LEGAL CULTURE AND LEGAL TRANSPLANTS THE SCOTTISH NATIONAL REPORT

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Introduction. I. *The Scottish Legal System*. 1. Historical Perspectives. 2. Post-modernist Perspective. II. *Specific Institutions or Legal Mechanisms*. III. *Conclusions*.

INTRODUCTION

Of the two perspectives to be considered - as suggested by the General Rapporteur for this topic - Scotland can best be viewed as a predominantly receiving country rather than a country of origin. As a result of its historical development, which will be covered by this report, it can also be referred to as a classical and simple mixed jurisdiction.[1]

It is worth mentioning at the outset that the Scottish mix was not the result of the imposition of Common Law upon a Civilian system by a colonial power, this being the classical case in the birth of mixed jurisdictions such as South Africa, Louisiana, Quebec or Sri Lanka. It was born rather from close cultural and political ties with the jurisdictions from both traditions at different stages of its history, to be seen below.[2] It is also usually claimed that the Scottish jurists created the mix by choosing the best of the ingredients from the various sources.[3]

The Scottish legal system is classified by our General Rapporteur as belonging to "the Roman-Common Law legal system, which includes 15 jurisdictions and 243 million inhabitants, representing almost 4.5% of

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1 For an analysis of mixed systems and this classification For Scotland see, Örücü, E., *A Theoretical Framework for Transfrontier Mobility of Law*, Jagtenberg, R. *et al*., (eds), Kluwer, 1995, pp. 7-16; systems and this classification for Scotland see Örücü, E.,"Mixed and Mixing Systems: A Conceptual Search" in Örücü, E. *et al*. (eds.), *Studies in Legal Systems*, Kluwer, 1996, pp. 335 – 352.

2 See Reid, E., "Comparative Law: Perspective from a Mixed Jurisdiction", *Hanse Law School Cahier*, num. *2*, *Methodology and its Application* (Facilitair Bedrijf, University Groningen, 2001), p.49.

3 However, this view has been challanged. See Evans-Jones, R., "Mixed Legal Systems, Scotland and the Unification of Private Law in Europe", in Smits, J. (ed), *The Contributions of Mixed Legal Systems to European Private Law*, Intersentia, Groningen, 2001, pp. 44-45.

the world's population",[4] though he does not call these mixed jurisdictions. The distinction and separateness of its laws from those of England, Wales and Northern Ireland, has justified regarding the Scottish legal system separately from the start, especially since when considering mixed jurisdictions, Scotland is always seen in a special light, and also since, recently, it has even been put forward as a model for the EU.[5] Indeed, the Scottish legal system does not sit comfortably in the classical classifications of different jurisdictions: as a simple mixed jurisdiction it lives in the periphery of two legal families, the common law and the civil law. Scotland has one of the simple mixed systems: a system mixed only at the substantive level.[6]

The Scottish legal system has an unusual history, and the paths of migration of law from different sources into Scots law are by seepage, imitation, inspiration, reception and imposed reception. The starting point is Scots customary law, overlaid by Anglo-Norman law, canon law, Roman law, European civil law and, in modern times, English law. The system recently is in the process of absorbing European Community law and European human rights law.

The General Rapporteur has suggested a "temporary periodization which can well be considered arbitrary, but, […] corresponds to events that set the guidelines for geopolitics, which have prompted the movement of legal models." This periodization rests on diachronic criteria, and the evolution of the legal systems on synchronic criteria. Thus a number of periods have been laid down: the period that begins with the discovery of America and finishes at the end of the XVIII century with the French Revolution, is the first one. The second period begins from the French Revolution, runs through the nineteenth century and concludes with the end of World War I, which also marks the end of the colonialist period and brings in substantial geopolitical change. The third period begins from the end of World War I and terminates with the fall of the Berlin Wall in 1989. The period from the fall of the Berlin Wall to the present is considered as the last period, and has been dubbed as the period of Post-Modernism. Significant changes have taken place in this period, one of the consequences of which is the circulation of legal models.

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[4] The General Rapporteur includes the following jurisdictions in this group: Alderney and Sark; Botswana; Guernsey, Japan; Jersey; South Korea; Lesotho; Liechtenstein; Mauritius; Namibia; Quebec; Scotland; South Africa; Sri Lanka and Swaziland.

[5] See Smits supra num. 3. Also see Smits, J., *The Making of European Private law: Towards a Ius Commune Europaeum as a Mixed Legal System,* trans. N. Kornet, Antwerp, Intersentia, 2002.

[6] See Rodger, A., "Thinking About Scots Law", *Edinburgh Law Review*, nums. 3 and 4, 1996, pp. 23 and 24.

Our central question is: How did the Scottish legal system fare in these periods and before, as well as how does it fare now?[7] We will approach our subject, as far as possible, through the questions posed by the General Rapporteur.[8]

I. THE SCOTTISH LEGAL SYSTEM

1. *Historical Perspectives*

A. As suggested by the questionnaire, we will first consider the period before the four mentioned above in order to observe what replaced the existing laws in the first period. The earliest information on Scotland tells us that Scotland was sparsely populated by indigenous Picts, about whose custom little is known. Later, around 500AD, two different groups of settlers introduced two different bodies of law into these lands: the Scots of Ulster brought in Celtic law to the south and west, and the Scandinavians brought with them Udal law to Orkney, Shetland and some coastal areas of the north-east. We can qualify these laws by stating that they were introduced by settlers as a result of conquest (or better still, settlement).

It is interesting to note that to a certain extent these two laws have survived. Udal law remained operational through the Code of King Magnus, the Law Mender, in Orkney and Shetland until 1468-9 when the islands were ceded to Scotland. Although today, the status of Udal law is not certain, its influence could be seen well into the twentieth century in relation to land tenure and it was successfully pleaded before

[7] See for the history and influences of Scots law generally, Reid, K. and Zimmermann R. (eds.), *A History of Private Law in Scotland*, Oxford, 2000; for articles chronicling the evolution of Scottish law, and Carey-Miller, D. I. and Zimmermann, R. (eds.), *The Civilian Tradition and Scots Law*, Berlin, 1997. Especially see, Cairns, J. W., "Historical Introduction" in Reid and Zimmermann *op cit*. Also see Reid, E. and Carey-Miller, D. L. (eds), *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law*, Edinburgh, 2005.

[8] Here the questions posed were: 1. Are there any legal models that have been received in the periods before those mentioned? Which ones and within what period? 2. What was the outcome? Did they replace existing models? If this is the case, which ones and in what periods? 3. What were the driving forces of legal reception? 3.1. Violent: conquest, colonization? 3.2. Passive: imitation, ideology, cultural, (predominantly language), techniques (simplification, codification etc)? 3.3. Scientific: teachings, the formation of legal panels in the countries of origin, spreading of legal literature, etc? 3.4. Commercial: commercial predominance? 3.5. Indirect: Direct contact with the countries of origin or through a third world country?

the courts.[9] In such matters, this law constitutes a different body of law from that operational in the rest of Scotland.

