Jersey & Guernsey Law Review – October 2007

THE CIVIL LAW TRADITION: SOME THOUGHTS FROM NORTH OF THE TWEED

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1 “The Jersey law resembles the Scotch law more than the English law.” So said M Godfray in his evidence to the 1861 Commission.[1] To what extent that may have been true in 1861, and to what extent it may be true now, is not for us to say, but the remark may at least serve as a plea in mitigation: we are conscious of our temerity, as Scots lawyers, in addressing this audience.[2]

Roman law ancient and modern

2 What is Roman law? It is often thought of as a single system. One says that “in Roman law” there were certain types of contracts, or that “in Roman law” there were certain types of servitude. But this is a moving target, for Roman law had a long history. Of course, the same is true of any major legal system. Although assertions about “English law” usually concern the law’s current state, English law has existed for more than a thousand years, and what was true in 1507 may not have been true in 1007 and may not be true in 2007. When people speak of Roman law they are often thinking of Roman law in the first 250 years or so of the Christian era, the so-called classical period; or they may be thinking of the law of the early Byzantine empire in the time of Justinian in the sixth century. But just as the Justinianic compilation, the *Corpus Iuris Civilis*, was the culmination of a thousand years of Roman legal development, a development that had begun in earnest in the fifth century BC with the *XII Tabulae*, so it was also the starting point for what is sometimes called the second life of Roman law, which began about 1100. The revived Roman law was an altered Roman law. It was developed and re-thought by academic lawyers. Much of what we think of today as “Roman law” is in fact not Roman law as such, but a mediaeval and post-medieval academic law. It was based on Roman law, but went beyond Roman law. The Roman materials were used as starting points for new developments, and ideas were also borrowed from the canon law. This academic Roman law is sometimes called the *ius commune*, the common law. Sometimes it is called “civil law”, a slippery term but one which can be used to distinguish the new Roman law from the old. And it was itself a moving target: some important themes in this new Roman law did not fully develop until rather late.

3 It was the new system which was taught in university law schools across Europe. But it was not the actual law in force in any state or province, just as the “American law” of contracts or torts or property that students learn at Harvard is not the law actually in force in Massachusetts, or indeed any other state in the USA, but is a sort of generalised and idealised law, to which actual state laws more or less approximate. In Europe the *ius*

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[1] Evidence given before the Commissioners into the civil, municipal and ecclesiastical laws of the Island of Jersey (1861) para 6926, quoted in S C Nicolle, *The Origins and Development of Jersey Law: An Outline Guide* (1998, revised 2005) para 11.19.

[2] This paper is the revised text of a talk given at the Royal Court in Jersey on 12 June 2007.

commune was the generalised and idealised common law of Europe, or at least much of Europe, and over time it tended to be accepted more and more by the various national and provincial systems. Everywhere the actual law in force was a mix of common law (*ius commune*) and local law (*ius proprium*). The mix varied from place to place and from century to century. For instance in the eighteenth century the Roman law tradition was weaker in northern France and Belgium than it was in southern France and the Netherlands. Only in England (but not Scotland) was the pattern different, but even in England a good deal of Roman law was accepted.

4 Jersey and Guernsey were no exception. *"Quand le droit particulier et municipal se tait, il faut toujours avoir recours au droit commun,*[3] *qui est la règle generalle"* wrote Poingdestre in the seventeenth century.[4] The same was being said in most of Europe.

5 About the end of the eighteenth century the legal world, like the political world, changed. The rise of rationalism made people feel that law should not be dominated by the past but should be re-cast in accordance with the dictates of reason. The rise of the modern nation state meant that laws became national in a way they had never been before. The partial legal unity of much of Europe that had previously existed with the *ius commune* largely disappeared: the law of Europe broke up into fragments. Of course, historical processes are complex, and what has just been said is inevitably an oversimplification. One must not overstate the degree of unity before the late eighteenth century, and one must not suggest that the fragmentation happened at a single moment. Indeed, the final flowering of the *ius commune* happened in the nineteenth century, in Germany, with the "pandectist" school, the school of modern Roman law,[5] and the influence of this school was felt over much of Europe.[6] A more nuanced account would show that the fragmentation was already happening well before the French Revolution, and that it was not completed until the old *ius commune* died in Germany with the coming into force of the German Civil Code in 1900. But the overall picture is correct. Rudolf von Jhering wrote that "legal science" had "degraded" into mere "local law".[7] Intriguingly, the lost legal unity shows signs of reappearing in our own times: a point to which we return later.

