LEGAL EDUCATION IN SCOTLAND AND QUEBEC

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TABLE OF CONTENTS.

ABSTRACT

This thesis shall look at legal education in Scotland and Québec from a comparative standpoint. It shall question whether a nationalistic characterisation of law in these two jurisdictions is an accurate one, and whether nationalism is an appropriate value in the teaching of law. The establishment and character of legal education in Scotland and Québec will be considered, as will the relationship of the legal professionals to legal education.

Dans cette thèse l'auteur entreprend de comparer l'enseignement de droit tels qu'il existe en Ecosse et au Québec. Dans notre exposé nous nous poserons la question de savoir si une characterisation nationaliste du droit a bien sa place dans ces deux juridictions, et si le nationalisme juridique est une valeur appropriée à l'enseignement du droit. A cette fin, nous étudierons non seulement les fondements et les caracteristiques de l'enseignement du droit en Ecosse et au Québec, mais aussi l'influence que peuvent avoir les professions juridiques de ces deux juridictions sur l'enseignement de droit.

LEGAL EDUCATION IN SCOTLAND AND QUEBEC.

INTRODUCTION.

One of the main features of Scots law and Québec law has been the influence which other legal traditions have exerted upon them. The reception of laws has been a formative and continuing influence upon their legal cultures.[1] One of the most controversial features of Scots and Québec law is the influence which the common law has exerted upon them. Legal education might cultivate a critical approach to this controversy.

Typically, the initial reception of Anglo-American law has been attributed to the political ascendancy of a country with a common law tradition.[2] The Anglo-American common law has prevailed not by its superior quality but by

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[1] T.B.Smith has written that "the Scottish system has been largely developed by comparative jurisprudence, and has drawn its principles, its categories and its methods from different sources at different stages of its evolution" in "English Influences on the Law of Scotland" in Studies Critical and Comparative, (Edinburgh: W.Green & Son Ltd., 1962) at p.116.

[2] "Impositon from without or servile acquiescence from within reflect the inequalities of political, economic, intellectual, and shall I say moral forces ranged behind the competing jurisprudential attitudes", T.B.Smith "The Preservation of a Civilian Tradition in Mixed Jurisdictions" in Yiannapoulis ed. Civil Law in the Modern World, (Baton Rouge: Louisiana State University Press, 1965) at p.11.

the range of the political forces behind it.[3]

However, historians have traced the currents of migration and reception of legal ideas and have demonstrated that the reception of laws is a phenomena which is known to every legal tradition. Professor Alan Watson contends that legal borrowings occur on such a grand scale that they correspond to "cultural rules of legal borrowing".[4] For Professor Watson, legal tradition is the most important factor in legal development, laws are very rarely created de novo; the longevity of legal rules and the scale on which receptions have occurred point to the importance of tradition in law.[5]

A contrasting view is that laws are strongly tied to one nation. This finds its ideological foundation in the work of Montesquieu, who stressed the necessary connection between law and the particular people for whom they were

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[3]In this way, the type of anlaysis of reception mastered in Koschaker's work becomes prevalent. Paul Koschaker used the comparative method to study the reception of Roman law in national systems of law, specifically in Italy, France, Germany and England. Paul Koschaker Europa Und Das Romische Recht, 2d ed., (Munchen: Beck, 1954) at p.136-138. Koschaker concluded that the main reason for the reception of foreign law in a national system was not because of the superior quality of that foreign law, but rather a question of power (Machtfrage).

[4]A.Watson The Evolution of Law, (Baltimore: John Hopkins University Press, 1985) at p.67.

[5]For a pellucid account of the traditionality of law see M.Krygier "Law as Tradition" (1986) 5 Law and Phil. 232. See also A.T.Kronman "Precedent and Tradition" (1990) 99 Yale L.J. 1029.

formulated.[6] In Québec and Scotland nationalism leads to the assertion that law is culturally specific, and that one strand of their legal heritage is more important than another.

A nationalistic approach to law emphasises the internal dynamics of a legal "system" in force within certain boundaries; it ignores the interplay between different legal traditions.[7] In Scotland and Québec this leads to the assertion that the legal "system" is in conflict with another "system", as if in a battle for supremacy.

The controversial influence of the common law upon Scots and Québec law is mapped out in terms of conflict.[8] The common law "system" is perceived as being the stronger, despite the historians' insights into the extent to which the common law has borrowed principle and form from the

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[6]C.deSecondat, Baron de la Brède et de Montesquieu De l'Esprit des Lois, (Geneva: 1748).

[7]The literature on the relationship of legal tradition to legal system is too extensive to explore in this thesis. I have attempted to avoid using the term "system", except where this is the original choice of vocabulary, or the term used for a certain debate (for example, the "classification of legal systems"). See H.P.Glenn "Droit Comparé et droit québécois" (1990) 24 R.J.T. 341. See also J.H.Merryman The Civil Law Tradition, 2d ed., (Stanford: Stanford University Press, 1985).