Celtic law was the most influential for Scotland as a whole, especially in the eleventh century, during the reign of Malcolm Canmore. The law is to be found mainly in The Book of Deer and a collection, The law of the Brets and the Scots. This law was largely unwritten customary law, it operated in individual communities known as tuath. In time, the Kingdom of the Scots was divided into seven provinces, within each of which were several such individual communities.

Though the influence of Celtic law may be detected in certain institutions today, often under amended names, it is difficult to say that it has survived as a body of law, since it was overtaken by other types of law. However, various aspects of this law survived for much longer and certain aspects of the substantive law had a continuing influence. "For example, the action of assythement, for wounding or slaughter, was not formally abolished until the Damages (Scotland) Act 1976, following its attempted revival in the case of *McKendrick v Sinclair*[10]".[11] It could be said that the ethos of Celtic law remains with the Scots today.

Some aspects of Celtic law were absorbed into feudal law equivalents, although, on the whole, Celtic law was different from the later feudal law.[12] Feudal law started to develop in the eleventh century and was introduced more directly in the mid-twelfth century in imitation of Anglo-Norman England.[13] Feudal law had a considerable degree of pluralism, following the granting by the King to his Lords and to towns of charters to right of judgment. The feudal law became modified by the burghs and local customary law developed alongside it. Centralized power was never very strong in Scotland and the statute law was framed in general terms allowing differing interpretations. Feudal law was thus diversified.

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[9] See e.g. *Smith* vs *Lerwick Harbour Trustees* 5F 680; *Lord Advocate* vs *Aberdeen University and Budge* 1963 SC 533 (the St Ninian's Treasure case). A general discussion of Udal law can be found in Sir Thomas Smith's entries in *The Laws of Scotland: The Stair Memorial Encyclopaedia*. Also see Ryder, J., "Udal law: An Introduction" *Northern Studies*, num. 25, 1981.

[10] 1972 SC (HL) 25.

[11] Attwooll, E. M. M., *The Tapestry of the Law: Scotland, Legal Culture and Legal Theory*, Kluwer Academic Publishers, London, 1997), p. 61.

[12] For some institutions which were absorbed into feudal law see Attwooll, E. M. M., "Scotland: A Multi-dimensional Jigsaw" in Örücü, E. *et al*. (eds), *Studies in Legal Systems: Mixed and Mixing*, Kluwer Law International, The Hague, 1996, p.18.

[13] See, McQueen, H. L., *Common law and Feudal Society in Medieval Scotland*, Edinburgh, Edinburgh University Press, 1993.

Alongside feudal law was Canon law, dispensed through church courts, with appeal to Rome, concerned with church property, with offences against the church doctrine and with those aspects of life that were considered to have spiritual importance. These two separate but harmoniously operating bodies of law governed most of mainland Scotland in the middle ages. It must also be remembered that, "whatever the influence of canon law on secular law, there is no doubt that canon law, both in content and procedure, was heavily indebted to Roman law".[14]

That is why at this stage it can be said that Roman law was brought into Scotland by canon law "through the back door".

Both feudal law and canon law are of interest in the context of this mixed jurisdiction in respect to procedure. Procedure before the feudal courts followed the English pattern of specific writs, or brieves, for specific remedies, though the brieves were greater in number than the English writs, and remedies more general than the English ones. In time the brieves gave way to a simple summons to appear.

The remit of the church law became restricted, and slowly, along with most continental Europe, Scotland developed her own version of the *ius commun*e. Here we see a blend of native custom with common elements of feudal law, the law merchant, canon law and Roman law.

It is important to note that it is claimed that during the period 1286-1370 Scots law went into a "dark age" and did not come out of it until the seventeenth century.[15] By this is meant that there was a considerable lack of sophistication in the law. The period indicated is a period of major political upheaval and of dissatisfaction with the administration of justice. Yet, this period is sometimes seen as one of transition,

> *a time of movement from unprofessional, unwritten law to the mature law that began to emerge in the fifteenth century*.[16]

In fact, even in this so called "dark ages", there were many able lawyers in Scotland, specially ecclesiastics, who were well grounded in the Roman and canon laws.

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[14] Attwooll, supra note 11, p. 64.
[15] Lord Cooper of Culross, "The Dark Age of Scottish Legal History 1350-1650" in Selected Papers (cit. ch .III, n. 1).
[16] Attwooll, supra note 11, p. 64.

> *All in all, there is a sense in which Scotland has no known indigenous law. Celtic and Udal law were brought in by settlement. Feudal law was copied from England of the Anglo-Normans. Canon law was established through the Church. Roman law filtered in from the Continent of Europe. In more recent times, case law has been influenced by other jurisdictions, predominantly of the common law kind.*[17]

> *Yet, even if there is a sense in which Scotland has no known indigenous law, there is, equally, a sense in which its law is truly Scottish. For, no matter which set of law is under consideration, it has been developed – both procedurally and substantively – in ways peculiar to Scotland. This is exemplified not only by the way in which early feudal law, though taken from England, came to be different in significant ways but also by the fact that the rules of the two countries concerning tenure and transfer of buildings and land bear little resemblance to one another today. Thus even if Scotland has little known originally indigenous law, it has a highly "indigenified" one.*[18]

Thus, in the period before the first period suggested by the Questionnaire, the outcome was already a mixed jurisdiction, and that is why Scotland can be called "mixed from the very beginning".[19] The driving force was the formation and development of a state, a Kingdom. There was conquest (settlement) at the start but later developments were not related to conquest or violence; there were the passive forces of imitation, language and techniques. At this stage there was no scientific input such as teaching or legal literature. The receptions were direct and indirect, conscious and unconscious. There was no codification and no laicism.

B. In the first three periods suggested by our General Rapporteur, Scotland can be regarded truly as a mixed jurisdiction, which was the result of a gradual development without an abrupt replacement of one law by another. Direct reception of Roman law for instance, was limited. There were two main causes for this gradual reception of the Roman law. The first cause was that many Scots studied law at continental universities, especially from sixteenth century onwards, particularly in the Netherlands and in France, the latter specifically during the days of the Auld Alliance. Some also went to Italy and Germany. On their return they would cite in pleadings before the courts Roman law as absorbed by the *ius commune*, having brought back with them, the structures, concepts and substance of the learned laws. The second cause is that though at first

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[17] Attwooll, supra note 12, p. 25.
[18] *Ibidem*, p. 26.
[19] Sellar, W. D. H., "Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions", *Edinburgh Law Review*, num. 4, 2000, pp. 3 and 4.

Roman law was used in a piecemeal fashion filling in the gaps and resolving conflicts between rules, it started to appear in the literature of the law and eventually was incorporated into the important systematizations produced by the so called "institutional writers" of the 16th, 17th and 18th centuries. Legal literature flourished. Compilations of court decisions, the well-established Practicks, began to take the form of digests, having commenced with Balfour in the 1570s. Other comprehensive works included *Welwood's The Sea Laws of Scotland*, 1590, *Craig's Ius Feudale*, 1603, published in 1655, Skene's edition of the *Regiam Maiestatem and the Quoniam Attachiamenta*, 1609, and most influential of all, Stair's *Institutions of the Law of Scotland*, 1681.

