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## Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture

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**MIXED JURISDICTION AND THE SCOTTISH LEGAL  
TRADITION:  
RECONSIDERING THE CONCEPT OF MIXTURE**

Stephen Thomson\*

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ABSTRACT

Scotland is typically regarded as a mixed jurisdiction based on an assessment of its combination of civilian and common law traditions. If this narrow definition of “mixture” is opened up, one

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will find several other traditions which are constituent parts of the Scottish legal tradition. Those range from the seemingly remote Celtic and udal law, through feudal and canon law, to the law of the European Union and the European Convention on Human Rights. An holistic approach to the question of mixture requires that each of these traditions is accounted for, especially because of the difficulties in assessing the legacy of any given tradition. Those difficulties are exacerbated by the fact that legal traditions are indiscrete or “impure”, having been the subject of influence, modification, contamination, borrowing and so forth. They have mixed with other traditions, and some have conveyed parts of others. By focusing on the civilian and common law traditions, we risk adopting a reductionist approach to the question of mixture by essentially excluding vital parts of the story: which other traditions were (or are) part of the mixture, which parts disappeared or were subsumed into other traditions, which aspects of one tradition were conveyed by another. An holistic approach also recommends that the predominantly private law oriented focus of the literature is opened up to analysis of public law and criminal law. That will likely bring out further aspects which show that the pedigree of Scots law is a mixture, not only of civilian and common law ingredients, but also of other diverse traditions.

## I. INTRODUCTION

Scotland is often described as a “mixed” jurisdiction. Whilst some have claimed that it is the only such system in Europe,<sup>1</sup> others may disagree with that proposition.<sup>2</sup> We are told, at any rate, that Scotland is the oldest among those jurisdictions comprising the world's “third” legal family.<sup>3</sup>

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1. Hector L. MacQueen, *Mixed Jurisdictions and Convergence: Scotland*, 29 INT'L J. LEGAL INFO. 309, 310 (2001).

2. *See, for example*, arguments advanced that Cyprus and Malta are also mixed systems—*see, respectively*, Nikitas E. Hatzimihail, *Cyprus as a Mixed Legal System*, 6 J. CIV. L. STUD. 37; and Kevin Aquilina, *The Nature and Sources of the Maltese Mixed Legal System: A Strange Case of Dr. Jekyll and Mr. Hyde?*, 4 COMP. L. REV. 1 (2013).

3. VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 5 (Cambridge Univ. Press 2001); Mauro Bussani & Vernon Valentine Palmer, *The Liability Regimes of Europe – Their Façades and*

That may be so under a specific casting of the mixed jurisdiction category, principally understood as one combining civilian and common law traditions. In that sense, Konrad Zweigert and Hein Kötz argued that “Scots law deserves particular attention from comparative lawyers as a special instance of the symbiosis of the English and Continental legal traditions.”<sup>4</sup> That may be understood within what has been said to be “characteristic of mixed jurisdictions,” namely “to retain private civil law within a surrounding system of Anglo-American public law.”<sup>5</sup> T.B. Smith described the mixed jurisdiction as “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”<sup>6</sup> Similarly, Niall Whitty described it as usually meaning “a civilian system overlaid by the common law.”<sup>7</sup>

Whilst this civilian and common law dichotomy would inevitably place Scotland in a “mixed” category, it represents just one perspective on the concept of “mixture”. If we reconsider what it is that constitutes mixture, in particular by forcing the definition open beyond a simple civilian and common law antithesis, might we change our view of the extent to which Scotland is a mixed jurisdiction, or whether it is a special case among jurisdictions in being “mixed”?

The question becomes one of what, exactly, is being mixed? As Esin Öricü has pointed out, not all mixed systems would be

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*Interiors in PURE ECONOMIC LOSS IN EUROPE* 143 (Mauro Bussani & Vernon Valentine Palmer eds., Cambridge Univ. Press 2003).

4. KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 204 (3d ed., Tony Weir trans., Oxford Univ. Press 1998).

5. BUSSANI AND PALMER, *supra* note 3, at 143.

6. T.B. Smith, *The Preservation of the Civilian Tradition in “Mixed Jurisdictions”* in *CIVIL LAW IN THE MODERN WORLD* 2-3 (A.N. Yiannopoulos ed., Louisiana State Univ. Press 1965).

7. Niall R. Whitty, *The Civilian Tradition and Debates on Scots Law*, *TYDSKRIF VIR DIE SUID-AFRIKAANSE REG* 227, 232 (1996).

mixtures of the same ingredients.<sup>8</sup> This fact has not gone unnoticed in the literature. Vernon Palmer proposed three principal characteristics by which mixed jurisdictions might be identified. First, they should be “built upon dual foundations of common-law and civil-law materials,” and even although other systems “present diverse mixes,” including traditions of religious law, indigenous custom and so on, “common law and civil law [should] constitute the basic building blocks of the legal edifice.”<sup>9</sup> Second, the presence of these dual elements should be “obvious to an ordinary observer.”<sup>10</sup> Third, there is a structural allocation of content: “the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law.”<sup>11</sup> Notwithstanding Palmer's definition, which marks off the “mixed jurisdiction” from jurisdictions with traditions otherwise mixed, the basic analytical framework still draws on a civilian and common law dichotomy.<sup>12</sup>

In Scotland, it is well documented that there is a mixture of civilian and common law traditions.<sup>13</sup> However, if one were able to reach into the legal system and remove the civilian and common law components, would all of its content have been extracted? The answer to that must be firmly negative. If one is receptive to the footprint or legacy of other legal traditions in Scots law, they will find them. Those other traditions, too, are part of the mixture; one

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8. See Esin Örüci, *What is a Mixed Legal System: Exclusion or Expansion?*, 12 ELECTRONIC J. COMP. L. 1, 4 (2008).

9. PALMER, *supra* note 3, at 7-8.

10. *Id.* at 8.

11. *Id.*

12. Palmer has acknowledged the limitations of a straight civilian and common law dichotomy. He also outlined the difference in approach between scholars studying mixture within the civilian and common law framework—whom he described as “scholars in the classic mixed jurisdiction tradition,” and those of a more liberal persuasion who may be regarded as legal pluralists. See Vernon Valentine Palmer, *Mixed Legal Systems – The Origin of the Species*, 28 TUL. EUR. & CIV. L.F. 103 (2013).

13. See, for example, Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 L.Q. REV. 228 (1998); W.D.H. Sellar, *Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions*, 4(1) EDIN. L. REV. 3 (2000); and Whitty, *supra* note 7.

which is in Scotland revealed as much more diverse than the initial hybrid of civilian and common law traditions may have suggested. Moreover, even if those comprise the two principal traditions in Scots law, it will be asked whether a quantitative approach is appropriate.

This article considers the mixed quality of Scots law and the Scottish legal tradition in four contexts, each of which is intended to point to a deeper and fuller concept of mixture in the mixed jurisdiction analysis.

The first is an historical perspective: if the civilian and common law traditions are not the only traditions which have left a legacy in the Scottish legal order, what others might be identified? This section gives a brief and non-exhaustive outline of other traditions which have featured in the evolving Scottish legal tradition, namely Scottish common law, feudal law, canon law, udal law, Celtic law, the Bible, and foreign maritime law.

Second, the argument is made that an “updated” view of mixed jurisdiction must take account of the extent to which two major streams of law have permeated Scots law in more modern times — those of the European Union (EU) and the European Convention on Human Rights (ECHR). These cannot be excluded from the analysis, and whilst they may constitute part of the mixture in any jurisdiction to which they relate, that fact alone necessarily distinguishes those jurisdictions from the majority of the world's jurisdictions where neither EU law nor ECHR law is applicable. Moreover, the particular character and structural features of EU and ECHR law are such that they do not receive monolithic, uniform application in each jurisdiction. They gain the colouring of local institutional and normative features which vary among jurisdictions.

The third aspect discussed is one of methodology: an holistic approach is required for the question of mixed jurisdiction. It should be asked whether a quantitative, or some other, framework of analysis is preferred for evaluating whether and to what extent

individual constituent traditions should feature in the discussion. Consideration should be given to how one accounts for temporal dimensions, how one addresses the question of legacy, and the extent to which legal traditions are indiscrete or “impure”. This section will reflect on these issues.

Fourth, it is suggested that the extent to which private law analysis has dominated mixed jurisdiction scholarship has the potential to misrepresent, or only partially represent, the nature of the law and legal system *in general*. In particular, the discussion may be said to take insufficient account of public law, criminal law and other areas which lie beyond the field of private law. The risk arises that jurisdictions are in general classified according to definitions and analyses conducted along private law fault lines. The suggested outcome is that, if and until other areas of law are properly accounted for, it may be appropriate for the private law literature to explicitly confine itself to private law, and be cautious about purporting to speak to the nature of the wider law and legal system in general terms.

