THE ORIGIN AND CHARACTERISTICS OF THE MIXED LEGAL SYSTEMS OF SOUTH AFRICA AND SCOTLAND AND THEIR IMPORTANCE IN GLOBALISATION

Cornie van der Merwe*

1 Introduction

The legal systems of the world are divided into two main categories, namely civil-law systems based on the Justinianic Corpus iuris civilis and common-law systems derived from the predominantly judge-made English common law. Apart from these two main streams, there are so-called mixed systems of law containing a mixture of civil and common law;¹ all legal systems are to some extent mixed. Each system, even the Korean one that is heralded as a civil-law system, contains certain elements of customary or traditional law in its family law and law of succession, especially in so far as succession to land is concerned.

Is it possible to distinguish some truly mixed legal systems from other pluralistic or hybrid systems? Vernon Palmer has argued that the legal systems of South Africa, Scotland, Louisiana, Quebec, Puerto Rico, Sri Lanka and the Philippines are examples of genuine mixed ones because they have the following three distinct characteristics:² Firstly, they consist of a genuine mixture of civil and common law with little direct influence by religious laws, customary law or canon law. This is not the case in Turkey, for instance, whose family law has been heavily influenced by Muslim religious provisions. Secondly, the presence of the dual elements of civil and common law is obvious to any objective observer. For example, in America it is acknowledged that the jurisdictions of Texas and California contain civil-law elements. They are, however, described as


² For a detailed discussion of these characteristics, see Palmer (n 1) 8-12.

* Research Fellow, University of Stellenbosch; Professor Emeritus of Civil Law, University of Aberdeen.
common-law jurisdictions. By contrast, it is patently clear that Louisiana is a civilian jurisdiction. Thirdly, the structural allocation of content in these mixed jurisdictions is predominantly private civil law and public Anglo-American law. The basic terms of allocation are usually contained in treaties, articles of capitulation, organic laws and constitutional provisions.

In this paper in honour of Professor Andrew Domanski, one of South Africa’s *cognoscenti* on legal historical matters, I am going to scrutinise two of the above jurisdictions, namely South Africa and Scotland. Before looking at the structural allocation of content in the South African and Scots legal systems, I shall first explain how it came about that South Africa and Scotland have been recognised as two of the most important mixed legal systems in the world today.

2 South Africa

2.1 Genesis of a mixed legal system

2.1.1 Dutch settlement at the Cape of Good Hope under the Dutch East India Company

In 1495, three years after Christopher Columbus discovered America in 1492, Bartolomeu Dias was the first person to sail around the Cape. He did so en route to the Far East to obtain spices for sale on the lucrative European market. The powerful Dutch East India Company established a refreshment station at the Cape in 1652 under the Dutch Governor Jan van Riebeeck to provide ships with fresh water, vegetables and meat. Although sparsely populated by indigenous tribes, the Cape was considered a *res nullius* that became the property of the Dutch East India Company by occupation, and the law of Holland was declared to be the law applicable there.4

During 1657 a number of *freeburghers* or free citizens left the employ of the Dutch East India Company and started farming for their own account. This led to a gradual colonisation of the Cape,5 aided by the arrival from Europe of marriageable girls from

---

3 By a charter of 1602 the Dutch government (States-General) empowered the seventeen Directors of the Dutch East India Company to handle areas of jurisdiction usually preserved to the State, eg, service contracts with the company’s employees. For more details on the Dutch East India Company and its role in the early Cape, see Van der Merwe et al “South Africa” in Palmer (n 1) 95-96.

4 A letter from the Directorate of the Dutch East India Company (VOC) to the Council of India in 1621, couched in vague terms, stated that the law to be applied in the countries governed by the Council of India (also the Cape as *buitencomptoir* or foreign dependency) was the law of the State of Holland. There is also an instruction of 1657 by Van Riebeeck (Colonial Archives, The Hague, 3969, Vol 1657: Political Resolution of February 21, 1657), to the so-called *freeburghers*, to live according to the laws of the Netherlands and India. See, further, Van der Merwe et al (n 3) 95-96; Hahlo & Kahn *The Union of South Africa. The Development of its Laws and Constitution* (1960) 12; Fagan “Roman-Dutch law in its South African historical context” in Zimmermann & Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (1996) 39.

Dutch orphanages, and of the French Huguenots and poor German families. Authority over the indigenous population was exercised on the basis that Dutch law represented a kind of ratio scripta (written law) and thus a universal natural law applicable to all inhabitants. In this way Roman-Dutch law was transplanted to the Cape and acquired a territorial rather than a personal field of application. The colonial administration established a land registration system and a network of courts. Roman-Dutch legal literature was obtained via the Dutch territories in Asia and Cape students studying at the Dutch University of Leiden. By 1795 the population of the Cape consisted of 17,000 colonists, 26,000 slaves imported from Mozambique, Madagascar, India and Malaysia and 14,000 Bushmen and Hottentots. The Zulu and Xhosa were engaged in internecine wars to the North.

212 British colonial rule: 1795-1803 and 1806-1900

The Cape was occupied by Britain, firstly in 1795 in the course of the Napoleonic wars and again for a second time in 1806 after it reverted briefly to the Dutch authorities. Under the Articles of Capitulation the colonists were allowed to retain their existing laws and privileges, on the basis of the famous English-law principle enunciated in the case

---

6 Idem 4-5, 10-12.
7 Wijpkema “Die invloed van Nederland en Nederlands-Indië op die ontstaan en ontwikkeling van die regswese in Suid-Afrika tot 1881” (LLD, University of Leiden, 1934) 49-51 indicates that various schemes were devised for importing these legal sources to the Cape via Batavia. According to information obtained by Wijpkema from the Colonial Archives in The Hague, the following Roman–Dutch authorities were, inter alia, available at the Cape after 1750: Leeuwen Roomsch Hollandsch Recht; Groenewegen Aanteekeningen; D Bruyn Proces Crimineel; Mattheus Criminele Tractatus; Menochius & Bewerwijk Criminele practijck; Galenus Tractatus Crimineel; Van Zurck Codex Batavus; Huber Heedendaagse Rechtsgeleertheyd; Van Zutphen Judiciele practijck; Merula Manier van procedeeren; Bort Tractaat van Criminele Saake; Gaill Observationes van die keyserlycke practycke; and Farinaci Tractaat van getuigen.
8 According to Wijpkema (n 7) 55, the number of Cape law students at Leiden numbered two from 1726 to 1750, fifteen from 1751 to 1775, and twelve from 1776 to 1794.
9 See, in general, Du Bois “Introduction” in Van der Merwe & JE du Plessis (eds) Introduction to the Law of South Africa (2004) 9-10; Du Bois & Visser “Der Einfluss des europäischen Rechts in Südafrika” 2001 Jahrbuch für europäische Geschichte 47. For population figures in 1806, 1809, and 1904, see Van der Merwe et al (n 3) 113-114; and on the Xhosa in general, see Giliomee (n 5) 130-160.
10 Art 7 of the Articles of Capitulation of 1795 allowed the colonists to “retain all the privileges which they now enjoy”. This art also re-established the former Raad van Justitie “to administer justice … in the same manner as has been customary until now” and according to existing “laws, statutes and ordinances”.
11 The Cape was formally ceded to the British government by the Convention of London in 1814 as part of a deal concluded with the Netherlands (Van der Merwe et al (n 3) 98).
12 Art 8 of the Articles of Capitulation of 10 Jan 1806 provides that “the Burghers and Inhabitants shall preserve all their Rights and Privileges which they have enjoyed hitherto”; and then, in art 8 of the Articles of Capitulation of 19 Jan 1806, this clause was made applicable to all inhabitants of the Cape Colony. In art 17 the inhabitants were guaranteed continued enjoyment of their old rights and privileges. See Van der Merwe et al (n 3) 104; Hahlo & Kahn (n 4) 17, 203. For the debate among scholars as to whether this provision was intended to cover private law, see De Vos Regsgeskiedenis (1992) 247.
of *Campbell v Hall*\(^{13}\) that the law of conquered territories remained in force until altered by the Sovereign.\(^{14}\)

Initially the English authorities endeavoured to anglicise the Cape by settling five hundred British immigrants in the Eastern Cape in 1820; and in 1822 the Colebrook-Bigge Commission suggested that English law should be introduced into the Cape immediately. However, the English authorities, faced by demonstrations and threats of non-cooperation, realised that they could not force their laws onto a sizeable Dutch population who could not even understand the language in which the laws were written.\(^{15}\) They came to the conclusion that the sudden and complete introduction of English law would inevitably cause extreme confusion and distress. In addition, the authorities soon came to acknowledge that Roman-Dutch law made adequate provision for all the ordinary demands and necessities of life in a civilised society and was not so objectionable as to require abrupt and immediate abandonment.\(^{16}\)