Stair's work is of great importance and is referred to from time to time even today. It is significant also for our purposes here. Stair offered a comprehensive restatement of Scots law, set out in accordance with the principles of natural law, with equity as the apex. He drew the content mainly from the existing laws and customs of Scotland interwoven with the elements of feudal, canon and Roman law as found in the ius commune and in the writings of continental jurists.

> *These are taken selectively, however, on the basis that men 'are most happy whose laws are nearest to equity and most declaratory of it'.*[20]

Stair is rightly referred to as an "institutional writer". Some other writers are also referred to as such, though there is not general agreement on these names or some of their writings: Craig's Ius Feudale, Bankton's Institute 1751-3, Erskine's Institute 1773 and Bell's Commentaries, 1804, are regarded as "institutional" for the civil law, but there is no agreement on Mackenzie's Institutions 1678, Erskine's Principles 1754 and Kame's Principles 1760. In criminal law Mackenzie's Law and Custom 1678 and Hume's Commentaries 1797 are so accepted.

> *Institutional writings are of significance, however, for more than just helping to illustrate the way in which Scotland's legal present incorporates its past. For they represent the closest Scotland ever came to codification and while they fall short of this, lend substance to an understanding of its law as rooted in general principles. It is this feature, and the kind of reasoning to which it conduces, along with a number of specific institutions, that indicate Scotland's kinship with the civilian rather than the common law tradition.*[21]

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[20] Attwooll, supra note 11, p.67.
[21] Attwooll, supra note 12, pp. 21 and 22.

The founding of the Court of Session in 1532 provided the opportunity for a professional and permanent judiciary to develop the law of Scotland in the tradition of their continental training. Scots law's "Roman phase" lasted from the sixteenth to the late eighteenth century during which civil law as expounded by continental commentators was freely cited. The influence of Roman law can be seen both on positive rules and on systematization.

The Crowns of Scotland and England were united in 1603, which did not improve the relations between England and Scotland much, and Scots law continued to develop independently, especially in the areas of landholdings and trade. However the most important date is 1 May 1707 when the Acts of Union were passed. Both the Scottish and the English Parliaments endorsed the Union, the Scottish conceding union with England and the English conceding free trade with Scotland. Scotland however, did not become a province of England and the independence of its laws, its church and its educational system were protected. This protection gave form to the continuing belief in Scottish nationhood, culture and identity.[22] From the mid-nineteenth century to the end of the Second World War, Scottish lawyers also saw themselves as part of the wider world of the British Empire.

For our purposes, the retention of Scottish law and education in the Acts of Union is most significant. A distinction was drawn between matters to be dealt with in common and those of purely Scottish significance. Article XVIII provided that all laws not inconsistent with the Treaty should remain in force, with the exception of those concerning the regulation of trade, customs and excises. Otherwise, pre-union Scots law was to be,

> *alterable by the Parliament of Great Britain, With this difference betwixt the laws concerning publick Right, Policy, and Civil Government and those that concern private Right; That the laws which concern publick Right, Policy and Civil Government may be made the same throughout the whole United Kingdom but that no alteration be made in Laws which concern private Right, except for the evident utility of the subjects of Scotland*.[23]

Article XIX provided that,

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[22] See Willock, I. D., "The Scottish Legal Heritage Revisited", in Grant, J. P. (ed.), *Independence and Devolution: The Legal Implications for Scotland*, Edinburgh, 1976, pp. 3 and 4.

[23] This exception however, has consequences, as it gives the possibility to the British Parliament to introduce concepts and institutions into Scots law alien to it.

> *the Court of Session or colledge of justice do after the union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the laws of that Kingdom and with the same authority and privileges as before the union subject nevertheless to such regulation for the better administration of justice as shall be made by the Parliament of Great Britain…*

The same applied to the Court of Justiciary. The Article then went on to state that,

> *no causes in Scotland be cognoscible by the courts of Chancery Queen's bench Common Pleas or any other court in Westminster Hall and that the said courts or any other of like nature after the union shall have no power to cognosce within Scotland or stop the execution of the same.*

Although the institutional writers, with the exception of Craig, Stair and McKenzie, all post-date the Treaty and the Acts of Union, soon after these events, certain changes were introduced, and Scots law became subject to new influences: The Scottish Privy Council was abolished, the English system of the justices of the peace was introduced, an exchequer Court was established, the English law of treason was extended to Scotland, all during 1707-1708. In addition, since Article XIX did not expressly exclude the House of Lords, being not one that sat "in Westminster Hall", very soon the practice grew of appealing matters in civil causes to the House of Lords, regarded as the inheritor of similar powers held by the old Scottish Parliament.

Again for our purposes, this has a most significant impact on the Scottish legal system and civil law, since it is mostly through this path that English law has seeped into Scotland, though technically, the House of Lords does not decide Scots cases directly but refers them back to the Court of Session for it to alter its interlocutor, where necessary. Despite its separate standing, Scots law was now changing. Appealing civil matters to the House of Lords contributed to this, especially since with a few Scottish Lords, questions of Scots law were determined by men who - if trained in law at all, as they later came to be – were trained in English law. Even in 1876 when salaried Lords of Appeal were appointed, there were only one or two Scottish judges who had a place in Scotland's highest civil court, thus always necessarily in the minority.[24]

Thus, we can say that the Treaty of Union opened two channels for English legal influence. First, the new Parliament of Great Britain was empowered to legislate for the new Kingdom as a whole. Second, as the

[24] However, in modern times it is unlikely that an English majority would decide a case against the concerted opinion of their Scottish bretheren.

Treaty was silent as to the right to take appeals from the Scottish courts to the judicial organ of the new Parliament, the House of Lords, soon after the Union, the House of Lords upheld its own jurisdiction to hear civil appeals from Scotland. Both in its legislative and judicial capacity, Parliament was overwhelmingly English in composition and outlook.

The UK Parliament sitting in London with a substantial majority of English members is naturally concerned primarily with English interests. Parliamentary draftsmen entrusted with expressing the intention of the legislature receive their professional training in English law and are not necessarily familiar with the theory and terminology of Scots law. In a similar manner, the majority of judges in the House of Lords are trained in English law and speak in English terms of art and more often than not, transpose a Scottish problem into the equivalent English one, and then propound an English solution.[25]

One can easily list a considerable number of instances where alien English doctrines have been introduced into Scots law through the House of Lords. For instance, the institution of "common employment", which became part of Scots law from 1858 when Lord Cranworth argued: "But if such be the law of England, on what ground can it be argued not to be the law of Scotland",[26] was only finally abolished by statute in 1948;[27] the English distinction between "invitee, licensee and trespasser" formed part of Scots law from *Dumbreck v Addie* in 1929 [28] until its removal again by statute in 1960;[29] the introduction of the scienter rule in relation to animals in 1855,[30] was removed by statute in 1987.[31] In the area of obligations various doctrines have also seeped into Scots law such as the English doctrine of privity of contract, of a separate category of negligence, and of the law of mistake. However, there is no extensive research carried out on the whole range of House of Lords decisions in Scots cases to fairly assess the extent of its influence on Scots law. In fact, a considerable amount of borrowing has occurred from within Scotland by use of English precedents in Scottish courts,[32] or by statute, most importantly, in the areas of commercial and consumer law, an example of which is the Sale of Goods Act 1979. It may be interesting to note that