Civilian property law

6 We now move from the general to the specific. Property law is a good illustration of modern Roman law. It was one of those areas where the *ius commune* moved forward substantially from the Justinianic law. Jersey and Guernsey share something of the

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[3] Meaning the *ius commune*. The term "common law" has many – too many – meanings. Another is "unenacted law". Another is English common law. Modern French lawyers use the term *droit commun* to mean general French law (typically as contained in the *Code civil*) as opposed to special rules contained in particular statutes.

[4] *Les Privilèges, Lois et Coutumes de l'Ile de Jersey,* published by the Law Society of Jersey in 1928, at 261.

[5] This term is especially associated with Friedrich Carl von Savigny, whose *System des heutigen römischen Rechts*.appeared in eight volumes from 1840 to 1849.

[6] Including France. A good deal of French legal thinking has come from the pandectist school. An example would be the concept of the juridical act (*l'acte juridique*) which has become common coin across Europe.

[7] "*Die Rechtswissenschaft ist zur Landesjurizprudenz degradiert, die wissenschaftlichen Grenzen fallen in der Jurisprudenz mit den politischen zusammen. Eine demütigende, unwürdige Form für eine Wissenschaft*": *Geist des Römischen Rechts* § 1 (p 15 of vol 1 of the 9th edn).

heritage of civilian property law, but it may be that this is an area where the full benefits of that heritage have yet to be fully realised and exploited.

7 In 2004 the bailiwicks marked 800 years since the separation.[8] But 2004 also marked another anniversary, a separation of insular from continental Norman law of a different type. For the enactment of the *Code civil* in 1804 marked the end of Norman customary law,[9] and the bailiwicks experienced a second separation. Louisiana and Quebec had an analogous experience. The former nevertheless to some extent tracked developments in France, and the latter did so more closely.[10] The results have been interesting. But this leads into the topic of the "mixed systems", to which we return later. The reason we mention this point here is that the separation of 1804 may possibly explain, or explain in part, why the property law of Jersey and Guernsey seems not to have gone as far down the civilian path as an outsider might have expected.[11]

8 The value of modern Roman property law – and in the civilian tradition "property" means both movable and immovable property – lies in its structure and concepts more than in its specific rules. Because the essence of that law continues to be found in all modern civilian systems and mixed systems – in France and Germany, in Scotland and Quebec – a lawyer from any one system can open a book about property law in any other and feel immediately at home. The detailed rules vary, but the general ideas are much the same. And the general ideas are readily accessible, in English, through the literature of the mixed systems.[12]

9 First comes the location of property law within law in general, and that begins with the distinction to which law students in most of Europe are introduced in the first week of their studies: the division of law into public and private.[13] Property law belongs to private law.[14] Property rights are examples of patrimonial rights: they are rights in a person's patrimony. The patrimony – *patrimonium*, *le patrimoine* – is the set of a person's assets and liabilities. Then, narrowing the focus, comes the distinction between ownership and possession. Roman lawyers liked to stress the separation of these concepts,[15] and this is a vital theme of civilian property law. Next comes the distinction between different types of property, the most important being that between movables and immovables, which, by the

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[8] Two works marked the occasion: P M Bailhache (ed), *A Celebration of Autonomy 1204-2004: 800 Years of Channel Islands' Law* (2005), and G Dawes (ed), *Commise 1204: Studies in the History and Law of Continental and Insular Normandy* (2005).

[9] Though for long after 1804 the French courts still had to interpret and apply that law to property rights created before 1804. In principle that could, we take it, still happen today. Post-1804 case law of the property law of Normandy may be a source that has been overlooked – a thought which struck us when we came across L A André, *Coutumes de Normandie, lois françaises, jurisprudence des tribunaux et conférences des coutumes voisines (Bretagne, Maine, Orléans, Paris, Perche et Picardie) concernant le voisinage, la mitoyenneté et les servitudes* (1905), which contains a good deal about the customary law as still having continuing legal effect.

[10] In Louisiana, there was a gradual decline in the number of lawyers who could read French. For a time the problem was addressed by the publication of leading French works in English translations.

