THE ORIGINS OF THE COMMON LAW AND CIVIL LAW SYSTEMS – AN OVERVIEW OF SCOTLAND AND SOUTH AFRICA

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ABSTRACT

This paper seeks to critically analyse the similarities and differences between the development of the civil law system in France and the common law system in England and Wales. Having established the historical origins and characteristics of the two legal systems, the paper venture into the legal influence these two systems have had in the development in the legal system of Scotland and South Africa. This is done in three folds. Part A, considers the main reasons for the adoption of the common law system, Part B looks at the extent to which the two jurisdictions mirrors the common law system of England and Wales, and finally, Part C considers the other major legal influences in the jurisdictions, particularly aspects of the civil law system. The paper concludes on the note that there is a strong absorption of the common law in South Africa while Scotland remains a true example of a "mixed legal system".

Keywords: Common Law, Civil Law, South Africa, Scotland, France, England and Wales

INTRODUCTION

The legal system of a country is but a reflection of its' heritage, traditions, and socio-political and religious beliefs. England and France have great history behind them that have influenced the development of their legal systems. As such, any attempt to comprehensively study the origins of the two legal systems would fall outside the scope of this short paper. Therefore, this paper will begin by defining the Common Law and Civil law while distinguishing it from its various interpretations. Subsequently, it would briefly examine the development of English Common Law and French Civil Law. Consequently, the differences and similarities between

the two systems would be critically evaluated. The paper concludes that the two systems are distinct; each with its own specialty.

THE MEANING OF THE COMMON LAW AND CIVIL LAW

The Common law and Civil law can refer to several things. The Common law could mean at least four things.[ii] It could be classified as a legal system;[iii] it could refer to the national law,[iv] it could also mean to be the law made by judges;[v] and also the laws that have not traditionally been derived from the courts of equity.[vi] Similarly, the Civil law can refer to Roman law[vii] or the domestic "non-criminal" law.[viii] It could also refer to law which is not military law.[ix] For the remainder of this essay, both the Common law and Civil law would refer to legal systems unless otherwise stated.

THE DEVELOPMENT OF THE COMMON LAW IN ENGLAND AND WALES

The origins of the common law could be traced to Medieval England.[x] Previously, the law was not coherent as different regions of the land had different local and customary rules;[xi] there was nothing "common" to the law.[xii] After the Norman Conquest, kings initiated to consolidate power[xiii] by institutionalizing[xiv] adjudication of disputes in the forms of writs[xv] while leaving juries[xvi] to ascertain facts. Due to the limited nature of writs and the remedies[xvii] it offered, the King was forced to establish the Courts of Chancery,[xviii] headed by His Lord Chancellor, whose task was to remedy[xix] the harshness of the common law using principles of fairness.[xx] Later, records of both the common law courts and courts of equity formed precedents for future cases.

Over centuries, numerous events shaped the common law legal system in England and Wales. In 1215, the Magna Carta[xxi] founded the rule of law.[xxii] In 1536, the Church of England was created[xxiii] and the Act of Union 1536 incorporated Wales with England as one realm.[xxiv] In 1615, the *Oxford's case*[xxv] established that equity prevails over the common law.[xxvi] In 1628, the Petition of Right was signed.[xxvii] In 1651, following the end of the First English Civil war and the execution of Charles I, Parliament is made superior to the monarch.[xxviii] The Bill of Rights of 1689 gave Parliament more freedom.[xxix] In the 1700s, Scotland and Ireland[xxx] are incorporated[xxxi] as one United Kingdom.[xxxii] In the 1800s, courts of the common law and equity are merged together.[xxxiii] In 1973, the UK joined the EEC,[xxxiv] giving rise to a new source of

law;[xxxv] which prevailed[xxxvi] over national legislation.[xxxvii] In 1998, the Human Rights Act was passed which secured[xxxviii] human rights recognised under the ECHR.[xxxix] In 2005, the House of Lord's role as the appellate court of the judiciary ended.[xl] In 2016,[xli] the UK voted to leave the EU. The same year *Miller's case*[xlii] clarified that Parliament had to be involved as withdrawal effects were of fundamental change to the UK's constitutional arrangements;[xliii] with the most recent of developments being the enactment of the EU (Withdrawal) Act 2018 with Britain set to leave the EU in October 2019.[xliv]