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[25] This is much less so now.
[26] Lord Cranworth in *Bartonshill Coal Company* vs *Reid*, 1858, *Macq*, num. 3, 266.
[27] Law Reform (Personal Injuries) Act 1948.
[28] *Dumbreck* vs *Addie & Sons (Collieries) Ltd* 1929 SC (HL) 51.
[29] Occupiers Liability (Scotland) Act 1960 s. 2.
[30] *Fleming* vs *Orr* 1855, Macq., num. 2, 14.
[31] Animals (Scotland) Act 1987.
[32] Professor Walker, for example, found that 25% of the cases cited in the Court of Session since "Hitler's war" were English. See D.M.Walker, "A Note on Precedent", *Juridical Review*, num. 61, 1949.

after the UK membership of the European Community, greater pressures were exerted on Scotland for greater assimilation of Scots commercial law with the English one.

The indirect influence of English law comes about as a result of citation of English precedents in the Scottish courts ostensibly in pari materia; citation of English legal literature; English legal education of some members of the Scottish legal profession; and common language. The common language facilitates not only easy borrowing but exposes the legal system to subversion through imposition or incautious acceptance of technical terms of English law as equivalents to Scottish (civilian) concepts. For instance, in the law of delict, Scotland adheres to the broad civilian concept of "culpa" which cannot be reconciled with England's narrow particular tort of "negligence". English authority was cited and alien jurisprudence poured through such a breach. In addition, the doctrine of "undue influence" in Scots law is derived from English equity and most of the leading cases relating to the developing doctrine of "frustration of contract" are English. In addition, Scots law has taken the English institutions of agency, of trust[33] and of assignment, though called "assignation" in Scotland.

The third period from the end of First World War to the fall of the Berlin wall is quite a significant period for Scotland. Especially the era following the Second World War can be called "the first renaissance" of Scots law.[34] The ideology of the Scots law reform movement, supported by Lord Cooper and T.B. Smith, illustrates the belief that "Scots law is an authentic emanation of the Scottish spirit"; [I]ts predominant characteristic is an adherence to principle rather than precedent"; "judges have a part … in the enunciating these principles"; English law constitutes a "threat to the integrity of Scots law", injecting foreign doctrines into it; to save Scots law, the judge and jurist must draw upon its "historical roots and upon the experience of other 'mixed' systems[.]"[35] In addition, "Scots law has a destiny to be a bridge between the common law and civilian systems within the European Community".[36]

This period has seen a considerable resurgence of the Roman law influence on the systematics also. The most influential general book of the 20th century to date is Gloag and Henderson's "Introduction to the Law

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[33] See Gretton, G. L., "Trusts without Equity", 49 *International and Comparative Law Quarterly*, 2000, pp. 599-620 and Milo, J. M. and Smits, J. M. (eds.), *Trusts in Mixed Legal Systems*, Nijmegen, Ars Aequi, 2001.

[34] See Örücü, E., "The Judge and Jurist in Scotland: On the Verge of a Second Renaissance", *Tulane Law Review*, num. 78, 2003, pp. 89-103.

[35] Willock, supra note 22, at pp. 3 and 4.

[36] *Ibidem*, p. 4.

of Scotland". The subcutaneous influence of Roman law can be seen in the marked decline in the space attributed to non-Roman elements. The clearest indication of the influence of the Roman system however, has been on the organization of university courses. All non-Roman elements are treated as falling outwith "Scots law". All Scots law subjects, that is, family law, succession, property, voluntary and delictual obligations, are compulsory. In the law of persons, Scots law retains its distinction originating from Roman law, between pupils and minors and adults, with minors having considerable legal capacity; whereas in English law, those persons who are not adults are infants and have no legal capacity.

The outcome of all these legal receptions from both sources has been a gradual development, with this mixed system sitting on the fence, one foot in the common law world and one foot in the civil law world. No existing models are replaced. Though it must be said that slowly more English law was and has been seeping into Scottish law than any civilian law.[37]

Nevertheless, Scots private law does retain many distinct features. For instance, in the area of contract, though English law has been influential, particularly in the areas of mistake (or error) and damages, in certain aspects Scots law remains distinct. It does not for example, have any developed doctrine of privity of contract, no doctrine of consideration or a doctrine of cause.38 The constitution of a contract in Scots law requires simply consensus, whereas in England it is determined by consideration. The Roman doctrine of ius quaesitum tertio has been accepted into Scots law but not in English law. The law of property, trusts and succession in Scotland, for the most part, has not been affected by English law.

Though in terms of procedural law, the Scottish legal system has its own court structure totally separate from that in England, where there is a division in function to reflect the distinction between law and equity, one major English legal institution has infiltrated into Scotland: civil trial by jury. The rules of evidence have also been influenced by English law though there are several differences such as corroboration as a general rule and the retention of the right of silence.

Statutes are separately enacted for Scotland by the British Parliament. There have always been purely Scottish procedures for

[37] See e.g. Gow, N. QC, "Can Scotland's Separate Legal System Survive?", *The Law Magazine*, 22th January 1988.
[38] See for further examples Attwooll, supra note 11, pp. 79-81.

judicial review[39] and, particularly in relation to scope, a "distinct Scottish flavour to the decisions reached".[40] One institution unique to Scotland is the Children's Hearing System, set up to follow the Kilbrandon Report in 1968 and now regulated by the Children (Scotland) Act 1995. In the criminal law area, where the graver crimes rest on the Scottish common law and especially the institutional writing of Hume, the best known Scottish born and bred institutions are the "not proven" verdict, the declaratory power of the High Court, the role of the Crown Office in decriminalizing or recriminalizing activities by its attitude towards prosecuting them, the judge's charge to the jury which is much narrower than the English practice and so on.

Again, in this period, one of the driving forces was the need to develop a modern law. The other force was the Union with England. Another was proximity to the source of the common law and the distance from the civilian tradition. This meant sharing institutions and language with England, which facilitated the transfer of techniques of law making and application. There was direct contact with the country of origin of the common law and much less so with the countries of origin of civil law such as France and the Netherlands. There is no violence, no conquest or colonization, however, there is some imposed reception of the common law as a result of shared ideology, culture, language and techniques (simplification). Here the role of the shared Parliament and the House of Lords as the final court of appeal in civil matters cannot be underestimated. There were also the passive forces of imitation and convenience. At this stage there was scientific input such as teaching and spreading of legal literature. The receptions were direct and indirect, conscious and unconscious. There was still no codification and no laicism in the real sense.

