existence of laws that do not necessarily impact on non-commercial areas. The fact that Scotland and England continue to possess distinct criminal and family laws, for example, is testament to the survival of non-commercial legal differences. Differences exist in legal approaches as well as in specific branches of law. The traditional English legal position is based on case law rather than codification while Scots law, with a different tradition, has incorporated this doctrine of judicial precedent.

Codification has been actively considered within the United Kingdom. Scottish and English codification, Anglo-Indian codification and UK-Commonwealth codification

were much discussed in the late 19th and early 20th centuries. The UK lawmakers acknowledged the merits of codification although difficulties, especially political ones, were also discussed. These examples are important, for they show that UK lawmakers are willing to consider alternative approaches. They also show that difficulties abound which cannot be resolved without the necessary political will.

Ultimately, perhaps the political challenges are greater than the legal ones. Codification was considered between England and politically weaker entities – India, the Commonwealth and Scotland, although the pressures for Scottish-English codification were two-way, indicating perhaps a rather more equal level of influence than in the other two cases. The fact that a full-scale UK codification did not take place and that codification outwith the UK was largely unsuccessful may reflect a variety of pressure groups and interests, including disagreements between the key players, as discussed earlier, and the onset of war in South Africa.

Given opposing views and more pressing political matters, it is perhaps not surprising that codification fell from the political agenda. Scottish and English legal differences, though existent, were relatively minor, since much of the commercial law had been developed after English/Scottish union. In Rodger's (1992) view, this meant that the need to codify was less pressing than other matters. Codification would certainly have tackled remaining differences but commerce seemed, and still seems, to work well enough throughout the UK without wholesale legal uniformity.

The Scottish and English legal experiences show that harmonisation and codification are two concepts capable of a wide variety of definitions. Harmonisation need not mean uniformity and codification need not mean that all laws are codified. Individual statutes can be essentially codified within an uncodified branch of law.

Implications

Turning to the present day, it is interesting to speculate whether lessons can be learned from Anglo-Scottish attempts at codification and harmonisation. The historical analysis suggests that codified and custom-based systems need not be mutually exclusive. Harmonisation of company laws throughout Europe may not necessarily pose an unwelcome threat. English law, if history is a guide, should not be without influence in such a process. Scots law meanwhile might be able to strengthen ties that have been partially, but by no means totally, eroded over time.

The historical harmonisation attempts presented in this paper suggests that legal differences need not be an impediment to harmonisation, bearing in mind the definition of harmonisation advanced at the start of the paper. It shows that even though differences remain, a form of coexistence and co-operation is possible. The relevance of the recognition of differences within a harmonised whole has implications for the future of the EU with the ever-increasing importance of the concept of subsidiarity. The Treaty of Maastricht, which came into force on 1 November 1993, includes a special protocol on subsidiarity urging the EU not to legislate when an aim may be better achieved at a more local level (Cass, 1992).

The subsidiarity concept was endorsed in Article I-9 of the EU Constitution as a fundamental principle whereby the EU should not take action (except in areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level (Estella, 2002). This concept thus recognises that differences may be warranted in some cases and any remaining legal differences,

provided they do not impede the wider aims of the EU, could therefore be tolerated both within definitions of harmonisation and of subsidiarity.

At a time when the interface between law and accountancy is coming under increasing scrutiny, the harmonisation of company law within the EU provides an interesting example of the challenges posed by that interface. The all-embracing impact of the law is clearly seen; the law is more than a mere set of rules to be learned and applied. It is a part of a country's cultural heritage, influencing and being influenced by the customs and beliefs of the day. In this light, the law is seen as a central feature of social, political and economic order. Throughout the EU different legal systems appear to have generated different accounting environments (Roberts *et al.*, 2002; Walton *et al.*, 2003). Definitions of harmonisation allow for differences, where workable (Alexander *et al.*, 2003). The UK experience shows that the UK has not been reluctant to consider attempts to lessen legal differences in the past, but that political considerations may hinder progress. It also shows that legal differences need not pose an insurmountable threat to commerce and co-operation. Different traditions can co-exist, making the laws and accounting environments all the richer. Although this paper has focused on implications for the EU, the same arguments could be applied more widely. For example, within an accounting context, the IASB is working to ensure worldwide acceptance of international accounting standards (IASB, 2004). Such standards, containing specific accounting guidance, are implemented in different countries, each with varying legal systems, yet the aim is that greater comparability of financial reporting will be achieved through their onservance (IASB, 2004).

This paper has considered one aspect of the harmonisation of company law, focusing on Scotland and England. Further research could be undertaken into the more recent history of EU company law harmonisation and on what other countries have done in the past to attempt to achieve harmonisation. Research into the interface between law and accountancy could also be undertaken in the light of recent corporate scandals. Finally, this paper has shed some light on the political and power aspects of attempts to achieve harmonisation. Further work could be performed in different contexts in order to clarify the impact of politics and power on harmonisation.

Notes

1. The term "mercantile law" refers to the full range of laws in the business field covering, for example, agency, partnerships, sale of goods and company law. Early texts on Scots law use this term. The narrower term "company law" is used later in the paper when the implications for the EU's programme specifically relating to company law harmonisation are examined.
2. A similar situation is evident in the imposition of legal requirements relating to accounting. For example, Turkish accounting displays the strong influence of France than Germany (Roberts *et al.*, 2002) while accounting in Korea is strongly influenced by the USA (Nobes and Parker, 2002), showing the effect where a dominant power exerts influence over a weaker one.
3. (1852) 15 D. 229; 25 Sc. Jur. 164, 2 Stuart 120.

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