THE DEVELOPMENT OF THE CIVIL LAW IN FRANCE

Prior to 1789, there was no French legal system; there were differing regional laws; with the Southern side of France dominated by Justinian's codified Roman law[xlv] such as the *Lex Romana*,[xlvi] and the Northern side dominated by customary law;[xlvii] both sides were influenced by feudal, canon and royal law.[xlviii] Therefore, the civil-law system in France was not an original creation; it was an adoption of Roman law infused with customary laws.[xlix]

Justinian's compilation was lost in the sixth century and rediscovered[l] by Italian scholars in the eleventh century. For legal coherence,[li] from the thirteenth century onwards, monarchs ordered customary laws to be recorded "modelling" Roman law compilations;[lii] with a large compilation[liii] project undertaken in 1453. Simultaneously, the period witnessed great influence from the works of French jurists such as DuMoulin and Domat. Despite attempts at codification, there still remained vast legal differences between regions which was resolved post-French Revolution,[liv] with the enactment of the French Constitution 1791 and the Napoleon's Civil Code 1804.[lv] Following the aftermath of two world wars, France co-founded[lvi] the EEC adding the final source of law[lvii] into their modern legal system.

THE DEVELOPMENTAL DIFFERENCES BETWEEN ENGLISH COMMON LAW AND FRENCH CIVIL LAW SYSTEM

The most striking difference between the two systems is the codification[lviii] of the law. In the 1000s when France began adopting Roman law into their legal system, England already had a developed legal system of their self-making, engrained in case law; hence, England never had the "need"[lix] to compile the law. This French obsession for codification is also reflected today

with the French having a Constitution[lx] whereas England remains one of the oldest democracies[lxi] in the world without having one.

Similarly, the French Constitution enshrines, since 1971,[lxii] with its preamble "…a list of norms…"[lxiii] regarded as the *bloc de constitutionanalité*, which integrates human rights,[lxiv] social and economic rights[lxv] and some fundamental principles[lxvi] recognised under the Preamble of the 1946 Constitution and, since 2005, rights and obligations arising out of environmental matters.[lxvii] In comparison, it was not until[lxviii] the enactment of the Human Rights Act 1998 that human rights were guaranteed in the domestic courts[lxix] of the UK. The point to takeaway from this distinction is that in the absence of a written constitution, it is the English judiciary that guarantees protection of the rights of the people whereas in France it is the *Conseil Constutitionnel*.

Moreover, the law-making in England is exclusively left to Westminster[lxx] Parliament with questions of constitutionality determined solely by the courts of the judiciary. In contrast, proposed statutes that have been passed by the French Parliament and awaits Presidential signature must conform[lxxi] to the French Constitution of 1958 as determined by the *Conseil Constutitionnel*, which is a non-state actor.[lxxii] Put simply, the French Parliament has sovereignty limited by the Constitution, whereas Westminster Parliament is unbound – it can pass legislation banning smoking in the streets of Paris[lxxiii] or require all blue-eyed babies to be killed.[lxxiv]

Furthermore, as England was never geographically "European", continental legal developments had limited reach and influence as testified with adjudication of disputes in the two courts systems. The French doctrine of separation of powers[lxxv] strictly forbids French judges from participating as legislative authority[lxxvi] – courts must follow the *principes généraux de droit;*[lxxvii] because of which French judicial decisions are not binding on future cases – no doctrine of *stare decisis*.[lxxviii] Alternatively, despite the English model[lxxix] of separation of powers demarcating the judiciary from the executive and legislature, judges do make law which are binding but they do not legislate – they merely "declare" the law.[lxxx] Indeed, this reality is evidenced with the common law defining murder,[lxxxi] as opposed to statutes.[lxxxii] The French fear of the judiciary overriding the legislature's authority roots to the mischief of the royal courts of the *Ancien Régime*[lxxxiii] of the time.[lxxxiv] However, for the English judiciary's declarations, such a notion is, if not encouraged is often welcomed.[lxxxv]