Obviously, the commercial predominance of the southern partner was considerable. However, even here Scots law maintains some differences. For instance, the Scottish law of partnership is based on the Roman "societas", and while the law has been substantially codified by the Partnership Act 1890, that Act preserved the common law rules except so far as inconsistent with the Act (section 46). Thus, though the Act did much to foster the assimilation of English and Scots law, it still left important areas of divergence, such as preserving the personality of the Scottish firm as distinct from the individual partners, while leaving the English firm unaltered in its non-recognition of the separate personality. In mercantile law there has been rough unification by statute of much of the UK commercial law with predominant English influence.

[39] For instance, under Scots law there is no need for leave to apply.
[40] Attwooll, supra note 11, p. 71.

2. *Post-modernist Perspective*

A lot has happened in Scotland in this period. The General Rapporteur's post-modernist perspective coincides with a number of major events in Scotland and indeed in the UK. 1998 brought devolution to the UK, a form of self-government in varying degrees for Wales, Scotland and Northern Ireland. In Scotland devolution is full, in the sense that there is a Scottish Parliament that can pass Acts of Parliament in areas that are devolved matters. Devolution in Scotland took place under the Scotland Act 1998, and the Scottish Parliament was set up and became responsible for private and criminal law as of 1 July 1999. The Scotland Act subjected both the new Parliament and the Scottish Executive to the European Convention on Human Rights, and on 2 October 2000 the whole UK legal system came under the sway of Convention rights by way of the UK Human Rights Act 1998. Devolution brought to Scotland legislative and executive institutions, with a modest measure of self-government within the unitary conception of the British State, however flexible the unitary constitutional structure is. It must be pointed out however, that although English is the normal working language of the Scottish Parliament and it legislates in English only, for strong historical and cultural reasons the Scottish Parliament may also carry out its work in Gaelic and encourages the use of Scots (The Gaelic Language (Scotland) Act 2005). When in the meetings of the Parliament and committees Gaelic is used, the Official Report incorporates the Gaelic text before the report of the English interpretation; however, when Scots is used, the Official Report incorporates that language in the body of the text.

Since 1973, there has also been a fundamental impact on the system from the European Union, its laws, regulations, directives and conventions, and the human rights law.

Following membership of the EU, the devolution, the setting up of the new Scottish Parliament and the Human Rights Act, Scotland is on the verge of "the second renaissance".[41] What might the shape of this renaissance be? A rejuvenation of the "mixedness" as part of nationalist fervour? A rejuvenation of the civilian element of the "mixedness" with increasing import from the civilian member states via the EU and especially the ECJ? An increased input of common law solutions by Scottish judges and jurists? A Europeanisation and an overall convergence as a result of efforts to create an integrated Europe with a specific place for Scotland in it? This today is not only to be seen in

[41] See Örücü, supra note 34.

private law, but also in public law and constitutionalization, and human rights. Will the sometimes perceived "second rate and inadequate status" of Scots law[42] be shrugged off under these new conditions?

Today a more interesting question might be, by the token of European law, will the civilian influence on Britain as a whole, redress the past and present suppression of the Scottish civilian tradition by the common law of England? How will the judge and the jurist behave in this new environment of the ongoing mix and who will be the leaders of such a renaissance, as Scottish legal system opens up to new and more realistic mixes and the elite group stays open to the outside world? What will the impact of our times be, not only on Scotland but also on England?

First a look at the "domestication" of human rights shows us that, Acts of Scottish Parliament are subject to challenge in courts, the system of temporary sheriffs – a long established institution – has been swept away, the system of land use inquiries have been reviewed, concepts of fair trial, liberty, privacy, freedom of expression and association have gained a new impetus, and the courts have to observe Convention rights in private law, criminal law and public law.

Second, devolution brought in an opportunity to develop the law in accordance with modern thinking and standards. There is for instance, a proposal for the Parliament to codify all, or parts of, Scottish private and criminal law.[43]

> *The work of the Law Commission, the completion in the 1990s (and subsequent revisions) of the 26-volume Laws of Scotland: Stair Memorial Encyclopaedia, an extensive academic analysis of Scots law, means that much of the basic research on the current state of the law has been done.*[44]

These activities have been stimulated both by the human rights considerations and the work on European private law, in which a number of Scots academics have participated. For instance, the Principles of European Contract Law, the Vienna Convention on International Sale of Goods, the Unidroit principles of International Commercial Contracts have been very much in the mind of the Scottish Law Commission since 1993.

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[42] McCall Smith, A., "Scots Law in Comparative Context", in Grant, supra note 22, p. 160.

[43] See Clive, E. M., "Current Codification Projects in Scotland", *Edinburgh Law Review*, num. 4, 2000, pp. 341-350. Also see Clive, E. M., "Submission of a Draft Criminal Code for Scotland to the Minister for Justice", *Edinburgh Law Review*, num. 7, 2003, pp. 395- 398.

[44] MacQueen, H. L., "Scots Law" in Smits, J. M. (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, Edward Elgar, 2006, p. 648.

The consideration of the impact of the European Union membership is the third issue in this context. In the areas of commercial law and social law, the concept of a "single market" and thus, a British approach developed. However, even then, distinctive Scottish provisions have been preserved. For instance, the Sale of Goods Act of 1893 now has a Scottish regime of buyers' rights and remedies, compatible with the principles of Scots contract law. Such a development is also to be seen in the field of consumer protection law under the Unfair Contract Terms Act 1977 which has similar but different provisions in separate Scottish and English parts. Nevertheless, particularly in legislation, it is possible today to speak of a United Kingdom law of companies, taxation, financial services, consumer protection, employment and intellectual property. The driving force of the European Union also resulted in similarities and convergence, to be seen in the law of partnership, insolvency, security rights and supply of goods and services. The Scottish civilian tradition is under pressure from the English common law, as in a larger single market, harmonization appears desirable.

However, noteworthy recent developments to the contrary must also be considered. For instance, in the case of *Fairchild v Glenhaven*,[45] England also derived the benefits from openness to the civilian tradition partly by taking the Scottish civilian tradition bridge. Though largely instigated by Lord Bingham of Cornhill, who himself carried out an intense scrutiny into civilian case law from France, Germany, the Netherlands, Austria, Spain and Norway alongside the usual common law jurisdictions, Lord Roger of Earlsferry, the, at the time, recent Scottish addition to the House of Lords, was instrumental in looking extensively into Roman Law, some civilian cases and four Scottish appeal cases decided by the House of Lords. The outcome relied on another Scottish appeal case at the House, *McGhee*,[46] which was revitalised, explained and applied.

It is possible to see some of the more recent changes in Scots law as the result of a general "growing together" of the common law and the civilian traditions. It can also be claimed that today, many people would classify Scots law as belonging, to a large extent at least, to the common law tradition. Its content does not depend entirely on legislation and the notion of common law is very important, though it is far broader than in England, as it covers all non-statute law. This view needs a correction

[45] *Fairchild* vs *Glenhaven Funeral Services Ltd and others; Fox* vs *Spousal (Midlands) Ltd; Matthews* vs *Associated Portland Cement Manufacturers* (1978), Ltd and others, 3 *All ER*, 2002, p. 305.
[46] *McGhee* vs *National Coal Board*, 3 *All ER*, 1972, 1008.

though, since, such common law, owes much to its civilian and canonical roots.