[8]See H.P.Glenn, supra n.7 at p.346. When two legal "systems" are in conflict with one another, it will be the stronger which will conquer.

civil law."[1] These questions will be discussed in the first chapter and referred to throughout the thesis.

In the second chapter, I shall look at the establishment and character of legal education in Scotland and Québec and modern paradigms in university legal education which have been influential.

In the final chapter, I shall look at the relationship of the university to the professional bodies and I shall consider how the professional structure informs la formation professionelle.

[1] Ibid at p.342. Professor Glenn emphasises that we never see the common law functioning as a pure system. It is also useful to point out that there is no historical or inevitable connection between the common law and the English language or the civil law and the French language. French and Latin dominated the spoken and written language of English lawyers for 500 years. David Melinkoff comments: "Both before and after the Statute of Pleading, the all important writs were in Latin, with copies available in French translation...There was nothing written in English of immediate practical value to the practicing common lawyer or law student. Oral study of law at the Inns of Court was also in French", D.Melinkoff The Language of the Law, (Boston: Little Brown and Company, 1963) at p.113, 126-135.

CHAPTER 1.

POLITICS AND THE CONFLUENCE OF LEGAL TRADITIONS.

In this chapter I wish to describe the interaction of different legal traditions, (the classification of legal systems), the general theme of the reception of laws and the role of the university before and after the emergence of the nation states in Europe. These concepts should be demarcated at the outset as they have a direct bearing on the way Scots law and Québec law are characterized and in turn this shapes patterns of legal thought.

Typically, Scots law and Québec law are described as hybrid legal systems or mixed jurisdictions and much emphasis is placed on their "civilian" heritage.[10] This treatment of Scotland and Quebec as being culturally specific in law affects how law is taught. The way one is taught to think is linked to the way one thinks. In the

[10]T.B.Smith is one writer who illustrates this bent. In "The Preservation of the Civilian Tradition in Mixed Jurisdictions" T.B.Smith associates the vindication of a civilian tradition in mixed jurisdiction with a growth of national or cultural consciousness or power: in this way the assertion of a legal tradition becomes one aspect of the assertion of a cultural tradition. Supra n.2 at p.13. T.B.Smith suggests that the recent reassertion of a Scottish national ethos is in reaction against real or supposed neglect of Scottish interests by a London based "establishment". His exposition of the Scottish legal system is often written with nationalistic concern.

field of law this perpetuates the characteristics of a tradition at the most general level.

Scots law and Québec law are often characterized in terms of the "purity" of their legal systems, with reference to their civilian traditions. Should one analyse a jurisdiction in terms of the superiority of one strand of legal influence over another?

In the context of Québec legal education, the question has been discussed by David Howes, amongst others. Howes has described the different intellectual climates which have reigned in Québec as polyjurality and monojurality.[11] He suggests that the difference between these two terms is that "polyjurality" describes a tendency to regard other legal traditions as "alternatives for us" rather than "alternatives to us". Monojurality places one legal culture above others. In Québec, this has led to a spirit of narrow nationalism and an emphasis on the preservation of "la pureté de notre droit".[12]

In Howes discussion, Judge Pierre-Basile Mignault was a proponent of "monojurality". His strategy in pursuing this philosophy was many pronged. He contrasted the purity of the civil law in Québec with the mongrel law of other jurisdictions. He illustrated how the common law and the

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[11]D.Howes "The Transformation of Québec Law: From Polyjurality to Monojurality 1875-1929" (1986) 32 McGill L.J. 524.

[12]P-B. Mignault "L'avenir de notre droit civil" (1923) 1 Rev. du Bar. 56 at p.57.

civil law had different solutions to the same problems and used different methods and techniques. He also stressed the hierarchy of sources. Howes suggests that Mignault made something unnatural from Québec law. Nonetheless, Mignault's ideas and the spirit of positivism had its effect on Québec law and this influenced how the next generation thought.[13]

Howes suggests that the original character of Québec law is now difficult for us to conceive due to the alteration of our processes of thought through our education: "the conceptual world of Taschereau is practically unthinkable to us-- educated, as we are, on the other side of the Mignault divide".[14]

From a nationalistic perspective, one could concentrate on the distinctiveness of Scottish culture in law, education[15] and religion.[16] Similarly, one might

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[13]It might not be that practice has changed to the extent that Professor Howes claims, rather it is rhetoric which has changed since the days of Mignault, and I allude to this in the next chapter in a discussion of university legal education in Québec.

[14]Supra n.11 at p.525.

[15]G.S.Osborne Change in Scottish Education (Edinburgh, Longman, Green & Co. Ltd., 1968) :"Most Scots would regard local control of their country's own educational system as essential to the preservation of national characteristics. As an independent State, Scotland, in the fifteenth and sixteenth centuries, attached greater importance to her people's education than any other nation..." at p.1.