THE DEVELOPMENTAL SIMILARITIES BETWEEN ENGLISH COMMON LAW AND FRENCH CIVIL LAW SYSTEM

English common law is much closer to classical Roman law[lxxxvi] than that which was adopted by the French. Unnaturally, the similarities between English and French systems are limited to a few. One of them, as Stein notes is that both the systems were originally grounded in case law with rules being narrowed down from individual cases as principles;[lxxxvii] while the French compiled these "principles" in the form of codes, the English retained it in cases – but in essence, they are the same.

Another similarity between the two legal systems arises from the influence of canon law. Almost all English equitable principles could be traced back to the teachings of the Catholic Church as most Lord Chancellors also held high office in the Church.[lxxxviii] Similarly, the 1804 Civil Code embodies narrowed-down principles of equity from Justinian's *Corpus*. Modern-day equity is dispensed by the English courts from "principles"[lxxxix] whereas for the French it's through judicial interpretation of the codes[xc] – the historical root for fairness for the two systems are the same.

However, the most significant developmental similarity between the two legal systems stems from the increased persistence of democracy. Time and time again both the French and English have resisted the absolutist authority[xci] of the monarch and a system of governance that may allow a corrupt cohesion of two organs of the State. This is observed with the French abolishing the monarchy[xcii] and the English limiting the powers[xciii] of the Crown. Subsequently, this has led the French to conform to the doctrine of separation of powers absolutely whereas the English, even with a partial separation of powers, continues to maintain separation with strong constitutional conventions – in this, they are one and the same in purpose.

CONCLUSION

We have explored and examined the legal legacies of the world's oldest legal champions. We have observed the inception, and addressed the events, that have come to shape the foundation of the two legal systems. What we are left with is two unique systems of governance, each with its own idiosyncrasy. Neither one could be said to be better than the other as each completes and competes with the others' shortcomings. Conclusively, it could be said that both the

systems are much like the two sides of a coin – they are one and the same; but each reflecting a different side of history.

Part A: Reasons For Adoption Of The Common Law System

South Africa –

South Africa's legal system shadows the imprints of colonial history.[xciv] Its' legal system originates in 1652 with the Dutch settlement at the Cape of Good Hope.[xcv] The settlers' system operated on *Roomsch-Hollandsch Recht*[xcvi] law,[xcvii] and for roughly 150 years it operated as such; till in 1795 when the region was first occupied by the British.[xcviii] As the Roman-Dutch legal system was weak to administer and control English settlers and the superadded fact legal institutions were "…rudimentary, [and] inefficient…",[xcix] there was a need for reformation of the legal system, which was ultimately left by the English to the Dutch in 1803.[c]

The English returned in 1806 marching for large legal reforms.[ci] Despite the Articles of Capitulation[cii] promising to preserve the operation of the Roman-Dutch law,[ciii] throughout the 1820s, the policy[civ] for anglicising the legal paradigm, to accommodate to the needs of the arriving Britishers gained momentum. Furthermore, in 1828 a Supreme Court and subsequent lowers courts were established displacing the Dutch courts of the time,[cv] thereby embedding English procedural law in the legal system. As the judges were British trained, English authorities would often be used to establish precedent for cases; thereby injecting another layer of English common law.

Additionally, due to the attempted adoption of a "codified" law like the *French Civil Code 1809*, legal development had ceased under the Dutch regime forgoing the modern needs of the populace. Moreover, due to the commercial significance[cvi] of the Cape, the laws of the region had to be "aligned"[cvii] with that of the laws of England and its British colonies.[cviii] Put simply, therefore, South Africa adopted the common law system because of historical origins, developmental and modern needs and necessity to align the British colonies under one unison system of legal governance.