The view taken by this article is very much a general one which aims to address Scots law and the Scottish legal system at their widest extent. That position is purposely taken, both as a response to the tendency of the mixed jurisdiction literature to focus on a private law analysis,<sup>14</sup> and because there appears little reason in principle to begin with a magnified view of any one substantive area of law (such as private law) and to recede from that point to a more general analysis. An alternative approach may have been to move from the principal focus of the literature—private law—out to a more general analysis, however that would reinforce the notion that private law is the natural starting point for the discussion, and the article seeks to contest that idea; at least until (should one be forthcoming) a convincing explanation is given as to why private law should be the main focus of an holistic

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14. See *infra* section IV.

mixed jurisdiction discussion which can faithfully be said to address the general law and legal system at large. The article therefore raises a series of questions which it is hoped will feed into a discussion on the proper parameters and methodology of the mixed jurisdiction commentary.

By final word of introduction, this article is concerned with “sources” in the sense of the pedigree of law—that is to say, streams or currents of legal tradition. It does not discuss “sources” in the sense of resources of law, such as legislation and the common law, although these are often the media through which legal traditions are conveyed.

## II. TRADITIONS OF LAW IN SCOTLAND: HISTORICAL

In line with the principal orientation of the mixed jurisdiction literature on a civilian and common law axis, the contemporary debate on the mixed character of Scots law has primarily been conducted on the same axis.

Even if the civilian and common law elements were the main contributors to Scots law and the Scottish legal tradition as now understood, it is perhaps surprising that such little attention has been given to other contributing traditions in the context of a mixed jurisdiction analysis. The accent on civilian and common law elements is subject to a range of possible criticisms: it is too simplistic an analysis; it is reductionist; it suggests that these are pure and discrete traditions; it is a Eurocentric analysis (and therefore ill-suited for application in a global comparative law context);<sup>15</sup> and so on. The reductionist criticism is particularly instructive because it points to the fact that in measuring a system with a civilian and common law yardstick, the legacy of other traditions is essentially left out of the discussion. That legacy may manifest directly in the Scottish legal tradition, or even indirectly

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15. Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT'L & COMP. L.Q. 35, 49 (2002).

through another tradition—including through the civilian and common law traditions.

This section outlines some of the other traditions which jostle for recognition of their own respective places within the Scottish legal tradition. Rather than attempting to restate the effect of the civilian and common law traditions in Scotland, the opportunity will instead be taken to give an overview of traditions with a less remarked footprint. The traditions identified are not exhaustive—this is a necessarily brief overview, but should give a taste of the plurality and variety of those traditions.

#### *A. Scottish Common Law*

When the “common law” is discussed in the Scottish context, reference is typically made either to the common law tradition deriving from England, or common law as a non-statutory resource of law.

There is recognised to have been, however, a Scottish “common law” in the sense of a more indigenous common law tradition inherited in the mediaeval period. This likely comprised significant elements derived from the English common law tradition, but with Scottish usages, additions and innovations. This would precede the main period of civil law reception in Scotland, as well as the main period of common law reception.

The common law of Scotland<sup>16</sup> was a feature of the historical circumstances of the kingdom, and whilst it would include aspects of other legal traditions—such as English common law, mediaeval Roman law and canon law influences—there is also recognised to have been a body of “native Scottish customs,” the first known reference to that “common law” being in a royal brieve from

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16. Noting that the approximate geopolitical territory of Scotland as now understood took shape from around the 9th to the 13th centuries. *See also infra* note 90.

1264.<sup>17</sup> This law was “common” in the sense that it derived from customs common to the various peoples who together made up the people of the Scottish kingdom.<sup>18</sup> The mediaeval Parliament of Scotland not only enacted programmatic statutes, with their connotations of positivity, but also expressed the accumulated customs—the “common law”—of the realm.<sup>19</sup>

Custom should be understood as an important source (or expression) of “law” in earlier periods in Scotland; indeed, as it was elsewhere in Europe. David Ibbetson identified three senses in which the term “custom” (*consuetudo*) can be understood in the context of mediaeval Europe. First, it refers in its least technical sense to the way in which a social group orders its affairs; the way in which things are done. Second, custom is distinguishable from *lex*: whilst *lex* is written law (*ius scriptum*), custom is unwritten (*ius non scriptum*). They are, however, complementary, in the sense that *lex* can record customs, clarify them or recognize them as authentic or authoritative. Third, custom is distinguished from *lex*, but rather than being understood as complementary, *lex* prevails: it conditions custom.<sup>20</sup>

The importance of custom in the specifically Scottish context comes through in several senses.

First, the kingdom was not socially or demographically cohesive, at least to the extent that it would become: custom was therefore about drawing out “the way things were done” from a variety of social groups. Second, jurisdiction was scattered through a broad array of courts, officials and other bodies. Their jurisdiction was sometimes overlapping or even competing, and they were not united in a defined jurisdictional hierarchy: practices

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17. A.M. GODFREY, *CIVIL JUSTICE IN RENAISSANCE SCOTLAND: THE ORIGINS OF A CENTRAL COURT* 18 (Brill 2009).

18. *THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA*, Vol. 22, para. 359, Butterworths LexisNexis.

19. See GODFREY, *supra* note 17, at 18.

20. David Ibbetson, *Custom in Medieval Law* in *THE NATURE OF CUSTOMARY LAW* 153-155 (Amanda Perreau-Saussine & James Bernard Murphy eds., Cambridge Univ. Press 2007).

and usages common to these fora could therefore be regarded as customs in a broader sense. Third is the related fact that there was no centralised, characteristically judicial forum until the establishment of the Court of Session (or College of Justice) in 1532: until then, no single judicial institution had the capacity and jurisdiction to regularize the application and implementation of law throughout the kingdom. Underlying patterns or commonalities therefore pointed to customs in the realm. Fourth, Parliament was not purely a legislative body as now understood. Not only did it perform an additional, adjudicative function, its statutes were not always programmatic in nature. Instead, they often promulgated and gave regularised form to existing customs. Finally, the resources of law were not widely recorded in writing. The “way things were done” would therefore embody a bottom-up, constitutive approach to custom, rather than a top-down, prescriptive approach expressed in legal writings.

The common law of Scotland was not confined to substantive content, but necessarily entailed more structural aspects, especially in the context of the emergence of a general framework or system of jurisdiction across the kingdom. Mark Godfrey has written extensively on this subject in the context of the emergence of the Court of Session as a supreme civil court in Scotland in the 16th century.<sup>21</sup> The ultimate normative authority of the monarch was essentially the unifying factor in an array of jurisdictions, exercised by a multitude of persons, officials and bodies, the jurisdictions of which were, as noted, sometimes overlapping or even competing. The common law would in this context emerge through common practices or applications of law, or the manner in which remedies were awarded. The various jurisdictions hung together under a general governing role exercised by the King in Council and Parliament, but the mediaeval common law context facilitated the systematization of the legal order and its movement toward an

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21. See generally GODFREY, *supra* note 17.

overall structure, both in terms of jurisdictional hierarchy and structural coherence.<sup>22</sup> Hector MacQueen has powerfully argued that the pleadable briefs of right, mortancestry and novel disseisin occupied a central place in the development of a Scottish common law, and that they were in use in Scotland (modelled on English equivalents) from prior to 1300 until the 15th century or later.<sup>23</sup>

The main, early repository of the Scottish common law was the *Regiam Majestatem*. Whilst based on the English text *De legibus et consuetudinibus regni Angliae* attributed to Ranulf de Glanvill (itself an expression of English common law), *Regiam Majestatem* also incorporated materials from the Romano-Canonical tradition and other early resources,<sup>24</sup> in addition to containing a significant body of feudal material.<sup>25</sup> The date of origin of the text (or texts) is disputed, though it may have been compiled in the early 14th century, or even have been older in nature.<sup>26</sup> It is regarded as the most important statement of Scots law in that period, though it is supplemented by other texts including *Quoniam Attachiamenta*, and the older, 13th century, *Leges Quatuor Burgorum*. *Regiam Majestatem* has itself been referred to in a few cases from the 20th and 21st centuries. It has, for example, been cited with reference to guardianship,<sup>27</sup> testamentary succession,<sup>28</sup> reparation,<sup>29</sup> the

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22. GODFREY, *supra* note 17, at 269.

23. See generally HECTOR L. MACQUEEN, COMMON LAW AND FEUDAL SOCIETY IN MEDIEVAL SCOTLAND (Edinburgh Univ. Press 1993).

24. THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Vol. 22, para. 360, Butterworths LexisNexis.

25. *Id.* at paras. 366 and 551.

26. *Id.* at para. 360.

27. *Law Hospital NHS Trust v Lord Advocate*, 1996 S.C. 301 at 323, per Lord Clyde.

28. *Clark's Executor v Clark*, 1943 S.C. 216 at 223, per Lord Justice-Clerk Cooper.

