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# The Political Purpose of the ‘Mixed Legal System’ Conception in the Law of Scotland

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## 1 The Mixed System of Scots Law

### a) General

According to the prevalent and authoritative narrative among Scottish legal academics, Scotland has a mixed legal system, and it is the only mixed legal system in Europe. However, outside Scotland and outside other mixed jurisdictions, the mixed system of Scots law has unfortunately not received much attention.<sup>1</sup> For a better understanding of this fairly cryptic account some background information is necessary. ‘Mixed system’ in this context is generally understood, in a somewhat reductionist way,<sup>2</sup> as a mixture between Roman law-based Civil Law (as found in the continental European Civil Law jurisdictions) and the Common Law of England. Thus this is conceptually a ‘simple mix’, whereby the law is a hybrid only of Civil Law and Common Law as its ingredients.<sup>3</sup> ‘Mixed system’ also refers to private law and the commercial law-aspects of private law only; it does not cover all areas of Scots law, namely not criminal law, and it does not refer to public law (constitutional law and administrative law). With these restrictive caveats, the present definition of ‘mixed system’ can make sense, otherwise it would be problematic.

But it is not the purpose of this article to discuss where the possible flaws of the idea of the ‘mixed system’ used by Scottish legal academics lie, for I want to show the purpose of the ‘mixed system’ conception in legal and political discourse, not its accuracy or otherwise. As a further methodological point, the following is presented from the perspective of an author with a Civil Law education and background from a Continental European Civil Law jurisdiction, with a Common Law education and background from England, and with practical experience of Scots law as a legal academic in Scotland for over ten years. Naturally

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<sup>1</sup> H. MacQueen, ‘Mixed Jurisdictions and Convergence: Scotland’, 29 *International Journal of Legal Information* (2001), p. 310-311.

<sup>2</sup> A classical counter-example are the pluri-jural systems of African states, for example the usual pattern of indigenous customary laws, Islamic law and (English) Common Law in Commonwealth Africa, see e.g. A. Allott, *Essays in African Law* (Butterworth, 1960), p. 4-5, 12, 63, 67. In the case of the mixed system of South Africa, the concentration on purely the Civil Law (Roman-Dutch) part and the Common Law (English) part without considering the customary law element at all can lead to most uncomfortable findings, see below and A. Rahmatian, ‘Book Review: Vernon Valentine Palmer: Mixed Jurisdictions Worldwide: The Third Legal Family’, 8 *Edinburgh Law Review* (2004), p. 427-428; E. Özücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’, 3 *Journal of Comparative Law* (2008), p. 49.

<sup>3</sup> E. Özücü, 3 *JCL* (2008), p. 46.

this account is not only subjective, it also tends to be sceptical, especially as to the exact nature of this *mixité* from the viewpoint of someone with an intimate knowledge of the ‘pure’ Civil Law and the ‘pure’ Common Law. In the same way as pouring white wine into red wine does not create a rosé but a horrible concoction, the mixing of Civil Law and Common Law does not create anything new or better *per se*, and it may not create anything different from its constituent parts at all.<sup>4</sup> Nevertheless, some Scots lawyers regard the mixed nature of Scots law as having a special, separate and independent quality, perhaps even superiority,<sup>5</sup> when compared to the Civil Law, and particularly to the Common Law, the ingredients out of which Scots Law has been formed. It cannot be avoided that the non-Scot often finds it difficult to discern such a quality, regardless of how sympathetic he or she is to the beliefs of Scottish colleagues.

The historical reasons for the mixed nature of Scots law have often been presented and need not be retold.<sup>6</sup> Of interest is rather an analysis of that mixed nature, but sometimes one cannot help thinking that the usually provided broad discussion of the historical development of mixed Scots law seeks to fill a certain analytical void.

Perhaps one may start with an account of the generally accepted understanding of ‘mixed system’ or the ‘Scots law mix’<sup>7</sup> among Scots lawyers. Scots law before the Act of Union with England in 1707 was generally part of the Roman-law based *ius commune* of the European continent. There is the idea that English law encroached on Scots law mostly from that time onwards, exacerbated by the fact that in civil law matters the highest court of the country was the (English) House of Lords.<sup>8</sup> But modern scholarship has shown that the influence of English law started much earlier than with the Union between Scotland and England, probably from the beginning of the development of both jurisdictions.<sup>9</sup> Plans to unify Scots and English law after the Scots King James VI ascended to the throne in 1603 failed, not least because England feared an imposition of the civil law. As of the early eighteenth century, Scots law was already a mixture between Scots law in the *ius commune*

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<sup>4</sup> A. Rahmatian, ‘Codification of Private Law in Scotland: Observations by a Civil Lawyer’, 8 *Edinburgh Law Review* (2004) p. 31-59, at p. 34.

<sup>5</sup> T. B. Smith, ‘The Common Law Cuckoo’, in T. B. Smith, *Studies Critical and Comparative* (W. Green and Oceana Publications, 1962), p. 96-97, 115. Discussion also in K. Reid, ‘The Idea of Mixed Legal Systems’, 78(5) *Tulane Law Review* (2003), p. 5-40, at p. 13-14, 20.

<sup>6</sup> H. MacQueen, ‘*Regiam Majestatem*, Scots Law, and National Identity’, 74 no. 197 *The Scottish Historical Review* (1995), p. 1-25; W. Tetley, ‘Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)’, 60 *Louisiana Law Review* (1999-2000), p. 677-738, at p. 684, and 688 (for Scotland).

<sup>7</sup> E. Reid (2013), ‘Mixed but Not Codified: The Case of Scotland’ (chapter 16), in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes (Ius Gentium: Comparative Perspectives on Law and Justice)* (Springer, 2013), p. 343-368, at p. 344.

<sup>8</sup> E.g. T. B. Smith, ‘The Common Law Cuckoo’, p. 92-93, and ‘English Influences on the Law of Scotland’, p. 122-123, both in T. B. Smith, *Studies Critical and Comparative* (W. Green and Oceana Publications, 1962).

<sup>9</sup> W. D. Sellar, ‘Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions’, 4 *Edinburgh Law Review* (2000), p. 3-18, at p. 4-7; H. MacQueen, 29 *Int J Leg Info* (2001), p. 310, with further references.

civil law tradition and English common law.<sup>10</sup> The influence of English law on Scots law increased strongly in the nineteenth century, particularly in Victorian times with English case law and the introduction of principal commercial law statutes,<sup>11</sup> such as the Sale of Goods Act 1893, which is essentially still in force as the Sale of Goods Act 1979 (as amended). The exact relevance of the different elements of the mixture has always remained controversial among Scottish legal scholars. For some scholars Scots law is Civilian in its core, with influences and changes by English law, others consider it a genuine mix between both legal systems. Some emphasise that the mix contains important elements of Canon law and Scots customary law.<sup>12</sup> If a tentative answer can be found at all, it would depend much on the historical period and on the particular area of the law in question. Here we also enter the debate about the interpretation of the legal ‘*mixité*’ by Scottish Legal Nationalism, which will be dealt with separately.<sup>13</sup> The following examples illustrate how this ‘*mixité*’ is realised in practice in the law of obligations and the law of property.

#### b) *Contract*

The mixedness of civil and common law elements within Scots law is different in different subject areas. In contract law, the main source of law is case law (Scots ‘common law’) and custom. Partial statutorisation and quasi-codification<sup>14</sup> of certain areas of contract law with statutes for the whole of the UK, such as the Consumer Credit Act 1974, Sale of Goods Act 1979, the Unfair Contract Terms Act 1977, and now the UK Consumer Rights Act 2015, have shaped Scots contract law, although it is difficult to say whether these UK statutes can be regarded as distinctively ‘English’ imports. Within the Scots common law (case law) of contract, Scots law is different from English law in relation to some specific points: the absence of the doctrine of consideration, the recognition of contracts for the benefit of third parties (in England only since the Contracts (Rights of Third Parties) Act 1999<sup>15</sup>), the primary remedy of ‘specific implement’ (specific performance) as opposed to mere damages for breach of contract (although Scottish legal practice differs little from England<sup>16</sup>), the absence of a distinction of contractual terms between conditions (fundamental terms, leading

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<sup>10</sup> E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 346.

<sup>11</sup> A. Rodger, ‘The Codification of Commercial Law in Victorian Britain’ 108 *Law Quarterly Review* (1992), p. 570-590.

<sup>12</sup> E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 346, 351, for an impartial overview. See also W. D. Sellar, 4 *Edin L R* (2000), p. 12, 16.

<sup>13</sup> Below under 2.

<sup>14</sup> On the terminology one can adopt, see A. Rahmatian, 8 *EdinLR* (2004), p. 50.

<sup>15</sup> However, in English law commercial relations of this kind could be emulated by the trust in many cases, and there have long been special statutory rules for insurance agreements, being the really practical case of contracts for the benefit of third parties (e.g. s. 11 Married Women’s Property Act 1882).