Scotland –

Prior to 1707, Scotland had a developed legal system composed of feudal laws, Roman laws and Canon law.[cix] Scotland became one with England with the Act of Union 1707.[cx] However,

the Scottish legal system was not anglicized over a night. Indeed, "…sovereignty over Scotland was [never] transferred to England."[cxi] Although Scotland had adopted Anglo-Norman institutions of governance in the thirteenth century,[cxii] Articles XVIII of the Act promised to preserve Scottish law and the Scottish court structure,[cxiii] except for laws relating to customs and excise and trade (these were coalesced with English law) and excepts laws that would provide "evident utility of the subjects within Scotland";[cxiv] while Article XIX prohibited English courts from hearing or pronouncing judgment over Scottish cases.[cxv] Therefore, although English institutions were "borrowed" the laws retained to be Scottish except for in cases of customs and trade purely because of economic consistency.

Another reason why the Scottish adopted the common law legal system was due to the vacuum created by the lack of trained Scottish legal professionals in the sixteenth century. During this period Scotland was geographically influenced by the English.[cxvi] Although the position changed by the end of the eighteenth century when French and German civil law trained lawyers started to practice in Scottish courts;[cxvii] much of property law and the law of succession was adopted[cxviii] from the English jurisdiction. Furthermore, till 1999 Scottish laws[cxix] were made in Westminster Parliament. This along with the House of Lords' Appellate Committee serving as the highest court for Scotland further cemented the English common law in Scotland.[cxx]

However, the most significant reason for Scotland adopting the common law legal system was because of ease of transition in itself. From the 19th century, there was a shift in tendency whereby Scots sought unity with the larger English-speaking community.[cxxi] This fluidity of linguistic ease, coupled with the weakness inherited by the Scottish reception of Roman law[cxxii] and perception that civil law arose from dictatorships[cxxiii] presented the Scots with a lucrative opportunity to adopt a legal system based on freedom and justice.

Part B: Extent To Which The Common Law Systems Mirror That Of England And Wales

South Africa –

English law was imported into South Africa by way of statute from the nineteenth century.[cxxiv] English common law influence dominates in matters of commercial, company, criminal, constitutional and administrative law. Particularly, in regards to commercial law there is a

strong influence of English principles. Negotiable instruments such as promissory notes and cheques are governed by the Bills of Exchange Act 34 of 1964. This Act is very similar to the British Bills of Exchange Act 1882.[cxxv]

In relation to company law, although English case law are not directly binding on South African courts, they are strongly persuasive. This is seen with the *Turquand*[cxxvi] rule;[cxxvii] a complete English company law borrowing.[cxxviii] In regards to constitutional principles, formation of the South African State strongly borrows itself from the Westminster model with the four territories exercising limited devolved powers while having the principle of parliamentary sovereignty at the heart of it.[cxxix] Similarly, South African administrative law owes great borrowings from the English too, particularly, the idea of constitutionalism from A. V. Dicey.[cxxx]

As a whole therefore, although the modern day South African legal system is a “mixed” system, it strongly resembles English doctrines and principles. In that extent, South African common law legal system greatly resembles English the common law system.

Scotland –

The Act of Union 1707 forged economic and political partnership between Scotland and England, particularly in mercantile,[cxxxi] labour and administrative matters.[cxxxii] The Act stipulated for harmonization of laws relating to trade, customs and excise, essentially transferring English commercial law doctrines into the Scottish legal system by way of statute and case principles. Private law, however, at least initially, remained Scottish till the nineteenth century. This is made evident by basic Scottish contract law; which distinctly layered its civil heritage through arrangements such as unilateral obligations and the non-requirement for consideration.[cxxxiii] Similarly, property law despite originating in the skin of the common law has infused itself with much of the continental law. While the English abandoned the concept of feudalism, the Scots retained it till 2004.[cxxxiv] The same is equally true for the law of succession and torts (delict for the Scots). In terms of civil procedure, the law still retains the adversarial system whereas criminal procedure coincides largely with the inquisitorial system of continental Europe.[cxxxv]

Conclusively, therefore, it could be said that the Scottish legal system is truly “mixed”. While most matters of commerce and trade owe debt to the English, private law remains distinct with

faded traces of the Roman heritage infused with subtleties of the common law. Hence, the Scottish legal system does not mirror the English common law to a large extent.