29. *McKendrick v Sinclair*, 1972 S.C. (H.L.) 25 at 56, per Lord Simon of Glaisdale.

criminal liability of married persons,<sup>30</sup> and the criminal offence of rape.<sup>31</sup>

### *B. Feudal Law*

As noted, *Regiam Majestatem* contained a significant body of feudal material, indicating the presence or legacy of feudalism in this earlier period in Scotland. Whilst it is unclear when feudalism arrived in Scotland, it may have been as early as the end of the 11th century,<sup>32</sup> though it has also been attributed to the reign of King David I of Scotland, which spanned 1124-1153.<sup>33</sup> The idea was that all land belonged to the Crown, and was “feued” out to vassals, often capable of further “subfeuing”. This was in return for services—originally of “men at arms” and produce, or of commodities, and then for monetary payments called feu duties.<sup>34</sup>

From the reign of David I onward, the reach of feudalism was gradually extended in Scotland with the effect of strengthening royal control over the territory.<sup>35</sup> Although there continued to exist pre-feudal estates and lordships, and the campaign of “feudalization” may have had less impact on lower levels of society in the 12th and 13th centuries,<sup>36</sup> feudal charters could grant rights of jurisdiction, particularly manifesting in regality and barony courts (so-called “franchise courts”).<sup>37</sup> Although franchise

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30. *Miln v Stirton*, 1982 S.L.T. (Sh Ct) 11 at 11.

31. *Lord Advocate's Reference No. 1 of 2001*, 2002 S.L.T. 466 at para. 22, per Lord McCluskey.

32. THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Conveyancing Reissue, Butterworths LexisNexis, para. 5.

33. Hector L. MacQueen, *Tears of a Legal Historian*, JUR. REV. 1, 4-7 (2003).

34. THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Conveyancing Reissue, para. 5.

35. MacQueen, *supra* note 33, at 5-7.

36. *See id.* at 14-17.

37. *See, for example*, THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Criminal Procedure Second Reissue, paras. 20-22. Heritable jurisdiction was substantially abolished by the Heritable Jurisdictions (Scotland) Act 1746. On charter grants in a Scottish common law context, *see, for example*, John Hudson, *Legal Aspects of Scottish Charter Diplomatic in the Twelfth Century: A Comparative Approach*, 25 ANGLO-NORMAN STUD. 121 (2002).

jurisdiction was regarded as being distinct from the grant of land itself, with the jurisdiction being heritable,<sup>38</sup> feudalism clearly had important consequences for the manner in which the law and legal system<sup>39</sup> were organised.

The system of feudal tenure was not abolished until November 28, 2004.<sup>40</sup> Whilst the Abolition of Feudal Tenure etc. (Scotland) Act 2000 proclaimed that the “feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished,”<sup>41</sup> this was in fact the end stage in a series of abolitionary steps stretching back over several centuries.<sup>42</sup> In the wake of feudal tenure came fresh legislation relating to title conditions and tenemental properties,<sup>43</sup> dealing with specific proprietary issues which would arise on the abolition of feudal tenure.

Kenneth Reid has described the legacy of feudal tenure in Scotland as “less than might be supposed,” noting that the abolition of feudal tenure brings “the most substantial reception of Roman law in Scotland since the seventeenth century.” One exception to this is the legacy of the affirmative real burden,<sup>44</sup> a form of condition on the development of land, which Reid described as “a permanent legacy of the feudal era.”<sup>45</sup>

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38. THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Criminal Procedure Second Reissue, para. 20, Butterworths LexisNexis.

39. To the extent that it is legitimate to (i) speak of a single “system”, and not of a mosaic of “systems”, at that time; and (ii) invoke the connotations of uniformity and regularity associated with a “system”.

40. The date on which the Abolition of Feudal Tenure etc. (Scotland) Act 2000 took effect.

41. Abolition of Feudal Tenure etc. (Scotland) Act 2000, s.1.

42. THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, Vol. 18, para. 113, Butterworths LexisNexis.

43. Title Conditions (Scotland) Act 2003; Tenements (Scotland) Act 2004.

44. Kenneth G.C. Reid, *Vassals No More: Feudalism and Post-Feudalism in Scotland*, EUR. REV. PRIV. L. 282, 300 (2003).

45. *Id.*

*C. Canon Law*

Canon law has left a significant legacy on Scots law and the Scottish legal system. Papal jurisdiction was exercised with regard to disputes in Scotland from at least as early as 1170.<sup>46</sup> The Court of Session (or College of Justice), established in 1532 as the country's first (and surviving) central and characteristically judicial institution, comprised a bench split equally between spiritual and temporal appointees;<sup>47</sup> those in the former category being canon lawyers. It was a rule, until 1579, that the President of the College of Justice should be a prelate.<sup>48</sup> This distinction between spiritual and temporal appointees survived until 1640.<sup>49</sup>

Canon lawyers were also active among the practitioner cohort. Some of these were particularly experienced,<sup>50</sup> and John Cairns noted that by 1590 there had developed in Edinburgh a professionalised central civil court patronized by an organised legal profession “largely trained in the Roman and canon laws.”<sup>51</sup> A number of intrants to the Court had read both the canon and civil laws predominantly at continental European universities,<sup>52</sup> though it appears that canon law was in fact taught prior to civil law at the University of St. Andrews.<sup>53</sup>

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46. See R.S. MYLNE, *THE CANON LAW* 9-10 (Morrison & Gibb 1912).

47. ROBERT KERR HANNAY, *THE COLLEGE OF JUSTICE* 109 (William Hodge 1933); and see also the College of Justice Act 1532.

48. HANNAY, *supra* note 47, at 107-109.

49. John W. Cairns, *Historical Introduction* to 1 *A HISTORY OF PRIVATE LAW IN SCOTLAND* 86 (Kenneth Reid & Reinhard Zimmermann eds., Oxford Univ. Press 2003).

50. See, for example, JOHN FINLAY, *MEN OF LAW IN PRE-REFORMATION SCOTLAND* 87 (Tuckwell Press 2000).

51. John W. Cairns, *Academic Feud, Bloodfeud, and William Welwood: Legal Education in St. Andrews, 1560-1611*, 2 *EDIN. L. REV.* 158, 160 (1998).

52. HANNAY, *supra* note 47, at 146-147; John W. Cairns, *Importing our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century* in *SCOTLAND AND THE LOW COUNTRIES: 1124-1994*, 141-142 (Grant G. Simpson ed., Tuckwell Press 1996).

53. William M. Gordon, *Roman Law in Scotland* in *THE CIVIL LAW TRADITION IN SCOTLAND* 19-20 (Robin Evans-Jones ed., Stair Society 1995).

Cairns also noted that canon lawyers were assisting litigants in secular disputes.<sup>54</sup> Indeed, canon law commanded persuasive authority in the secular courts,<sup>55</sup> and canonical materials were being cited in secular litigation as early as 1380.<sup>56</sup> Even though canon law was regarded as the “fouler source” or “dunghill” in some circles,<sup>57</sup> the institutional writer Sir Thomas Craig wrote that whenever a conflict arose between canon and Roman law, the former was preferred.<sup>58</sup>

It has been said that the Scots law of marriage and testamentary succession were based on canon law,<sup>59</sup> and that its influence on the law of obligations was “positive and direct”.<sup>60</sup> The canonical tradition is also thought to have significantly influenced civil procedure in Scotland,<sup>61</sup> perhaps influenced by the practice and procedure of the *Sacra Rota Romana*.<sup>62</sup> In sum, Lord Cooper wrote of “the extent to which . . . Canonist traditions permeated the thinking of Scottish lawyers,” and noted that the “immense debt which Scots Law owes to Canon Law and Practice has never been sufficiently acknowledged.”<sup>63</sup> The canonical tradition has also

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54. Cairns, *supra* note 49, at 31, 46 and 69-70.

55. Gordon, *supra* note 53, at 23.

56. Cairns, *supra* note 49, at 45.

57. See David B. Smith, *Canon Law* in AN INTRODUCTORY SURVEY OF THE SOURCES AND LITERATURE OF SCOTS LAW 188 (Stair Society 1936).

58. Abolition of Feudal Tenure etc. (Scotland) Act, I, 18, 17.

59. J.J. Robertson, *Canon Law as a Source* in STAIR TRICENTENARY STUDIES 113 (David M. Walker ed., Stair Society 1981).

60. W. David H. Sellar, *Promise* in 2 A HISTORY OF PRIVATE LAW IN SCOTLAND 266 (Kenneth Reid & Reinhard Zimmermann eds., Oxford Univ. Press 2004).

61. See Cairns, *supra* note 49, at 63-64; Gordon, *supra* note 53, at 19-22; and J.J. Robertson, *The Canon Law Vehicle of Civilian Influence with Particular Reference to Scotland* in THE CIVILIAN TRADITION AND SCOTS LAW 117-133 (David L. Carey Miller & Reinhard Zimmermann eds., Duncker & Humblot 1997).

62. See Robertson, *supra* note 61, at 121-125.

63. LORD COOPER, SELECT SCOTTISH CASES OF THE THIRTEENTH CENTURY xxii (William Hodge 1944).

been described as “powerfully operative”,<sup>64</sup> “longlasting[, and] . . . profound”<sup>65</sup> in the Scottish legal system.

#### *D. Udal Law*

Norse settlers arrived on Orkney and Shetland, two archipelagos off the north east coast of the Scottish mainland, around 800. Under their rule, the islands were subject to Norse law, or “udal law”.