Thus the English authorities settled for a more moderate programme of gradual adjustment and piecemeal reform of the Cape system of administration of justice, which soon acquired a typically British flavour. A Civil Appeal Court and a Criminal Appeal Court were established in 1807 and 1808 respectively and circuit courts were introduced in 1811 to serve outlying districts.\(^{17}\) The recommendation of the Colebrooke-Bigge Commission in 1823\(^{18}\) that an independent court system be established as a buffer against corruption and abuse of power, led to the adoption of the First Charter of Justice in 1827\(^{19}\) and the replacement of the *Raad van Justitie* (the highest criminal and civil court under the Dutch) by the new Cape Supreme Court in 1828. This court was staffed by four (and later three) legally qualified judges recruited from England, or, in the case of William Menzies,\(^{20}\) Scotland. In 1827 a new system of lower courts presided over by colonial officials, known as magistrates, was established to replace the old Dutch courts of *landdrosten* and *heemraden* (bailiffs and minor judicial officials). The law of procedure and the law of evidence were reshaped in accordance with English law. Ordinance 40 of 1828 adopted English criminal procedure, Ordinance 72 of 1830 introduced the English law of evidence, and various rules of the Cape Supreme Court made English

\(^{13}\) (1774) Lofft 655, 98 ER 848; 1 Cowp 204.

\(^{14}\) See Van der Merwe et al (n 3) 105, 109-110. However, immediately after the transfer of sovereignty, Britain started imposing its own system of laws by legislative enactment: a Proc of 12 Jul 1822 provided that testamentary dispositions of United Kingdom subjects were to be given effect according to English law; Ord 62 of 1829 reduced the age of majority from twenty-five to twenty-one years; Ord 72 of 1830 made the English law of evidence applicable to the Cape; Ord 104 of 1833 replaced the Roman-Dutch law of universal succession of heirs with the English system of executorship; the Cape Marriage Order in Council of 1839 redefined the formalities of marriage; and both the Law of Inheritance Amendment Act of 1873 and the Succession Act of 1874 abolished the legitimate portion and other restrictions on freedom of testation. See Van der Merwe et al (n 3) 96-97, 105-106.

\(^{15}\) See Palmer (n 1) 24-25; Van der Merwe et al (n 3) 105, 106.

\(^{16}\) See Du Bois (n 9) 10-11.

\(^{17}\) See, in general, Fagan (n 4) 50.


\(^{19}\) By letters patent of 24 Aug 1827. See Theal (n 18) at 254ff.

\(^{20}\) Menzies was a senior puisne judge at the Cape from 1827 to 1850.
civil procedure applicable, although a few features of Roman-Dutch law were retained. Because of the educational and professional backgrounds of the new judges and soon also of legal practitioners who could only practise at the Cape Bar if they had qualified at Oxford, Cambridge or Dublin, characteristic common-law features were introduced into South Africa. These included public oral trials handled by legal representatives of the parties; adversarial rather than inquisitorial procedures; the institution of the office of the Attorney-General to replace the old Dutch prosecutor (Fiskaal) and a public prosecution service based on the English model; the establishment of trial by jury in 1831; the delivery and reporting of well-argued judgments by individual judges, and the doctrine of precedent. Pleadings and documents such as wills and contracts were moulded along English lines that affected the relevant substantive Roman-Dutch law.

The offices of Master of the Supreme Court (instead of the Dutch-inspired Orphan Chamber) and Registrar of Deeds were established. The judicial powers of the field cornets, traditionally friends of the farmers, were also abolished. The Second Charter of Justice of 1832 guaranteed freedom for all in the Cape, abolished the carrying of passes, and opened up ownership of land to everybody.

In addition, British rule drew South Africa into a rapidly expanding and intensifying network of international trade, which significantly boosted commercial and political activity that had been stifled by the authoritarian and monopolistic practices of the Dutch East India Company. In 1809 the Netherlands had adopted a variation of the French Code Civil so that the Cape could no longer follow legal development in the Netherlands in seeking to modernise its law. This led to a large-scale legislative importation into the Cape of English commercial law relating to shipping, insurance, company law, insolvency, intellectual property and negotiable instruments. The Colebrooke-Bigge Commission Report hinted that English statutes on mercantile law were imported because the Roman-Dutch law in this field was too simple and unsophisticated to deal with the growing sophistication of British commercial transactions. The somewhat more sophisticated English constitutional law settled conflicts between the Dutch settlers and English rulers. Once the principles of English constitutional and administrative law had been adopted in the Cape, the Dutch principles of public law were completely eclipsed.

21 Van der Merwe et al (n 3) 109.
22 See Du Bois (n 9) 11-12, 14-15.
23 See, in general, Van der Merwe et al (n 3) 100-101; Hahlo & Kahn (n 4) 205-207; Fagan (n 4) 51.
24 Ordinance 50 of 1828, s 205-207.
25 See Du Bois (n 9) 11.
26 Van der Merwe et al (n 3) 7 mention Ord 6 of 1843 on Insolvency, the Merchant Shipping Act of 1855, the Joint Stock Companies’ Limited Liability Act of 1861 and the General Amendment Act of 1879, making English law applicable to maritime and shipping law, fire, life and marine insurance, stoppage in transit and bills of lading. See also Hahlo & Kahn (n 4) 18-20.
27 See the Report of the Colebrooke-Bigge Commission at 14: “Upon Commercial questions the Dutch Law is singularly deficient, but the Judges are enjoined to follow the principles and practice of those States which are most distinguished by their Commercial enterprise and experience.” See, further, Van der Merwe et al (n 3) 108-109.
On the other hand, while a more efficient land registration system was introduced upon the establishment of the Land Registration Office in 1828, the Colebrooke-Bigge Commission described the Roman-Dutch civil law regulating property and land as “simple and efficient,” and praised the system of public recording of titles. There was therefore no inclination to replace the fair structure of the Roman-Dutch law of property with the “ungodly jumble” (according to Oliver Cromwell) of English property law. Nevertheless, the British did introduce changes to the existing system of landholding at the Cape that “besides its careless informality was depriving the government of substantial revenues”. Firstly, in 1813 all loan farms \((\text{leeningsplaatsen})\) were converted into perpetual quitrent holdings by Sir John Cradock’s Perpetual Quitrent Tenure Proclamation. Then, in the 1830s, again motivated by a desire to raise revenue, the British tried to change the system of land tenure from perpetual quitrent tenure to “freehold”. Thus the Cape law of personal status, succession, property and obligations remained substantially Roman-Dutch civilian law.

213 The Great Trek of 1837

In 1837 fifteen thousand Dutch colonists called “Voortrekkers”, dissatisfied with the emancipation of slaves and the gradual anglicisation of the Cape by the British government, left the Cape and established the Republics of the Orange Free State and of the Transvaal in 1854 and 1852 respectively. These new Republics stipulated in their Constitutions that Roman-Dutch law should be applied in their territories.

---

28 Until 1828, deeds were executed and registered before two members of the Court of Justice, and after that in the presence of the Colonial Secretary. At the suggestion of the Colebrooke-Bigge Commission (n 27) a permanent Registrar of Deeds was appointed so that “all deeds of any and whatsoever kind as have been heretofore certified and enregistered as aforesaid shall be certified and enregistered before and subscribed by the Registrar of Deeds”. See Ord 39 of 1928. The first Registrar of Deeds was also the Registrar of Slaves. From 1882 onwards, excellent farm registers were kept, followed much later (1927) by excellent township registers. See, in general, Hahlo & Kahn (n 4) 201; Hahlo & Kahn \(\text{The South African Legal System and its Background}\) (1968) 458; Nel Jones – \(\text{Conveyancing in South Africa}\) (1991) 3-6; Birch “\text{Indefeasibility of title in land}\)” 1961 (78) SALJ 65.

29 See the Report of the Colebrooke-Bigge Commission (n 27) at 13: “The Laws of Property and Succession are chiefly derived from the civil law and the customs of Holland. They are very simple in their structure, and not unsuited to the condition of a people devoted to agricultural pursuits.”


31 Milton “Ownership” in Zimmermann & Visser (n 4) 665.

32 See, further, Van der Merwe et al (n 3) 111-113.

33 \textit{Idem} 105-106.