[11] For the view that more cogniscence should be taken of modern French law, see Gordon Dawes' chapter in *Commise* (n 8).

[12] E.g. K G C Reid, *The Law of Property in Scotland* (1996); C G van der Merwe and M J de Waal, *The Law of Things and Servitudes* (1993) (South Africa); P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property*, 5th edn (2006) (South Africa); A N Yiannopoulos, *Louisiana Civil Law Treatise vol 2: Property*, 4th edn (2001).

[13] *Institutiones Iustiniani* 1.1. 4: *"Duae sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet."*

[14] There is also a public law side to property, such as planning law, land tax law and so on.

[15] "*Nihil commune habet proprietas cum possessione*", as Ulpian put it: *Digesta Iustiniani* 41.2.12.

way, is a distinction that the original Roman law did not draw. Then there comes the key distinction between personal rights and real rights. Real rights are rights in things, such as the right of ownership of a house or of a car. A personal right is a right against a person, such as a contract right. Real rights are absolute rights while personal rights are relative rights. On the whole, and subject to certain qualifications, the sphere of property law is the sphere of real rights.

10 Real rights are themselves of various types. The primary one is ownership, which can held by one person or by more than one – *pro indiviso*, or *par indivision* as the French say. Ownership can be – to use the French term – dismembered: that is to say, chunks can be split off from it, leaving what remains as ownership still, but in a less complete form. These *démembrements* are known as limited real rights. They are also sometimes called the *iura in re aliena*, because by their very nature they are real rights in property that belongs to another person. The main examples are servitude, usufruct and mortgage. Thus when an owner grants a servitude over his land, there are two real rights in that land, the real right of ownership and the limited real right of servitude. Much of civilian property consists of the exploration of these limited real rights and the way they relate to the right of ownership and to each other.

11 Then there is the dynamic side of property law, the way in which real rights are created, transferred and extinguished. Here there is the publicity principle, the principle that, since a real right has third-party effects, its creation or transfer should be made public in some way, so that third parties can know of it: third parties should not be bound by secret acts. Publicity may be by possession or by registration. The publicity principle has certain exceptions. Then there is the principle that *nemo plus iuris ad alium transferre potest quam ipse haberet*:[16] nobody can transfer a greater right than he has. English law has the same principle under the snappier guise of *nemo dat quod non habet*.

12 The great English legal comparatist, F H Lawson, once wrote that civilian property law had a "certain intentional poverty of ideas".[17] By this he meant that it was simpler than English property law, and achieved that simplicity by having only rather a few basic conceptual building blocks. And indeed it is simpler, while at the same time meeting all the requirements of modern developed societies. The one thing that it does not have is the trust. But some civilian property systems have successfully added the trust, including Scotland. The experience of Scotland and other countries shows that, contrary to the nonsense that is sometimes uttered on this subject, the trust can be made to cohere with civilian property law.[18] France has this year passed a law introducing the trust in the *Code civil*, though its scope is limited. Of course, Jersey and Guernsey also have the trust.

The Scottish experience

[16] *Digesta Iustiniani* 50.17.54
[17] F H Lawson, *A Common Lawyer looks at the Civil Law* (1953) 68.
[18] See *e.g.* JM Milo and JM Smits (eds), *Trusts in Mixed Legal Systems* (2001).

13 An independent state until 1707, Scotland is now of course part of the United Kingdom of Great Britain and Northern Ireland. The tercentenary of the Union with England fell to be celebrated in 2007. One result of the Union was the dissolution of the Scottish Parliament and the creation of a new British parliament in London. But since 1999 a separate Scottish Parliament has sat once again in Edinburgh, with extensive devolved powers which extend over much of private law.[19] At the recent elections, the Scottish Nationalist Party received the largest number of seats and formed a minority administration. Thus the possibility that Scotland will eventually break away from the UK and return to independent statehood cannot be ruled out.

14 The legal system of Scotland is quite separate from that of England and Wales.[20] Indeed its separate existence was entrenched in the Treaty of Union. The separation extends both to legal institutions – the courts, the legal profession and the like – and also to the content of the law itself. At the time of the Union, the law in Scotland was typical of much of continental Europe, with a mixture of civil law (*ius commune*) and local law (*ius proprium*), and it was common for Scottish lawyers to receive part of their legal education on the continent – at first in France but, after the Reformation, mainly in the Netherlands. One long-term effect of the Union with England was a degree of penetration by English law, so that today Scotland is classified by comparatists as "mixed", *i.e.* combining significant elements of both civil law and (English) common law. We return to that important subject later.