“Udal” derives etymologically from the Old Norse “*oðal*”, meaning “ownership of inherited family property in which certain rights belong to the kin.”<sup>66</sup> The term “udal law” is used in two senses: narrowly, by reference to the specific regime of land ownership from which it etymologically derives (sometimes referred to as udal tenure); and more broadly, by reference to Norse law as generally applied in Orkney and Shetland.<sup>67</sup>

Udal law was maintained in Orkney and Shetland upon their transfer to Scotland in the mid-15th century. As part of the marriage arrangements of King James III of Scotland and Margaret, daughter of King Christian I of Denmark, the latter pledged the archipelagos in 1468 and 1469 respectively in lieu of a dowry. Even although Scottish customs and culture had growing influence on the islands, a parliamentary commission was of the view in 1567 that they should be subject to their own laws.<sup>68</sup> The contrary view was expressed by the Privy Council in 1611, which

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64. HANNAY, *supra* note 47, at xiv and 107.

65. W. David H. Sellar, *A Historical Perspective* in THE SCOTTISH LEGAL TRADITION 41 (New enlarged edition, Michael C. Meston, W. David H. Sellar & Lord Cooper eds., Alden Press 1991).

66. Michael Jones, *Udal Law and Contested Histories of Land Tenure and Landscape in Orkney and Shetland*, 66(3) LATVIJAS ZINATNU AKADEMIJAS VESTIS 105, 109-110 (2012).

67. William Jardine Dobie, *Udal Law* in AN INTRODUCTORY SURVEY, *supra* note 57, at 450; JONES, *id.* at 110.

68. T. THOMSON & C. INNES (EDS.), 3 ACTS OF THE PARLIAMENTS OF SCOTLAND 41 (12 vols, 1814–1875).

held that “foreign laws” were no further to be used in Orkney and Shetland.<sup>69</sup>

One of the characteristic features of udal tenure was the allodial nature of land ownership, that is to say, its ownership by the “udaller” or “odalsman” without service being owed to a superior. This stood in contrast to the feudal system which was widespread in Scotland. The udaller was, however, under strong familial obligations with regard to disposition of land.

In addition to the udal or “odal”, which was the hereditary estate itself, there were also common lands which belonged to the community and were used for pasture, water and so on. These appear to have been known as “commons” in Orkney and as “scattold” or “scattald” in Shetland.<sup>70</sup> “Scat”, (from the Norse “*skattr*”, meaning “tax” or “tribute”) was paid annually for the udal lands in the form of butter, fish, oil and coarse cloth.<sup>71</sup> Land could also be let by the udaller to a stranger for a payment of rent called a “leigu-burdr”.<sup>72</sup>

Although udal tenure is an outstanding feature of the Orcadian and Shetlandic legal traditions, it did not exist to the complete exclusion of feudalism.<sup>73</sup> In fact, feudalism came to increasingly displace udal tenure, such as with the Crown's feuing of the islands and inducing udallers to receive charters for the sake of having written title<sup>74</sup>—udal land titles were held rather by proof of possession. Other aspects of udal law and custom were displaced, such as the more feudalistic practice of primogeniture coming to supersede partition as the udal mode of succession.<sup>75</sup>

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69. J.H. BURTON ET AL. (EDS.), 9 REGISTER OF THE PRIVY COUNCIL OF SCOTLAND 181-182 (38 vols., 1877-1970).

70. See W.P. DREVER, UDAL LAW IN THE ORKNEYS AND ZETLAND 11 (W. Green 1914).

71. *Id.*

72. *Id.* at 3.

73. *Id.* at 1.

74. See *id.* at 4-6.

75. *Id.* at 7.

Other characteristics of the udal legal tradition included rules on prescription,<sup>76</sup> the mode in which proprietorial ownership was passed,<sup>77</sup> a system of land measures (such as ouncelands and pennylands)<sup>78</sup> and of weights and measures (such as pundlars, lispunds and cuttels),<sup>79</sup> and the existence of a superior court called the “law-thing” (under the presidency of a “law-man”), with the decrees of island courts subject to review in Norway.<sup>80</sup>

Much of this system of law has since departed, and the courts have ruled against its application in a handful of cases. In 1890, for example, the Court of Session denied that an udal custom, whereby proprietors in Shetland could demand a share of the value of whales stranded and killed on their land, had “the force of law.”<sup>81</sup>

In an action brought by the Lord Advocate against the University of Aberdeen, with regard to ownership of Pictish antiquities excavated on St. Ninian's Isle, Shetland, the Court of Session held that “the law or rule of Magnus was not still the law of Scotland in the islands of Shetland.”<sup>82</sup> This referred to a code attributed to King Magnus VI of Norway which was introduced around 1274, which would (it was alleged) be determinative of ownership; but it was not the sum of udal law. Of the state of udal law in general, Lord Patrick said that “the position was long ago reached where nothing could be said with certainty to remain of that law save udal tenure of land, scat, which was the return for udal lands, scattold, which was a right of commonty, and a few weights and measures.”<sup>83</sup>

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76. *Id.* at 8.

77. *Id.* at 8-10.

78. Or perhaps “systems” in the plural, as some measures had different values between the archipelagos, and it appears that land in Orkney was subdivided into much smaller units such as merks, uriscops and yowsworths—*see id.* at 14-15.

79. Or perhaps, again, “systems” in the plural.

80. *See Dobie, supra* note 67, at 451-455.

81. *Bruce v Smith* (1890) 17 R. 1000.

82. *Lord Advocate v University of Aberdeen*, 1963 S.C. 533.

83. *Id.* at 556, per Lord Patrick.

In a case in which questions arose as to the legal status of the seabed within the territorial waters around Shetland, the Court of Session declined to find in favour of the applicability of udal law to the seabed.<sup>84</sup> Although it was argued that in Norway the seabed was subject to udal law in the same way as the foreshore, it was held that there was no (domestic) authority supporting that contention in Shetland. Udal law did not expressly deal with ownership of the seabed. In addition, as udal land titles were determined by proof of possession, rather than by writing, it seemed contrary to principle to expect that udal tenure should govern the seabed, which was permanently covered by sea water.<sup>85</sup>

Whilst much of udal law has perished, udal tenure survives, being recognised both in statute<sup>86</sup> and case law.<sup>87</sup> Furthermore, the udal legal tradition may be said more generally to have resulted in some local differences as to the application or applicability of law. For example, there was judicial confirmation in 1907 that the feudal law on salmon fishing rights did not apply in Orkney.<sup>88</sup> There may also be implications arising from udal tenure for rights relating to the foreshore, cables, pipelines and fishing.

Udal law comprised an additional legal tradition which was influential at least in one part of Scotland, and which does not fall

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84. *Shetland Salmon Farmer Association v Crown Estate Commissioners*, 1991 S.L.T. 166.

85. *Id.* at 183, per Lord McCluskey.

86. Land Registration (Scotland) Act 1979, ss.2(1)(a)(v) and 3(3)(b); Abolition of Feudal Tenure etc. (Scotland) Act 2000, sch. 12, para. 39(2)(b); Housing Benefit Regulations 2006/213, art. 2(1); Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/214, art. 2(1); Land Registration etc. (Scotland) Act 2012, s.50(5). It is stated in the explanatory notes to the Abolition of Feudal Tenure etc. (Scotland) Act 2000, at para. 183, that “Skat is a tribute under udal tenure which equates to feuduty under feudal tenure. In the case of skat, however, this would normally be payable directly to the Crown. Payment of skat has survived only on Orkney and Shetland”.

87. *See, for example, Short's Trustee v Keeper of the Registers of Scotland*, 1994 S.C. 122 at 128; *Kaur v Singh*, 1999 S.C. 180 at 187, 188 and 191; *Yaxley v Glen*, 2007 Hous.L.R. 59 at 64; and *Trustees of the Elliot of Harwood Trust v Feakins*, 2013 S.L.T. (Sh Ct) 108 at 116. *See also Lerwick Harbour Trustees v Moar*, 1951 S.L.T. (Sh Ct) 46 at 48.

88. *Lord Advocate v Balfour*, 1907 S.C. 1360.

within the civilian/common law framework. In addition, it had to be conciliated with the law prevailing on the Scottish mainland, and this engaged both the law and institutions of the Scottish mainland.

### *E. Celtic Law*

The content and extent of Celtic law observed in Scotland is obscured by a lack of documentary evidence. Among the few surviving documents are Adomnán's Law, from 697, which sets out laws on armed conflict for the protection of women and non-combatants;<sup>89</sup> and the Book of Deer, which in addition to mainly Christian texts, contains some records of grants of land. Notwithstanding the paucity of surviving written material, David Sellar has made a significant contribution to this otherwise little-remarked pasture of Scottish legal history.

Celtic law is understood as the law pertaining to communities speaking a Celtic language, rather than any specific ethnic group as such. Accordingly, Sellar noted that, of the four main peoples who inhabited Scotland—namely the Scots, Picts, Britons and Anglo-Saxons<sup>90</sup>—only two, the Scots and the Britons, were Celtic peoples, and a third, the Picts, may have been to some extent.<sup>91</sup>

Sellar has argued that “the story of Celtic law in Scotland did not come to an abrupt end with the advent of feudalism.”<sup>92</sup> He illustrated a number of instances in which Celtic legal tradition appears to have made its way into the common or general law of

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89. W.D.H. Sellar, *Law and Institutions: Gaelic* in THE OXFORD COMPANION TO SCOTTISH HISTORY (Electronic version, Michael Lynch ed., Oxford Univ. Press 2001).