Part C: Other Major Legal Influences In These Jurisdictions

South Africa –

In 1652, Jan van Riebeeck brought Roman-Dutch law to the Cape of Good Hope. Prior to this the Cape, with the African people operated on the basis of African customary or indigenous law.[cxxxvi] After the anglicisation of the legal system from the 1800s, the South African system was injected with religious laws of the Arab, Indian and Judaeo-Christian settlers arriving at the Cape.[cxxxvii] However, religious law only covers personal laws of religious groups, unlike customary law which is applicable to a range of legal issues.

In addition, South Africa greatly refers back to the "old authorities" – written texts of Roman-Dutch scholars, in case judgments. These include but are not limited to Johannes Voet's *Commentarius ad Pandectas*, Simon Van Leeuwen's *Het Roomsch Hollandsch Recht*, Hugo De Groot's *Inleidinge tot de Hollandsch Rechtsgeleeidheid* and Van der Linden's *Rechtsgeleerd, Practicaal en Koopmans Handboek*.[cxxxviii] However, as these writings do not have the force of law, they may be "abrogated by disuse or … [be] superseded by the operation of doctrine of precedents."[cxxxix]

In contrast, section 211 (1) of the South African Constitution requires Courts to apply customary law where it is applicable.[cxl] Customary law covers familial matters and matters associated to property and inheritance. While the "law" operates on strict vindication of rights, customary law emphasises on reconciliation. In this respect, South African legal practice is more "civil" than "common".

Scotland –

Thirteenth century Scots law was composed of feudal law and customary law. After the Scottish Wars of Independence, Roman law was injected in the Scots legal system.[cxli] This continued till the end of the fifteenth century, when the Roman law entered in the form of canon law with the adoption of romano-canonical procedures in ecclesiastical courts. The insemination of Roman law in the Scottish legal structure is afforded testimony in several Acts of Parliament such as the Tutor's Act 1474 and the Liferent Caution Act 1491.[cxlii]

In the meantime, the community of Scots lawyers acquired professional training from Europe, particularly from France and Italy, and post Reformation from the Netherlands and Germany. When these foreign trained lawyers came back, they imparted their continental education in Scottish courts and subsequently cases. These "impartments" of foreign origin established variant Roman law into the Scottish legal system.

Additionally, Scotland was influenced by scholarly writings; particularly that of Sir Thomas Craig,[cxliii] James Dalrymple,[cxliv] Sir George Mackenzie's work[cxlv] on property law i.e. matters such as heritable and movable properties, Andrew McDouall's writings[cxlvi] on civil rights and Joseph Bell's work,[cxlvii] which was later expanded to mercantile law.[cxlviii]