<sup>16</sup> H. MacQueen, J. Thomson, *Contract Law in Scotland* (4<sup>th</sup> edition, Bloomsbury Professional, 2016), 252-253.

to rescission of the contract in case of a breach) and warranties (allowing damages only for breach).<sup>17</sup>

Some areas of contract law are a clear mixture of Scots and English law, for example the law of error, but in this case the mixture is an unfortunate muddle.<sup>18</sup> The reason is that in the nineteenth century Scots law imported the English concept of misrepresentation,<sup>19</sup> a part of the law of tort (although it appears in the context of the formation of contracts<sup>20</sup>), while the ‘classical’ Scots law of error is conceptually a part of contract, because its idea is being a remedy that deals with a defect in consensus in the contract formation process. With this idea of ‘error’ as a flawed and remediable consensus, Scots contract law is Civilian: it focuses on the erring party, while in the originally tortious English law remedy of misrepresentation the focus is on the misrepresenting party.<sup>21</sup> As the Civilian concept of error and the English concept of misrepresentation are irreconcilable, Scottish courts in reality consider error cases *strictu sensu* as misrepresentation cases or, depending on the facts and interpretation, situations of error are dealt with as breach of contract events, without touching the complex area of error at all.<sup>22</sup> This approach is, of course, influenced by English law, in contrast to the Civil law systems in Continental Europe which distinguish more clearly between defects in formation and defects in performance of the contract, and organise their remedies accordingly.<sup>23</sup>

### c) *Delict (Tort)*

With regard to torts, Scots law of delict, as is the correct name, is indeed a law of *tort*, not a law of a number of *torts*, so there is an overarching principle of extra-contractual liability and reparation. This overarching principle is based on the Roman law *actio legis Aquiliae*, as developed further by the *ius commune*, particularly by the *usus modernus pandectarum* in the seventeenth century.<sup>24</sup> In theory this is important, because Scots lawyers may interpret the case law, which is the principal source of Scots law in delict (as in contract), not incrementally on a case-by-case basis, but against a certain intellectual framework. In

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<sup>17</sup> E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 359; H. MacQueen, J. Thomson, *Contract Law in Scotland*, p. 138-139.

<sup>18</sup> W. W. McBryde, ‘Error’, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol 2 (Obligations) (Oxford University Press, 2000), p. 72.

<sup>19</sup> H. MacQueen, 29 *Int J Leg Info* (2001), p. 316.

<sup>20</sup> J. Cartwright, *Contract Law* (2<sup>nd</sup> ed., Hart Publishing, 2013), p. 174, 177.

<sup>21</sup> A. Rahmatian, 8 *EdinLR* (2004), p. 42.

<sup>22</sup> See example by W. W. McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed., Thomson/W. Green, 2007), p. 406.

<sup>23</sup> E.g. in Germany, see §§ 117, 119, 122, 123 German BGB (defects in formation: error, fraud, duress etc.), §§ 320ff, § 434 BGB etc. (defects in performance).

<sup>24</sup> H. MacQueen and W. D. Sellar, ‘Negligence’, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2 (Oxford University Press, 2000), p. 517-547, at p. 521-524.

practice this is rather irrelevant, especially with regard to the tort of negligence as by far the most important tort.

The example of the tort or delict of negligence shows that there are essential areas of private law which differ practically not at all in England and in Scotland.<sup>25</sup> In such areas the idea of a ‘mixed system’ becomes very difficult indeed to ascertain. This is demonstrated by the fundamental negligence case of *Donoghue v. Stevenson*, the case that states the famous general duty of care rule in the form of the ‘neighbour principle’.<sup>26</sup> In the view of some writers Scots law has influenced English law here.<sup>27</sup> It is true, the case originated in Paisley (Glasgow), but then its Scottish pedigree becomes more obscure. All judges, also the otherwise dissenting ones, proceeded on the basis that English and Scots law on negligence were already the same at that time.<sup>28</sup> It has been shown that Lord Atkin probably convinced the Scottish judge Lord Macmillan to delete all references to Scottish authorities in the second draft of his speech to make it an unquestionable precedent also for English law,<sup>29</sup> but there is divided opinion about the interpretation of this finding. One view regards this as a proof that the Scottish authorities would not have added much to the ruling and could therefore be omitted,<sup>30</sup> while others see this act as showing that the formulation of a general principle of liability for negligence (in its degree new to English law) in fact constituted the Scottish contribution,<sup>31</sup> especially Lord Macmillan’s reference in his first draft to the institutional writer Erskine (1773).<sup>32</sup> Erskine’s mentioning of a ‘neighbour’ in the context of a (general?<sup>33</sup>) delictual liability rule was considered to be the likely cornerstone of Lord

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<sup>25</sup> E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 362.

<sup>26</sup> [1932] AC 562, 1932 SC (HL) 31. It can safely be assumed that the facts and ruling of this case are well known and need not be discussed in the present context, see e.g. S. F. Deakin *et al.*, *Markesinis and Deakin’s Tort Law* (5<sup>th</sup> edition, Clarendon Press, 5<sup>th</sup> ed, 2003), p. 75; W. V. H. Rogers, *Winfield & Jolowicz on Tort* (15<sup>th</sup> edition, Sweet and Maxwell, 1998), p. 94. For an extensive treatment of its history, see W. W. McBryde, ‘The story of the “snail in the bottle” case’, in P. T. Burns and S. J. Lyons (eds), *Donoghue v. Stevenson and the modern Law of Negligence. The Paisley Papers* (The Continuing Legal Education Society of British Columbia, 1991), p. 25.

<sup>27</sup> E.g. R. Leslie, ‘Scotland (Report 2)’, in V. V. Palmer (ed.), *Mixed Jurisdictions Worldwide* (Cambridge University Press, 2001), p. 240, at p. 250; R. Evans-Jones, ‘Roman Law in Scotland and England and the development of one law for Britain’, 115 *Law Quarterly Review* (1999), p. 605, 618.

<sup>28</sup> Per Lord Buckmaster, [1932] AC 562, at 566-567, per Lord Atkin, at 579, per Lord Thankerton, at 602-603, per Lord Macmillan, at 608-609. Lord Tomlin agreed with Lord Buckmaster in every respect, at 599.

<sup>29</sup> A. Rodger, ‘Lord Macmillan’s speech in *Donoghue v. Stevenson*’, 108 *Law Quarterly Review* (1992) p. 236, 246-247.

<sup>30</sup> A. Rodger, 108 *LQR* (1992), p. 242.

<sup>31</sup> R. Evans-Jones, 115 *LQR* (1999), p. 624.

<sup>32</sup> J. Erskine, *An Institute of the Law of Scotland* (Bell, 1773), Book III, 1, 13, p. 415: ‘[E]very one who has the exercise of reason, and so can distinguish between right and wrong, is naturally obliged to make up the damage befalling his neighbour from a wrong committed by himself.’ This passage has been considered as the first reference to the neighbour principle.

<sup>33</sup> Whether there was a general principle of delictual liability for negligence in the 17<sup>th</sup> and 18<sup>th</sup> centuries in Scots law is controversial, arguably not, see D. Visser and N. Whitty, ‘The Structure of the Law of Delict’, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2 (Oxford University Press, 2000) p. 422, 438. See also W. J. Stewart, *Delict* (4<sup>th</sup> edition, Thomson/Green, 2004), p. 9 with further references.

Atkin's definition of the neighbour principle.<sup>34</sup> Traces of a more generalising approach to liability for negligence can also be found at about the same time with Lord Kames (1778).<sup>35</sup>

General principles, even with regard to negligence, are not confined to Civil Law and mixed legal systems, such as that of Scotland. In English law, *Le Lievre v. Gould*<sup>36</sup> (limiting the general principle in *Heaven v. Pender*<sup>37</sup> by the notion of proximity), on which particularly Lord Atkin relied in his speech,<sup>38</sup> already contained a kernel of a general principle of duty of care based on proximate relationship. It is also questionable whether the approaches of the 'English' (rather: Welsh) Lord Atkin and the 'Scottish' Lord Macmillan in *Donoghue* show any significant difference in effect.<sup>39</sup> US-American lawyers may point to the slightly earlier *Palsgraf* case before the Court of Appeals of New York in 1928,<sup>40</sup> where a similar principled approach to liability for negligence was taken.

Whatever the exact situation was then in the making of *Donoghue*, one may say that it is 'certainly not impossible that the Scots law played an important role in reassuring the majority that a generalised principle of delictual liability – with proper limits – could indeed be formulated',<sup>41</sup> but that in effect does not change much in the present context of the discussion. If the contribution of Scots law to English law in *Donoghue* lies in the principled approach to the law of negligence (as opposed to an incremental approach in the English common law<sup>42</sup>), then the resulting neighbour principle can be seen as somewhat at odds with Scots law itself. As already said, in 'classical' Scots law delictual liability is indeed based on the principles of the *actio legis Aquiliae*<sup>43</sup> (in the shape of the *usus modernus*) in accordance with the legal tradition of the Civil Law systems.<sup>44</sup> In the Civilian tradition, liability is founded on the general concept ('*damnum iniuria datum*') that compensation for a loss or damage (*damnum*<sup>45</sup>) has to be made if it has been caused (in the sense of a *condicio sine qua*

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<sup>34</sup> R. Evans-Jones, 115 *LQR* (1999), p. 624.