90. The Scots, of Dál Riata, were predominantly found in the western coastal areas of Scotland. The Picts were mainly to the north of the River Forth and in the east of Scotland. The Britons were found in Strathclyde and the southwest of Scotland. The Anglo-Saxons were found in Northumbria, straddling the area to the southeast of the River Forth and part of what is now the northeast of England.

91. Sellar, *supra* note 89.

92. W.D.H. Sellar, *Celtic Law and Scots Law: Survival and Integration*, 29 SCOTTISH STUD. 1, 20 (1989).

Scotland. For example, whenever the old regality and barony courts were repledging their jurisdiction over inhabitants from within their geographical jurisdiction whom had been accused before other courts, there was a requirement for a person to act in the capacity of a cautioner—in essence, a guarantor—called a “*culrath*” (or variant spellings thereof). Sellar explained that this represented a technical term of Celtic law, deriving from “*cúl*” meaning “back”, and “*ráth*” a “pledge” or “surety”, the etymology of the term providing a good explanation of its function in law.<sup>93</sup> He cited a number of cases from the 16th century in which this “*culrath*” was found, and an unsuccessful attempt at repledging as late as 1700.<sup>94</sup>

Another instance of Celtic legal tradition was that of tanistry, namely, “[l]oosely defined . . . the name given to the system whereby succession to office, typically the office of king or chieftain, is open to various members, or to different segments, of a ruling kindred, rather than descending by primogeniture down the one line, as under feudal law.”<sup>95</sup> Sellar cited instances of tanistry in Scotland from the 15th, 16th and 17th centuries,<sup>96</sup> and stated that it was a “long lasting legal concept” which was “capable of being harmonized with others from a quite different background,” including the tutor in both feudal and Roman law.<sup>97</sup>

Sellar gave a number of other illustrations, arguing that “[s]uch survivals are to be seen not as isolated curiosities, of antiquarian interest only, but as part of the very fabric of a legal system one of the outstanding features of which has been continuity with the past.”<sup>98</sup> These suggest that Celtic law is another part of the mixture within the Scottish legal tradition.

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93. *See id.* at 15-16.

94. *Id.* at 15.

95. *Id.* at 13.

96. *Id.* at 14.

97. *Id.*

98. *Id.* at 20. *See also* W.D.H. Sellar, *Marriage, Divorce and Concubinage in Gaelic Scotland*, 51 *TRANSACTIONS OF THE GAELIC SOCIETY OF INVERNESS*

*F. The Bible*

The law of Scotland included part of the Bible. The most notable example was the Incest Act 1567, which prohibited incest by consanguinity and affinity with the degrees of relation “as is contenit in the xvij Cheptour of Leuiticus.” That is to say, the 18th chapter of Leviticus was directly incorporated as part of the Scots law of incest. What is all the more remarkable is that this state of affairs persisted until the repeal of the 1567 Act by the Incest and Related Offences (Scotland) Act 1986.

It is not the only example of reliance on Biblical sources in Scots law. Sodomy and bestiality were punishable by death as criminal offences, not due to criminalising legislation, but because according to the Bible they constituted sins.<sup>99</sup> More recently, the view was taken in a case from 1963 that two verses of the Book of Exodus may have been made part of the law of Scotland by a previous case with regard to liability for animals.<sup>100</sup> In addition to these specific examples of reliance on the Bible, it has been argued that Christian theological doctrine, and Calvinist Presbyterianism in particular, significantly influenced Scots criminal law and its particular brand of moralism.<sup>101</sup>

*G. Foreign Maritime Law*

The High Court of Admiralty was one Scotland's central courts, in existence until its jurisdiction was transferred to the Court of Session by statute in 1830.<sup>102</sup> It commanded jurisdiction

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464 (1978-1980), on evidence of Celtic secular marriage in Scotland until the 17th century.

99. Chloe Kennedy, *Criminal Law and Religion in Post-Reformation Scotland*, 16(2) EDIN. L. REV. 178, 183 (2012).

100. *Henderson v John Stuart (Farms) Limited*, 1963 S.C. 245 at 249, per Lord Hunter; with reference to *Milligan v Henderson*, 1915 S.C. 1030.

101. See generally Kennedy, *supra* note 99.

102. Court of Session Act 1830, s.21.

over prize,<sup>103</sup> maritime and admiralty affairs, both civil and criminal.

It was stated by Thomas Callander Wade that the law administered by the High Court of Admiralty was “the customary law of the sea, and not necessarily the ordinary law of the land . . . a sort of general law of the sea based on the *jus gentium* and customs of seafaring men.”<sup>104</sup> These were formally expressed in various codes, the most authoritative of which was said to have been the 13th century<sup>105</sup> *Rôles d'Oléron*, (of which there were Scots translations<sup>106</sup>) which had application throughout Northwestern Europe. Edda Frankot argued that one can “assume that the *Rôles d'Oléron* were part of the central body of medieval Scottish law,”<sup>107</sup> and that although there is “no specific evidence that the *Rôles* were adopted as the official Scottish sea law... that the extant copies are all part of compilations of the main Scottish laws does suggest that they were in common use throughout the country.”<sup>108</sup> Wade also stated that the *Lex Rhodia* (used primarily in the Mediterranean), incorporated in the *Digest* of Justinian, (and therefore in “Roman law”), was “if not ... authoritative, at least ... a useful guide.”<sup>109</sup> There may also have been knowledge in Scotland of the Gotland or Wisby Sea Law,<sup>110</sup> primarily used in the Baltic.

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103. Prize jurisdiction is that over enemy property seized or captured at sea.

104. THOMAS CALLANDER WADE (ed.), *ACTA CURIAE ADMIRALLATUS SCOTIAE* xix (Stair Society 1937).

105. See EDDA FRANKOT, “OF LAWS OF SHIPS AND SHIPMEN”: MEDIEVAL MARITIME LAW AND ITS PRACTICE IN URBAN NORTHERN EUROPE 11 (Edinburgh Univ. Press 2012).

106. Edda Frankot, *Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea* in *COMMUNITIES IN EUROPEAN HISTORY: REPRESENTATIONS, JURISDICTIONS, CONFLICTS* 164 (Juan Pan-Montojo & Frederik Pedersen eds., Pisa Univ. Press 2007). See also FRANKOT, *supra* note 105, at 81-85.

107. Frankot, *supra* note 106, at 164.

108. FRANKOT, *supra* note 105, at 13.

109. WADE, *supra* note 104, at xix.

110. Frankot, *supra* note 106, at 164; *though see* FRANKOT, *supra* note 105, at 88.

The sources of maritime and admiralty law in Scotland were considered by some of the institutional writers. Viscount Stair noted that “the rule by which the Lords have always proceeded in the matter of prizes hath been the law and custom of nations,” and that “the Lords . . . do not exclude the defence of strangers . . . though that be a rule by our custom, but do proceed according to the common law of nations.”<sup>111</sup> George Joseph Bell stated that Scots maritime law “partakes more of the character of international law than any other branch of jurisprudence,” noting that “in all the discussions on this subject in our Courts, the continental collections and treaties on this subject, and the English books of reports, have been received as authority by our Judges, where not unfitted for our adoption by any peculiarity which our practice does not recognize.”<sup>112</sup> He listed, by order of authority in that regard: first, foreign maritime codes and laws (the Rhodian laws, *Il Consolato del Mare*, the laws of Oléron and Wisby, the Ordinances of the Hanseatic Towns, *Le Guidon de la Mer*, the *Ordonnance de la Marine*, and the *Code de Commerce*); second, the decisions of foreign maritime and mercantile courts (in particular the High Court of Admiralty in England, the mercantile court of Genoa, the supreme civil courts of Friesland, and the courts of Holland); and third, the works of foreign writers in maritime law.<sup>113</sup>

These suggest a broad array of non-Scottish sources in use in maritime and admiralty causes in the Scottish courts, which do not appear to align with a simple civilian/common law dichotomy.

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111. STAIR, INSTITUTIONS, II, 2, 6; with the “Lords” (i.e. the Court of Session) nevertheless observing treaties between the King and his allies, “in so far as they differ from the common law of nations”.

112. GEORGE JOSEPH BELL, 1 COMMENTARIES ON THE LAWS OF SCOTLAND AND ON THE PRINCIPLES OF MERCANTILE JURISPRUDENCE 497-498 (5th ed., William Blackwood 1826).

113. *Id.* at 498-502. Several foreign sources are cited by A.R.G. McMillan, *Admiralty and Maritime Law* in AN INTRODUCTORY SURVEY, *supra* note 57, at 325.

## III. TRADITIONS OF LAW IN SCOTLAND: MODERN

There is another dimension to the concept of a mixed legal system which has not gone unacknowledged in the literature,<sup>114</sup> but which should be emphasised as potentially further disturbing a simple civilian and common law dichotomy. That is the extent to which two modern streams of law or legal tradition have permeated the Scottish legal order: the law of the European Union (EU) and the law on the European Convention on Human Rights (ECHR). Other “external” streams of law may be making their way into Scots law, such as aspects of modern international law, but the EU and ECHR dimensions have arguably had a particularly extensive impact on domestic Scots law, and for that reason those two streams of law will be selected for comment.