34 \textit{Idem} 97, 117

35 The Orange Free State \(\text{Grondwet}\) (Constitution) of 1854, supplemented by an Ord of 1856, accepted Roman-Dutch law as the basic law \((\text{hoofdwet})\) of the state, namely the law that was applied by Dutch judges in the Cape Colony before 1828, but excluding new Dutch laws and institutions which were in conflict with the law as expounded by Voet, Leeuwen, Grotius, Merula, Lybrechts, Van der Linden and Van der Keessel. In the Transvaal, the \(\text{Volksraad}\) (Parliament) confirmed, in art 31 of the so-called “Thirty-Three Articles” drawn up in 1844 and supplemented in 1849, the “Hollandsche Wet” as the basis of the law “but only in a modified way and in conformity with the customs of South Africa and for the benefit and welfare of the community”. In Annexure 1 to the \(\text{Grondwet}\) (Constitution) of the
and the Constitution of the Republic of Transvaal adopted the *Trader’s Handbook*, an elementary work by the famous Roman-Dutch writer Van der Linden, as the main source of its law. However, in practice the republics adopted the system of open courts and the jury system as well as English procedural rules. In commercial and other public-law fields, they gradually imported Cape laws, and in the course of time their judges and practitioners too. In these territories, the judges looked for guidance to English, Scottish and, especially, Cape cases (as well as consulting civilian sources other than the authorities of seventeenth-century Holland). Thus other elements had already infiltrated the Roman-Dutch law applied by the courts prior to English occupation.

These Republics, together with the Republic of Natal, became more fully “mixed jurisdictions” when they were conquered by the English. Natal was annexed to the Cape in 1843, and became a separate English colony in 1856; the Orange Free State and the Transvaal both came under English control as Crown Colonies in 1902 (after the Second Anglo-Boer War). The old constitutions were repealed and the old legislative and executive structures were replaced by new constitutions created by letters patent, a governor representing the Crown, and nominated Executive and Legislative Councils. New superior courts (a Supreme Court and a High Court in the Transvaal, and a High Court in the Orange Free State) were established. The judges from the Old Republics were not reappointed to these courts, but almost all the new judges had a good knowledge of Roman-Dutch law. The old *landdrosst’s* courts were replaced by magistrates’ courts and, for minor criminal matters, justices of the peace. As in the Cape, Masters of the Supreme Court and Registrars of Deeds were appointed. The English introduced various English law-inspired statutes immediately after taking over control of these colonies, although in each case ordinances were passed preserving the status of Roman-Dutch law.

2 1 4 *The Anglo-Boer War (1899-1902) and subsequent development until 1990*

After the discovery of diamonds in the Orange Free State (1867) and gold in the Transvaal (1886), Britain declared war against the Boer Republics in 1899 under the pretext of the
Transvaal government’s denial of the vote to the British Uitlanders (Foreigners). After a few initial successes the Boers resorted to guerrilla warfare and finally capitulated in 1902 by signing the Treaty of Vereeniging. The Treaty guaranteed personal liberty and freedom to all South African citizens. The four provinces, Cape, Natal, the Orange Free State and Transvaal were united into the Union of South Africa by the Act of 1910 and the legal systems of the four colonies were gradually integrated. South Africa became an independent nation within the British Commonwealth in terms of the Statute of Westminster in 1931. It abolished appeals to the English House of Lords in 1955 and became a Republic in 1961.

After 1910 the newly-created Appellate Division of the Supreme Court of South Africa played a vital role in the return to prominence of Roman-Dutch law. Stubborn opposition to English legal influence, especially at Afrikaans universities, led to a heated debate between the so-called “purists” who favoured a return to pure Roman-Dutch law and “pollutionists” who preached the retention and if necessary, the extension of English-law influence. After the political triumph of Afrikaner nationalism in 1948 more and more people who had studied at Afrikaans universities were appointed as judges. This led, between 1960 and 1980, to a considerable “re-civilisation” or reorientation of South African law away from English law and back to the European ius commune. Since this re-orientation took place mainly in the field of private law, leaving the public-law influence of English law intact, a distinctly South African common law emerged through the blending of Roman-Dutch law and English law by the courts and the legislature.

Effect of British and South African rule on indigenous people

The indigenous people of South Africa did not play any role in the development of the mixed legal system in South Africa. Although it was accepted that Roman-Dutch law as the written law applied as a kind of ius naturale to all the inhabitants of South Africa, the indigenous population was relegated to the personal status of serfs or servants and never
attained full citizenship. The British concept of the rule of law caused better treatment of the indigenous population, but it also subjected them to the discipline of the State. Gradually this led to the creation of a racial sub-class within the colonial society.

British policy initially favoured legal assimilation, but growing protests from ever larger and better organised indigenous communities like the Zulus in the east of the country caused the British rulers to replace the policy of legal assimilation with that of “indirect rule”. By this policy indigenous institutions and laws were kept in place (and adapted). Members of indigenous communities were co-opted into the colonial administration as junior partners and exercised some indigenous legal powers under the supervision of colonial officials and institutions. This produced a parallel legal system with its own Code, unwritten (“native customary”) laws and a tiered system of courts, and ultimately a racially segregated and hierarchical state, economy and society. The Native Administration Act (no 38 of 1927) espoused a modernised version of “indirect rule” for the whole of South Africa, alongside laws that allocated land, employment and education on a racial basis and enforced social segregation. This system permitted the survival of some indigenous law that applied in respect of family relationships and communal land. Customary law constituted one segment of the racially segregated legal system that eventually matured into apartheid.

Thus white colonists and black indigenous people in South Africa were subject to an elaborate hierarchical order, which initiated a modification of the European legal traditions of Roman-Dutch and English law that had been transplanted to South Africa. Transplanted Roman-Dutch law was detached from its Dutch social and ethical moorings as represented by the liberal policies of one of the leading architects of Roman-Dutch law, Hugo Grotius, and reflected primarily the concerns and interests of only the European section of South African society.48 After the Nationalist party’s victory at the ballot box in 1948 this transplanted system was transformed and hardened, through the adoption of racial laws, into the elaborate system of racial segregation known as apartheid.49 Legal rules restricted the provision of labour and limited freedom of movement on a racial basis. Thus an apartheid superstructure was superimposed upon an infrastructure of Roman-Dutch law.50 Similarly the liberal commercial laws imported from England enhanced

48 See, also, Sachs Law and Justice in South Africa (1973).


50 Arthur Chaskalson, who later became the President of the South African Constitutional Court, explained this hybrid system as follows in Chaskalson “Law in a changing society” 1989 SAJHR 293-294: “Law provided the foundations on which a racially discriminatory society was built. … In all this there was, of course, a conflict between the common law which denies all forms of discrimination and recognises and seeks to protect fundamental rights and freedoms, and the bureaucratic state which increasingly claimed the right to decide for people how they should lead their lives and how privilege should be distributed. This attempt to create an apartheid superstructure upon an infrastructure of Roman-Dutch common law called for an almost schizophrenic approach by courts to problem solving. They were at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory laws: at one time to be an instrument of justice
the prosperity of whites in South Africa and deepened the racial divide. The Master and Servant Acts, disconnected from the famous English liberalism of the home country, played a central role in the creation of a racial underclass of workers whose contractual labour obligations were enforced through criminal sanctions. The transplanted English public-law doctrine of legislative sovereignty aided the development of a legally enforced racial hierarchy in a society where the right to vote was restricted to whites.\textsuperscript{51}

216 Legal developments between 1990 and 2006\textsuperscript{52}

The apartheid policies of the South African government met with increasing national and international opposition. The armed struggle of the African National Congress and the Pan African Congress intensified and after South Africa had been boycotted in sport an oil embargo followed. The position became untenable for the white government and after a few secret meetings between the South African President De Klerk and Nelson Mandela, Mandela was freed from jail in 1990. Blacks and whites started working together on an interim Constitution. The interim Constitution, the outcome of a multi-party negotiation process, was enacted by the last white Parliament in 1993. It extended the vote to every person over eighteen years in South Africa, outlawed racial and other discriminatory measures and safeguarded individual rights in a Bill of Rights. A Constitutional Court was created to enforce individual rights, due process and the rule of law.\textsuperscript{53} The first election was held in 1994 with millions of blacks and whites queuing together to cast their ballots. Nelson Mandela was elected as the first President. The final Constitution was adopted in 1996. It was influenced by the German, Canadian and American Constitutions and is recognised as one of the most sophisticated in the world. A Truth and Reconciliation Commission under Bishop Tutu was formed to reveal all the scandals of the apartheid era and to allow people to confess their guilt and thus bring reconciliation between black and white. A Land Claims Court was established to consider the claims of dispossessed people. Further elections were held in 1999, 2004 and 2009, and South Africa was awarded the opportunity to stage the Football World Cup in 2010. Although criminal activity is still at an unacceptably high level, the financial structure of South Africa is in capable hands and the South African currency has stabilised.