[16]G.E.Davie The Democratic Intellect:Scotland and her universities in the nineteenth century, (Edinburgh: Edinburgh University Press, 1961) :"At the Union of 1707, the Scots virtually gave up their political and economic independence, but retained the right to follow their national usage in religion, law and education...In education,

emphasise the specificity of Québec culture as manifested in its language, law and religion.[17] Viewed in this way, the phenomena of reception of laws becomes a discussion of power and political dominance. In both Scotland and Québec, there seems to be a fear of the loss of legal identity, a fear that these two jurisdictions will eventually lose their civilian heritage.[18]

This sentiment is reflected in the argument that it is largely through its legal system that the Scottish nation lives on after Union with England in 1707. Lord Cooper of Culross has suggested that "nothing would more effectively contribute to the swift obliteration of the Scottish people than the loss of the legal system under which we have lived since the dawn of history".[19]

The idea of the protection of the civil law is a theme

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especially, the two countries continued to develop in independence of one another...during the century following the Union, the educational system of Scotland became more and more unlike that of England, at the very time when, in other respects, the country was becoming increasingly anglicised." at p.3.

[17]Supra n.12 at p.116.

[18]In his article on "The Impact of the Common Law in Louisiana and Québec", J.-L.Baudouin describes the history of these two jurisdictions in terms of strife and struggle. He writes of "the danger to the civil law" (at p.18) by "the pernicious menace of the common law" (at p.6) in J.Dainow ed., The Role of Judicial Decisions and Doctrine in the Civil Law and in Mixed Jurisdictions, (Baton Rouge: Louisiana State University Press, 1974). Baudouin describes the two jurisdictions in terms of the confusion and conflict which blights each jurisdiction, even though he suggests that the interpentration between the two styles is inevitable.

[19]Lord Cooper of Culross in Selected Papers, (Edinburgh: Oliver & Boyd, 1957) at p.144.

which is aired in much of the literature on legal education in the Province of Québec.[20] Alongside the French language and the Catholic religion, civil law is regarded as essential to the survival of the French Canadian nation.

This was Louis Baudouin's message when he wrote that :"la Province de Québec est le seul bastion avancé de défense de la civilisation française dans le continent nord-américain. Elle représente la survivance de cet esprit français que les Anglais appellent si volontiers l'esprit doctrinaire...".[21]

Sylvio Normand suggests that jurists rely on explicitly nationalistic reasons when discussing the protection of the civil law.[22] It is not only an important part of their heritage, but is crucial to their survival as a nation. Normand analyses this theme in articles published in the periodical "Revue du droit" and he points to the frequent reference that is made to "l'héritage des ancêtres" and "la survie de la nation" in this periodical.

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[20]H.P.Glenn "Persuasive Authority" (1986) 32 McGill L.J.261: "In Québec, a culturally distinct population was often said to require a distinctive law as a means of cultural demarcation and even cultural survival", at p.291.

[21]L.Baudouin "Comparaison des méthodes et des institutions en matière d'enseignement du droit, leurs mérites et leurs défauts" (1951) 11 Rev.du Bar.425 at p.425.

[22]S.Normand "Un thème dominant de la pensée juridique traditionelle au Québec: La sauveguarde de l'integrité du droit civil" (1986) 32 McGill L.J. 559.

As I have suggested, this viewpoint is marked, caricatured almost, in Judge Mignault's work. In "L'avenir de notre droit civil", Mignault wrote that:"notre droit civil est ce que nous, de la Province de Québec, avons de plus précieux après notre religion et notre langue. C'est un héritage que nous avons reçu de nos pères à charge de le conserver et de le rendre."[23]

Comparative law, the reception of laws and the taxonomy of legal systems can be manipulated to demonstrate that the law of another jurisdiction is a rival to our own. By doing so other traditions are placed in opposition to our own and differences then merit an undue emphasis.

In Jefferson's Louisiana: Politics and the Clash of Legal Traditions, George Dargo argued that the Louisiana Civil Law Digest of 1808 cannot be fully understood and appreciated if the historical analysis is confined to the legal parameters of the problem alone.[24] Dargo contends that it was the oscillations in Louisiana's political history which created a legacy of legal confusion.

Dargo describes how the Digest of the Civil Laws was adopted after much political wrangling over the merits of the civil and the common law traditions in Louisiana. The focus of the debate was between the Jeffersonians, who saw

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[23]Supra n.12 at p.116.

[24]George Dargo Jefferson's Louisiana: Politics and the Clash of Legal Traditions, (Cambridge, Mass: Harvard U.P., 1975).

the reception of the common law as a necessary stage in the process of national unity and the local population who wished to preserve their tradition of law.

The Jeffersonian administration supported Governor Claiborne in backing a wholesale adoption of the common law. They reasoned that the next generation would be predominantly American and therefore there should be a reception of the common law.