*A. European Union Law*

Scotland, along with the other UK jurisdictions, became subject to the law of the European Communities upon the coming into effect of the European Communities Act 1972. The norms, processes and institutions of the European Communities were gradually developed to the far-reaching extent of the European Union of the present day. Through directives, regulations and other legal instruments, much EU-generated law has filtered into and shaped domestic law in Scotland, as it has elsewhere in the EU. Moreover, the European Court of Justice serves as the highest court in matters of EU law, its decisions serving both an interpretive and adjudicative function with the potential to have far-reaching consequences for domestic law.

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114. See, for example, Öricü, *supra* note 8, at at 10, 12 and 14; and Chris Himsworth, *Scotland: The Constitutional Protection of a Mixed Legal System in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS – PERSPECTIVES OF EVOLUTION: ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA* 120 (Jorge Costa Oliveira & Paulo Cardinal eds., Springer 2009).

The substantive reach of EU law is wide, including such diverse fields as education, employment, health and safety, consumer protection, financial regulation, companies, competition, intellectual property and data protection. It has also established extensive frameworks relating to the free movement of persons, goods, capital and services, which have implications across several areas of law.

Whilst it is true that EU law does not regulate everything in the domestic legal sphere, and that it is often implemented through media of national law and institutions, as in the case of directives, it cannot fail to be considered as a major source of law in the evolving Scottish legal tradition. It brings, indeed, another legal tradition to Scotland as manifested in the norms, systems, processes, practices and institutions of the EU—a tradition which is not confined to a single area of law. The civilian/common law dichotomy is at risk of looking outdated in the context of such a pregnant legal tradition as that of the EU; one which stretches across much of Europe. The EU legal order indeed has great potential for legal convergence or “harmonisation” across the member state jurisdictions, buttressed by the judicial clout of the European Court of Justice.<sup>115</sup> This is a major dimension which must surely feature in a modern sources of law and legal traditions discussion.

### *B. European Convention on Human Rights Law*

The law and jurisprudence on the European Convention on Human Rights is another distinct stream of law or emerging legal tradition.

The ECHR was ratified by the UK in 1951, but was not formally introduced into the domestic legal space until the enactment of the Human Rights Act 1998. Under that regime,

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115. This potential for legal convergence or harmonisation is sometimes seen as a medium or catalyst by which a new European *ius commune* can be achieved.

courts and tribunals in the UK must “take into account” the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights;<sup>116</sup> they must interpret primary and secondary legislation in a manner that it is compatible with Convention rights;<sup>117</sup> and they can declare that legislation is incompatible with the Convention.<sup>118</sup> It is unlawful for public authorities, which includes courts and tribunals, to act in a manner that is incompatible with Convention rights.<sup>119</sup> If a Minister of the Crown considers that there are compelling reasons for doing so, he may by order make such amendments to legislation that has been declared incompatible, as he considers necessary to remove the incompatibility.<sup>120</sup>

The human rights framework has had an additional dimension in Scotland: Acts of the Scottish Parliament are deemed by the Scotland Act 1998 to be “not law” to the extent that they contravene Convention rights.<sup>121</sup> The ECHR indeed bears on the very legislative competence of the Scottish Parliament.

The ECHR legal framework as implemented in the UK is thus an overarching one, bearing on the way in which public authorities conduct their activities, the way in which courts interpret legislation, and even the way in which the Scottish Parliament can legislate. There is, moreover, not only a statutory framework in the form of the Human Rights Act, but an ever-growing body of human rights jurisprudence both in the domestic courts and the European Court of Human Rights. These stimulate a deep well of human rights law and jurisprudence which does not appear to resonate with a simple civilian/common law analysis.

Before the “traditions of law” part of this article is left behind, there is an open question which should be posed: how would we

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116. Human Rights Act 1998, s.2.

117. *Id.* at s.3.

118. *Id.* at s.4.

119. *Id.* at s.6.

120. *Id.* at s.10.

121. Scotland Act 1998, s.29.

characterise those great areas of law, especially statutory law, which do not seem readily to correspond with the aforementioned traditions? Are the many statutes which regulate fields as diverse as pensions, social security, health and safety at work and road traffic to be regarded as expressions of the (English) common law tradition? Are they somehow connected to the civilian tradition? Or are they in some other category, perhaps a more general “modern statutory law” category, whether of Scotland or the wider UK? Furthermore, what import might devolution hold for this: is legislation of the Scottish Parliament spawning a nascent legal tradition, distinct from that of the UK Parliament?

These questions, whatever their answers, lead into essential issues of methodology.

#### IV. REQUIREMENT FOR AN HOLISTIC ANALYSIS

Whether or not it is correct to say that the civilian and common law traditions are the dual foundations or building blocks of Scots law, those are clearly only part of the story when it comes to describing Scotland as a mixed jurisdiction. As Chris Himsworth observed, “the Scottish system is inadequately described simply as a mix of common law and civil law.”<sup>122</sup> Other traditions have occupied their own place in Scottish legal tradition, including some with considerable legacy, such as canon law. It is only by means of an holistic analysis that we can achieve a more faithful statement of the character of the law and legal system as a whole, beyond its *prima facie* civilian and common law parts.

The first question to be clarified is one which goes to the heart of the methodology employed in evaluating mixture in legal traditions. If the principal traditions of law in Scotland are civilian and common law in nature (and it would have to be shown how that is so), then this might form the basis for an argument that those should form the backbone of the analysis. Perhaps the Celtic

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122. Himsworth, *supra* note 114, at 122.

or udal law traditions are not worth bothering about because they seem so remote or marginal, or because their modern relevance seems so slight. This is essentially a quantitative approach whereby the analysis seems driven by a search for the size of a legal tradition's footprint: the civilian and common law traditions merit the most attention because theirs is the “largest” contribution.

It seems that even a quantitative approach must be at least partly qualitative, however. In measuring canon law against feudal law, for example, one must surely take account of the fact that the canon law influence is arguably the more enduring—in civil procedure, and so on.

If one insists on a strict definition of mixture, however, a tradition seems worthy of attention whether its contribution is 50% or 5%. Of course, we may be tempted, and even justified, in affording the 50% more consideration than the 5%; but should we then demote the 5% from our analysis, or from the principal axis of assessment, simply because it is 5% and not 50%? It sometimes appears that this is what happens in the mixed jurisdiction literature, with traditions bearing a smaller footprint overshadowed by a debate over which of the two major contributions, civilian or common law, first penetrated Scotland, or which was the more influential. A legal tradition is the sum of its constituent parts, and any exclusion of its constituent traditions from the discussion is an omission. It encourages an incomplete or distorted evaluation of the receiving legal tradition.

A second issue in methodology is our attitude toward the temporal aspect of the analysis. In particular, to what extent is, or should, our approach be time-bound? Are we relaxed about timelines, or eager to keep “updating” our evaluation of Scottish legal tradition with each development? Should we, for example, regard feudal law as a minor contributor to Scottish legal tradition now that feudal tenure has finally been abolished? Should it have been demoted in our analysis when the Abolition of Feudal Tenure etc. (Scotland) Act 2000 came into effect? Or should it continue to

feature prominently in our analysis because it still underpinned land ownership in Scotland until quite recently, and indeed because Scotland was remarkably placed in Europe in having a system of feudal tenure in place at such a late date? Do we continue to recognise the extent to which feudal law made land ownership in Scotland distinctive, or look upon it as an historical artefact? If, incidentally, we opt for an approach of continual updating, the time may have come to challenge a straight civilian and common law dichotomy as “outdated” in light of the aforementioned EU and ECHR contexts.

The temporal dimension leads into another question: how do we assess legacy? A meaningful contemporary analysis should probably not be concerned with bygone traditions that were once observed somewhere in the land we now call Scotland, but which are firmly extinct. Instead, we should be concerned with those which have left some footprint on Scots law or the Scottish legal system.

The question of legacy is, however, far from straightforward. How, for example, would we assess the legacy of feudal law in Scotland? To what extent has the abolition of feudal tenure diminished the feudal legacy? Clearly the active feudal component of Scots law has waned, but does that signify a corresponding diminution in legacy? It is perhaps too superficial to suggest that the legacy of feudal law is present only to the extent that feudal components are present, active and visible in the system. Somewhere between the extremes of the defunct legal tradition, and that which is still in obvious operation, is a grey area where a tradition is no longer observed in its own terms, but the legacy of which lingers on. To what extent has feudal law influenced the Scottish legal tradition in the longer term? To what extent has it bequeathed deeper conceptual, methodological or structural elements to the legal order? How different would Scots law, including property law and jurisdiction, look today had feudal law never arrived on Scottish shores?