217 Summary

The adoption of the post-apartheid Constitution had a twofold effect on South African law as a mixed legal system. Firstly, the application of the principles enshrined in the Constitution is steadily whittling away at the superstructure of apartheid laws and is and at another to be an instrument of oppression.” See also Mureinik “Dworkin and Apartheid” in Corder (ed) Essays in Law and Social Practice (1988) 207-208.


\textsuperscript{52} See, in general, Du Bois (n 9) 16-19.

\textsuperscript{53} See, in general, L du Plessis & Corder Understanding South Africa’s Transitional Bill of Rights (1994). On changes in the recruitment of judges, see Van der Merwe \textit{et al} (n 3) 125-131.
slowly freeing the infrastructure of mixed English and Roman-Dutch law of any form of racial discrimination. Thus South Africa has taken its place alongside Scotland and Quebec as one of world’s truly mixed legal systems. The second effect of the Constitution and especially of the creation of a Constitutional Court is that constitutional law has pervaded the whole field of South African private and public law. Consequently South Africa is left with a mixed legal system consisting of predominantly English procedural and commercial law, predominantly Roman-Dutch private law in the fields of persons, property, succession, contract, delict and unjustified enrichment, and

---

54 This is clear from every chapter written in Van der Merwe & Du Plessis (eds) Introduction to the Law of South Africa (2004). See Van der Merwe et al (n 3) 173-174 for the infusion of constitutional values into private law and 186-195 for examples of the constitutionalisation of private law.

55 See Van der Merwe et al (n 3) 160-164. Some features of Roman-Dutch civil procedure such as an arrest ad fundandam jurisdictionem or suspectus de fuga, the provisional sentence (nampptissement) on a bill or other liquid document, the mandament van spolie (spoliation order), and the decree of perpetual silence were preserved when civil procedure was remodelled on English lines in the 1830s, and still exist today. See Hahlo & Kahn (n 4) 19; Erasmus “The interaction of substantive law and procedure” in Zimmermann & Visser (n 4) 149. For the impact of common-law procedure on civil law substance, see Van der Merwe et al (n 3) 165-167.

56 See Van der Merwe et al (n 3) 148-154. For civilian influence to a greater or lesser extent, see idem 158-160. Note that although English constitutional law was initially accepted in South Africa, a totally new constitutional dispensation was ushered in after the first democratic election in South Africa on 27 Apr 1994. The system of parliamentary sovereignty was abolished and the principle of the rule of law was introduced. In the new dispensation the Constitution of the Republic of South Africa is the highest authority and in terms of s 2 of the Constitution, the courts (in the final instance the Constitutional Court) have the power to declare any legislation, law, or conduct invalid if it is in conflict with the Constitution.

57 See Van der Merwe et al (n 3) 105f.

58 Idem 105. Examples of minor adjustments are the reduction of the age of minority from twenty-five to twenty-one and the alteration of the formalities for the solemnisation of a marriage.

59 See Van der Merwe et al (n 3) 168. Notable examples of the influence of English law are land tenure in the forms of perpetual quitrent and the ninety-nine-years leasehold; a landowner’s duty of lateral support; the requirement of adverse user for acquisitive prescription; the doctrine of estoppel as a restriction on the owner’s power of vindication; attornment as a mode of fictitious delivery; the modelling of the Sectional Titles Act 95 of 1986 on the New South Wales Conveyancing (Strata Titles) Act of 1961; and the mechanism of foreclosure in South African mortgage law.

60 See Van der Merwe et al (n 3) 169-170, 196-200. Notable examples of the English influence are the formalities for the execution and amendment of testamentary dispositions, and the ouster of the legitimate portion. The English trust was accommodated within the civilian framework of succession, property and contract.

61 See Van der Merwe et al (n 3) 180-184, 196. The doctrines of consideration and laches were not adopted but the mailbox rule and the doctrine of estoppel were adopted with some qualifications.

62 Idem 170-171, 174-180, 196. Notable English influences are the doctrine of vicarious liability; damages in tort; the tort of emotional shock; the notion of contributory negligence and the last opportunity rule; sovereign immunity; some aspects of the law of nuisance and the clothing of the civilian law of defamation in various peculiarly English characteristics.

63 See Van der Merwe et al (n 3) 167-169.
the pervasive influence of the new Constitution guaranteeing personal freedoms and the rule of law.\textsuperscript{64}

\section{Scotland}

Like South Africa, Scotland has a mixed legal system consisting of elements of civil law, derived mainly from Roman law, and common law derived from English law. The Roman law that shaped the development of modern Scots law is mainly, if not exclusively, Roman law as revived and understood by the Glossators and thereafter as understood by the successive schools of Roman lawyers who applied themselves to the study and application of the texts that survived from antiquity.\textsuperscript{65}

\subsection{Genesis of the Scots mixed legal system}

\subsubsection{Early infiltration of Roman law}

Although the Romans occupied the southern part of modern Scotland for a time, it is uncertain whether even southern Scotland was still part of the Roman Empire when in AD 212 Roman citizenship was extended by the Edict of Caracalla to almost all the inhabitants of the Empire. Since Roman forces were withdrawn from the whole of Britain in the early fifth century it seems unlikely that the Roman occupation left any mark on the law even of southern Scotland.\textsuperscript{66}

The Scots law of the thirteenth century was broadly similar to the English law of that period and consisted of feudal law,\textsuperscript{67} customary law,\textsuperscript{68} and the laws of the cities of Stirling, Roxburgh and Berwick.\textsuperscript{69} But after the Scottish Wars of Independence that culminated in the Battle of Bannochburn (1314), Roman-law provisions gradually infiltrated the Scots legal system so that by the time of the Union of Scotland and England in 1707\textsuperscript{70} the

\begin{itemize}
  \item \textsuperscript{64} See, also, Du Bois (n 9) 1-8.
  \item \textsuperscript{67} Robinson, Fergus & Gordon An Introduction to European Legal History (2000) 156-158 mention that feudalism also spread to Scotland as part of the European-wide twelfth century renaissances
  \item \textsuperscript{68} Robinson \textit{et al} (n 67) 155 mention the \textit{Book of Deer}, a ninth-century manuscript from a monastery in Aberdeenshire, with reference to Celtic customs. Cairns (n 66) 28-29 states that in 1264 a royal \textit{brieve} of Alexander III referred to a usage throughout Scotland according to ancient approved custom and common law (\textit{ius commune}). According to him the term “customs” in Scotland generally referred to the law developed by the Anglo-Norman institutions to protect and enforce the new feudal tenures.
  \item \textsuperscript{69} See Cairns (n 66) and Pollock & Maitland The History of English Law before the Time of Edward Vol 1 (1986) 222-223 for the resemblance of Scottish law to English law before the War of Independence.
  \item \textsuperscript{70} By the Union with Scotland Act 1706 and the Union with England Act 1707.
\end{itemize}
system was dominated by a Roman influence.\textsuperscript{71} “Infiltration” occurs where legal systems are not mature or strong enough to prevent (or are not even conscious of) the appearance of outside legal rules in a system in a non-continuous and osmotic process.

3 1 1 1  Canon law and the ecclesiastical courts

Up until the late fifteenth century Roman law entered Scotland in the form of canon law,\textsuperscript{72} the law of the Roman Catholic church, and the adoption of romano-canonical procedure in the ecclesiastical (church or papal) courts.\textsuperscript{73} According to the Latin maxim, \textit{ecclesia vivit lege Romana}, the Church lived by the rules of Roman law. Clerical lawyers studied in Europe and naturally gained knowledge of Roman law, which they applied in the ecclesiastical courts on their return to Scotland.\textsuperscript{74} Traces of Roman law may thus be found in the early Scots legal materials such as the Laws of the Four Burghs,\textsuperscript{75} the \textit{Liber de iudicibus}\textsuperscript{76} and the most important Scottish medieval law book, \textit{Regiam majestatem}.\textsuperscript{77} The ecclesiastical courts were following romano-canonical procedure by the twelfth

\textsuperscript{71} See the following remark by Reid (n 66) 216-217: “At the time of Union with England Scotland already had a well-developed legal system and, as expressly provided by Articles XVIII and XIX of the Treaty of Union, that legal system retained its separate character and its separate institutions thereafter. The character of the Scottish legal system was to an extent already “mixed” by this point, although the precise balance of the mix has been the subject of scholarly debates.”

\textsuperscript{72} As early as 1176 the papal bull \textit{Cum universi} recognised the \textit{Ecclesia Scoticana} as the special daughter of the papal see; and officials specialising in the growing science of canon law were found in Glasgow by 1189, St Andrews by 1194 and Aberdeen by 1199. See Cairns (n 66) 29.

\textsuperscript{73} See Gordon (n 65) 4; Reid (n 66) 218.