Whilst the Louisiana populus, who were predominantly Creoles, saw in the civil law a work of purity, clarity and consistency. In Baudelaire's words, it was a world where everything is "ordre et beauté, luxe, calme et volupté."[25] In contrast to the systemic purity of the civil law, the common law was thought to be a veritable grimoire-- a book of magic or an unintelligible scrawl: this was Bernard Marigny's vision of the Anglo-American common law.[26]

Dargo discusses the issue in terms of systemic purity and the "clash" of legal systems. Legal systems are treated as pure, self sufficient entities. According to Dargo, the reception of laws is ultimately a political matter; it is the export of a part of the cultural hegemony of an

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[25]This quotation is taken from H.Kotz "Taking Civil Codes Less Seriously" (1987) 50 M.L.R. 1 at p.1.

[26]Supra n.24 at p.173.

imperialistic neighbour.[27]

Comparative law might be used creatively in Scotland or Québec to aid legal educators and legal practitioners to deal intelligently with concepts and rules derived from different genera of legal thought, as Lord Cooper reminds us.[28]

How should we look at laws which have been inspired by other jurisdictions? In this first chapter my aim is to elucidate how the concept of juridical nationalism has filtered through to Scotland and Québec and whether nationalism is an appropriate value in the teaching of law.

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[27]Ibid at p.172.

[28]Supra n.19 at p.144. Lord Cooper also observed that without the stimula of comparative law Scots law "will assuredly perish".

THE CLASSIFICATION OF LEGAL SYSTEMS.

The legal systems of Scotland and Québec have been described as "hybrid" systems of law, as mixed jurisdictions. Scots law, like Québec law, has been classified as mixed in the sense that the Civilian or Romanistic foundations have been overlaid by Anglo-American jurisprudence.[29] Of the Western traditions, the common law and the civil law are often considered to be the influential traditions. It is in between these two traditions that one places Québec and Scotland.[30]

As we have seen, legal systems have been classified into "families" or groups of systems. Various attempts have been made at these different classifications but it is

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[29]Certain scholars have suggested that the "mixed" systems which owe a debt to both Rome and Westminster may be the model for the future if there is a rapprochement of ways of legal thinking and transacting.

R.B.Schlesinger has pointed out that when searching for a common core of legal principles that :"The comparatist's natural instinct will induce him to select the most influential systems, i.e., those which have played the role of "parents" in large "families" of legal systems," Rudolf B.Schlesinger in "The Common Core of Legal Systems: An Emerging Subject of Comparative Study" in Twentieth Century Comparative and Conflicts Law, (Leyden: A.W.Sythoff, 1961) at p.67.

Schlesinger suggests that one has to keep in mind that the travel of legal ideas is a dynamic and continuous development and that current and future trends may be as important as past historical facts.

[30]Schlesinger proceeds to note that :"The code of a relatively small and not very "influential" nation may offer particulary interesting and constructive solutions for the very reason that its draftsmen have been "influenced" by several others and have eclectically woven the strands of several "influential" ideas into a new and original pattern," ibid at p.67.

important to emphasize that these groupings are not important per se.

In 1969, Malstrom commented on what he considered to be the most penetrating attempts at classification to be made until his day. Malstrom described Arminjon, Nolde and Wolffs' scheme of analysis,[31] René David's fluid efforts,[32] and Zweigert and Kotz's "stylistic" proposal.[33]

In his theory of legal families, Malstrom argued that the legal systems which are European in origin have so many features in common that they should be classified into a Western group.[34] In Malstrom's schemata, the common law and the civil law would fall into one group and could later be subdivided according to the interests of the

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[31]P.Arminjon, B.Nolde & M.Wolff Traité de Droit Comparé, vol.1., (Paris: Librairie Générale de Droit et de Jurisprudence, 1950) at p. 42-53.

[32]R.David Les Grands Systèmes de Droit Comtemporain, 9th ed. (Paris: Dalloz, 1988) at pp.19-32.

[33]K.Zweigert, H.Kotz Einfuhrung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 1st ed., (Tubingen: Mohr, 1969-71).
K.Zweigert, H.Kotz An Introduction to Comparative Law, vol.1., 2d ed., trans. T.Weir (Oxford: Oxford University Press, 1987).

[34]In his work on Civil Law and the Anglo-American Lawyer, H.P.de Vries also takes the position that recent comparative law taxonomy has tended to emphasise the differences rather than the similarities between various Western legal systems :"Differences and similarities are easily reduced to a matter of degree in Western law. Yet it is the differences in degree which clouds and distorts the image", at p.4.

researcher.[35]

Harold J.Berman in his work Law and Revolution: The Formation of the Western Legal Tradition treats the history of Western civilization as a whole rather than as a history of individual nations.[36] Berman takes the position that distinctly Western conceptions of law and methodological techniques came to life in the eleventh and twelfth centuries as a result of a "papal revolution" initiated by Pope Gregory VII.

Berman suggests that his story is singularly unfamiliar and contradicts the usual periodization of Western history. Berman writes: "The fallacies of the conventional periodization of Western history are closely related to the exaggerated nationalism of the nineteenth century, when "scientific history" first started to be written. Indeed the raison d'etre of scientific history seemed to be, in many instances, the tracing of the growth of one's nation from tribal and feudal origins to contemporary glory and grandeur."[37]

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[35]A.Malstrom "The System of Legal Systems, Notes on a Problem of Classification in Comparable Law" (1969) 13 Scand.Stud.Law. 127.