15 In Scotland, the history of legal writing is long and intermittently distinguished. Already by the time of the Union, the law had been set out systematically and at length by James Dalrymple, Viscount Stair, in his *Institutions of the Law of Scotland*, first published in 1681 but written some twenty years earlier.[21] In the course of the next 150 years, this path-breaking and highly influential account was followed by a series of other "institutional" works – so called because they were often modelled on the *Institutes* of Justinian. Chief among them were Andrew McDouall, Lord Bankton's *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England* (1751-3),[22] John Erskine's *An Institute of the Law of Scotland* (1773),[23] and two works by George Joseph Bell written in the first quarter of the nineteenth century, the *Principles of the Law of Scotland*,[24] the *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence*.[25] Rather like the works Poingdestre or Le Geyt in Jersey, these institutional works are accorded a special status even today and are regarded as giving an authoritative account of the law of their time.

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[19] See generally the Scotland Act 1998.
[20] For a history of Scots law, see J W Cairns, *"Historical Introduction*", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 14-184.
[21] The current edition is the 5th, by D M Walker (1981).
[22] This was reprinted by the Stair Society, vols 41-3, in 1993-5.
[23] The current edition is the 8th, by J B Nicholson (1871, reprinted 1989).
[24] The current edition is the 10th, by W Guthrie (1899, reprinted 1990).
[25] The current edition is the 7th, by J McLaren (1870, reprinted 1990).

16 But the appetite for legal literature was not always sustained. A period of great activity in the 50 years before 1914 was followed by 50 years of relative indolence. When we were law students in the 1970s there were few modern books to consult, and many key topics lacked recent systematic treatment or even – as with property law – any treatment at all. With English law so strong, influential and well-provided in terms of literature, there were periodic calls for fusion with England – in effect for the abandonment of Scots law. For example, in 1907 J Dove Wilson, a judge, wrote that[26] -

> "Scottish Law is still distinctly separate from English. After a union of the crowns for three, and of the legislatures for two hundred years, it was to be expected that the laws of the two countries would be the same. And clearly they ought to be the same, because it is absurd that a small country like Scotland, so intimately connected with a large country like England, should still keep its own law, and uniformity should extend, not only over the United Kingdom, but over the British Empire."

17 Fifty years later, the imperial dream had faded but the difficulty of size remained, as a correspondent reminded the readers of *Scots Law Times*[27] -

> "It seems to me that this small country cannot afford in the middle of the twentieth century to have its own legal system."

18 But just when Scots law was apparently at its weakest, it began to revive, and then, in time, to grow stronger than ever before. The revival can be traced back to the 1950s, and to certain key individuals such as T B Smith of Aberdeen then Edinburgh University, and David Walker of the University of Glasgow. In a small legal system individuals can make a big difference, and without the contribution of Smith in particular – brilliant, charismatic, visionary, and controversial – it is difficult to believe that Scots law would be in the healthy state in which it currently finds itself.[28] But beginnings were slow, and it was only in the 1980s that the revival began fully to be felt.

19 The key to the revival was the carrying out of fundamental research and the publication of its results. At first both were highly problematic. On the one hand, there were few people willing and able to do the writing and research. As Smith commented in 1949[29]-

> "No lawyer could live by his pen in Scotland. In fact, writing on the law of Scotland is an act of piety not of profit. There is a sore need today for such acts of piety, and the duty to enrich the literature of our jurisprudence lies in particular upon the Law Faculties of our Scottish Universities."

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[26] (1907-8) 17 Yale Law Journal 171 at 234.
[27] 1960 Scots Law Times (News) 28.
[28] For Smith's contribution, see E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005).
[29] T B Smith, *Severality of administration of justice in the United Kingdom* 1949 Juridical Review 151 at 169.