\textsuperscript{74} In litigation involving religious bodies there are references to Roman institutions like long prescription, very long prescription and restitution. Ecclesiastical matters were handled by skilled lawyers trained abroad, until the first Scottish university was founded in St. Andrews in 1413.

\textsuperscript{75} The \textit{Leges quattuor Burgorum} is a collection of material, some going back to the twelfth century. Much of it derived from the customs of Newcastle and general mercantile usage. It recorded some of the earliest Scottish customary provisions applying to Edinburgh, Stirling, Roxburgh and Berwick. The term disappeared in the early sixteenth century and burghs were replaced in the 1550s by the Convention of Royal Burghs which thereafter represented the interests of burghs. See Robinson et al (n 67) 161; Cairns (n 66) 23.

\textsuperscript{76} See Gordon (n 65); Stein “Roman law in medieval Scotland” in Stein (ed) \textit{The Character and Influence of the Roman Civil Law. Historical Essays} (1988) 269-317 at 275ff. This work contains extracts from the writings of Ivo of Chartres, including \textit{Inst} 2 1 12-16 on the acquisition of wild animals.

\textsuperscript{77} See Gordon (n 65) 4-5, 8; Stein (n 76) 107-123; Robinson et al (n 67) 163; Cairns (n 66) 42-44, 67. \textit{Regiam Majestatem} (royal Majesty which mimics the opening words of Justinian's \textit{Institutes, Imperatorum Maiestatem}) is essentially a commentary on the procedures followed in both civil and criminal matters. Although it follows the structure of \textit{Glanville}, a book that appeared in about 1190, which describes the laws and customs of England especially as administered by the royal courts, the \textit{Glanville} material was adapted to take account of Scottish conditions and contains references to Roman notions such as pacta \textit{in rem} and pacta \textit{in personam}, arbiters and arbitration and gifts between husband and wife. These pacta had a definite romano-canonical flavour and seem to derive from the canonist Goffredus de Trano's \textit{Summa in titulos decretalium} written between 1241 and 1246.
century and by the end of the thirteenth century Roman law was used as a subsidiary authority when it did not conflict with canon law.

3 1 1 2 Infiltration into the King’s (secular) courts, notarial practice and statutes

Gradually, litigants in the King’s or secular courts, as opposed to ecclesiastical courts, acquired knowledge of the civilised and sophisticated operations of the church courts and insisted that these practices be transplanted to the secular courts. In addition, from the thirteenth century onwards, ecclesiastical and secular court notaries started using Roman-law concepts in their notarial documents, for example the renunciation of the *exceptio doli*, the benefits of the *senatus consultum Velleianum* that prohibited women from acting as sureties (that is, as personal guarantors), and claims for *restitutio in integrum*. These references seem to have been based on a definite understanding of Roman law rather than a show of learning.

Fifteenth-century records of the Scottish Parliament (as from 1466) and the King’s Council (as from 1478) show that Roman law was frequently used in new legislation. The Tutor’s Act of 1474 adopted the Roman-law principle that a child’s tutor should be the nearest male agnate aged twenty-five or older. The Prescription Act, also of 1474, introduced the Roman institution of very long prescription (forty years) in Scotland. The Liferent Caution Act of 1491, which provided that a tutor or a liferenter should give security against the waste and destruction of lands under his control, was inspired by the Roman *cautio usufructuaria*.

In the early Scottish courts judicial business was conducted according to the romano-canonical procedure of ecclesiastical courts. The pursuer had to summon the defender to court and state his claim. Representation by a procurator was allowed. The parties had to address their arguments to the court, whereupon the court gave its decision in the form of a “decreet”. Apart from evidence of sophisticated treatment of the issues, there is also evidence of specific reliance on Roman-law defences, for example that a person had entered into an agreement because of “force and dreid” (fear). By not later than the

78 In 1233 judges-delegate hearing a dispute between Paisley Abbey and one Gilbert of Renfrew decided the case on the advice of men skilled in both Roman law and Canon law. See Gordon (n 65) 5.
79 See Gordon (n 65) 5-6; Stein (n 76) 293-294; Robinson *et al* (n 67) 164; Cairns (n 66) 88-89. See Robinson *et al* (n 66) 245-246 on the origins of the Scottish notarial profession.
80 See Gordon (n 65) 11; Cairns (n 66) 67-68.
81 In this document the usufructuary (liferenter) had to exercise the care expected of a reasonable man in looking after the property under his/her control. An Act of 1493 on various matters amongst others authorised the revocation of acts done to their prejudice by youths of tender age, presumably in order to set aside acts that had prejudiced the Crown during the minority of James IV. See, further, Cairns (n 66) 72-73, 162 for litigation in which reference was made to the *ius commune* and the *Institutes and Codex* of Justinian.
82 Since there was as yet no separation of legislative and judicial powers, it was conducted in Parliament or Council.
83 See Gordon (n 65) 12.
fifteenth century the highest Scottish courts were sufficiently sophisticated to take canon as well as Roman law into account when deciding cases.\textsuperscript{84}

3 1 1 3  \hspace{1em} Growth of a body of professional lawyers

Slowly a body of professional lawyers began to emerge. After Scots Independence in 1328 (Treaty of Northampton), many Scots pursued studies in Europe. Before the first Scottish University, St Andrews, was founded in 1413, more than four hundred Scottish students had studied Law or Arts abroad, most of them in France.\textsuperscript{85} Even though the majority of these students specialised in canon law, they had at the same time acquired a considerable knowledge of Roman law. Since the teaching of law at Scottish universities\textsuperscript{86} did not prove very successful, the Scots continued to study abroad, mainly in Cologne, Louvain\textsuperscript{87} and Northern Italy\textsuperscript{88} during the fifteenth century, France during the sixteenth century and, after the Reformation,\textsuperscript{89} in the Netherlands\textsuperscript{90} and in the German universities during the eighteenth and nineteenth centuries.\textsuperscript{91} Between 1600 and 1800 about 1600 Scots matriculated from the Law Faculty at Leiden alone.\textsuperscript{92} Upon their return to Scotland, these trained lawyers dazzled the Scottish courts by their sophisticated use of the Roman and \textit{ius commune} sources with which they had become familiar during their

\textsuperscript{84}  Ibid.
\textsuperscript{85}  Gordon (n 65) 8; Robinson \textit{et al} (n 67) 230. See also Watt \textit{A Biographical Dictionary of Scots Graduates to 1410}(1977). William Spynie († 1406) studied Arts and Canon law in Paris, and possibly Roman law in Avignon. Later he was later probably involved in the case of \textit{Bishop of Aberdeen v Crab}, recorded in the register of the diocese of Aberdeen. In this case a charter granted to Crab and his wife by a former bishop was challenged by the bishop who succeeded him in his court as feudal superior. A cleric, probably William de Spynie, in turn challenged the jurisdiction of the latter bishop on the ground that he was a judge in his own cause: see Gordon (n 65) 7-8.
\textsuperscript{86}  See Gordon (n 65) 8-9; Cairns (n 66) 69. Bishop Wardlaw who had studied Roman and Canon law at Orleans and Avignon, founded the University of St Andrews in 1413. The university’s bull of foundation provided for the teaching of both Civil and Canon law but it seems that only Canon law was taught. Bishop Turnbull, who had studied at Louvain and Pavia, founded the University of Glasgow in 1451. The University of Aberdeen was founded in 1495 by Bishop Elphinstone who had studied Arts at Glasgow, Canon law in Paris and Civil law at Orleans. He prescribed the Orleans course in Civil law for Aberdeen. There were many trained lawyers in Scotland, although not as many graduated from local universities as had been hoped. The papal bull made provision for the teaching of both Civil law and Canon law, and also for better payment for professors and also granted dispensation (special permission given by the Church) to clerics to study civil law.
\textsuperscript{87}  See Baxter “Scottish students at Louvain University” 1928 (25) \textit{Scottish Historical Review} 327-334.
\textsuperscript{88}  See Mitchell \textit{Scottish Law Students in Italy in the Later Middle Ages}(1937).
\textsuperscript{89}  On the Reformation, see Cairns (n 66) 76-77. The Reformers wished to promote the academic study of Roman law as evidenced by \textit{The First Book of Discipline} of 1561 providing for instruction in Roman and municipal law. See Cameron \textit{The First Book of Discipline with Introduction and Commentary} (1972) 140-1 – 140-3.
\textsuperscript{90}  See Cairns (n 66) 128-129; Cairns ‘Importing our lawyers from Holland: Netherlands influences on Scots law and lawyers in the eighteenth century’ 1999 (20-22) \textit{J of Legal History} 49-52.
\textsuperscript{91}  See Rodger “Scottish advocates in the nineteenth century: The German connection” 1994 (110) \textit{LQR} 563.
\textsuperscript{92}  See Gordon (n 65) 9-10.
European sojourn. The contents of Scottish cathedral libraries attest to the availability of much canon and Roman law literature.\(^93\) The Catalogue of the Library of the Faculty of Advocates published in 1693 boasts works by the Bartolists and French customary lawyers, the texts of *coutumes*, decisions of the French *parlements*, and the works of Charles Dumoulin and Guy Pape; and includes treatises by Dutch civilians such as Leeuwen, Matthaeus, Voet, Grotius, Huber, Noodt, Vinnius and many others.\(^94\)

### 3.1.2 Reception of Roman law in Scotland

Reception suggests something more than infiltration, namely the importation of the whole or part of an external system, coupled with the local population’s realisation and acknowledgment that this process is taking place. Reception could therefore only take place in Scotland when Scots law was recognised as an independent and coherent system.