It is true that recently, the awareness of and therefore the desire to preserve the civilian element of Scots law has had a rebirth. Academics writing along these lines have had an impact on the courts. For instance, the unititular basis of the law of property has been reaffirmed in the House of Lords; the law of unjustified enrichment has taken a new turn; the underlying principle of good faith in contract law has been recognized; the remedy of specific implement as a basic entitlement of a contracting party has been revitalized.[47]

The legal profession, which took shape along English lines, with a split between advocates and solicitors, has undergone in Scotland a partial fusion of the two branches of the profession following legislation in 1990. Now a solicitor might also gain rights of audience as a solicitor-advocate; and an advocate may be instructed directly by a client rather than through the intermediation of a solicitor. The Faculty of Advocates still requires entrants to study civil law (as Roman law is called in Scotland), though limited only to property and obligations. The need for this is seen as irrational and impractical by many modern lawyers, but every law school in Scotland offers an elective course in Roman law.

Thus it is still fair to claim that Scottish legal system is a "hybrid" or "mixed" jurisdiction, although the main model has been, in the recent past and even today after the revitalization of the Scottish Parliament following devolution, England. Nothing is overt, and therefore, there is no displaced model.

As for international law, two features of United Kingdom constitutional framework must be mentioned: the doctrine of the sovereignty of parliament and unitarism. The Westminster parliament is sovereign and the unitary character of the state is the structural necessity of this sovereignty. The Union is an incorporated union and though there are five legal systems in the UK, Scottish legal system being one of these, the UK is a unitary state and not a federation. Though 1998 brought devolution to the UK, as seen above, this did not have an impact on international law. The mode by which supranational sources (except for EC law) become applicable in domestic courts in the UK must be considered here. In the UK treaty making is a prerogative of the Crown (the Government). Parliament has no function in treaty making, apart from passing implementing legislation. A treaty that has been approved

[47] For cases to support the above, ranging from 1997 to 2004 see MacQueen, supra note 44, p. 646.

by the State and has entered into force in the international arena does not become part of the law of the land automatically, a separate "incorporation" Act being required. Thus the effect of the treaty is dependent upon the process of "transformation": the treaty as such has no effect; the effect is produced only by national rules that incorporate the treaty. This means that an unincorporated treaty has no formal standing at all in Britain.[48] One consequence that flows from this is that if such an unincorporated treaty conflicts with statute or even common law, the latter will prevail. Though treaties that are "incorporated in terms", by being appended to a statute and forming a substantive part of that statute will have the most unequivocal status in domestic law, they have no special position since the concept of "higher law" does not exist in the UK. An Act of Parliament may simply give effect to a treaty the full text of which appears as a "Schedule" to the Act. However, it is more often the case that Parliament embodies the treaty provisions in different terms and sometimes without even referring to their treaty origins. It is also possible that the terms of the treaty become distorted by the specific implementing legislation in the process of incorporation. In addition, as Parliament is supreme, it can pass legislation inconsistent with international treaty obligations; though the assumption is that it will not do so lightly. It is also noteworthy that British courts follow the terms of the Vienna Convention on Treaties (Articles 31-33) on rules of interpretation, though that treaty is not incorporated into domestic law.

Having said all that however, the model laws and legislative guidelines on the part of the International organizations such as the UNCITRAL, UNIDROIT, and the Hague Conference have had an unquestionable impact in the UK, and for our purposes, on Scots law. Most of such instruments have been incorporated into the Scottish legal system verbatim, though some with modifications. The main factor to remember here is that following the common law tradition, considered above, and adhering to the dualist theory, all international instruments, apart from the EU regulations and directives, have to be incorporated into Scottish law by a domestic Act of the Westminster Parliament, before they become binding in the domestic scene. However, these are on the whole short Acts with the international instrument attached in a Schedule, on the whole without reservations.

It is worth mentioning here that in R v *Secretary of State for Scotland* (1998 SLT 162 and also 1998 S.C. 49), it was pointed out that the ECtHR decision referred to would have been relied upon if there had been ambiguity in Scots law, where the case being referred to was *X v UK*

[48] See as an example where the House of Lords declined to construe Bermuda 2 on this ground in *British Airways* vs *Laker Airways*, A.C., 1985, pp. 85 and 86.

(1981 4EHRR 188). Here, English cases and legislation were looked at for "assistance to be derived" from them. However, differences of terminology meant that it was better to concentrate on Scottish legislation (1998 SLT 162 at 167, 173 and 1998 S.C. 49 at 65). Later, in the House of Lords it was pointed out that although their Lordships in the Inner House of the Court of Session regarded the *Canons Park* as irrelevant on the ground that the terminology of the English Mental Health Act differed from that of the Scottish Act, now both parties before the House recognized that there was no substantial difference in effect between the provisions of the two Acts and "were at one in accepting that the English case could not be distinguished." So *Canons Park* was followed (1999 S.C.17).

II. SPECIFIC INSTITUTIONS OR LEGAL MECHANISMS

The developments discussed under II (a) and (b) also cover the questions posed under the heading of "Specific Institutions or Legal Mechanisms".[49] It would be more or less impossible to disentangle these. In addition, the risk of repetition would be too great.

III. CONCLUSIONS[50]

The "Tapestry of the Law"[51] by Elspeth Attwooll ends with a comment on a quotation from Wittgenstein:

> … *we should therefore accept that 'as in spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres'. Further, as the Scottish version so amply shows, there may be many different types of thread to the tapestry of the law.*

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[49] These questions are: Are there Institutions or legal mechanisms that have been received in the periods before those indicated? Which ones and in which periods? If yes, what was the outcome? Did its adoption displace other institutions or legal mechanisms? What were the driving forces of legal reception? Violent: conquest, colonization? Passive: imitation, ideology, cultural, (predominantly language), techniques (simplification, codification etc)? Scientific: teachings, the formation of legal panels in the countries of origin, spreading of legal literature, etc.? Commercial: commercial predominance? Indirect: Direct contact with the countries of origin or through a third world country? Confessed or denied? What are the general identification elements of the received institutions or legal mechanisms: legislative, legal or doctrinal? Are there specific recognizable elements of legal hybridization? Could you exemplify? Psychological Approach. The reception was conscious or unconscious?

[50] This part derives extensively from my earlier work, supra note 34.

[51] Attwooll, supra note 11, p.250.

All mixed systems differ in the way they have been formed as their histories show. They also differ in the way legal elites have reacted to the mixture, handled it and tuned the incoming legal elements, by moulding them to make them part of the legal system. Furthermore, they differ in how the mixture has been sustained, nurtured or killed.[52] Thus, in all these senses each mixed system is unique.

Obviously looking at any system, say fifty years ago and again today may reveal considerable differences both in structure, context and conceptual infill, and in the attitude of lawyers and academics to the system and to the mix of the system. Do the legal elite favor the "mixedness" and try to further it or do they want to eradicate it in the name of convenience? Is the legal system dominated by the so-called "purists", "pollutionists" or "pragmatists"?