20 But on the other hand, even if books were written, few would sell. The legal profession was small and, it seems, careful with money. “It is depressing”, wrote Smith, “to observe lawyers queuing up in the professional libraries to consult the single copy of *Mugwash on Middens*, the fruit of years of patient unrewarded labour on the part of Mugwash, whose wife now takes in washing and whose children beg their bread through the streets.”[30] And David Walker noted that: “It is difficult to resist the conclusion that many practitioners are too ignorant to appreciate the need for books or to know how to use them or too mean and short-sighted to buy them”.[31]

21 Yet in the end books were both written and bought. Here three factors were of particular importance. The first was a programme of energetic commissioning. In 1960 Smith set up the Scottish Universities Law Institute, modelled in part on the Louisiana State Law Institute which he had observed in his mixed legal systems tours of the 1950s (discussed below), and became its first director. The Institute’s remit was, and is, to publish texts on the main areas of Scots law and based on a comprehensive review of the sources. Over the years, many books have been commissioned and published on topics as contract, delict, unjustified enrichment, landlord and tenant, husband and wife, parent and child, prescription and limitation, constitutional law, private international law, criminal law, civil remedies and evidence. Many indeed are now in their second or later editions. Their publication transformed the state of legal literature. Much later, in the 1980s, Smith embarked on a new cycle of commissioning for an encyclopaedia of Scots law – the 25-volume *The Laws of Scotland: Stair Memorial Encyclopaedia*, which was published between 1987 and 1996 and is now in the process of being revised.

22 Secondly, publications were sometimes subsidised or at least underwritten in respect of possible losses. The publications of the Scottish Universities Law Institute were underwritten by the Carnegie Trust. The *Stair Memorial Encyclopaedia* was a joint venture between a commercial publisher (Butterworths) and the Law Society of Scotland. Within the last five years, the Edinburgh Legal Education Trust has subsidised a new series of books, *Edinburgh Studies in Law*,[32] while itself founding a second series, *Studies in Scots Law*, from which it does not expect to make a profit.[33] Interestingly, the funds in the Edinburgh Legal Education Trust derive entirely from the profits of continuing professional development lectures to the legal profession given under the auspices of the University of Edinburgh.

23 The final factor was a massive expansion in the number of students studying law – and hence both of law teachers and, ultimately, of consumers in the form of members of the legal profession. In 1960 there were fewer practising solicitors than half a century earlier. Today there are three times as many.[34] Over the same period the number of universities which offer law degrees has risen from four to ten. The University of

[30] T B Smith, *Legal imperialism and legal parochialism* 1965 Juridical Review 39 at 53.
[31] D M Walker, *Legal scholarship in Scotland* 1960 Scots Law Times (News) 10 at 14.
[32] Five volumes have so far been published by Edinburgh University Press.
[33] The first two volumes were expected to be published in 2007.
[34] In 1960 there were 3,259 solicitors with practising certificates. In 2005 there were 9,637.

Edinburgh alone has a full-time staff of 50 in its Law School. From the point of view of Smith and his colleagues, this expansion was as fortuitous as it was unexpected. The historical tide, it seemed, was running in their favour. As numbers grew, so there was both an increasing supply of law teachers to write books and articles and an increasing group of their former pupils to buy them. Although subsidies for certain types of books remained, law publishing in Scotland became a commercial proposition and even, in some cases, an attractive one.

24 If Scotland's experience shows anything, it is that a modern and scholarly literature is essential to the good health of a legal system. The reasons are obvious. Without books, the law can neither be taught nor found; every legal problem involves a review of primary sources which practitioners lack the time – and, it may be, the skill – to undertake; and there is the temptation – necessity, even – to plunder the books of other systems without much regard to their suitability. Without books a legal system will have a crisis of confidence which may threaten its long-term viability.

25 So much is plain. But legal literature has an importance beyond the convenience of a quick answer to a client's pressing problem. At a deeper level, writing and research achieve knowledge and understanding of the nature of one's own law. As already mentioned, Scots law is a mixed legal system. So, in a broad sense, are the laws of Jersey and Guernsey. But what is the mixture? The only way to find out is to do the research. In its absence, statements about the law's composition are speculative and, it may be, driven by cultural preference. In Scotland a great deal, but by no means all, of that research has now been done. The results are to some extent unexpected. The conventional view, insofar as there was one, had been that the influence of Roman law was confined to relatively marginal areas, most notably the law of movable property (but omitting the most important part, sale of goods, which is regulated by the Sale of Goods Act 1979, a UK statute) and the law of unjustified enrichment. Otherwise there was little left of the civil law tradition. But what was found was quite different. Throughout private law the imprint of civil law remains strong,[35] and nowhere is it stronger than in the law of property, where it had been disguised behind an apparently impenetrable cover of feudalism, and feudal terminology.[36]