#### 3.1.2.1 Creation of the Court of Session

Until the establishment of the Court of Session in 1532 Scotland had the problem that there was no sophisticated system within which the infiltrated Roman-law concepts and principles could operate.\(^95\) However, the creation of the College of Justice (later the Court of Session)\(^96\) in 1532 gave Scotland its first really centralised, authoritative secular court, with the Lord President and seven of the fifteen “senators” originally appointed being churchmen.\(^97\) It provided an outlet for practice by “professional advocates” almost all of whom had studied Roman law and the *ius commune*. The professional lawyers used Roman law in their arguments and the majority of judges were capable of understanding and accepting such pleadings. As a result the court adopted romano-canonical procedure

---

\(^{93}\) *Idem* 10 n 37.

\(^{94}\) *Watson et al An Introductory Survey of the Sources and Literature of Scots Law in Stair Society* Vol 1 (1936) 177.

\(^{95}\) Reid (n 66) 217-218 has argued that the lack of a central court structure in this early period meant that, in contrast to England, a class of secular professional lawyers was slow to develop. She relied on Cairns (n 66) 44-47 in contending that this absence of a secular legal profession, and the rise of academically qualified ecclesiastical lawyers rendered Scots law open to the influence of the *ius commune*, as evidenced by late-fourteenth century sources that indicate that there had then already been a significant penetration of *ius commune* scholarship into the common law of Scotland. She states that the College of Justice, or Court of Session was finally established in 1532, when King James V opened in Edinburgh “a college of cunning and wise men, both of the spiritual and temporal estate, for the doing and administration of justice in all civil actions”.

\(^{96}\) The creation of the College of Justice by legislation in 1532 confirmed the King’s council as a central court and indirectly led to its extension. The judges in the college of Justice (Lords of Council and Session), formed the Session and later the Court of Session. They commonly resorted to Roman law to resolve the legal questions before them.

\(^{97}\) See Gordon (n 65) 13; Robinson *et al* (n 67) 231-232. In accordance with the constitution of the College of Justice, the first four Lord Presidents were all churchmen. After the Reformation according to new provisions, those holding judicial office were required to have both legal knowledge and a good reputation. Clerical participation continued in the Court of Session until the mid-seventeenth century; the last churchman to hold office, Archbishop Burnet of Glasgow, was appointed an Extraordinary Lord in 1664 and died in 1668.
and introduced a considerable number of Roman rules. The crucial question is whether the presence of a centralised court transformed the Scots legal system into a mature, coherent system of legal rules capable of “receiving” parts of Roman law in such a way that it became part of Scottish law.

3 1 2 2 Emergence of Scottish legal literature

The emergence of a strong body of Scottish legal literature showed that the Scots system had developed into a sophisticated European legal system.

Prior to the appearance of the great Scottish institutional works there were collections by judges and advocates of important judicial decisions in so-called “practicks”. Apart from being used as precedents, these collections acknowledge the importance of Roman law and indicate that it was being consulted and applied whenever no Scots authority could be found in a difficult case.

The first substantial thesis on Scots law, the *Ius Feudale* by Sir Thomas Craig, was written in Latin in 1606, but only printed in 1655. It concerned feudal law and had as much relevance in Europe as in Scotland. It was important, firstly, because to some extent its structure followed the institutional scheme of persons, things and actions used by the Roman jurists Gaius and Justinian. Secondly, Craig discussed the place of Roman law amongst the sources of Scots law and ranked Roman law below Scottish legislation, judicial decisions and feudal law. However, he admitted that there was scope for reference to Roman law since much of Scots law was unwritten and inadequate. Thirdly, he used Roman law and writers on Roman law to fill in the gaps in Scots law on general points and even went so far as to say that Scotland was bound by Roman law in so far as the latter accorded with the laws of nature and right reason.

As a result of the Reformation and the growing influence of natural law in Europe, the “institutional” writers who followed also displayed a growing concern for the ranking

---

98 At this time Roman and canon law were established as subordinate persuasive authorities in the secular courts. The Reformation ended the authority of canon law when Papal authority was rejected in 1560. Where canon law was already accepted as part of Scottish law, the courts continued to apply it if it was not in conflict with reformed doctrine. See Gordon (n 65) 12-13.

99 See Gordon (n 65) 14; Robinson *et al* (n 67) 233-234. Apart from decision *practicks* there were also digest *practicks* which resembled handbooks containing references to decisions and other authorities.

100 See Avon Clyde (ed) for Sir Thomas Hope’s *Major Practicks* (publ by the Stair Society – *Hope’s Major Practicks* 1608-1633) Vols 1 & 2 (Publications of the Stair Society, 3 and 4, Edinburgh, 1937 and 1938).

101 See the remarks made by John Lesley, Lord of Session in 1564 in *De origine moribus et rebus gestis Scotorum* (Rome, 1576) 71.

102 He discussed, eg, the question whether the right over a feudal vassal is a type of ownership (*dominium*) or merely a usufruct (liferent) as held by the famous French humanist Cujacius.

103 Gordon (n 65) 16-18; Robinson *et al* (n 67) 234; Cairns (n 66) 98-100. As from the seventeenth century, natural law was seen as an alternative source of general authority and Roman rules were accepted or rejected according to whether they were seen as “natural” or not.

104 Robinson *et al* (n 67) 234 explains that the term has become a work of art in modern Scottish law but that “institution” originally referred to a work, usually in the vernacular, setting out the native law in a comprehensive and systematic way on the model of Justinian’s *Institutes*. 
of sources. James Dalrymple, Viscount Stair’s majestic *Institutions of the Law of Scotland* first published in 1657, transformed Scots law once and for all into a viable system. He cited Roman law throughout, firstly as a source of ideas, secondly, as persuasive authority and thirdly, as highly regarded because of its inherent equity and links to reason (natural law). Although Stair was critical of the structuring of legal treatises on the model of the *Institutes* of Gaius and Justinian, he used the Roman structure to a certain extent.\(^\text{105}\)

Sir George Mackenzie’s *Institutions of the Law of Scotland* (published in 1684 with eight editions between then and 1758 and eventually, in 1754, replaced by Erskine’s *Principles*) followed the Roman institutional order more closely, but adapted the structure to Scottish needs, for example in dealing with the division between immovable (heritable) and movable property, which is foreign to Roman law. Mackenzie also ranked Scots statutes, court decisions and customs above Roman law. Although he disliked the wholesale importation of rules where it was not strictly necessary, he admitted that much of Roman law had already been incorporated into the fabric of Scots law.\(^\text{106}\)

Andrew McDouall, Lord Bankton, in his *An Institute of the Laws of Scotland in Civil Rights* in three volumes published between 1751 and 1753, followed the order of Stair’s *Institutions*, but modified it to conform more closely to the order of Justinian’s *Institutes*. He frequently referred to Roman texts. This did not necessarily mean that Roman law was always applied but it did mean that Roman law could be used as a framework for discussion.\(^\text{107}\)

John Erskine in *Principles of the Law of Scotland* (1754) and *An Institute of the Law of Scotland* (posthumously 1773) followed the institutional scheme in his works but cited Roman law in his *Institute* much more frequently than Mackenzie did. However, he did not follow Roman law directly even when he drew heavily on it. The *Institute* was a more ambitious work than Mackenzie’s; in scale similar to the works of Stair and Bankton.\(^\text{108}\)

Baron David Hume, in his *Lectures* published after his death by the Stair Society,\(^\text{109}\) acknowledged the usefulness of Roman law but denied that it was authoritative.\(^\text{110}\) In his *Commentaries on the Law of Scotland respecting Crimes* (1797) he referred primarily to reported Scottish cases and records of criminal cases but preferred English persuasive authority to that of Roman law.\(^\text{111}\)