<sup>35</sup> Kames (H. Home), *Sketches of the History of Man*, Vol. IV, Book III, Sketch II (Principles and progress of morality), Section 6 (Laws respecting reparation) (2<sup>nd</sup> edition, Strahan and Cadell, 1778), p. 66: '... an action is *culpable* or *faulty*, if the consequent mischief was foreseen or might have been foreseen; and the actor ... is subject to reparation.', and at p. 69: 'What is said upon culpable actions, is equally applicable to culpable omissions ...'. See also A. Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh University Press, 2015), p. 85-87, with further references.

<sup>36</sup> [1893] 1 QB 491 at 497, 502, 504.

<sup>37</sup> (1883) 11 QBD 503 at 509.

<sup>38</sup> [1932] AC 562 at 580-581, 582.

<sup>39</sup> D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), p. 191.

<sup>40</sup> *Helen Palsgraf v The Long Island Railroad Company* 248 NY 339, per Cardozo C.J., at 341-342, 344.

<sup>41</sup> See D. Visser and N. Whitty, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2, p. 461.

<sup>42</sup> Compare Lord Buckmaster's dissenting speech, [1932] AC 562 at 567, 577-578.

<sup>43</sup> The classical Roman law statement of the *Lex Aquilia* is in D. 9, 2, 1 pr.; D. 9, 2, 2 pr.; D. 9, 2, 27, 5.

<sup>44</sup> H. MacQueen and W. D. Sellar, in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2, p. 517, 519.

<sup>45</sup> The compensation was then also split into two categories of calculation, *damnum emergens* and *lucrum cessans* which survive in present codifications today, e.g. in Austria §§ 1293, 1323, 1331, 1332 ABGB.

non) by an unlawful (*iniuria*) and culpable (*culpa*) act.<sup>46</sup> The aquilian liability rests on *culpa* (fault). However, in the era of Natural Law attempts were made to develop a principle of strict liability on the basis of *alterum non laedere*, but these theories did not succeed.<sup>47</sup> The fault-based aquilian system was the concept which prevailed in the Civil Law countries, especially owing to Savigny and the Pandectists in Germany in the 19<sup>th</sup> century.<sup>48</sup> The neighbour principle in *Donoghue*, even if it is indeed rooted in some way in Scots law, is not in line with the *Lex Aquilia*, because it is not strictly speaking fault-based, but establishes a general rule of an *actual* duty of care owed to a certain group of persons,<sup>49</sup> and that is the foundation of a compensation claim if the breach of that duty has caused damage. In Civilian terminology one could say that the Common Law duty of care principle establishes that the breach of duty is an unlawful (but not necessarily also culpable) act (*iniuria*) which, for that reason, triggers liability, while *culpa* (in the narrow meaning of ‘negligence’) under the aquilian system establishes liability for negligent acts because they are also culpable acts (*culpa* in the wide sense of ‘fault’). The Scots law on negligence as it went into *Donoghue* was then a Scots *Common Law*, not the aquilian Scots *Civil Law*. This Scots *Common Law* rule emerged as a result of a convergence of Scots and English laws in the nineteenth century in this area, when there was a rise of negligence cases as a result of the industrialisation.<sup>50</sup> Thus if *Donoghue* contains a Scots law contribution, then it is not a clearly discernable result of the *Civilian* tradition which is supposed to be the distinguishing factor in relation to English law, and which is the essential ingredient that creates the ‘mixed system’ of Scots law.

#### d) *Property*

While the Scots law of obligations has been shaped profoundly by English law, Scots property law is essentially Civilian in nature. One can take the view that, taken in isolation, Scots property law is not really ‘mixed’ at all because it is Roman in its conception. Its fundamental concepts, such as real rights, *traditio*, *possessio*, *accessio*, originate from Roman

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<sup>46</sup> *Culpa* (fault) can be in the form of *dolus* (intention), or *culpa* in its narrow meaning (negligence). The terminology in the discussion of the aquilian liability over the centuries was not consistent, see R. Zimmermann, *The Law of Obligations* (Oxford University Press, 1996), p. 1004 (*iniuria* and *culpa* in classical Roman law), p. 1027 (meaning of *culpa* in the *usus modernus*).

<sup>47</sup> R. Zimmermann, *The Law of Obligations*, p. 1033; N. Jansen, ‘Duties and rights in negligence: A comparative and historical perspective on the European law of extracontractual liability’, 3 *Oxford Journal of Legal Studies* (2004), p. 443, 452, 456 (on such an approach by Hugo Grotius in his *Inleiding* only).

<sup>48</sup> R. Zimmermann, *The Law of Obligations*, p. 1034; N. Jansen, 3 *OJLS* (2004), p. 459.

<sup>49</sup> This ‘idealistic’ view of a duty of care is, however, disputed, see discussion of the ‘idealist’ N. J. McBride, ‘Duties of Care – Do they really exist?’, 3 *Oxford Journal of Legal Studies* (2004), p. 417, 418. The other group which McBride calls ‘cynics’ maintains that ‘duty of care’ means only that a person will be liable for causing damage by negligence in a particular situation.

<sup>50</sup> MacQueen, Hector and Sellar, W. David H. (2000), in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2, p. 544, 546.



law.<sup>51</sup> In particular, it embodies the idea of a single and indivisible *dominium* as ownership and absolute entitlement, instead of the English concept of *title* with (theoretically) relative entitlements, whereby the strongest of competing titles prevails, and whereby the entitlement is defended by torts (especially trespass and conversion).<sup>52</sup> The Civilian method for the protection of property is the *rei vindicatio* (action of delivery), but Scots law has not adopted the *rei vindicatio* in the strict sense.<sup>53</sup> More recent antiquarian and historicising discussions to revive the ancient Scots law remedy of spuilzie (unlawful taking away or meddling with movables in another's – owner's or lawful possessor's – possession and without the owner's consent)<sup>54</sup> have had no effect.<sup>55</sup> The idea is to re-establish spuilzie, itself probably a further development from the *actio spolii* of canon law,<sup>56</sup> to create an equivalent to a *rei vindicatio* and to make Scots property law more 'Civilian'.

The most important feature of Scots property law is the absence of a division between legal and equitable ownership that is characteristic of English property law.<sup>57</sup> The English trust is founded on this legal concept of simultaneous different qualities of ownership.<sup>58</sup> Hence Scots law does not have an institute that is equivalent to the English trust. What is called 'trust' in Scots law is really a kind of extended *fiducia* based on contract, in that the trust property may be conceptualised as being held as a special patrimony (a discrete estate) separate from the general patrimony of the trustee, so that the creditors of an insolvent trustee are also bound by the entitlement of the beneficiary to that special patrimony. Furthermore, Scottish trust law recognises real (proprietary) subrogations, so that the proceeds of sale obtained for trust property sold become part of the trust property.<sup>59</sup> There is, however, no clear statement of the Scottish courts as yet that has adopted the academic analysis of general and special patrimony.

In summary, Scots property law can only form an ingredient for the making of the mixed system of Scots law, if, rather arbitrarily, the law of obligations is also added to the mix.

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<sup>51</sup> E. Reid, in J. C. Rivera (ed.), *The Scope and Structure of Civil Codes*, p. 357.

<sup>52</sup> F. H. Lawson, B. Rudden, *The Law of Property* (3<sup>rd</sup> edition, Oxford University Press, 2002), p. 68; M. Bridge, *Personal Property Law* (4<sup>th</sup> edition, Oxford University Press, 2015), p. 80, 86.

<sup>53</sup> K. Reid, *The Law of Property in Scotland* (Butterworth, 1996), para. 158, p. 129-130; J. Stair, *The Institutions of the Law of Scotland*, David M. Walker (ed.), (The University Presses of Edinburgh and Glasgow, 1981) (1<sup>st</sup> ed. 1681), IV, 3, 45, p. 830.

<sup>54</sup> J. Thomson, *Delictual Liability* (4<sup>th</sup> edition, Tottel, 2009), p. 5, 26.

<sup>55</sup> Very occasionally spuilzie resurfaces, see A. Rodger, 'Spuilzie in the Modern World', *Scots Law Times (News)* (1970), p. 33; C. Anderson, 'Spuilzie today', 38 *Scots Law Times* (2008), p. 257-260.

<sup>56</sup> J. W. Cairns, 'Historical Introduction', in R. Zimmermann and K. Reid (eds.), *A History of Private Law in Scotland*, Vol. 1 (Oxford University Press, 2000), p. 73.

<sup>57</sup> M. Bridge, *Personal Property Law*, p. 6-10.

<sup>58</sup> F. H. Lawson and B. Rudden, *The Law of Property*, p. 86, 94.

<sup>59</sup> G. Gretton, 'Trusts without Equity', 49 *International and Comparative Law Quarterly* (2000), p. 599, 606, 609-610, 614.

Thus the conception of ‘mixed system’ can be administered quite flexibly; it can be tailored in a broader way (property law with the laws of contract and delict), or more narrowly (within contract, for example the law of error), or may even be postulated as having an inverse effect (Scots law influencing English law, and not even a ‘classical’ Civilian concept that is normally supposed to characterise Scots law, but a Scots Common Law idea of some kind, such as in the tort/delict of negligence). One starts to notice that the idea of the ‘mixed system’ of Scots law is not only the result of a disinterested analysis of a *status quo* of facts, but also a passionate social construct of legal scholarship, or of outright politics.