26 Although we hesitate, as outsiders, to say anything about Jersey, we detect the same sort of uncertainty which once afflicted Scotland. In what sense can the law really be said to be Norman? What is the continuing value, if any, of writers such as Terrien? To what extent was the civil law received, and how? And following on from that, to what extent is it permissible to make use of civilian writers such as Domat and Pothier? To what extent is modern English law of direct assistance, and to what extent the law of modern

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[35] For details, see R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995); D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997).

[36] K Reid, *Property law: sources and doctrine*, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1 p 185.

France? It may be that the answers to these questions are obvious to everyone other than an outsider. If so, we apologise. But we would be surprised if that were the case.

27 Why does this matter? It matters for its own sake, of course. But it also matters for a quite different reason. Small legal systems, not generating enough law of their own, must borrow to survive. But it is important to borrow from the right place. In assembling an engine – to change the metaphor – it is necessary to use compatible parts. Otherwise the engine will not work. A mixed legal system can easily become a muddled one. If so, it will not work. One thing the Scottish experience shows is that different areas of law have their origins in different sources and influences. A topic in commercial law, for example, may be based on English law while another in private law may be based on Roman law. The implications are both obvious and important. If an area of law – for example, property law – turns out to be predominantly civilian in character, there is little sense, and much danger, in seeking to borrow from English law.[37] To plan the future, therefore, one must first map the past.

28 A discussion of legal borrowing leads naturally to the remaining topics in this paper. At the end we will have something to say about modern European systems and the quest for legal unity, but first it is necessary to outline a recent development of considerable importance for Scotland and, it may be, for Jersey and Guernsey too. This is the mixed legal systems movement.

The mixed legal systems movement

29 In 1915 the noted (English) comparatist, R W Lee, published an article in the Michigan Law Review entitled *The Civil Law and the Common Law – a World View.*[38] In this article, with wonderful imperial pretension, Lee divided up the world according to which of the two types of legal system – for in his view there were only two – prevailed. The results were plotted in a map. But even in 1915 – when the law of empires had done much to displace indigenous laws – the model could not quite be made to work. With regrettable stubbornness, a small number of jurisdictions defied ready classification by appearing to draw their law *both* from the common law and from the civil law. Lee named them "mixed jurisdictions" and gave them their own marking on the map.[39] And so was born the idea of mixed legal systems or mixed jurisdictions.[40]

30 But despite being identified by Lee and, later, by other scholars, mixed legal systems were not at first seen as a distinctive and cohesive legal family. The idea that they might be was first urged by Scotland's T B Smith in the 1950s. Smith was an early exponent of comparative law, and in the course of a wide programme of reading had come across a group of systems whose laws were often extraordinarily similar to those of

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[37] And of course *vice versa*.
[38] (1915) 14 Michigan Law Review 89.
[39] Unfortunately, the scale of the map is too small to show the Channel Islands.
[40] This account of the origins and development of mixed legal systems is drawn from K G C Reid, *The idea of mixed legal systems* (2003) 78 Tulane Law Review 5.

Scotland. And he realised that, in the same way as he had learnt much from those systems, so they could learn much from each other. Indeed this might even be a condition of survival of systems which, by their very nature, were always likely to be under pressure. Smith liked to quote Benjamin Franklin's dictum that "We must all hang together, or most assuredly we will hang separately". The choice was perhaps not accidental: Franklin was writing of the thirteen American colonies in the aftermath of the Declaration of Independence, when hanging together was the means of resisting an imperial power centred in London.

31 What were these mixed jurisdictions? The three Smith most admired were South Africa, Louisiana and Quebec. But there were others, as Lee's map had shown, including the states of southern Africa (notably Zimbabwe), Sri Lanka, Puerto Rico, and the Philippines. In a study published in 1962 Smith added to this list the jurisdictions of the Channel Islands,[41] as others have done since.[42]

32 Smith was an indefatigable traveller to the mixed legal systems of the world, and he invited scholars from these jurisdictions to teach for a few months at a time at Edinburgh University. Despite these efforts, however, he failed to kindle in others the enthusiasm which he felt himself, and by the 1970s it seemed as if interest in mixed jurisdictions was all but spent.