Last among the Institutional writers was George Joseph Bell. His *Principles of the Law of Scotland* published in 1829, was designed as an introductory student’s textbook. His *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence*, first published in 1800, but later expanded, broke with the institutional tradition in that it did not offer the usual width of coverage but concentrated on bankruptcy and more
broadly on mercantile law and thus become a detailed treatise on particular aspects of Scottish law.\textsuperscript{112}

3 1 2 3 Summary of reception

By the time of the Union of Scotland and England in 1707 the steady flow of legal literature had transformed Scots law into a mature system. Since the Middle Ages Roman law had been infiltrating Scots law slowly and gradually, and by the time of Union much of the substantive European \textit{ius commune} had already been absorbed into Scots law. The reception of Roman law in Scotland may therefore be summarised as follows: First came the reception of parts of Roman (civilian) law by the Scottish courts (especially the Court of Session), which wove it into the fabric of Scots law so that it acquired binding authority through the system of precedent; and secondly came the institutional writers’ adoption of the Roman institutional structure and the absorption of parts of Roman (civilian) law into their accounts of the Scots law of their times.\textsuperscript{113}

3 2 English influence

Through the Treaty of Union (1707) Scotland voluntarily joined England in the new Kingdom of Great Britain and transferred sovereignty to the British Parliament. The influence of the \textit{ius commune} and especially of Roman-Dutch law persisted well into the eighteenth century, but the influence of civilian law eventually declined and Scots law became increasingly subjected to anglicisation. The reasons for this may be summarised as follows:\textsuperscript{114}

Firstly, the influence of the \textit{ius commune} and of Roman-Dutch law declined because of national codifications, in the form of the Code Napoleon (1795) and the later Dutch Civil Code (1835). Thus Scots law was severed from its main source of modernisation and was inevitably influenced by new developments in English law.

Secondly, although the independent Scots court structure was preserved in the Acts of Union of 1707, the House of Lords\textsuperscript{115} in England became the highest court of appeal from the Court of Session in Scotland too. Thus some English-law influence was inevitable in the spheres of private law and public law, except that in criminal law the House of Lords had no jurisdiction.\textsuperscript{116}

Thirdly, as in South Africa, the administration of justice in Scotland was modelled on the English prototype. This led to a unitary court system as compared to a diffuse one as

\begin{itemize}
  \item \textsuperscript{112} See, further, Robinson \textit{et al} (n 67) 236-237; Gordon (n 65) 24-25; Reid (n 66) 250.
  \item \textsuperscript{113} See Cairns (n 66) 101: “The Scottish advocates slipped as easily between Latin and Scots as between civil law and Scots law in their thinking”; and at 175 Cairns reviews Scots law as “an autonomous national law”.
  \item \textsuperscript{114} See, also, Reid (n 66) 223.
  \item \textsuperscript{115} In terms of the Constitutional Reform Act 2005, the Appellate Committee of the House of Lords ceased sitting in 2009 and has been replicated in the new Supreme Court of the United Kingdom, to which jurisdiction to hear appeals in civil matters has been transferred. See Reid (n 66) 225, 235.
  \item \textsuperscript{116} See, also, Robinson \textit{et al} (n 67) 232; Gordon (n 65) 26-27. See, especially, Reid (n 66) 224-227 on the effect on Scottish law of appeals to the House of Lords.
\end{itemize}
encountered in Europe, and a profession divided between solicitors and barristers, called
advocates in Scotland. Until 1999 the Queen appointed the highest Scots judges from the
ranks of the most successful Scots advocates.

Fourthly, although the doctrine of precedent that compels courts to stand by their
previous decisions (stare decisis) was not purely the result of anglicisation,117 English
law played a major role in confirming its significance in Scotland. This, coupled with
the ready availability of English law reports published by Blackstone with decisions of
English courts on points undecided in Scots law, led to the infiltration of English notions
into Scots law.

Fifthly, and coupled with the former, with Scots law increasingly being defined by
legislation (promulgated in London) and court decisions, it became less necessary to
refer to Roman law or the 
*ius commune*
 for guidance.

Finally, following on the unprecedented growth in trade and industry in England after
the Industrial Revolution of the 1850s, the acknowledgment of the superiority of English
mercantile law and the trade advantages inherent in following English practice led to a
full-scale reception of English commercial law into Scots law.118

3.3 Summary

Thus Scotland ended up with a mixed legal system that shows a strong civilian
influence119 in the law of persons,120 the law of property,121 the law of succession,122 the

---

117 According to Stair *Institutions of the Law of Scotland* (1657) 116 and Erskine *Principles of the
Law of Scotland* (1754) 1147 a succession of cases would suggest a settled custom even before
Union. Collections of cases (Practicks) were compiled and circulated in Scotland from 1540 onwards.
Various private collections were published from the late seventeenth century onwards, and the Faculty
of Advocates published reported cases as from the beginning of the eighteenth century. See Morison’s
*Dictionary of Decisions* (22 volumes) containing reports from 1540 to 1808.

118 See, also, Robinson et al (n 67) 232. The Treaty of Union decreed that laws concerning trade, customs
and excises were to be harmonised.

119 See, in general, Palmer (n 1) 29-30; Reid (n 66) 254-268.

120 See Reid (n 66) 258. Children born in marriage are presumed to be legitimate and the interest of
the unborn are protected; mutual obligations of fidelity and support are imposed upon parents and
children.

121 See Reid (n 66) 243 who describes Scots property law as a construct of civilian principles tempered
by common law pragmatism. See, further, Reid 252, 255, 257-258. The original modes of acquisition
of property and the modes of transfer of movable property are almost wholly civilian as is the law
relating to servitudes and real security, diligence (execution of judgments) and bankruptcy (at 252).
At 268 she mentions that despite adherence to the maxim *inaedificatum solo cedit*, the Tenements
(Scotland) Act of 2004 allows ownership in apartment buildings.

122 See, in general, Reid (n 66) 258, 269-270. Scotland has retained a strong civilian influence in the
field of intestate succession (parents and siblings share in the estate) but has followed the English
law of testate succession in certain respects. Scotland, unlike South Africa, retained the institution of
a legitimate portion and imported the institution of a trust but adapted it to a civilian mode (see, esp,
at 270). Scotland did not adopt the English system of legal and equitable ownership but divided the
trustee’s estate into ordinary and trust patrimony, placed the trustee in a fiduciary relationship with the
beneficiary and gave the beneficiary a fortified personal right to enforce his or her interests.
law of contract\textsuperscript{123} and delict,\textsuperscript{124} unjustified enrichment\textsuperscript{125} and \textit{negotiorum gestio} \textsuperscript{126} This is countered by an English influence in the sphere of constitutional and administrative law,\textsuperscript{127} mercantile law\textsuperscript{128} and to some extent criminal law\textsuperscript{129} while the Scottish law of evidence and procedure remains largely distinct from its English law counterpart.\textsuperscript{130} Since 1999 the rights enshrined in the European Convention on Human Rights (ECHR) have played an increasingly important part in the development of private law in Scotland.\textsuperscript{131}

\textsuperscript{123} In the law of contract, Scotland rejected the English-law principles of consideration and privity of contract and maintained consensus qualified by the doctrine of \textit{bona fides} as the cornerstone of the law of contract. Scots law further recognises unilateral obligations; irrevocable offers; contracts for the benefit of third parties; performance as the primary right of a creditor; and the \textit{exceptio non adimpleti contractus}. The rules on contractual capacity and on formal validity also remain distinct. They have, however, introduced the mailbox theory for the acceptance of an offer and the doctrine of estoppel called personal bar in Scotland. See, in general, Reid (n 66) 255-256, 266, 271.

\textsuperscript{124} In the law of delict, Scotland adheres to fault as the basis for delictual liability, but recognises forms of strict liability, the doctrine of vicarious liability and the English rules relating to contributory negligence. Scotland recognises the tort of nuisance but founded it on a civilian interpretation of the doctrine of abuse of rights. Scotland imported English aspects of the law of defamation, but makes defamation actionable without publication thus harking back to the civilian delict of \textit{iniuria}. Scotland recognises the English tort of occupier’s liability based on the distinction between trespassers, invitees and licensees. See, in general, Reid (n 66) 226, 255, 260-263.

\textsuperscript{125} \textit{Idem} 256-257.

\textsuperscript{126} \textit{Idem} 257.

\textsuperscript{127} Scotland accepts the principles of separation of powers, the independence of the judiciary, judicial review of governmental acts, due process of law and freedom of speech. Writs of \textit{quo warranto} and \textit{habeas corpus} are used to ensure the rule of law. See Reid (n 66) 231.