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[xxviii] Despite the monarchy being restored in 1660 by Charles II
[xxix] Art 9; Ian Loveland, *Constitutional, Administrative & Human Rights Law* (7th edition, Oxford University Press 2015) p 236
[xxx] Ireland became an independent state in 1921 with 6 counties in the North forming part of the UK.
[xxxi] Acts of Union 1707 and 1801 made Scotland and Ireland a part of the United Kingdom.
[xxxii] During this period great English colonies embraced independence such as Canada, Australia and Hong Kong.
[xxxiii] The Judicatures Acts of 1873 and 1875; (see also) Ian Loveland, *Constitutional, Administrative & Human Rights Law* (7th edition, Oxford University Press 2015) p 128
[xxxiv] The European Economic Community.
[xxxv] S.2(1) of the European Community Act 1972 gave direct effect within the UK; EU Regulations and Treaties automatically become binding without the requirement of Acts of Parliament.
[xxxvi] R (Factortame Ltd) v Secretary of State for Transport Case C-213/89 at para [17] of I-2473
[xxxvii] S.14 of the Merchant Shipping Act 1988 was disapplied.
[xxxviii] S.2(1) of the Human Rights Act 1998 requires domestic courts to "take into account" various decisions of the ECtHR.
[xxxix] European Convention of Human Rights.
[xl] By means of the Constitutional Reform Act 2005; with a new Supreme Court of the UK being made in 2009.
[xli] 23rd June 2016
[xlii] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5
[xliii] As per Lord Neuberger; < https://www.bbc.com/news/uk-politics-38720320 > accessed 1st July 2019
[xliv] Rowena Mason,"Boris Johnson becomes PM with promise of Brexit by 31 October" *The Guardian* (London, 24th July 2019)
[xlv] As it was written law, it was regarded as *Pays du Droit écrit* – "country of written law"
[xlvi] This document along with the *Codex repetitae praelectionis*, the Digest, the Institutes and the Novels made Emperor Justinian's *Corpus Iuris Civilis*; (see also) George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*, (2015 edition, Springer International Publishing, 2015) p 210
[xlvii] As the law was customary, it was regarded as *Pays des Coutumes, droit coutumier* – "country of customs"
[xlviii] Catherine Elliot, Eric Jeanpierre & Catherine Vernon, *French Legal System* (2nd edition, Pearson Education 2006) p 2 – 3
[xlix] George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (2015 edition, Springer International Publishing, 2015) p 204
[l] At the University of Bologna, Italy; (see also) Diana Nestorovska, "Influences of Roman Law and Civil Law on the Common Law" (2005) 1 Hanse L Rev 79 at p 80
[li] *Supra* n.50 at p 288
[lii] Such as the *Les Livres de Jostice et de Plet* (The Books of Justice & Pleadings), *Coutumes de Beauvaisis* (The customs of the country of Clermont in Beauvaisis) and some compilations of authority of feudal lords (*Chartes de coutumes*)
[liii] King Charles VII order compilation of customary laws of the whole region; known as the Orinance of Montils-les-Tours
[liv] *Ibid* n.52
[lv] Raymond Youngs, *English, French & German Comparative Law* (3rd edition, Routledge Publishing 2014) p 64
[lvi] Lorna Woods & Philippa Watson, *Steiner & Woods EU law* (12th edition, Oxford University Press 2014) p 3
[lvii] European Union law.
[lviii] < https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf > accessed 3rd July, 2019
[lix] As per Prof Robert Hazell on < http://news.bbc.co.uk/2/hi/uk_news/politics/7241942.stm > accessed 3rd July, 2019
[lx] 15 constitutions in total since the 1789 Revolution.
[lxi] < http://www.oldest.org/politics/democracies/ > accessed 4th July, 2019
[lxii] Conseil Constitutionnel Decision 71-44 DC, 16th July 1971, *Liberté d'association*, Rec. 29
[lxiii] Eva Steiner, *French Law – A Comparative Approach* (2nd edition, Oxford University Press 2018) p 6
[lxiv] Adopting the 1789 Declaration of Rights of Man which affirms principles such as equality under the law and the presumption of innocence.