33 Yet suddenly, even dramatically, Smith's vision has started to be realised. A notable turning point was the publication in 2001 of a study of seven mixed legal systems – Scotland, South Africa, Louisiana, Quebec, Puerto Rico, the Philippines and Israel – edited by Vernon Palmer of Louisiana.[43] A whole series of books has followed,[44] including a major comparative study of the private law of Scotland and South Africa.[45] A World Society of Mixed Jurisdiction Jurists was formed at a congress held in New Orleans in 2002, and the second congress, at which Jersey was represented, was held in Edinburgh in 2007. The Society encourages communication among mixed jurisdictions, as well as providing, through its congresses, a regular forum for the exchange of information and ideas.[46]

34 Each member jurisdiction became "mixed" by a series of historical accidents often quite as strange and unexpected as those which affected the Channel Islands; and yet they have similarities which are almost uncanny, as Palmer's book brings out very clearly.

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[41] T B Smith, *Studies Critical and Comparative* xi ("the most ancient of the civilian systems to have come under the influence of English law").

[42] For a notable recent example, see T V R Hanson, *Comparative law in action: the Jersey law of contract* (2005) 16 Stellenbosch Law Review 194.

[43] V V Palmer (ed), *Mixed Legal Systems in Comparative Perspective: the Third Legal Family.*

[44] The most recent contribution is the important chapter by Jacques du Plessis in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006).

[45] R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004). Two other recent works also contain extensive comparison of Scots and South African law: see H L MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006); K G C Reid, M J de Waal and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007).

[46] See http://www.mixedjurisdiction.org.

All mixed jurisdictions have the legal methodology of the common law – although some, such as Louisiana and Quebec, have civil codes, based loosely on the *Code civil*. But the content of the law is decidedly mixed. Public law is always largely common law, whereas private law has a strong civil law influence. And the most civilian area of all is invariably the law of property.

35 It is easy to see the value of these systems to Scotland, and to each other. They provide an often sophisticated literature from countries whose laws tend to be similar to one's own. Their legal development offers solutions, warnings, or at least points of comparison. And they have two practical advantages over the legal systems of continental Europe. First, they work by case law and so can readily be borrowed from. And secondly, for the most part, their literature is written in English. In short, they offer comparative law without pain. For our own part, we have found a study of other mixed systems of considerable help in our writing about the law of Scotland. And what is true in this respect for Scotland is likely to be true also for Jersey and Guernsey.

36 The revival of interest in mixed jurisdictions has a number of causes which cannot be explored here. But one which is of obvious importance is the new project for the unification of private law in Europe; for if the civil law and the common law are to be brought together, where better to look for a model than those jurisdictions which have already achieved – albeit innocently and by accident – this veritable miracle of legal science? This thought brings us to our final topic.

The new Europeanisation

37 The Europe of the nineteenth century, and even more of the twentieth, was on the whole an age of national laws. Roman law and the *ius commune* had become relegated to the realm of the historian. In the past quarter of a century, however, things have changed. A new legal Europe has begun to develop, and Europe is moving towards a juridical future which until recently was unimaginable. To some extent that new and as yet uncertain future has involved a recovery of the past. The legal nationalisation that began at the close of the eighteenth century has gone into reverse gear.

38 To a considerable extent this is because of the European Union. Once upon a time EU legislation was about import duties on bananas. It was economic law. It hardly touched lawyer's law. But things have gradually changed, and there is a growing corpus of legislation impacting on private law. The European Parliament, which of course tends to attract Europhiles, has repeatedly called for increased legal uniformity across Europe and has even called for a single European civil code. The European Commission has responded by agreeing to draft what it calls a Common Frame of Reference (CFR). What exactly this curious phrase means, no one really knows, no doubt because it was a political fudge. The Dutch comparatist, Ewoud Hondius, calls it a "pre-code".[47] There are

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[47] In A Hartkamp et al (ed), *Towards a European Civil Code*, 3rd edn (2004) 13.

those who would put it more strongly: "Just call it a code" says Hugh Collins.[48] Whether the CFR, when drafted, will ever take effect or not, and if so, in what form, is another matter, for the powerful pressure in its favour is balanced by intense opposition, the opposition probably being strongest, as it happens, in the bailiwicks' two neighbours, England and France.[49]

39 But in addition to what is happening at EU level, something is happening that goes further still. Academics have started co-operating across Europe in a way that has never been unusual in other disciplines but hardly used to happen in law. There are various reasons for this, including such mundane matters as cheaper travel and the internet. Another is the new conception of Europe. A third is the re-emergence of a *lingua franca*: not Latin this time but English. This new pan-European legal movement is happening mainly in English. Scottish academics are of course involved, and have the double advantage of having English as their first language and a home legal system which is mixed.