\textsuperscript{128} Commercial law relating to companies, insolvency, bills of exchange, copyright, patents and designs has been transplanted from English law mostly by means of legislation. See the Copyright Act of 1709 (8 Anne c 19); the Partnership Act, 1890; the Bills of Exchange Act, 1892; the Sale of Goods Act, 1893; the Marine Insurance Act, 1906; and lately the Companies (Floating Charges) (Scotland) Act, 1961. See Reid (n 66) 223-224, 230, 249.

\textsuperscript{129} The presumption of innocence and the principle of no penalty without a legal provision, \textit{nulla poena sine lege}, prevail. Trial by lay jury in civil cases in Scotland had ceased in medieval times, but was reintroduced in 1815 along the lines of the English model. The Jury Court was merged into the Court of Session in 1830. According to s 11 of the Court of Session Act 1988 jury trials remain competent in the Court of Session primarily for cases involving defamation or personal injury. See Reid (n 66) 253. They can still be requested in appropriate criminal trials.

\textsuperscript{130} See Reid (n 66) 230, 251-254.

\textsuperscript{131} The Human Rights Act of 1998, a United Kingdom (UK) statute which incorporates the ECHR as part of UK domestic law, made the rights enshrined in the ECHR part of the law of Scotland. Section 29(1) (d) of the Scotland Act of 1998 limited the competence of the Scottish Parliament to exclude legislation incompatible with the Convention while s 57 requires the Scottish Government to act in accordance with the Convention. This incorporation of ECHR rights into domestic Scottish law provides important checks on the powers of public authorities to interfere with a person’s right to property in terms of Art 1 of the First Protocol ECHR, and would determine the scope of a public authority’s duty of care where it is alleged that its negligence in fulfilling statutory obligations has resulted in injury to the individual. In disputes between private parties, Convention rights are relevant in deciding what terms might be implied in, for instance, contracts of employment, the exercise of contractual remedies that are disproportionate, the use of oppressive measures to recover a debt (Art 1 of the First Protocol), remedies for the misuse of private information and a defence based on words spoken in a privileged context on a matter of public interest in a suit in defamation (Art 8, protecting
While the principles of private law in mixed jurisdictions may be indisputably civilian in many areas of private law, the technique used in handling the material is a typically common-law one.\textsuperscript{132}

\section*{4 Conclusion: The importance of mixed legal systems in globalisation}

The importance of mixed legal systems in globalisation is that South African and Scots law and other genuinely mixed legal systems have demonstrated that the two main legal systems of the world, namely common law and civil law, can coexist peacefully in one united legal system. Furthermore, some of the concepts and institutions developed in mixed legal systems, like the South African and the Scottish law of trust\textsuperscript{133} and the Scottish standard land security that replaced the obscure and antiquated English law of mortgage, are of a truly hybrid character and thus suitable for adoption in harmonisation projects like that of European private law.

On a global scale the ease with which English commercial practices have been incorporated into the civilian law of contract of mixed legal systems, leaving the civilian principle of \textit{consensus} virtually intact, can relieve the fears of Continental, Asian and South American civilian lawyers that harmonisation will inundate the law of obligations with unprincipled common-law provisions and institutions. Then, too, the adoption of the doctrine of precedent\textsuperscript{134} represents a gradual introduction of reform into a legal system as opposed to an immediate one via legislation. Only principles and rules that have been moulded in practice are accepted. Finally, because mixed legal systems have adopted the fundamental liberal Anglo-American principles of the rule of law and due process, enshrined in the European Convention on Human Rights and in the South African Bill of Rights in Chapter 2 of its Constitution, they have ensured that they will be counted amongst the most developed legal systems in the world.

private life and reputation, and Art 10 protecting freedom of expression). In regard to certain fields of law where Scottish law and the convention alike put a premium on the protection of an individual’s autonomy, dignity and self-esteem Buxton LJ in \textit{McKennitt v. Ash} [2006] EWCA Civ 1714; [2008] QB 73 at par 11, citing Lord Woolf CJ in \textit{A v B plc} [2003] QB 195 at par 4 has stated that the Articles of the Convention, have ceased to be “merely of persuasive or parallel effect” but have become “the very content” of the common law. See, further, Reid (n 66) 231-232, 247-248, 259-260, 267-268.

\textsuperscript{132} \textit{Idem} 243, 245.

\textsuperscript{133} For an excellent comparison between the South African and Scottish institutions of trust, see De Waal & Paisley “Trusts” in Zimmermann, Visser & Reid (eds) Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa (2004) 819-848.

\textsuperscript{134} The doctrine of \textit{stare decisis} was accepted by the Court of Session by the early nineteenth century, and then largely under English influence. See \textit{Rose v Drummond} (1828) 6 S 945; Gardner “Judicial precedent in Scots law” 1941 (53) Juridical Review 33; Smith \textit{Judicial Precedent in Scots Law} (1952) 28. On the acceptance of the doctrine in South Africa, see Van der Merwe \textit{et al} (n 3) 132, 142-144; and \textit{In re Taute} (1830) 1 Menz 497.
Abstract
This paper in honour of my friend and colleague, Andrew Domanski, traces the origin and basic features of the South African and Scottish legal systems, which are perhaps the two most important mixed legal systems in the world. These two systems are identified as truly mixed systems on the basis of criteria developed by Vernon Palmer in his book Mixed Jurisdictions Worldwide in order to distinguish them from other pluralistic or hybrid jurisdictions.

The genesis and development of the South African legal system is explored from the time of the Dutch settlement at the Cape in 1652, through British colonial rule from 1806-1900, the subsequent development of South African law after the Anglo-Boer War from 1902 till 1990 and the ushering in of the new constitutional era in South Africa after 1990. An important feature of this development was the gradual adjustment and piecemeal reform of the Cape system of administration of justice. This soon acquired a typically British flavour through, amongst other things, the adoption of the British court system and law of procedure and evidence, the recruitment of legally qualified judges from England and Scotland, the delivery and reporting of well-argued judgments by individual judges and the doctrine of precedent. In addition British rule drew South Africa into a rapidly expanding network of international trade, which significantly boosted commercial and political activity and led to a large-sale importation of English commercial law into the Cape and the eclipse of the unsophisticated Dutch constitutional and administrative law by its English counterpart. At present, the principles enshrined in the post-apartheid South African Constitution are whittling away the superstructure of apartheid laws and are gradually freeing the mixed Roman-Dutch law infrastructure of any form of racial discrimination, leaving a mixed legal system of predominantly English commercial and public law and Roman-Dutch private law, pervaded by the constitutional principles of personal freedom and the rule of law.

The genesis of Scottish law and its development into a truly mixed legal system started with the infiltration of Roman law into Scots law through the close connection between Roman law and canon law in the early Scottish ecclesiastical courts, which gradually also influenced the secular Scottish courts; the acceptance of Roman institutions in notarial practice and Scottish legislation, and the emergence of a body of professional lawyers who had studied in Italy, France and – after the reformation – in the Netherlands, rather than at the English universities of Oxford and Cambridge. A wholesale reception of Roman law, especially Roman private law, took place only after the creation in 1532 of a supreme court in Edinburgh, namely the Court of Session; and the creation of a Scottish legal literature by the “institutional writers” who had studied in Europe and who introduced the ius commune into their native Scots law. However, after Scotland voluntarily joined England through the Treaty of Union in 1707, the influence of civilian law steadily declined and Scots law became increasingly anglicised. Besides the administration of justice system being modelled on the English prototype and the English House of Lords being accepted as the highest court of appeal, the Scottish acknowledgment of the superiority of English commercial law after the unprecedented growth in trade and industry following on the Industrial Revolution of 1850, led to a full-scale adoption of English law into Scots law. Thus Scots law, like South African
law, ended up with a strong civilian private law and an English-law based constitutional, procedural and commercial law.

In conclusion, the mixed legal systems of South African and Scots law have demonstrated that the two main legal systems of the world, namely common law and civil law, can exist peacefully in one united legal system. Some of the concepts and institutions developed in mixed legal systems, like the South African and Scottish law of trust and the Scottish standard land security replacing the obscure and antiquated English law of mortgage, are of a truly hybrid character. This renders them fit for adoption in harmonisation projects like that of European private law. On a global scale the ease with which English commercial practices have been incorporated into the civilian law of contract of mixed legal systems leaving the civilian principle of consensus virtually intact, can relieve the fears of Continental, Asian and South American civilian lawyers that harmonisation will inundate the law of obligations with unprincipled common-law provisions and institutions. Finally, mixed legal systems, in having adopted the fundamental liberal Anglo-American principles of the rule of law and due process, enshrined in the European Convention on Human Rights and the South African Bill of Rights in Chapter 2 of its Constitution, have ensured that they will be counted amongst the most developed legal systems in the world.