[36]F.Wieacker in "European Legal Culture" (1990) 38 A.J.C.L. 1 discusses the emergence of the European identity which began to manifest itself in the eleventh century by virtue of a genuine renaissance in Roman law. I believe Wieacker's thesis is aligned with Berman's in this regard.

[37]H.J.Berman Law and Revolution: The Formation of the Western Legal Tradition, (Cambridge: Massachusetts, Harvard U.P., 1983) at p.538-539.

Berman continues: "Today nationalist historiography is giving way in many fields. In law, however, and especially in English and American law, nationalist historiography still reigns. The distinctive features of each national legal system within Western civilization are emphasized and their common features are minimized. Despite their common origins, each national legal system in the West is still hailed by its partisans for its unique qualities, which are said to correspond to the unique charcter and unique history of the particular nation whose law it is."[38]

As for the classification of legal systems, Berman regards the division into "Continental European" and "Anglo-American" as a very slight counteraction to the nationalist tendency. He concludes that "All Western legal systems--the English, the French, the German, the Italian, the Polish and the Hungarian, and others--have common historical roots, from which they derive not only a common terminology and common techniques but also common concepts, common principles, and common values."[39]

At one point in his discussion of the classification of legal systems in Les Grands Systèmes de Droit Contemporain, René David used the example of "mixed" jurisdictions as a justification for the non differentation of Western law. The strands which are present in hybrid

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[38]Ibid at p.539.

[39]Ibid at p.539.

systems of law are present in different shades in each jurisdiction which constitutes the Western legal tradition.[40]

As René David has cautioned us, it would be wrong to overemphasise the difference between systems which arise from their taxonomy: "Ces discussions ont fait couler beaucoup d'encre, elles n'ont pas pourtant beaucoup de sens. La notion de "famille de droits" ne correspond pas à une réalité biologique, on y recourt seulement à un fin didactique, pour mettre en valeur les ressemblances et les différences qui existent entre les différents droits. Céla autant, toutes les classifications ont leur mérite. Tout dépend du cadre dans lequel on se place et de la préoccupation qui, pour les uns ou les autres, est dominante."[41]

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[40]Supra n.32 at p.26, "L'incitation à parler d'une famille de droit occidentale est d'autant plus forte qu'il existe, en certain pays, des droits que l'on ne sait à laquelle des deux familles annexer, cars ils empruntent certains de leur éléments à la famille romano-germanique, et d'autres éléments à la famille de common law."

[41]Ibid at p.22.

THE RECEPTION OF LAWS.

The reception of laws is a prominent feature in the development of law in the Western legal tradition. Reception might be described as the borrowing of the laws of another country, or the borrowing of an idea from another legal culture.[42]

The main question to be answered by Western legal history is one posed by Paul Vinogradoff at the beginning of his work Roman Law in Medieval Europe[43]: "Within the whole range of history there is no more momentous and puzzling problem than that connected with the fate of Roman Law after the downfall of the Roman State. How is it that a system shaped to meet certain historical conditions not only survived those conditions, but has retained its vitality even to the present day, when political and social surroundings are entirely altered?"[44]

Historians have traced the currents of migration and reception of legal ideas and have demonstrated that the phenomenon of reception is one which is known to every

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[42]This notion of an "idea" being borrowed from another system is from A.Watson in Legal Transplants: An Approach to Comparative Law, (Cambridge, Mass: Harvard University Press, 1974) at p.17.

[43]The story Vinogradoff tells is, he says, a ghost story :"It treats of the second life of Roman law after the demise of the body in which it first saw the light", P.Vinogradoff Roman Law in Medieval Europe, (Oxford: Clarendon Press, 1929) at p.13.

[44]Ibid at p.11.

legal tradition. Arminjon, Nolde and Wolff argue that there are no pure legal systems, every jurisdiction has borrowed from another: "A l'exception, d'ailleurs contestée par quelques auteurs, des systèmes islamiques, il n'existe pas dans le monde moderne de système juridique absolument pur, formé et dévelopé à l'abri de toute influence extérieure".[45] Arminjon, Nolde and Wolff cite mixed jurisdictions as examples of this phenomena.

This view of the extent of reception was supported by A.B.Schwarz. In 1938, Schwarz wrote :"Ce que l'on appelle réception d'un droit étranger est un phénomène de l'évolution juridique de tous les âges...Ces réceptions de droit constituent des phénomènes plus ou moins complexes, d'une grande diversité d'apparences, dont les types n'ont guère été examinés d'une manière approfondie par l'histoire comparative du droit...".[46]

Should the difficulties or the benefits of looking at the law of other countries be stressed? Alan Watson is of the opinion that succesful borrowing can be made from a very different legal system, even one from a higher level of development and different political complexion.[47] The law reformer should be looking for an "idea" which could be

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[45]Supra n.31 at p.49.