40 What all these academics are doing goes beyond the traditional idea of comparative law. A new and partially integrated European legal culture is, after a long sleep, reviving.[50] This new European legal culture looks not only to the present and the future, but also to the past, which underpins so much of modern law. The distinguished German jurist, Reinhard Zimmermann, has in recent years transformed everyone's understanding of that shared past.[51] Some academics are working on drafts for a possible future European Civil Code.[52] The most important group here is that of Professor Christian von Bar – the "Study Group on a European Civil Code".[53] This has already published several texts, and there are many who believe that what we are seeing are early versions for what will indeed be within twenty years a complete or partial European Civil Code. In any event it seems likely that the von Bar texts will form the basis of the CFR. There are also other groups acting in parallel, though usually with the more modest aim of framing draft legislation for particular areas. An example of what has been produced is the *Principles of European Trust Law*.[54] Another is the *Principles of European Insolvency Law.*[55] Another is the *Principles of European Tort Law*, organised by the "European Group on Tort Law"[56] and running to no fewer than ten volumes. The oldest of these groups, and the best known, is the Lando Group (the "Commission on European Contract Law"),[57] which produced the *Principles of European Contract Law* (PECL).[58] This code of contract law has had a major impact, and

[48] In M Meli and M Maugeri (eds), *L'armonizzazione del diritto privato europeo* (2004) 124.
[49] See generally M W Hesselink (ed), *The Politics of a European Civil Code* (2006).
[50] For a few of the many books that have emerged, see below. There are several important journals such as the European Review of Private Law, the *Zeitschrift für Europäisches Privatrecht*, and the Maastricht Journal of European and Comparative Law. The present paper is orientated to private law, but there is a similar movement in public law.
[51] See in particular his *Law of Obligations: Roman Foundations of the Civilian Tradition* (1990).
[52] The literature is unmanageably large.
[53] http://www.sgecc.net/. And there is the Study Group's "sister" organisation, the Aquis Group: http://www.acquis-group.org
[54] D J Hayton, S C J J Kortmann, H L E Verhagen (eds), 1999.
[55] W W McBryde, A Flessner, S C J J Kortmann (eds), 2003.
[56] http://www.egtl.org/
[57] http://frontpage.cbs.dk/law/commission_on_european_contract_law/. Despite its name, this group never had an official status.
[58] O Lando and H Beale (eds), *Principles of European Contract Law: Parts I and II* (2000); O Lando, E Clive, A PrüM and R Zimmermann (eds), *Principles of European Contract Law: Part III* (2003). Professor von Bar's Study Group emerged as the successor organisation to the Lando Commission.

has set the agenda for contract law in Europe. It has already begun to influence both case law and legislation, as well as legal education. All these texts contain extensive commentary as well as the model legislative text itself. Other groups are not seeking to produce draft legislation but only to explore similarities and difference in the various systems in Europe. The best known is the Trento "Common Core" Group.[59]

41 Without their own university or college of law, the bailiwicks may be less aware of these developments than they ought to be.[60] Yet for Jersey and Guernsey – as for Scotland, England, France and the other jurisdictions of Europe – the developments go beyond the legal academy or bodies concerned with law reform. On one view they presage a future which is pan-European.

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[59] http://www.jus.unitn.it/dsg/common-core/. Some examples of its publications are: R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (2000); M Bussani and V V. Palmer (eds), *Pure Economic Loss in Europe* (2003); E-M Kieninger (ed), *Security Rights in Movable Property in European Private Law.*(2004); M Graziadei, U Mattei and L Smith (eds), *Commercial Trusts in European Private Law* (2005).
[60] But not unaware: Timothy Hanson (n 42) has argued that the *Principles of European Contract Law* might be a suitable model for a reform of the Jersey law of contract.