[lxv] Such as the right to education and the right to health protection.
[lxvi] Principles such as the freedom of association and the freedom of conscience.
[lxvii] Under the 2004 Charter for the Environment.
[lxviii] Despite Art 46 of the European Convention on Human Rights requiring the UK to give effect to the judgments of the European Courts of Human Rights, it was not enforceable until the 1960s.
[lxix] < https://constitution-unit.com/2016/05/03/the-human-rights-act-1998-past-present-and-future/ > accessed 5th July 2019
[lxx] Comprising of the House of Commons and the House of Lords.
[lxxi] The objectives of the French Parliament are set out in art. 24 of the French Constitution of 1958
[lxxii] The *Conseil Constitutionnel* (Constitutional Council) is not a part of the executive, the legislature nor the judiciary. It is an independent body which checks the constitutionality of proposed legislation of the Parliament.
[lxxiii] Sir Ivor Jennings, *The Law and the Constitution* (5th edition, University of London Press 1964) p 170 – 171; (see also) Ellison Kahn, "Constitutional and Administrative Law" (1968) 1968 Surv S African L 1 p 4
[lxxiv] Neil Parpworth, *Constitution and Administrative Law* (9th edition, Oxford University Press 2016) p 76
[lxxv] Art. 10 Law of 16-24 August 1790
[lxxvi] Art. 5 of the French Civil Code.
[lxxvii] General principles of the law.
[lxxviii] Latin term which means to "stand by what has been decided".
[lxxix] David Pollard, Neil Parpworth & David Hughes, *Constitutional & Administrative Law – Texts with Materials*, (4th edition, Oxford University Press 2007) p 45
[lxxx] Scott Slorach, Judith Embley, Peter Goodchild & Catherine Shephard, *Legal System and Skills*, (2nd edition, Oxford University Press 2015) p 141
[lxxxi] By Sir Edward Coke in *Institutes of the Laws of England*, 1797 Part 3 Co Inst 47
[lxxxii] For over 200 years England has retained the definition of the vilest of offences from the common law as opposed to statutes.
[lxxxiii] Refers to the socio-political system before the French Revolution of 1789.
[lxxxiv] Eva Steiner, *French Law – A Comparative Approach* (2nd edition, Oxford University Press 2018) p 66
[lxxxv] Take the example of R v R [1991] UKHL 12 – even where Parliament was silent for centuries of common law practice over the exemption of martial rape, it was the judiciary who took a stand for the people and corrected the common law.
[lxxxvi] Peter G Stein, "Roman Law, Common Law and Civil Law" (1991-1992) 66 Tul L Rev 1591 at 1594
[lxxxvii] *Ibid* n.87 at 1595
[lxxxviii] Alastair Hudson, *Understanding Equity & Trust* (3rd edition, Routledge-Cavendish 2008) p 207
[lxxxix] Latin maxims embodying the fundamental principles of equity.
[xc] Anne-Françoise Debruche," What is "Equity"? Of Comparative Law, Time Travel and Judicial Cultures*"* (2009) R.G.D 39(1) 203 at 214
[xci] Jean Brissaud, *A History of French Public Law 1915* (1st edition, Cornell University Library 2009) p 552 - 554
[xcii] In September 1792 the French monarchy was abolished with the execution of King Louis and his Queen in 1793.
[xciii] This is owed to the Magna Carta 1215, the English civil wars and the Bill of Rights of 1689; each further limiting the scope of the monarch's power.
[xciv] Van der Merwe & Jacques Du Plessis, *Introduction To The Law of South Africa* (1st edition, Kluwer Law International 2004) p 5
[xcv] *Ibid* n.95 at p 9
[xcvi] The term was coined by Simon van Leeuwen in the 17th century which translates as Roman-Dutch law.
[xcvii] Lee, R.W. ,"Roman-Dutch Law in South Africa" (1924) 40 LQ Rev 61 at [62]
[xcviii] Van der Merwe & Jacques Du Plessis, *Introduction To The Law of South Africa* (1st edition, Kluwer Law International 2004) p 10
[xcix] *Ibid*
[c] Jeremy Sarkin, "The Common Law in South Africa: Pro Apartheid or Pro Democracy" (1999) 23 Hastings Int'l & Comp L Rev 1 at [2]
[ci] *Supra* n.95
[cii] Articles I and II of the Royal Proclamation of September 23, 1799; (see also) W F Craies, "The Law of South Africa" (1990) 2 J Soc Comp Legis NS 233 at [233]
[ciii] Van der Merwe & Jacques Du Plessis, *Introduction to The Law of South Africa* (1st edition, Kluwer Law International 2004) p 11
[civ] *Supra* n.101