[46]A.B.Scharwz "La réception et l'assimilation des droits étrangers" (1938) 2 Recueil Lambert 582.

[47]A.Watson "Legal Transplants and Law Reform" (1976) 92 L.Q.R. 79.

transformed into the law of his own country.

This discussion of the cultural specificity of law has provoked debate between Alan Watson and Otto Kahn-Freund. Kahn-Freund, following Montesquieu, is of the opinion that it is only in the most exceptional cases that the institutions of one country can serve those of another country.[48] Kahn-Freund's principal thesis is that the degree to which any rule can be transplanted depends to what extent it is associated with the foreign power structure. In this regard, Kahn-Freund follows Montesquieu and Watson traces his thesis back to Montesquieu's writings.

Montesquieu's De L'Esprit des Lois appeared in 1748 and in this work, Montesquieu stressed the necessity of a close connection between laws and the particular people for whom they were formulated.[49]

Watson contends that Montesquieu very badly underestimated the amount of legal borrowing which had taken place and was still taking place, despite Montesquieu's insight into the factors which favour or militate against, the transplantation of laws.[50]

The reception of Roman law in Europe refutes

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[48]O.Kahn-Freund "Uses and Misuses of Comparative Law" (1974)37 M.L.R. 1.

[49]Supra n.6.

[50]Supra n.47 at p.80.

Montesquieu's proposal that it is "un grand hazard" if the laws of one nation can suit another. Although at this time, Montesquieu's emphasis on the cultural specificity of law gave an ideological foundation to an emphasis on national laws.

Watson holds that successful borrowing requires only a knowledge of the needs and structure of the borrowing society and the knowledge that relevant rules exist in other systems.[51] Watson believes that legal borrowings form patterns which can be described as forming "norms" or "rules" of borrowing: the reception of Roman law in medieval Europe was not a one-off thing but corresponds to the "cultural rules of legal borrowing".[52]

Comparative law taxonomy has tended to stress the differences between different jurisdictions rather than stressing the similarities between them. Seen in this light, the reception of "foreign" law is seen as the exception to the general practice, even although the movement of legal ideas has been demonstrated.

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[51] A.Watson Sources of Law, Legal Change and Ambiguity, (Philidelphia: University of Pennsylvania Press, 1984) at p.109.

[52] Supra n.4 at p.67.

THE ROLE OF THE UNIVERSITY AND THE IUS COMMUNE.

As we have seen, the classification of legal systems and the reception of laws can be manipulated to demonstrate that laws are culturally specific-- almost unconditionally bound to the political state from which they emerged.

In Québec and Scotland nationalism leads to the assertion that law is culturally specific and arguments that one strand of legal heritage is more important than another. In this way, the legal traditions in Scotland and Québec might be described in negatives, they are defined with reference to the common law tradition rather than as independent entities.

Obviously, the explanation of how legal traditions influence one another is a matter of degree. As influence is a rather elusive notion, it depends where one wants to place the emphasis and I wish to emphasise the common, Western tradition in law as a reaction against the nationalist tendency in law.

Berman and Wieacker, amongst others, illustrate the common roots of the Western legal tradition and this grouping counters the nationalistic tendency. Berman regards the flourishing of the universities in Europe as one of the important characteristics of the development of

the Western legal tradition.[53]

The glossators of Bologna revived the study of Roman law shortly before the eleventh century.[54] The Corpus Juris Civilis was conceived of not only as valid law in medieval Italy, but it was also :"a monumental design for a whole society, transmitting to the men of the middle ages the experiences and values of the ancient world."[55]

John P.Dawson describes how the enviroment in which the glossators worked was altered profoundly by their own teachings. At Bologna, a large number of the students were locals. Consequently, from the middle of the twelfth century, Italian towns were being supplied by large numbers of men trained in Roman law who would fill positions as judges, lawyers and officials.[56] This learning was so

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[53]"These three elements--the discovery of legal writings compiled under the Roman emperor Justinian, the scholastic method of analyzing and synthesizing them, and the teaching of law in the universities of Europe--are at the root of the Western legal tradition", supra n.37 at p.123.

Berman describes the scholarly character of the development of legal education in the universities, and in this extract, Berman discusses the independence of the professors: "In general, Bolognese jurists were free to support opposing views concerning the extent to which various provisions of Roman law justified imperial and papal claims...the European Universities established themselves from the beginning as educational institutions where professors were free to take opposing positions", at p.126.

[54]Supra n.43 at p.43-69, in his chapter on "The Revival of Jurisprudence".

[55]J.P.Dawson The Oracles of the Law, (Michigan: Ann Arbor, 1968) at p.124.

[56]Ibid at p.125.

prized that other ambitious towns sought law schools of their own.