The elements of the mix in modern Scots law and the exact balance between them have been the subject of constant controversy in the past and now, at home and abroad. This blend has been dubbed by this author elsewhere, a "mixing bowl" and not a "puree",[53] since the desire on the part of the legal elite has been to keep the distinctiveness. This desire however, was not consistent in the past, nor is it today. Nor is this distinctiveness always appreciated by the legal elite.[54]

Some claim that in Scotland the law has become the object of a "myth" arising from a defensive and nationalist historical jurisprudence.[55] Nevertheless interest in Scots law and the Scottish legal system is growing in Europe where it is sometimes regarded as a model for the new *ius commune* that is being developed. Scottish scholars have contributed to a number of Commissions and groups involved in creating General Principles in some fields of private law within the context of the European Union and also to renewed research activity into legal history at home.[56]

Two opposite strands of interest in the state of Scots law have emerged. The first strand can be summarised through the views of the Lord Hope of Craighead, the one time Lord President of the Court of Session:

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[52] See J. du Plessis, "The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences", 3 *Stellenbosch Law Review*, 1998, p. 338.
[53] See supra note 1.
[54] See Weir, T., "Divergent legal systems in a single member state", 6 *Zeitschrift fur Europaisches Privatrecht*, 1998, p. 564.
[55] Evans- Jones, R., "Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law", 114 *Law Quarterly Review*, 1998, p. 228
[56] Reid and Zimmermann, Carey-Miller and Zimmermann, supra note 7.

> *The Scottish legal system is as much a part of Scotland as its landscape. Its roots were firmly established here long before the Union of 1707. The framers of the Union Treaty were wise to respect its independence, and they provided expressly for its preservation in all times coming within the Unites Kingdom. It has remained since then as one of the essential pillars upon which Scotland has been able to base its separate identity. Far from withering under the influence of English law and English institutions, the legal system of Scotland has gone from strength to strength. … Scotland's own legal system provides the essential structure for whatever may lie ahead.*[57]

As Scots law copes with contemporary technological and social developments, we see the second strand arising. For example, it is the opinion of another one time Lord President of the same Court that:

> *Whether we find the appropriate solution to those problems in the classical Roman law of Julian, in the writings on Grotius, in the opinions of Lord Chancellor Brougham or in an article by some Australian academic seems to me to be, almost, a matter of indifference. We are, happily, citizens of a legal world which stretches not only backwards for more than two thousand years but onwards across the globe. Provided we abandon any notions of false superiority and go forward in that spirit, the future state of Scots law is likely to be happy*.[58]

The first renaissance of Scots law bore the marks of the "purists", and in their struggle with the "pollutionists" they gave up being "pragmatic" but wanted to preserve only one of the elements of the mix in preference over the other. Thus, it can be said that the preservation of the Scottish legal tradition reflects Scottish nationalism.[59]

Some of the nineteenth century developments of Scots law did however show a certain flexibility of approach. Those responsible for the "mixedness" of the system were exalted by some jurists and maintained their profound effect as "institutional writers"; some others were keen to move in the direction of English law. Now, some claim that receptions that led to the "mixedness" were a disruptive force and therefore discontinuity was the result,[60] whereas others claim that the receptions were part of the continuity and the development of the legal system.[61] Furthermore, Hector MacQueen indicates that the existence of the

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[57] Hope, D., "Foreword", *The Legal System of Scotland*, Edinburgh HMSO (1995), p. xi.
[58] Earlsferry, Roger of "Preface" in Farmer, L. and Veitch, S. (eds) *The State of Scots Law: Law and Government after the Devolution Settlement*, Butterworths, 2002, p. vi.
[59] See Meston, M. C. *et al*., *The Scottish Legal Tradition*, Saltire Society, Edinburgh, 1991.
[60] Evans-Jones, supra note 3, p. 45.
[61] Sellar, supra note 19, p.3

Scottish Law Commission since 1965, is responsible for the continuation of a distinct Scottish dimension in legislation and its improvement.[62] These could be shown to be the positive aspects of Scottish nationalism.

"After centuries in which Scots law has often appeared cocooned from the modern world in the manner of a cosy gentleman's club, where its privileges have seemed to be part of the natural order", a transition is not an easy one for the legal system to make.[63] Three main concerns accompany this view: The increasing legalization of Scottish political culture and the politicization of the legal culture; the impact of the evolution of public law on Scots law, since for centuries Scottish lawyers busied themselves with the cultivation of the principles of Scottish private law; and the continuing status of the Scottish legal tradition. At this time of what I would call "the second renaissance" of Scots law,[64] how will the above bear on legal practice and the self-image of Scots law?

An important concern is, can this manageable sized small legal system avoid the danger of self-referential development or will the Scots law's status as a mixed jurisdiction "dictate the options of legal development that will be open to Scotland"? [65]

In the new *ius commune* agenda in the European Union today, Scots law is gaining a prominence. For example, MacQueen points out that, "in a number of important respects the mixed Scots law of contract has anticipated the position arrived at by the Lando Committee in considering what is the best rule of contract law to deal with particular situations", and this "largely through the decisions of the courts", thus reflecting "problems that actually arose in practice".[66] We know that, it is not solely its history that places the Scottish legal system in this position but how the tuners of her laws have nurtured it.

Though Kellas believes that "It is more true today than at any time in the last 300 years that Scots law is made in Scotland for Scots",[67] this is correct only in view of the devolved matters. But, it is up to the politicians and academics to show that "what is English is not necessarily

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[62] MacQueen, Hector L. "Scots Law and the Road to the New *Ius Commune*", *Electronic Journal of Comparative Law*, vol. 4.4, December 2000, p. 7, *http://law.kub.nl/ejcl/44/art 44-1.html*

[63] Farmer, L., and Veitch, S., "Introduction", in Farmer & Veitch supra note 58 p. 7.

[64] See, Örücü, supra note 34.

[65] See, McCall Smith, supra note 42, p. 157.

[66] MacQueen, H. L., supra note 62, p. 8.

[67] Kellas, J. G., "Lawyers in Contemporary Scottish Politics: a New "Dundas Despotism"?" in Farmer and Veitch supra note 58, p. 34.

appropriate for Scotland"[68] at a time when new mixes are in the air. First, as Dunbar shows, though "Scotland has always enjoyed a remarkable mixture of peoples, languages and cultures", the Scotland we know today "is a comparatively recent construct".[69] Second, what Scotland needs today is a dynamic and progressive, forward looking legal system.

Law has an enhanced role in the new devolved system. However, it must be remembered that the devolved government now comes under the scrutiny of the Judicial Committee of the Privy Council.[70] This means that the legal system as a whole is under scrutiny. Further, since May 1999, there is the direct impact of the European Convention of Human Rights.