## 2 The Ideological Undercurrents: The Idea of Scottish Legal Nationalism

### a) *The features of Scottish Legal Nationalism and examples from private law*

The emphasis on the mixed nature of Scots law (being understood in its narrow meaning as a mix of Civil and Common Law) as the distinctive characteristic is mostly the product of Scottish Legal Nationalism. This movement emerged in the late 1950s, and was strongly represented particularly at Scottish law faculties, with T. B. Smith (1915-1988) as its leading academic figure.<sup>60</sup> Ten years ago Scottish Legal Nationalism was still dominant in Scottish law faculties, but it seems to have started waning in the last few years. A description of Scottish Legal Nationalism in a nutshell is best left to its detractors, who could provide a pointed and perhaps exaggerated, but concise and in my experience accurate description of this phenomenon – something which T. B. Smith and his followers with their penchant for legal and historical mysticism, sonorous affectation and with their almost meticulous imprecision apparently never quite managed to achieve with satisfactory clarity. In his well-known critical summary in 1976 the late Ian Willock identified the following hallmarks of the ideology of Scottish Legal Nationalism: Scots law, characterised by an adherence to principle rather than precedent, reflects authentically a Scottish *Volksgeist*, and Scottish juristic writers and judges have a duty to voice these qualities. The influence of English law through the UK

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<sup>60</sup> A principal text is T. B. Smith, ‘Strange Gods: The Crisis of Scots Law as a Civilian System’, in T. B. Smith, *Studies Critical and Comparative* (W. Green and Oceana Publications, 1962), 72, 81, 88. Beside T. B. Smith was the judge Lord Cooper of Culross (Thomas Mackay Cooper) (1892-1955), Lord President of the Court of Session, the most prominent representative of Scottish Legal Nationalism in the Scottish Legal Profession, see T. Cooper, *The Scottish Legal Tradition*, S. C. Styles (ed.) (The Saltire Society and the Stair Society, 1991), p. 87-89. But Scottish Legal Nationalism was always less popular with the pragmatic legal practitioners.

Parliament and the House of Lords (Supreme Court) endangers the integrity of Scots law which needs to be saved. In particular:<sup>61</sup>

‘The salvation of Scots law lies [for Scottish Legal Nationalism] in drawing upon its own historical roots and upon the experience of other “mixed” systems, such as those of South Africa and Louisiana, where too a basically Roman civilian system is threatened by infiltration from other legal traditions. [...] Scots law has a destiny to be a bridge between the common law and civilian systems within the European community.’

The modern discourse of Legal Nationalism has qualified the idea of the ‘hostile encroachment’ of English law on Scots law considerably, in that now it is generally acknowledged that the influence of English law started well before the Union between England and Scotland,<sup>62</sup> and that the English influence can be regarded as enriching Scots law and is not a corrosive force. But other ideas still reign unabated today: (i) the idea that Scottish legal academic writing and especially Scottish Institutional Writers (authoritative textbook writers) are still a valuable source of law<sup>63</sup> even 200-300 years after their works were published, (ii) that there is a family of apparently similar ‘mixed systems’ (Quebec, Louisiana, South Africa) despite their completely different and hardly comparable historical origin, (iii) that Scots law has a mission, due to its unique ‘*mixité*’, to pose as a role model for harmonisation or even legal unification of private law in the European Union. And (iv) there is the notion of the *Volksgeist*, although ostensibly denied,<sup>64</sup> but very present in reality, though as a primitive version and rather in the spirit of the late nineteenth and twentieth centuries which bears little resemblance to Savigny’s idea of the *Volksgeist*.<sup>65</sup>

It must also be mentioned briefly that the concept of the ‘mixed system’ is white and Western, a point that is particularly delicate with regard to South Africa, often seen as the most important similar jurisdiction to Scotland concerning the ‘mixed system’ concept.<sup>66</sup> During the Apartheid era, the African customary laws were naturally and self-evidently omitted from the conception of a ‘mix’ between Civilian Roman-Dutch and Common Law in South Africa, and that had never been questioned by Scottish legal academics. But this exclusionist definition carried on in the international discourse of mixed systems, indeed as

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<sup>61</sup> I. D. Willock, ‘The Scottish Legal Heritage Revisited’, in J. P. Grant (ed.), *Independence and Devolution. The Legal Implications for Scotland* (W. Green, 1976), p. 1-14, at p. 4.

<sup>62</sup> W. D. Sellar, 4 *EdinLR* (2000), p. 3-18.

<sup>63</sup> T. B. Smith, *A Short Commentary on the Law of Scotland* (W. Green, 1962), p. 32-33, 113.

<sup>64</sup> See G. L. Gretton, ‘The Rational and the National: Thomas Broun Smith’, in E. Reid and D. Carey Miller (eds.), *A Mixed Legal System in Transition* (Edinburgh University Press, 2005), p. 30-43, at p. 35.

<sup>65</sup> For a discussion, see A. Rahmatian, ‘Friedrich Carl von Savigny’s *Beruf* and *Volksgeistlehre*’, 28(1) *Journal of Legal History* (2007), p. 4, 26-27.

<sup>66</sup> D. Carey Miller, ‘Sibling Mixed Systems: Reviewing South African/Scottish Comparative Law’, 20 *Edinburgh Law Review* (2016), p. 257.

late as 2001 at least, when a book entitled 'Mixed Jurisdictions Worldwide' appeared that omitted the customary law component in the South African country report entirely and did not mention Botswana and Zimbabwe at all, although both countries have the same 'mixed system' situation as South Africa.<sup>67</sup> This disturbing segregating element of the mixed system idea, both conceptually and practically, which one may regard as inherent in the present Scottish 'mixed system' conception rather than as an undesired side-effect, has not been considered as a problem to the present day.

Another revealing analysis about the nationalistic functionalisation of Scots law comes from Alexander McCall Smith (who later became a well-known fiction writer), also in 1976:<sup>68</sup>

'[Scots] law has itself become the object of a ... myth. Maintained after the Union as a focal point of Scottish identity it rapidly became a museum piece even escaping, until comparatively recently, the attentions of historical jurisprudence. After the heyday of anglicising influence Scots law became something of a political football, the object of fierce and in some cases unquestioning loyalty. ... It is hardly surprising ... that Scots law has struck a defensive position during the 20th century. At the time when other legal systems were undergoing rapid transformation to equip them to deal with the demands of modern conditions, Scots law suffered from conservative courts, inadequate legislative attention and a paucity of academic commentary and criticism. Although "legal nationalism" tends to accomplish nothing in concrete terms it could hardly be regarded as an unexpected reaction to the insensitive treatment that the law had received.'

There is no longer paucity of academic commentary and high quality scholarship in Scotland forty years later, but the problems of criticism, of conservative courts and inadequate legislative attention have remained valid points, despite the fact that Scotland has its own legislature for Scots law since devolution in 1999.<sup>69</sup> Also the defensive position in favour of Scots law which Scottish legal academics tend to take up has not changed much. A fairly recent example of this attitude is the debate around the House of Lords case of *Sharp v. Thompson* in 1997.

In *Sharp v. Thomson*,<sup>70</sup> the (simplified) facts were that the buyer of a flat paid the purchase price and was let into possession, but the registration of the buyer's ownership in the land register got delayed. Before registration took place, the seller became insolvent. Since conveyance of ownership has formally not been completed before registration, the seller's receivers could claim the flat for the seller's estate, through the operation of an

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<sup>67</sup> V. V. Palmer (ed.), *Mixed Legal Systems Worldwide* (Cambridge University Press, 2001) p. 7-10, 24, 32-33, 88-95, 178-181. Criticism by A. Rahmatian, 8 *EdinLR* (2004), p. 428-429.

<sup>68</sup> A. McCall Smith, 'Scots Law in Comparative Context', in J. P. Grant (ed.), *Independence and Devolution. The Legal Implications for Scotland* (W. Green, 1976), p. 153-161, at p. 153-154.

<sup>69</sup> Scotland Act 1998, ss. 28-30, 63A and schedule 5.

<sup>70</sup> 1997 SC (HL) 66.

existing floating charge which had crystallised due to the insolvency. The Scottish Court of Session, both at first and second instance, decided that the flat would be caught by the floating charge since the flat still belonged to the seller at the time of the insolvency.<sup>71</sup> The House of Lords reversed this decision, in that the flat was no longer part of the seller's assets and the buyers took the flat free of the floating charge. The House of Lords effectively argued that the seller is strictly speaking still the owner of the flat, but in a case like this, one has to look at the substance, not the form only: here the seller retains the form of ownership, but he has lost the substance. So the flat is no longer the 'property' of the seller and not subject to the floating charge.<sup>72</sup>

Scottish legal academics noticed quickly that this argumentation derived essentially from the English law of equity,<sup>73</sup> something that has no equivalent in Scots law.<sup>74</sup> The shrill outcry against this decision among Scots lawyers was remarkable and heartfelt. Two statements may be given as a *pars pro toto* for the debate: "What is the *ratio* of *Sharp v. Thomson*?" became a favourite examination question. It was unanswerable as a Zen koan, but, unlike a koan, there was no bliss of enlightenment.<sup>75</sup> And: 'In *Sharp v. Thomson* the problems caused by the floating charge came within an ace of destroying Scottish property law.'<sup>76</sup> It needs to be added here that the floating charge is itself a creature of equity and an import into Scots law from English law by statute in 1961.<sup>77</sup>

On the basis of the later case *Burnett's Trustee v. Grainger*,<sup>78</sup> the decision in *Sharp* has been interpreted as being restricted in authority and only applicable to the special situation of floating charges. Thus the story of *Sharp v. Thomson* was essentially the story of saving Scots property law from being 'polluted' by English law and, effectively, from becoming mixed. The answer whether this has been achieved by the nationalistic posturing of various academics or simply by the reasonable consideration that an essentially desirable legal outcome must be reconciled with the principles of the legal system in which this goal is to be attained, depends mostly on the ideological position of the commentator.