The working methods of the glossators were adapted from those of the schools of theology, and they adapted to their own purposes the methods of theological disputation, which placed much emphasis on system and logical form.[57] These doctors in law were consulted increasingly on difficult legal questions and in answer to these problems short treatises appeared (Summae).[58]

From the latter part of the thirteenth century onward, men who had been trained in the Roman law were being organized on a mass scale to give advice to the judges. One of the reasons for using locals was largely the ignorance of the judges of local custom and legislation.[59]

The great doctors in medieval Europe were primarily academics.[60] If one compares them with English lawyers of

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[57]"The method which the glossators used represents an adaptation of the method employed by new scholarship in Western Europe- the so-called scholastic method. The great instrument for the advancement of learning at that time was the dialectical process by which formal and universal logic analyses conceptions and constructs syllogisms, supra n.43 at p.56.

[58]Dawson gives the example of the "Questiones in Schola Bulgari Disputata," in Scripta Anecdota Glossatorum (Bibliotheca Iuridica Medii Aevi, ed. Gaudenzi, Bologna, 1892), II 197. Supra n.55.

[59]Ibid at p.139.

[60]Merryman tells us that after the revival of Roman law in Italy, those responsible for the development of the jus commune were scholars. The work of the Glossators and the Commentators, added to the Corpus Juris Civilis, made up the body of the Roman law received in Western Europe. During this period the responses of scholars to questions of

the fourteenth and fifteenth centuries, writes Dawson, it becomes apparent how much England lost by severing the tie between law practice and the universities. The wretched poverty of English Year Book learning stands in direct contrast to the wealth and range and intellectual power of Italian legal literature of the fourteenth century.[61] Vinogradoff describes how the commonwealths of Lombardy began to earn the fruits of economic and cultural progress and how this background of returning prosperity led to a spontaneous awakening of jurisprudence.[62]

How did we reach a conception of law which is couched in nationalistic terms? Professor Klaus Luig outlines the process of formation of national law in West European countries. Luig relates the appearance of institutional writings in the seventeenth and eighteenth centuries to a general movement in Europe leading to the differentiation of the ius commune and the growth of national legal systems in the European states of the ancien régime.[63]

He argues that this movement rested initially on a

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law were in some places accorded binding authority in the courts, Supra n.7 at p.60.

[61]Supra n.55 at p.143. Dawson writes:"Bartolus and Baldus were adept in solving specific problems, but they also mastered the whole vast inheritance from antiquity and reshaped the law of their own society according to a grand design."

[62]Supra n.43 at p.43.

[63]K.Luig "The Institutes of National Law in the Seventeenth and Eighteenth Centuries" (1972) 17 J.R. 193 at p.193.

change in the understanding of the significance of Roman law; a realization that the Corpus Iuris Civilis had not been received formally as positive law in Germany and Italy, which led to regional law of medieval origin being given prominence.

It is in this era that we see the foundation of chairs of national law in the various European universities and national courts of law.[64] Luig claims that the new national laws gave expression to the independence and autonomy of the rising nation states and that legal literature of this movement was based on the concept of "institutes".[65] The doctrine which came into existence as the outcome of the process of differentiation was based on concepts from widely differing sources, but it was now designated as "national" law without reference to these sources.[66]

Professor John W.Cairns has argued that it was the rise of the nation state that was important in the

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[64]It was in 1532 that the Court of Session was founded in Scotland.

[65]Luig writes :"The new national law, in accordance with the doctrine of the absolute external and internal sovereignty of the state, had to be independent of the "international" authority of Roman law and had to prevail over the laws of autonomous territories, towns and classes within the state, supra n.63 at p.200.

[66]These sources might be Roman, Canon feudal or customary law, ibid at p.195.

production of institutional writings.[67] He suggests that Luig overemphasized the role of the differentiation in the ius commune in the growth of institutional writings to the exclusion of the phenomena of the rising national consciousness in the developing nations of Western Europe. Luig views the rise of the nation state as a coincidental happening.[68]

For Cairns, institutional writings form a distinct genre: "They attempt to give a comprehensive but elementary treatment of a whole system of law treated as a national law", and they are linked to the development of university teaching of national law and the production of elementary textbooks."[69]

He writes :"[I]n the European languages of the seventeenth and eighteenth centuries, the terms "institutes" and "institutions" and their counterparts referred to works of an elementary nature on a subject, aimed at instruction; and, in law, the term alluded most

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[67]J.W.Cairns "Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State" (1984) 4 O.J.L.S. 318 at p.321.

[68]K.Luig writes :"The "autonomous doctrine" which came into existence as the outcome of this process and was based on concepts originating from Roman, canon, Germanic, feudal and probably also natural law, is here designated as national law, without regard to the actual origin of its individual parts, because it constituted the positively valid law within the several principalities and kingdoms, which were developing their own national consciousness." Supra n.63 at p.195.

[69]Supra n.67 at p.324.

obviously to the Institutes of Justinian."[70] They are connected with the rise of the nation state and the disappearance of the ideal of "Empire".