How far can Scots law contribute to European integration as Europe's only overtly mixed legal system?.[71] We know that the Scots law of contract with its "mixed" nature helped the Lando Commission while it formulated the Principles of European Contract Law.[72] We also know that it was the Scots model of the trust that was used for the Principles of European Trust Law to demonstrate how the Civilians may embrace this concept. We see reference to Scots law terminology in the English version of the new Quebec Code. It has been claimed that "if a ius commune novum is to be formulated for Europe, Scots law … offers a destination full of interest in the comparative legal researcher's world tour".[73] It remains to be seen however, how useful Scots law will prove to be a practical point of reference, unless it itself shows present day signs of dynamism and creativity as it faces its second renaissance.[74]

Robin Evans-Jones for example, is not optimistic on this point.[75] He sees the reasons for the fact that different traditions were influential in Scotland to lie in the weakness of culture and politics in the past rather than in the flexibility and openness of the mind of the judge and jurist. Those days are now over, therefore, there is need for a greater maturity of outlook, which may or may not exist in the present day Scottish legal elite.

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[68] *Idem*.
[69] Dunbar, R., "Legislating for Diversity: Minorities in the New Scotland", *Ibidem*, p.38.
[70] Scotland Act 1998, Sch. 6.
[71] See MacQueen, H. L., "Scots Law and European Private Law",*Ibidem*, pp. 59- 62, and 72-73.
[72] See MacQueen, H. L., supra note 62.
[73] Reid, supra note 2, p. 57.
[74] It has been claimed by Chris Himsworth that "the retention of the distinctive mixed system of Scotland is most unlikely." Himsworth, C., "Devolution and the Mixed Legal System of Scotland", *The Juridical Review*, 2002, p. 128.
[75] See Evans- Jones, supra note 54, and also Evans-Jones, supra note 3, p. 39.

Are the 'Rechthonoratien' in Scotland still able to pick from both the civil law and the common law what they consider to be the best solution for a specific problem? Or, is what wins are proximity, accessibility, convenience, the existence of a common appeal court, that is the House of Lords – and now the Supreme Court - and a common language, and that therefore, familiarity with English law means that the common law element of the "mixture" will always be supreme.

In fact, in Scottish judicial decisions foreign cases are cited and used, sometimes in a functional, sometimes in an ornamental way [76] There is still reference to old Roman law at times, though the most frequently cited jurisdiction is England. Some find this disturbing,[77] some advocate caution in the use of the English jurisdiction.[78] John Blackie shows how some foreign law has "gone native" over time.[79] Additionally, Lindsay Farmer and Scott Veitch state that "…the mixed legal system of Scots law was never much more than the repository in a small jurisdiction of ideas and influences forged elsewhere and used in whatever way was most practically convenient". [80] The state of Scots law has always been in flux. As Blackie points out, "That is not only for the obvious reason that ideas change, but because the sources that are considered to matter have constantly been reselected". [81]

> *What the process seems to show is not so much anything about whether the system is or is not civilian, nor about its 'style' as a legal system. It shows the way in which judges within it, against the background world of their times, have dealt, and will, it is anticipated, continue to deal with the challenges of judging on points of law within a small legal system that has had no absolute points drawn barring looking backwards or looking sideways.*[82]

A number of Scots lawyers have long had a strong and emotional belief in the existence of an organic connection between the practical principles of private law and the character of the Scottish people. For them, the presence of the Parliament in Edinburgh "would seem to

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[76] See Örücü, E., "Comparative Law as a Tool of Construction in Scottish Court", *Juridical Review*, 2001, p. 27.
[77] McDiarmid, C., "Scots Law: The turning of the Tide", *Juridical Review*, num. 3, 1999, p. 156.
[78] Blackie, J. and Whitty, N., "Scots law and the new *ius commune*" in MacQueen, H. L. (ed.), *Scots Law into the 21st Century: Essays in Honour of W A. Wilson*, 1996, pp. 77 and 78.
[79] Blackie, J., "Old and Foreign: History, Historiography and Comparative law", in Farmer and Veitch supra note 58, pp. 77-96.
[80] Farmer and Veitch, supra note 63, p. 9.
[81] Blackie, supra note 79, p. 96.
[82] *Ibidem*, p. 96.

represent the best means of protection against the incursion of foreign principles and the best means also of the preservation of the distinctive identity of Scots law in its relation to the Scottish people".[83]

The demands for legislation indicate that legislation will be in areas that "go well beyond the traditional understandings and concepts of Scots law." [84] Farmer and Veitch feel that, "It may be that the existence of a distinctive culture of Scots law is put under threat exactly at the moment at which it might have thought itself to be safe from foreign influence".[85] Nevertheless, it is also true that this is a time when Scots law has started to exert influence elsewhere, and not only on the continent of Europe but in England, more than ever before.

So, what will be the shape of the second renaissance? Is a civilian renaissance necessary, feasible or even desirable? "A civilian revival" indicates the pre existence of a "civilianness" in the past and a desire today to "redress past assimilation" with common law.[86] Yet, who minded this "past assimilation"? We know that early Scottish judges on the House of Lords didn't! We must remember that there are no longer any "civilian trained" lawyers, neither are foreign languages well known. In addition, the case *McIntosh* v HM *Advocate*[87] has already raised the possibility of appeal to the House of Lords in criminal cases.

It may be true that Chris Himsworth is right when he says that the Scottish "mix" "will not be the old civil and common-law mix, but the mix of laws enjoyed by all other modern systems which, in the pursuit of changing policy objectives, seek out new models of legal development from a wide range of sources".[88] New mixes may be about to be born in this post-modern period.

So the message must be "emoulé within a larger mix, look forward and sideways rather than backwards and only look backwards to discover the available tools, the best of both worlds, and be creative".[89]

In this post-modern period, an ongoing mixedness is the healthiest one for all legal systems. For Scotland, alliances with other

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[83] Farmer and Veitch, supra note 63, p. 9.
[84] *Idem*.
[85] *Idem*.
[86] See, Witty, N., "The Civilian Tradition and Debates on Scots Law", *Tydskrif vir die Suid-Africaanse Reg*, 1996, p. 227.
[87] 2001 SLT 304.
[88] Himsworth, supra note 74, p. 129.
[89] See Örücü, E., "Law as Transposition", *International and Comparative Law Quarterly*, num. 51, 2002, p. 205.

mixed jurisdictions as well as other legal systems in Europe are paramount, if this period is indeed to be the second renaissance. There are new receptions in the horizon and this time it will be a period of cross-fertilisation. "The tapestry has to be extended, and the stitches in this enlarged tapestry need the able hands of new mixers - the judges and jurists of the twenty-first century".[90]

> *In conclusion, Scots law can be both a contributor to, and a beneficiary of, the work going on towards a European private law. It has survived and developed as an independent legal system by dint of borrowing ideas from outside and then often giving them a characteristic twist of its own devising; so a fresh transplantation is unlikely to be rejected as a result of genetic incompatibility. But if Scots law is in turn to make its full potential contribution to European legal development, it must do more to put its house in order, in terms of making the law more readily accessible and understandable. […] Whether or not this is to be achieved through codification, much will inevitably depend upon academic Scots lawyers, as teachers and writers, to continue the work began by Sir Thomas Smith in the 1950s, whether or not they take up his civilian sword as the way to tackle the problems.*[91]

[90] Örücü supra note 34, p. 103.
[91] McQueen, supra note 44, p. 650.