Another battlefield of Scottish Legal Nationalism is the floating charge itself (a security right over a class of fluctuating moveable assets of a company, such as stock),

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<sup>71</sup> 1994 SC 503, 1995 SC 455.

<sup>72</sup> Discussion following K. Reid, 'Jam Today: Sharp in the House of Lords', 10 *Scots Law Times* (1997), p. 80

<sup>73</sup> E.g. K. Reid, 10 *SLT* (1997), p. 82; G. L. Gretton, 'Floating Charge in Scots Law: The Saga Continues', *Journal of Business Law* (1995), p. 213-214.

<sup>74</sup> On the alien notion of the beneficial interest in Scots property law as introduced by *Sharp*, see Reid, 78(5) *Tulane Law Review* (2003), p. 34.

<sup>75</sup> G. L. Gretton, 'Analysis: Ownership and Insolvency: *Burnett's Trustee v. Grainger*', 8 *Edinburgh Law Review*, p. 391.

<sup>76</sup> G. L. Gretton, in E. Reid and D. Carey Miller (eds.), *A Mixed Legal System in Transition*, p. 41.

<sup>77</sup> Companies (Floating Charges) (Scotland) 1961.

<sup>78</sup> 2004 SC (HL) 19.

originally an import from English law<sup>79</sup> and growing out of the English law of equity, as has been said before in the context of *Sharp v. Thomson*. Some authors were therefore in favour of the abolition of the floating charge in Scotland.<sup>80</sup> Since the Scottish system of property law follows the principles of Roman law, the English concept of the floating charge is incompatible with Scots law, because the floating charge enables a lender to obtain security over a category of moveable assets (even incorporeal ones, like book debts) or over all moveable assets of a company without determining the individual assets at the time of the grant of the security right and without the requirement of actual delivery. That is in contrast to the requirements of Roman law-based security rights over moveable property, especially the pledge.<sup>81</sup> The introduction of the floating charge into Scots law was prompted by practical commercial considerations.<sup>82</sup> Nevertheless it has been argued that the floating charge is incompatible with Scots property law, and its effects should be emulated by methods that fit the principles of the ‘mixed system’ of Scots law (which is with regard to property law rather Roman and not much mixed). It has also been said that the creation of a security right without delivery can be achieved with other forms of non-possessory security rights that Civil law systems recognise. There are, however, not many equal ones.<sup>83</sup> Furthermore, Scots law could be adapted (by legal reform) so as to accommodate the desirable security right over incorporeal assets, especially book debts, by other means than the floating charge.<sup>84</sup> It appears that the argumentation against the floating charge hinges less on the commercial effects of the floating charge but on the technical-legal origin from English law. Where Scots law is currently unable to deliver the features of the floating charge, legal reform is proposed, mostly in line with perceived Civil law principles.<sup>85</sup>

A further point of conflict among Scottish legal nationalists is the question whether the transfer of ownership is abstract or causal in Scots property law. Seemingly an extremely technical question of private law, it nevertheless provides material for a debate. Scots property law, being based on Roman law, distinguishes clearly between contract and conveyance as the two separate requirements for the transfer of property rights.<sup>86</sup> Under Scots common law, passing of ownership is supposedly abstract, that is, detached from the

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<sup>79</sup> D. Cabrelli, ‘The Case against the Floating Charge in Scotland’, 9 *Edinburgh Law Review* (2005), p. 411-414.

<sup>80</sup> G. Gretton, *JBL* (1995), p. 212. At least sympathetic to abolition also D. Cabrelli, 9 *EdinLR* (2005), p. 408.

<sup>81</sup> B. Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1975), p. 151.

<sup>82</sup> D. Cabrelli, 9 *EdinLR* (2005), p. 409, 415.

<sup>83</sup> D. Cabrelli, 9 *EdinLR* (2005), p. 421, states the South African ‘notarial bond’ as an alternative. Such legal institutes may be found in a ‘mixed system’ but are not characteristic of a Civilian system. A similar institution (creation of security through formal acts of writing) is that of the English security bill of sale, see M. Bridge, *Personal Property Law*, p. 302-304.

<sup>84</sup> D. Cabrelli, 9 *EdinLR* (2005), p. 424.

<sup>85</sup> One theoretical example D. Cabrelli, 9 *EdinLR* (2005), p. 431, makes is the abolition of the floating charge in England and in Scotland and a new harmonizing law which would then have to be consistent with a Civilian model (which one?) to be acceptable for Scots law – an unrealistic scenario.

<sup>86</sup> K. Reid, *The Law of Property in Scotland* (Butterworths, 1996), para. 606, p. 483-484.

underlying contract directed at passing ownership. Thus Scots lawyers maintain that the conveyance of real rights in Scots law is only dependent on (a) the common intention to pass ownership (abstract real contract), and (b) delivery, but not on the validity of the contract.<sup>87</sup> Somewhat anachronistically, some modern Scottish authors refer to Savigny in this regard.<sup>88</sup> As regards immovable ('heritable') property, the abstract nature of the conveyance has never been questioned<sup>89</sup> with reference to the institutional writer Stair (1681).<sup>90</sup> As to moveable property, the abstract nature of the transfer of ownership in Scots law is not entirely without doubt, because the authorities (institutional writers and court cases) are not very clear about this point if they discuss it at all.<sup>91</sup> However, some authors are adamant about the abstract nature of the transfer of ownership even as to moveable property,<sup>92</sup> and some authors have qualified the relevance of *iusta causa traditionis* to reconcile it better with Scots law.<sup>93</sup>

The reason behind these endeavours is that, when the 'English' Sale of Goods Act<sup>94</sup> became part of Scots law in 1893, it upset the existing system of transfer of ownership under Scots common law. The Sale of Goods Act provides that ownership in (specific) goods passes when the parties intend it to pass (s. 17), and that is, by default, but subject to parties' agreement, when the contract is made (s. 18, rule 1). This consensual (and therefore causal<sup>95</sup>) system of transfer of ownership not only ignores the distinction between abstract and causal conveyance, but lets the two carefully separated components of contract and conveyance in

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<sup>87</sup> K. Reid, *The Law of Property in Scotland*, para. 609, p. 486-487; D. L. Carey Miller, 'Systems of property: Grotius and Stair', in D. L. Carey Miller and D. W. Meyers (eds.), *Comparative and Historical Essays in Scots Law. A Tribute to Professor Sir Thomas Smith QC*, (Butterworths, 1992), p. 13, 30.

<sup>88</sup> K. Reid, *The Law of Property in Scotland*, para. 608, p. 485; D. L. Carey Miller, in D. L. Carey Miller and D. W. Meyers (eds.), *Comparative and Historical Essays in Scots Law*, p. 29. On Savigny's abstract real contract doctrine, see A. Rahmatian, 28(1) *JLH* (2007), p. 14.

<sup>89</sup> K. Reid, *The Law of Property in Scotland*, para. 611, p. 488.

<sup>90</sup> J. Stair, *The Institutions of the Law of Scotland*, D. M. Walker (ed.) (The University Presses of Edinburgh and Glasgow, 1981), Book II, 3, 14, p. 337: "narratives expressing the cause of the disposition [i.e. conveyance, transfer deed], are never enquired into, because though there were no cause, the disposition is good ...".

<sup>91</sup> K. Reid, *The Law of Property in Scotland*, para. 609, p. 486, with further discussion and references. D. Carey Miller, *Corporeal Moveables in Scots Law* (Thomson/W. Green, 2005), p. 141, 147-149. Even today the question of abstractness is not always expressly discussed, e.g. in some textbooks on property law, see T. Guthrie, *Scottish Property Law*, (2<sup>nd</sup> edition, Tottel, 2005), p. 47-48. In contrast, G. L. Gretton and A. J. Steven, *Property, Trusts and Succession*, (2<sup>nd</sup> edition, Bloomsbury Professional, 2013), p. 37, discuss this issue.

<sup>92</sup> Especially T. B. Smith, *A Short Commentary on the Law of Scotland*, p. 539. G. L. Gretton and A. J. Steven, *Property, Trusts and Succession*, p. 38, consider the abstract conveyance applicable to moveable property. K. Reid, *The Law of Property in Scotland*, para. 609, p. 487, also shows a clear preference to the abstract conveyance.

<sup>93</sup> K. Reid, *The Law of Property in Scotland*, para. 608, p. 486; W. M. Gordon, 'The importance of the *iusta causa of traditio*', in P. Birks (ed.), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Clarendon Press, 1989), p. 123.

<sup>94</sup> Now Sale of Goods Act 1979, c. 54.