The question of legacy is further complicated by another phenomenon: legal traditions are not discrete. Aspects of one tradition may, and are perhaps even likely to, inform, shape, alter or influence others with which they have contact. They are and have been incorporated into others. That is evident in the very concept of a “Scottish legal tradition” embodying aspects of other legal traditions,—civilian, canonical and so on. It is also evident from the literature; Hector MacQueen and David Sellar wrote, for example, that “from the time of its emergence in the Middle Ages, the common law of Scotland has been open to influence from both the common law and the civilian tradition. It has been a ‘mixed’ system from the very beginning.”<sup>123</sup> In other words, the civilian and common law traditions were both *received* into a third entity: the Scottish common law. It was not the case that these two traditions arrived in a vacuum, and that the two combined to produce a Scottish legal tradition. Whilst that might seem obvious, it is immediately apparent why it is unsatisfactory to measure “mixture” by principal reference to the two *received* traditions (civilian and common law), but not the *receiving* tradition (Scottish common law).

The indiscrete or “impure” reality of legal traditions demands that we revisit the temporal aspect. Consider, in particular, the extent to which the timelines of the various legal traditions overlap, and then the corresponding improbability that these traditions would, or could, be kept discrete. Of the traditions discussed in this article, the most ancient to be observed in “Scotland” is Celtic law. This significantly predated the Christian era, and as outlined, aspects of Celtic law survived in Scotland until as late as the 17th century. By then, a number of other traditions were already coexisting in Scotland. Feudalism may have arrived as early as the end of the 11th century. A Scottish

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123. H.L. MacQueen & W.D.H. Sellar, *Unjust Enrichment in Scots Law* in *UNJUST ENRICHMENT: THE COMPARATIVE HISTORY OF THE LAW OF RESTITUTION* 289 (E.J.H. Schrage ed., Duncker & Humblot 1995).

common law was in existence by at least the mid-13th century. It has been said that this was modelled after English common law to such an extent that it is “legitimate . . . to speak of a Reception.”<sup>124</sup> Canon law commanded sufficient authority in Scotland to be cited in *secular* cases by 1380. The Roman tradition may have begun to indirectly influence Scots law from the 13th century,<sup>125</sup> and Scots lawyers were being educated in civil law at continental European universities from the 14th century.<sup>126</sup> Even before one folds the udal, Biblical or diverse maritime legal traditions into the analysis, the temporal overlap among these traditions is clear.

The coexistence or cohabitation of these traditions was unlikely to be—indeed, was not—politely discrete. The picture that emerges is not only one in which civilian and common law were but two of several traditions; but one of, to adopt a fitting term used by Örüci, “encounter and combination”.<sup>127</sup> The traditions would perhaps inevitably compete, compare, borrow, lend, analogise, innovate, imitate, overlap, contaminate; in short, mix.

This is borne out by some initial evidence which could form a separate topic of research in its own right: the extent to which the constituent traditions of Scots law were or are “impure”. As crossovers, mutations and adaptations occurred, aspects of traditions would be absorbed into others and even be conveyed by them. Canon law may be taken as an example. Canon law was heavily influenced by the Roman law tradition from as early as the 4th century,<sup>128</sup> and continued to be influenced in a variety of ways in the centuries that followed.<sup>129</sup> The European *ius commune* was essentially a product of cross-pollination between the canon law

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124. Sellar, *supra* note 13, at at 6.

125. Gordon, *supra* note 53, at 15 *et seq.*

126. *Id.* at 19-20.

127. Örüci, *supra* note 8, at 5.

128. See JAMES A. CORIDON, AN INTRODUCTION TO CANON LAW 11-19 (Geoffrey Chapman 1991).

129. See, for example, JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 59-60 (Longman 1995); Robertson, *supra* note 59, at 112-115; and JOSEPH DODD, A HISTORY OF CANON LAW 134-135 (Parker, London 1884).

and Roman law traditions.<sup>130</sup> As such, the practise of canon law often meant indirectly drawing on the Roman law tradition. In other words, aspects of civilian tradition were conveyed through canon law<sup>131</sup> before there was a more direct reception of the civilian tradition in Scots law. Nevertheless, the canonical tradition is excluded from the principal axis of civilian and common law assessment in the orthodox mixed jurisdiction methodology.

Canon law is not alone in its apparent “impurity”. The Scottish common law was, as noted, open to influence from the English common law and civilian traditions,<sup>132</sup> and was also penetrated by the canon law of arbitration.<sup>133</sup> The evolving Scots feudal tradition, including its more formal and customary aspects, drew upon the English feudal tradition, and may also have drawn upon traditions from parts of continental Europe such as Normandy, Brittany and Flanders.<sup>134</sup> It has also been argued to have been reinforced by the Scottish common law and shaped by the European *ius commune*,<sup>135</sup> and the system of feudal tenure may even have incorporated aspects of Celtic legal tradition.<sup>136</sup>

Even the two great traditions often cast as adversaries, civilian and common law, failed to be discrete: English common law, for example, appears to have been influenced by civil law, canon law,<sup>137</sup> and even Celtic law.<sup>138</sup> It is likewise implausible that civil law stood insulated from the influence of other legal traditions, and not least from the canonical tradition. The *ius commune* is just one aspect of that. Accordingly, even although each tradition has been

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130. ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* 196 (Cambridge Univ. Press 2000).

131. See David B. Smith, *Roman Law* in AN INTRODUCTORY SURVEY, *supra* note 57, at 172; and Robertson, *supra* note 61.

132. See MacQueen & Sellar, *supra* note 123.

133. GODFREY, *supra* note 17, at 363-364 and 373.

134. MacQueen, *supra* note 33, at 12-14.

135. See *id.* at 17-26.

136. See, for example, Sellar, *supra* note 92, at 6-7.

137. See, for example, David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts before 1600*, 13(3) OXFORD J. LEGAL STUD. 388 (1993).

138. See Sellar, *supra* note 92, at 13.

separately identified and discussed in the foregoing part of this article, this has been done for taxonomic convenience only, and should not give the impression that these traditions were at all times separate and discrete. They are separately identified precisely to highlight the diversity of the Scottish legal tradition of which they became constituent ingredients.

Even if it were the case that the civilian and common law traditions *were* the two great streams which emerged from this clutter of traditions, they were by that stage, whenever it could be said to have occurred, quite impure. The extent to which they were impure, or bore the marks of other traditions, is not for this contribution to assess; but it is clear that the idea of a civilian and common law template with which to measure the character or imprint of Scots law becomes less plausible when these considerations are taken into account. If aspects of one legal tradition were mixed up with, or latent in, other legal traditions, the question arises as to the point at which aspects of the former tradition become aspects of the latter tradition. When one feature is incorporated into a conveying or vehicular tradition, to what extent is the bequeathing tradition removed from the equation? Has that feature now passed into the claim (or even definition) of the receiving tradition, or has it merely acquired the colour or veneer of a conveying tradition?

Moreover, if aspects of one tradition become conveyed through *multiple* traditions, how are we to characterise those elements? As noted, the civilian tradition was not only received in its own right, but also through canon law, and perhaps through other traditions; even the English common law tradition. It becomes hugely difficult to separate out all of the civilian strands from the conveying traditions.

Further still, to the extent that civilian elements survive in Scots law, they are collectively conveyed through Scottish legal tradition. The civilian tradition is, of course, conveyed in other jurisdictions, too, bearing the marks and idiosyncrasies of those

conveying traditions. As such, which version of civilian tradition is to be regarded as the “most civilian”? In other words, do civilian elements not acquire and become bound up in their conveying traditions such that it becomes decreasingly meaningful to speak about a single civilian tradition? Or is the discussion purely historical or genealogical, such that there is regarded as some end point after which the civilian tradition is either “deceased” or regarded as something different?

If therefore, the basic argument is that *Scotland is a mixed jurisdiction because it combines the civilian and common law traditions*, the concept of mixture is revealed as selective and reductionist. First, as noted, Scots law also incorporates aspects of other legal traditions. Second, even were it convincingly demonstrated that its dual foundations or basic building blocks are civilian and common law in nature, those foundations have themselves been the subjects of mixing, distortion, contamination, evolution and so on. Neither is purely civilian nor common law in its own right. Third, the Scottish legal tradition, like all extant traditions, is a living tradition. It evolves and undergoes change. Even if it was the case that the civilian and common law inheritances were the dual foundations or basic building blocks of Scots law, they have not necessarily remained so. In particular, a serious contemporary analysis cannot avoid accounting for the EU and ECHR traditions, and considering the extent to which they might dilute or further enrich the mixture of existing traditions. Furthermore, serious consideration should be given to how a great deal of modern statutory law is to be classified. Finally, the very *receiving* of aspects of the civilian and common law traditions was at least partly achieved by way of conveyance through other traditions. Those conveying traditions are then excluded from the basic dichotomy, even although they played a role in the very manifestation of certain civilian and common law elements.

Perhaps the civilian and common law dichotomy remains a valuable tool in the comparative private<sup>139</sup> law context. Perhaps if all systems were regarded as mixed, in its broadest sense, then one of the principal tools of comparison would be discarded, and the special nature of the mixed jurisdiction category lost.