[cv] *Ibid* n.104
[cvi] Prof Lee, "The Roman Law and Common Law Elements in Law of South Africa and Ceylon" (1959) 1959 Acta Juridica 114 at [116]
[cvii] Van der Merwe & Jacques Du Plessis, *Introduction to The Law of South Africa* (1st edition, Kluwer Law International 2004) p 11
[cviii] *Ibid* n.107
[cix] William Tetley, "Mixed Jurisdiction: Common law v. Civil law (Codified and Uncodified) Uniform L.R. 1999, 4(3) 591 at [691]
[cx] < https://www.parliament.uk/documents/heritage/articlesofunion.pdf > accessed 7th August 2019
[cxi] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide – The Third Legal Family* (2nd edition, Cambridge University Press 2000) p 216
[cxii] *Ibid* n.112
[cxiii] *Supra* n.112 p 220
[cxiv] *Supra* n.112 at p 222
[cxv] *Ibid* n.112
[cxvi] J W Cairns, "Codification and Scottish Legislation" (2007) 22 Tul Eur & Civ LF 1 at [5]
[cxvii] *Supra* n.112 p 218
[cxviii] W. D. H Sellar, "Scots law: mixed from the very beginning? A tale of two receptions." (2000) Edin. L. R. 3 at [7]
[cxix] S.1(1) of the Scotland Act 1998 established the Scottish Parliament.
[cxx] *Supra* n.112 at p 223
[cxxi] Alan Rodger, "Thinking about Scots law" (1996) Edin. L. R. 3 at [18]
[cxxii] Robin Evans-Jones, "Reception of law, mixed legal systems and the myth of the genius of Scots private law" (1998) L.Q.R. 228 at [232]
[cxxiii] *Ibid*
[cxxiv] William Tetley, "Mixed Jurisdictions: Commo law v. Civil law" (2000) 60 (3) La. L. Rev 678 at [693]
[cxxv] Van der Merwe & Jacques Du Plessis, *Introduction To The Law of South Africa* (1st edition, Kluwer Law International 2004) p 333-334
[cxxvi] Formulated by the English case of Royal British Bank v Turquand [1856] 6 E & B 327
[cxxvii] The principle that a third party can presume that an agent of the company has followed all internal procedures and obtained all internal approvals before concluding a contract on behalf of the company he represents.
[cxxviii] Van der Merwe & Jacques Du Plessis, *Introduction To The Law of South Africa* (1st edition, Kluwer Law International 2004) p 371
[cxxix] *Ibid* n.129 at p 57
[cxxx] *Supra* n.129 at p 108
[cxxxi] Alan Rodger, "The Codification of Commercial Law in Victorian Britain" (1992) L.Q.R. 108 (Oct) 570 at [572]
[cxxxii] William Tetley, "Mixed Jurisdiction: Common law v. Civil law (Codified and Uncodified) Uniform L.R. 1999, 4(3) 591 at [604]
[cxxxiii] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide – The Third Legal Family* (2nd edition, Cambridge University Press 2000) p 256
[cxxxiv] S.1 of the Abolition of Feudal Tenure (Scotland) Act 2000
[cxxxv] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide – The Third Legal Family* (2nd edition, Cambridge University Press 2000) p 252 - 253
[cxxxvi] Philip F Iya, "The Legal System and Education in Southern Africa: Past Influences and Current Challenges" (2001) 51 J Legal Educ 355 at [356]
[cxxxvii] T P van Reenan, "The Relevance of Roman-Dutch law for Legal Integration in South Africa" (1995) 112 South Africa L. J. 276 at [278]
[cxxxviii] Van der Merwe & Jacques Du Plessis, *Introduction To The Law of South Africa* (1st edition, Kluwer Law International 2004) p 47
[cxxxix] *Ibid* n.139 at p 48
[cxl] Chapter 12, Section 211 (1), The South African Constitution.
[cxli] Cornie van der Merwe, "The Origin and Characteristics of Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation (2012) 18 (1) Fundamina 91 at 104-105
[cxlii] Cornie van der Merwe, "The Origin and Characteristics of Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation (2012) 18 (1) Fundamina 91 at 104
[cxliii] *Ius Feudale (1655)*

[cxliv] James Dalrymple and Viscount Stair's *Institutions of the Law of Scotland (1657)*
[cxlv] Sir George Mackenzie's *Institutions of Law of Scotland (1754)*
[cxlvi] Andrew McDouall's *An Institute of Laws of Scotland in Civil Rights (1753)*
[cxlvii] Joseph Bell's *Principles of the Law of Scotland*
[cxlviii] Cornie van der Merwe, "The Origin and Characteristics of Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation (2012) 18 (1) Fundamina 91 at 107-108