<sup>95</sup> The consensual conveyance is arguably a subset of the causal conveyance, because the consensus is incorporated in (and creates) a contract, and that is also the cause (*iusta causa traditionis*). Compare the similar situation in French law, art. 1138 (1) CC.

Scots law collapse into one as the principal rule.<sup>96</sup> For these and other reasons<sup>97</sup> the provisions of ss. 17 and 18 of the Sale of Goods Act are often still considered as an alien English element within Scots law.<sup>98</sup> What is the reason for this opinion, given that the Sale of Goods Act was enacted in Scotland well over a hundred years ago and the extension of the English Sale of Goods Bill to Scotland was welcomed at the time?<sup>99</sup> Furthermore, most ownership transfers of chattels are effected under the Sale of Goods Act,<sup>100</sup> so there is little space for Scots common law in practice. As to the passing of ownership at the point of the contract, a Scottish textbook in 1896 remarked that '[t]his state of facts exists in the great majority of sales, so that in ordinary circumstances it may be stated that the old theoretical law has been abolished'.<sup>101</sup> Even the technicality of the separate abstract conveyance, which is far less important in legal reality than theoreticians may think,<sup>102</sup> seems to represent some ammunition for Scottish Legal Nationalism and is used to assert the Scottish position against England. One may speculate whether Scots lawyers would embrace a causal conveyance if the conveyance in English law were abstract.

b) *Practical sociological aspects of Scottish Legal Nationalism*

McCall Smith's assertion that "legal nationalism" tends to accomplish nothing in concrete terms' remains quite attractive. There is, however, one aspect in which Scottish Legal Nationalism has considerable practical effects. For the 'mixed system' conception acts as a device for the discrimination between Scots lawyers and non-Scots lawyers, and even for the discrimination against non-Scots lawyers, either in practice or in academia, and in this regard Scottish Legal Nationalism is quite successful. This also affects the teaching of subjects at Scottish Universities, quality assessment of research, career progress and so forth. Obviously,

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<sup>96</sup> See however the partly reconciling interpretation by K. Reid, *The Law of Property in Scotland*, para. 610, p. 487. There is also the problem that the Scottish (Roman) concept of property and the English meaning of property (or title?) differ.

<sup>97</sup> D. M. Walker, *A Legal History of Scotland*, vol. VI (*The Nineteenth Century*), (Butterworths, 2001), p. 872-873: For example, the distinction between sale and agreement to sell, the passing of the risk with the passing of ownership, but not delivery (as this was no longer required for the passing of ownership), the distinction between conditions and warranties, which were then all different from Scots law.

<sup>98</sup> E.g. Smith, *A Short Commentary on the Law of Scotland*, p. 540: 'By the Sale of Goods Act [...] [the passing of property] constitutes a *statutory exception to the general law of Scotland* regarding transfer of property in moveables.'; F. Davidson, L. J. MacGregor, *Commercial Law in Scotland* (3<sup>rd</sup> ed, W. Green, 2014), p. 7: 'the regime which was *imposed* by the Sale of Goods Act 1893 in relation to the passing of ownership of goods was very different from the pre-existing regime under Scots common law ...' (all my italics).

<sup>99</sup> See A. Rodger, Alan, 'The Codification of Commercial Law in Victorian Britain', 108 *Law Quarterly Review* (1992), p. 581-583; Anon., 'Current Topics: Sale of Goods Bill', 1 *Juridical Review* (1889), p. 311.

<sup>100</sup> Compare Sale of Goods Act 1979, s. 61 (1): "goods" includes ... in Scotland all corporeal moveables except money ...

<sup>101</sup> W. K. Morton, *Manual of the Law of Scotland* (Green, 1896), p. 239-240.

<sup>102</sup> See the similar situation already in post-classical Roman law, where contract and conveyance began melting together into one transaction, M. Kaser, *Das Römische Privatrecht*, Vol. 2 (*Die nachklassischen Entwicklungen*), (2<sup>nd</sup> edition, C. H. Beck, 1975), p. 275.



there is not much written source material on this sensitive issue. However, in 2006, a senior legal academic and Scottish Law Commissioner at the time lamented:<sup>103</sup>

‘The chances that a Scottish-trained applicant will be successful, unless the appointment is tied to Scots law, have declined sharply as the academy has become globalised ... The Scottish law school has thus become ... staffed increasingly by those who are not Scottish-trained. (Of course there are also great benefits here.)’

That arguably implies that proper candidates would normally not only be holders of a qualifying Scots law degree, but also be Scots, for almost nobody else would seek to obtain a qualifying law degree from a small jurisdiction of just over five million inhabitants. Would non-Scots nevertheless be encouraged, given that they are perceived to be alien to the Scottish legal tradition?<sup>104</sup> In reality, Scots are not at all crowded out from Scottish Law Schools by wild foreigners. What the author forgot to say is that non-Scots are typically only appointed to academic posts at Scottish law faculties if no Scottish candidate of at least acceptable quality can be found. If the appointment or promotion of a non-Scot becomes indeed inevitable, then that non-Scot might be considered as giving ‘great benefits’ to the law school, but, in my experience, rarely in relation to the study of comparative law in Scotland.<sup>105</sup> At the time that academic’s remarks attracted significant criticism from representatives of other Scottish law schools. But the criticism was directed against the suggestion of a weakening of the academic qualities of the Scottish law degree as being taught by non-Scottish staff, not against the implicit ‘ethnic’<sup>106</sup> bias of the original statement.<sup>107</sup> One should, however, give this particular academic due credit for honestly expressing in public what much of Scottish legal academia practises in private. In this area the discriminatory element of Scottish Legal Nationalism apparently does show some practical achievement.

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<sup>103</sup> G. L. Gretton, ‘Legal Science or Law-Lite? Is “Rechtswissenschaft” an alien term?’, *Journal of the Law Society of Scotland* (2006), p. 15.

<sup>104</sup> I posed exactly that question in 2007, see A. Rahmatian, ‘Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions’, in F. Macmillan (ed.), *New Directions in Copyright Law*, vol. 6 (Edward Elgar, 2007), p. 209.

<sup>105</sup> There is also the perception of Scottish academics that non-Scottish academics do not engage sufficiently with Scots law, see H. MacQueen, ‘Quo Vadis?’, 1 *Juridical Review* (2017), p. 14. If that is indeed so, then some reasons may be given in the main text above.

<sup>106</sup> The term ‘ethnic’ in this context is a shorthand expression. The idea of a Scottish identity and ethnicity is a very complicated one, see e.g. D. McCrone, *et al.*, ‘Who are we? Problematising national identity’, 46 (4) *The Sociological Review* (1998), p. 630, 634.

<sup>107</sup> P. Nicholson, ‘A Debate to Run and Run’, *Journal of the Law Society of Scotland* (2006), p. 16-18.

### 3 Contradictions: Anti-English but Pro-European Legal Nationalism

How can this staunchly parochial attitude (with certain segregationist leanings) with which Scottish Legal Nationalism imbues the ‘mixed legal system’ idea, be reconciled with a Europe-friendly and open approach to comparative law? The solution lies in the belief of Scottish legal nationalists that the mix of Civil Law and Common Law that Scots law constitutes is an excellent basis for harmonisation projects of private law across Europe. Often the flattering statement by the French comparative lawyer Lévi Ullmann after the first World War is quoted as a source of justification from outside: ‘Scots law gives us a pleasure of what will be some day the law of the civilised nations, namely a combination between the Anglo-Saxon and the Continental system’.<sup>108</sup> Apparently he did not know the state of affairs of Scots law very well; Scots law with its numerous arcane institutions does not necessarily present an attractive basis for a Europe-wide harmonisation. Furthermore, neither a possible mutual adaptation of Civil and Common Laws, nor a unification of private law in Europe is any indicator for a ‘civilised nation’. Rather conversely, I have always regarded the idea of a European civil code as seriously misguided.<sup>109</sup> The European civil code codification project, which has meanwhile probably been abandoned, is a conservative, uncreative, scholarly-detached, backward-looking venture without a law-reforming force and without taking account of the social and economic realities of the twenty-first century.<sup>110</sup> It is essentially a symbol of a modern form of nationalism. This notion of ‘Europe’ used in the European codification debate, with the legal imperialism it effectively entails, is in fact a nationalist concept in a version for the twenty-first century, and in its nature and spirit in many ways comparable to the nationalistic movements of the nineteenth century in central and eastern Europe (such as German nationalism, pan-Slavism).<sup>111</sup> From this perspective, the attitudes of Scottish Legal Nationalism and of the lawyers promoting a European codification project are intellectually by no means far apart.

Particularly in a globalised world one has to accept irreconcilable contradictions, something the philosophical and legal traditions of the Western world have always found difficult to grapple with.<sup>112</sup> This also applies to the vision of a harmonisation of European laws, a program of the European Union which sees further legal integration as a means to accomplish political and economic integration. In view of (unsurprising) recent political developments, one has to admit that further legal integration is not only impossible to achieve, it also gradually undermines the European Union itself, contrary to its professed

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<sup>108</sup> H. Lévy-Ullmann (trans. F. P. Walton), ‘The Law of Scotland’, 37 *Juridical Review* (1925), p. 390, cited e.g. by H. MacQueen, 29 *Int J of Leg Info* (2001), p. 310-311.