However, the dichotomy faces significant methodological challenges, and is at risk of tempting a distorted and exaggerated picture of Scots law and the Scottish legal tradition. It also arguably offers limited scope in a global comparative law context. If the world is truly a patchwork, not only of civilian and common law traditions, but of varying shapes and shades of canon, Celtic, Norse, Norman, Islamic, Talmudic, Chinese, Adat, socialist, tribal, customary law, and so on—how meaningful is a civilian and common law dichotomous approach to the question of mixed jurisdiction? Or is the mixed jurisdiction analysis intended for a more limited, European and private law audience?<sup>140</sup> The very nature of taxonomy may require that regarding every system as a mixed system is against the spirit of the exercise, but the taxonomy should not be any more reductionist than is unavoidable; either in the sense of how many traditions are represented, or the extent to which traditions are or can be regarded as pure or discrete.

If, however, there is still value in approaching questions of comparative law by reference to a civilian and common law yardstick, and in continuing to identify Scotland as one of the quintessential mixed jurisdictions, that reference to mixture should, at very least, not be perceived to exhaust the definition. It serves just one analytical framework, which neither shows the full extent of mixture within this particular mixed jurisdiction, nor which properly scrutinises the other legal traditions which may constitute part of the mixture, including those which played a role in conveying or influencing civilian and common law ingredients.

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139. *See infra* section IV.

140. *Id.*

## V. OVER-EMPHASIS ON PRIVATE LAW?

The literature discussing the detail and extent of Scotland's mixed legal heritage has focused primarily<sup>141</sup> on private law.<sup>142</sup>

It may be asked why it is that the topic of Scotland as a mixed jurisdiction has been examined primarily in a private law context. A plausible answer is simply that it has captured the interest of private lawyers much more than that of public lawyers. As the field receives more private law contributions, perhaps public and criminal lawyers do not regard this as a subject for them, that they have little to contribute to a field heavily aligned with a private law analysis.

Perhaps there is a different, or additional, reason: if Scots law is more distinctive from its English counterpart in the field of private law than in public law, then private law may be the natural focal point, because it is potentially where the distinctiveness factor is at its most pronounced.<sup>143</sup> If that were the reason, or a reason, the literature would benefit from clarification on this point, and would in that case surely have to include more consideration

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141. Though not exclusively. *See, for example*, a brief comment on public law and criminal law in Sellar, *supra* note 13, at 8-9; a private law take on what is typically conceived as a public law area in Hector L. MacQueen, *Human Rights and Private Law in Scotland: A Response to President Barak*, 78 TUL. L. REV. 363 (2003); and MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA, (Reinhard Zimmermann, Daniel Visser & Kenneth Reid eds., Oxford Univ. Press 2004), in which there are references to human rights law in the chapter on nuisance by François du Bois and Elspeth Reid. An exception to the general trend, which comes rather from a public law perspective, is Himsworth, *supra* note 114, at 119-141; and *see also* Esin Öricü, *Approaching Public Law as a "Mixed System"*, JUR. REV. 131 (2002).

142. *See, for example*, Robin Evans-Jones, *Unjust Enrichment, Contract and the Third Reception of Roman law in Scotland*, 109 L.Q. REV. 663 (1993); Evans-Jones, *supra* note 13; Robin Evans-Jones, *Roman law in Scotland and England and the Development of one Law for Britain*, 115 L.Q. REV. 605 (1999); George L. Gretton, *Reception Without Integration? Floating Charges and Mixed Systems*, 78 TUL. L. REV. 307 (2003); MacQueen, *supra* note 1; Hector MacQueen, *Unjustified Enrichment in Mixed Legal Systems*, 13 RESTITUTION L. REV. 21 (2005); Whitty, *supra* note 7; and Zimmermann, Visser & Reid, *supra* note 141.

143. This may be the suggestion of MacQueen, *supra* note 1, at 317.

of non-private law areas, such as public law and criminal law, in order to arrive at such a conclusion.

We therefore find that the mixed jurisdiction discussion is dominated by some quite particular attributes. First, the main focus in terms of pedigree is on the civilian and common law traditions. The contributors to the literature have certainly not been ignorant of other traditions.<sup>144</sup> On the contrary, some have made significant contributions on other legal traditions, such as Hector MacQueen on the Scottish common law,<sup>145</sup> and David Sellar on Celtic law.<sup>146</sup> However, for whatever reason, these have tended not to be folded into the wider mixed jurisdiction literature.

Second, the main focus in terms of area of law has firmly been that of private law. It is not that public law or criminal law aspects have gone unremarked—again, we find these occasionally mentioned in the literature.<sup>147</sup> However, the field is dominated by private law oriented analysis. It is through a private law lens that the evaluation of the mixed character of Scots law has been made.

These comments are not intended to diminish the valuable work that has been invested in the private law literature. The suggestion is rather that, if and until other areas of law are properly accounted for, it may be appropriate for private law contributions to explicitly confine themselves to private law, and be cautious about purporting to speak to the nature of the wider law and legal system in general terms. Some of the scholarship has been sensitive to this very point. Kenneth Reid and Reinhard

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144. See, for example, acknowledgement of other legal traditions in Kenneth Reid & Reinhard Zimmermann, *The Development of Legal Doctrine in a Mixed System* in Reid & Zimmermann, *supra* note 49, at 2-3 and 7. Reid and Zimmermann also described the “deeply entrenched and irreducible chasm between the civil law and common law traditions” as “exaggerated”, and, even within the “civil law systems”, such a dichotomy “is in danger of underrating [their] diversity”—*id.* at 2-3. Notwithstanding these observations, the contribution in question still primarily orientates its “mixed” analysis on civilian and common law fault lines.

145. MACQUEEN, *supra* note 23.

146. Sellar, *supra* note 92, at 20; Sellar, *supra* note 98.

147. See *supra* note 141.

Zimmermann, for example, were clear that the two-volume work of which they were editors, *A History of Private Law in Scotland*, was not a “full history of legal doctrine in Scotland,” but was instead, “confined to private law and within private law to selected topics from the law of property and the law of obligations.”<sup>148</sup> What seems apparent is a potential usefulness of the mixed jurisdiction category to comparative lawyers as a study in approximating or conciliating civilian and common law traditions in the private law sphere.<sup>149</sup> That is different, however, from a general description of Scots law or the Scottish legal system as “mixed”, whether in general or in terms of a mixture of civilian and common law constituents, beyond the significant but limited sphere of private law.

The orientation of the discussion in the field of private law may be self-reinforcing, both a cause and an effect of further private law contributions. Whatever the reason for the topic's principal orientation toward private law, the paucity of non-private law contributions cannot bode well for the probability that our conclusions are sufficiently holistic. The discussion becomes lopsided. The risk arises that the literature purports to describe, or is taken to describe, the whole of Scots law and the Scottish legal tradition; whilst in fact substantially discussing only private law material. In other words, there is a risk that the mixed character of Scots *private law* is extrapolated to the four corners of the legal order; that the character of a part of the law is used to suggest the character of the whole.

The literature is therefore in the odd position of having created a restricted analysis (civilian vs. common law; private law) which has been too liberally applied to the law and legal system at large. The mixed pedigree of Scots private law is not in dispute, though the extent to which it is mixed *is* disputed. Expanding the

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148. Reid & Zimmermann, *supra* note 144, at 9.

149. *See id.* at 3-4, though the language used is still one of “legal systems” rather than bodies of private law.

discussion to one which embraces, rather than glosses over, public law and criminal law will enrich the analysis and improve both its accuracy and its holistic viability. Even were Scots public and criminal law found to be plain expressions of some single legal tradition (quite unlikely, of course), then we would at least know that private law is where the mixed pedigree is found. What seems more probable is that an evaluation of public, criminal and other areas of law would reveal a further enriching mixture of traditions which make up the Scottish legal tradition as a whole.

#### VI. CONCLUSION

Scotland is a mixed jurisdiction in the sense that it combines a mixed pedigree of legal traditions. It is well remarked that Scots law includes inheritances from the civilian and common law traditions, and often that combination is precisely why Scots law is described as “mixed”.

However, the literature has tended to focus on the civilian and common law traditions, often to the exclusion or significant relegation of other constituent traditions. The mixture also includes aspects of, at least, the Scottish common law, feudal law, canon law, udal law, Celtic law, the Bible and foreign maritime law. Holistic considerations may require that these other traditions are folded into an analysis of Scotland as a mixed jurisdiction; not only because they coexist with aspects of the civilian and common law traditions, but because these traditions have, for centuries, mixed with each other. The traditions are neither discrete nor pure, and have informed, influenced and shaped others. Some have conveyed aspects of others. The extent to which the literature has focused on the civilian and common law traditions is at risk of insufficiently recognising or accounting for these phenomena.

The orthodox civilian and common law dichotomy may also struggle to deal with EU law and ECHR law as two modern streams of law which are not only making substantial headway in

Scotland, but in other jurisdictions too. Are EU and ECHR law civilian or common law in nature? Are they, themselves, mixed in pedigree? Or are they neither? The same questions may be asked of large areas of modern statutory law.

The picture of Scotland as a mixed jurisdiction is one of a very mixed jurisdiction; one which has received and been influenced by a number of indiscrete legal traditions. Comparative lawyers may still find value in upholding Scotland as a quintessentially mixed jurisdiction in the private law sphere, combining civilian and common law traditions, but these traditions bear the marks of each other, and of other traditions which they have encountered. Furthermore, even if they were found to account for a majority of the mixture, they comprise just part of a wider array of heritages which, together, make up the Scottish legal tradition.