<sup>109</sup> A. Rahmatian, 8 *EdinLR* (2004) p. 54.

<sup>110</sup> P. Legrand, ‘Against a European Civil Code’, 60 *Modern Law Review* (1997), p. 44, 58-59.

<sup>111</sup> A. Rahmatian, 28(1) *JLH* (2007), p. 22.

<sup>112</sup> See e.g. the seminal essay by I. Berlin, ‘Herder and the Enlightenment’, in H. Hardy (ed.), *Three Critics of the Enlightenment* (Pimlico, 2000), p. 168-242, at p. 231-239.

agenda. More harmonisation can be prejudicial to the European idea. This contradiction is what I have called the ‘Herderian paradox’, after the German philosopher and man of letters Johann Gottfried Herder (1744-1803): the more (imposed) unity in the laws is applied, the more the EU Member States will seek to move apart, politically and legally. I have illustrated the ‘Herderian paradox’ with the specialised and already significantly harmonised area of copyright,<sup>113</sup> but these findings apply even more so to any large-scale harmonisation of European private law. Particularist Scots lawyers within the UK may well maintain their particularism within the European Union, to further, not to jeopardise, the European idea.

#### **4 Scottish Legal Nationalism, Scottish Nationalism and Scottish Independence**

##### *a) The relationship between Scottish Legal Nationalism and Scottish Nationalism*

In the last few years major political events have taken place in Britain: the Scottish Independence referendum on 18 September 2014, which rejected independence by a fairly small margin (55.25% against, 44.65% in favour),<sup>114</sup> the general elections to the UK Parliament on 7 May 2015, in which the Scottish National Party (SNP), the principal political force in the promotion of Scottish independence, gained 56 out of the 59 Scottish seats in the Westminster Parliament<sup>115</sup> (and lost 21 seats in the 2017 snap-election, but is still the strongest Scottish party in Westminster<sup>116</sup>) and the referendum decision of the UK with 52% in favour of leaving the EU on 23 June 2016.<sup>117</sup> It is perhaps surprising that these fundamental changes in the British and Scottish political landscape have not yet been mentioned at all in the discussion of Scottish Legal Nationalism.

In theory, there need not be much difference between Scottish Nationalism and Scottish Legal Nationalism: they share a discriminating or separating/segregating mind-set: Scottish/Non-Scottish, Scots Law/English Common Law. It is a them-and-us, Scottish against English in particular, and one should name the matter as it is – if one finds this uncomfortable, then this is so because it is uncomfortable. There is no nationalism, either

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<sup>113</sup> A. Rahmatian, ‘European copyright inside or outside the European Union: pluralism of copyright laws and the “Herderian paradox”’, 47(8) *International Review of Intellectual Property and Competition Law* (2016), p. 912.

<sup>114</sup> See *Scottish Independence referendum*, at: <http://scotlandreferendum.info/> (accessed 31 March 2017). On the legal and political implications of the 2014 Scottish Independence referendum, see e.g. A. Tomkins, ‘Scotland’s Choice, Britain’s Future’, 130 *Law Quarterly Review* (2014), 215.

<sup>115</sup> Electoral Commission, *2015 UK General Election Results*, at: <http://www.electoralcommission.org.uk> (accessed 31 March 2017).

<sup>116</sup> See <http://www.bbc.co.uk/news/election/2017/results> (accessed 22 June 2017).

<sup>117</sup> Electoral Commission, *EU Referendum Results*, at: <http://www.electoralcommission.org.uk> (accessed 31 March 2017).

with special reference to law or in general, which does not aim at a construction of the ‘other’ and a separation from it, frequently with the consequence of a supremacist attitude towards the other.<sup>118</sup> An inclusive nationalism is an oxymoron, like dry water, although the present SNP government of Scotland claims to stand for only a ‘civic nationalism’, not ethnic nationalism. This seems in principle a better position if one manages to understand what that really means.<sup>119</sup> Nationalism is reminiscent of the nineteenth century,<sup>120</sup> with the most horrendous effects in Europe in the twentieth century, and as such a most troubling element in the discipline of comparative law.

Furthermore, the self-understanding of the ‘in-group’ is typically ascertained negatively, by unfavourable comparison of the ‘other’ to oneself. So one does not ask positively, what is the essence of being ‘Scottish’ or what is really ‘Scots law’, but what it is *not*: *not*-English, *not*-English law, mixed instead with a fundamentally Civilian influence, *not* Common Law, *not* Civil law. The mixture is itself substance of a hardly definable and slightly mystical quality, whereby its ingredients (Common Law, Civil Law) are rejected or at least a distinction is made between them and the ‘Scottish mix’. But because of its *mixité*, Scots law is supposedly even superior to (apparently non-mixed) Civil Law systems,<sup>121</sup> and superior to Common Law, or at any rate, irreconcilably different. This special magic of this unique *mixité*, seemingly the only one in Europe, can be understood properly merely by insiders, Scots, who are chosen to have the cultural background to see and appreciate this, while outsiders, aliens, can naturally never understand that. If one reads the literature of some Scots lawyers on issues of Scots law in relation to English law in particular, that is the inevitable impression one gets from this intellectual atmosphere, no matter in which way that may have been expressed specifically. Therefore the mixed system conception of Scots law would be a useful strategic weapon in the promotion of Scottish political nationalism.

The real situation is different. The main reason is that Scottish political nationalism and Scottish Legal Nationalism in fact operate in different spheres. There are several explanations for that. Tony Blair’s ideological reform of the Labour Party contributed substantially to the collapse of the Left in Britain, especially in Scotland, and as the result of the general elections in 2015 there was only one Labour MP for Scotland in the British

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<sup>118</sup> See the recent newspaper article by C. Heuchan, ‘The parallels between Scottish nationalism and racism are clear’, *The Guardian*, 27 February 2017.

<sup>119</sup> R. Kiely *et al.*, ‘Birth, blood and belonging: identity claims in post-devolution Scotland’, 53(1) *The Sociological Review* (2005), p. 150. ‘Civic nationalism’ is supposed to be based on citizenship and the rule of law, not on biological criteria.

<sup>120</sup> A historic account of Scottish nationalism by G. S. Pryde, ‘The Development of Nationalism in Scotland’, 27 *The Sociological Review* (1935), p. 264.

<sup>121</sup> G. L. Gretton, in E. Reid and D. Carey Miller (eds.), *A Mixed Legal System in Transition*, p. 36 with approving reference to T. B. Smith.

Parliament.<sup>122</sup> But since the 2017 snap elections there are now seven (historically between 40-50), which may be a sign of slight recovery. In this political situation, the government formed by the SNP,<sup>123</sup> which represents mostly the current political nationalism, is still able to pose, apparently successfully, as an essentially left-wing alternative to the classical Left for which Labour historically stood. Legal academics, who are representatives of Scottish Legal Nationalism, are, however, for the most part rather conservative, in accordance with the romantic antiquarian conservatism that characterises Scottish Legal Nationalism.<sup>124</sup> The left-leaning rhetoric with which the SNP canvasses votes may well be inconvenient to them and they may prefer not to be associated too much with SNP political nationalism.<sup>125</sup> After it became clear, following the EU referendum in 2016, that the UK will leave the EU ('Brexit'), the efforts of the Scottish government – trying to alleviate the effects of 'Brexit' or, alternatively, to leave the UK to secure EU membership of Scotland in the long run – make the academic technicalities of Scottish Legal Nationalism appear increasingly irrelevant. Furthermore, Scottish Legal Nationalists were always Europe- and EU-friendly themselves (also as a counterpoint to England), so this aspect has been absorbed in political reality without specific reference to the (private) law.

Another reason is that the input of Scottish academic lawyers in the Scottish legislature is presently rather limited, so questions of the mixed nature of Scots law with its various examples and difficulties remain essentially in academic circles, without any influence of this discourse on the law-making. That can only be welcomed, also with regard to an SNP government, because for a modern legislator technical problems such as the difference between the Scots and the English trust, whether the conveyance of moveable property in Scotland is abstract (apparently classical Scots common law) or causal (English law-influenced Sale of Goods Act),<sup>126</sup> or whether there is a quasi-equitable right in favour of purchasers in case of a delayed formal conveyance of land,<sup>127</sup> are entirely unimportant. The main concerns in governmental and parliamentary practice are typically issues like employment, affordable housing, consumer protection, and so on. Very specialist and theoretical points of private law which serve as fighting dogs in an ideological debate, are

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<sup>122</sup> See e.g. BBC News Elections 2015: 'SNP wins 56 out of 59 seats in Scots landslide', 8 May 2015, at: <http://www.bbc.co.uk/news/election-2015-scotland-32635871> (accessed 31 March 2017).

<sup>123</sup> The SNP formed a minority government in Scotland in 2007, a majority government in 2011 and a minority government in 2016.

<sup>124</sup> The same view in L. Farmer, *Criminal Law, Tradition and Legal Order. Crime and the Genius of Scots law, 1747 to the Present* (Cambridge University Press, 1997), p. 37-38.

<sup>125</sup> The SNP was in fact politically not too far away from the Conservatives, and be it only for tactical reasons (at least until the resignation of Prime Minister Cameron in 2016 after having lost the 'Brexit' referendum), see Oliver Wright, 'Note of French Consul General's claim that Nicola Sturgeon wanted a Tory win was "accurate"', *The Independent*, 22 May 2015, and the press release from the Cabinet Office and the Scotland Office: 'Scotland Office memorandum leak: Cabinet Office inquiry statement', 22 May 2015.

<sup>126</sup> See above under 2.

<sup>127</sup> *Sharp v. Thomson* 1997 SC (HL) 66, and above under 2.

naturally and rightly of no relevance outside the small circle of Scottish academic specialists.<sup>128</sup>

A further ground for the comparative irrelevance of Scottish Legal Nationalism to Scottish nationalism is the essentially pluralistic debate of the ‘mixed system’ idea in Scots law and of the nature of Scottish Legal Nationalism. Even ardent nationalists seem to be scholars first and present their research outcome according to orthodox scholarly methods, also where the results do not fit well the nationalistic narrative. For example, T. B. Smith, one of the founders of Scottish Legal Nationalism, shows in his opinions many inconsistencies with his nationalist stance (‘The rational and the national T. B. Smith’<sup>129</sup>). But he was unable to change or falsify his scholarship in relation to the practical aspects of private law to support a nationalistic position. The same applies to the other ‘nationalist’ scholars of Scots law, as far as I am able to verify that.<sup>130</sup> We have seen that the idea of the ‘mixed system’ is not only a conception used for nationalistic purposes but, in some measure, also a device to exclude non-Scots from competition in the small market of Scottish legal academics. However, it is an entirely different dimension to re-write scholarly research to adapt it to a nationalistic ideology. That would be a route Scottish Legal Nationalist academics are, it seems, not prepared to take, at least not consciously. The result is a cacophony of different voices about Scottish Legal Nationalism and the ‘mixed system’ as its principal concept.

This cacophony is encouraging, but it disqualifies academic opinion and scholarship from obtaining a central role in the making and strengthening of Scottish political nationalism. Political ideologies and mass-movements such as Scottish nationalism, currently led by the SNP, require simple statements and answers, a straightforward and unsophisticated narrative, and a clear aim, irrespective of how romantic and irrational this aim may be. Highly specialised academic viewpoints with many different shades, turns in opinion, caveats, friendly academic or unfriendly personal battles,<sup>131</sup> and, worst of all, intellectual erudition and scholarly knowledge for the sake of it, are, fortunately, unsuitable to the construction of a legal foundation for political nationalism.

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<sup>128</sup> An instructive example by A. Rodger, ‘Thinking about Scots Law’, 1(1) *Edinburgh Law Review* (1996), p. 3-24, at p. 9 regarding the legal amendment by the Damages (Scotland) Act 1993: ‘The moral seems to be the obvious one that people affected by a statutory provision are not concerned with the purity of its legal antecedents or with the idea that it embodies some principle of their national law. Understandably enough, they are simply concerned with the way in which it affects their own position.’

<sup>129</sup> G. L. Gretton, in E. Reid and D. Carey Miller (eds.), *A Mixed Legal System in Transition*, p. 30-31, 39-40.

<sup>130</sup> It is, of course, theoretically possible that I have also been deceived successfully by a nationalistically distorting narrative.

<sup>131</sup> E.g. D. Walker, ‘Review of T B Smith, *Scotland: The Development of its Laws and Constitution*, and: *A Short Commentary on the Law of Scotland*’, 26 *Modern Law Review* (1963), p. 466-468.

b) *The role of Scottish Legal Nationalism and Scots law – or the Law of Scotland – in a possible independent Scotland after ‘Brexit’*

A curious result of a successful Scottish political nationalism could be the demise of Scottish Legal Nationalism. In the current political climate, an independence of Scotland from the United Kingdom is more likely than ever in history. Opinion polls in 2015 after the referendum indicated that,<sup>132</sup> and the planned ‘Brexit’ of the UK could support this trend.<sup>133</sup> Since Scotland has voted in favour of remaining in the EU in all its constituencies with an overall result of 62% in the EU referendum in June 2016, but does not have a veto or a say in the ‘Brexit’ negotiations of the UK central government with the EU (the UK Supreme Court has confirmed this constitutional position recently<sup>134</sup>), this may well fuel the endeavours to seek Scottish independence, something that is part of the political goals of the nationalist SNP government in Scotland anyway. Thus Scotland seceding from the UK to re-join the EU at the earliest possibility is not unrealistic at present. After the British Government has notified the EU of the UK withdrawing from the EU Treaties according to Art 50 of the Treaty of Lisbon on 29 March 2017, the Scottish Government has, based on a resolution of the Scottish Parliament, formally requested an order of the British Government to allow legislation to hold a second Scottish Independence referendum, perhaps by the end of 2018, or after ‘Brexit’.<sup>135</sup>

If the secession of Scotland from the rest of the UK really happens, then the Scottish Parliament is – or ought to be<sup>136</sup> – the legislator of a new country, and the Acts it passes are simply Scots law, since they are the statutes of the nation state of Scotland; the same applies to the case law of the Scottish courts. The meaning of the term ‘Scottish law’ or ‘Scots law’ would then be the equivalent of the terms ‘Dutch law’ or ‘Italian law’. It would be a matter for legal historians to discuss whether Scots law is ‘mixed’, and if so, in which way and from when onwards. One would also realise more strongly that Civil Law systems are often also

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<sup>132</sup> According to a recent poll, there is even a greater percentage in favour of independence than at the time of the Independence Referendum in 2014, see Tom Brooks-Pollock, ‘Scottish independence: Poll shows that more Scots would vote Yes than at last year’s referendum’, *The Independent*, 25 May 2015.

<sup>133</sup> See e.g. opinion polls by Ipsos MORI, ‘Support for independence rises as referendum speculation grows’, 9 March 2017. However, opinion polls (as at May 2017) still point towards against independence with a lead of about 8-12%.

<sup>134</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 150.

<sup>135</sup> David O’Leary, ‘Nicola Sturgeon signs letter asking for second independence referendum’, *The Herald*, 31 March 2017.

<sup>136</sup> This insertion is not intended to irritate, but a reaction to the peculiar debate leading to the Independence Referendum in 2014, when there was no draft constitution tabled which ought to have been the subject-matter of an independence referendum, since it is in law the foundational instrument of a new state. Apparently the Crown (‘the Queen’) should have been retained, but its constitutional role was unclear, especially in relation to the prerogative powers of the Crown: could a Scottish Government govern on the basis of the prerogative powers of the Crown without the Scottish Parliament?

mixed, so for example the German law of securities over land,<sup>137</sup> or the fusion of *droit coutumier* and the *droit écrit* in French law.<sup>138</sup> The principal purpose of the concept of the ‘mixed system’, the notional and practical separation of Scots law from English law, would become redundant, because Scotland as a new state automatically has a recognised independent national law. The ‘mixed system’ conception loses its individualising and differentiating purpose. There is currently no indication that any specific notion of Scots law and its ‘*mixité*’ will have a significant relevance in the discourse of general political nationalism, be it in a devolved Scotland within the United Kingdom or in an independent Scotland. In either case, Scots law will merely be regarded pragmatically as the legal system, the body of law of the nation of Scotland, whether or not it will be an independent state in the future.

Whatever the future of Scotland will be, either in the UK or outside (and then perhaps in the EU at some point), it seems that Scottish Legal Nationalism has become obsolete, particularly after ‘Brexit’. T. B. Smith, the principal academic founder of this ideology, was a man of a long by-gone era,<sup>139</sup> and so is the mindset and framework of Scottish Legal Nationalism. There is still research appearing in praise of T. B. Smith,<sup>140</sup> but such pieces seem to be the last afterthoughts of an antiquarianism that has rightly faded. Scottish Legal Nationalism has promoted research in Scottish legal history and doctrinal law of high academic quality (my own research also benefited immensely from that), but these achievements no longer need the romantic, nationalistic and antiquarian incitement, if they ever needed it at all. If Scotland stays in the UK, the outdated intellectual framework of Scottish Legal Nationalism does not assist the further development of modern scholarship in Scots law, and if Scotland becomes an independent state, Scottish Legal Nationalism as a bulwark against English law will be redundant. In either situation, Scottish Legal Nationalism can and should be consigned to history: this will also permit a more disinterested discussion of the mixed system of Scots private law.

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<sup>137</sup> Difference between the *Hypothek* and the *Grundschild*: both are still regulated in the German BGB, §§ 1113, 1191, although in practical terms the *Grundschild* prevails over the *Hypothek* by far, see H. Prütting, *Sachenrecht* (33<sup>rd</sup> ed, C. H. Beck, 2008), p. 262.

<sup>138</sup> K. Zweigert, H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998), p. 75-80, 87-88.

<sup>139</sup> W. A. Wilson’s obituary of T. B. Smith contains some anecdotes – whether these make T. B. Smith appear more endearing is for the reader to decide. See W. A. Wilson, ‘Sir Thomas Smith’, *The Juridical Review*, Part 1 (1989), p. 1-4.

<sup>140</sup> A. D. MacPherson, ‘T. B. Smith and Max Rheinstein: Letters from America’, 20(1) *Edinburgh Law Review* (2016), p. 42-65.