Cairns suggests that all over Europe, the production of Institutes had similar features. Their form and structure are influenced by Justinian's Institutes but perhaps also by Canon law.[71]

All countries used the concept "Institutes" to describe systemic exposition of the new discipline. In Scotland the authors who wrote such Institutes were traditionally called "Institutional writers" and Luig suggests that this term reflects a particular literary acheivement and is a parallel to the terms glossators, commentators, post-glossators and pandectists.[72]

Cairns, however, defends the position that the concept of institutional writer in Scots law is a creation of the modern era. For in Scots law, "institutional writers" are said to be an authoritative source of the law.[73] Cairns argues that there is no adequate explanation for this, and

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[70] Ibid at p.326

[71] J.W.Cairns "Institutional Writings in Scotland Reconsidered" in A.Kiralfy, H.L.MacQueen eds., New Perspectives in Scottish Legal History, (London: F.Cass, 1984) 76 at p.79.

[72] Supra n.63 at p.226.

[73] D.M.Walker The Scottish Legal System, 5th ed., (Edinburgh: W.Green & Son Ltd., 1981) :"The authority of a statement by an institutional writer is probably about equal to that of a decision of either Division of the Inner House" at p.402. (The Inner House is the appellate section of the Court of Session).

that the question of who an institutional writer is, is largely ignored. The attribution of authority to certain works by certain authors is, in Scotland, a modern development contradicting the historical reality.'[14]

This development is largely a creation of the Scottish judiciary :"What an institutional work is in Scotland is the attitude of the courts to certain works."'[15] Further, Cairns argues that modern day writers are uncritical as to sieving out who and who is not "institutional".'[16]

To my mind, Cairn's analysis of the function and commentary on the works of the institutional writers in Scotland is a penetrating one. The value which is placed on

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'[14]Supra n.71 at p.99-103.

'[15]Ibid at p.98-107.

'[16]"For contemporary Scots lawyers there thus is a group of specially authoritative books distinct from other "non-institutional" textbooks on Scots law. Works which do not have "institutional" status are not considered to be technical authorities, though their arguments may be adopted as reasoning in court", ibid at p.99. Cairns argues that in Scotland an institutional work does not require a certain form or structure or to deal with certain topics and be concerned with national law, it only requires that the Scottish courts recognise it as authoritative, (p.102).

Those works which D.M.Walker has classed as "institutional" in Scotland are : Sir Thomas Craig Jus Feudale, (1685), Viscount Stair The Institutions of the Law of Scotland, (1681), Lord Bankton An Institute of the Laws of Scotland, (3 vols., 1751-53), John Erskine An Institute of the Law of Scotland, (2 vols., 1773), George Joseph Bell Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence (1804), and his Principles of the Law of Scotland, (1829), D.M.Walker, supra n.73, at p.401. T.B.Smith gives a substantially similar list in Scotland. The Development of its Laws and Constitution, (London: 1962) at p.32 and 907.

For Cairns, there is no rationale as to this selection of authors or of their works, the sole explanation is that the courts have chosen to elevate certain works and this choice is uncritically followed by scholars, supra n.71 at p.99-103.

the works of these authors today has been greatly inflated. It is said to align Scots law with the civilian legal tradition in the detail of la doctrine.

Both Stair and Bankton wrote their institutes as a defence of the Scots law system and it is easy to see how this has been interpreted to the present day. Lord Cooper saw in these works the basis of a private law codification, and much is written on the value of these works to the Scottish legal heritage as a heritage distinct from Anglo-American common law. Here we see the defence of a particular doctrinal structure-- "the institutes" linked to the very existence of Scots law.

The unity of Western law has been lost with the rise of the nation state. In recent times, jurists have argued for comparative law to take the place of Roman law in creating legal doctrine and making law a supranational enterprise.[77] René David, Marc Ancel and Imre Zatjay have argued for the role of comparative law in the development of a new ius commune.

Marc Ancel has written that: "C'est ici, nous semble-t-il, que le droit comparé nous apparaît dans toute sa nécessité et dans toute sa force. Il peut aujourd'hui jouer le rôle du droit romain pour les hommes de la Renaissance

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''M.Ancel "Valeur Actuelle des Etudes de Droit Comparé", in Twentieth Century Comparative and Conflicts Law, supra n.29. See also R.David supra n.32. John W.Cairns is sceptical of the above approach to legal unification, see J.W.Cairns "Comparative Law, Unification and Scholarly Creation of a New Ius Commune" (1981) 32 N.I.L.Q. 272.

ou du droit naturel pour les hommes du XVIIIème siècle."[78]

Marc Ancel stressed that until the eighteenth century, the lawyers of the European continent lived in the tradition of a universal common law, represented by Roman law, to such an extent that national laws were, in effect, exceptions to this pattern.[79]

Ancel writes of the menace of juristic nationalism: "Les Etats nouveaux, jalousement enfermés dans leurs frontières territoriales, étaient portés au contraire à se replier sur eux-mêmes et à repousser, comme d'instinct, tout ce qui pourrait ressembler à une importation étrangère. Cette tendance, qu'on aurait pu croire dépassée dans le monde du XXème siècle, si riche en communications internationales de toute nature, subsiste encore plus qu'on ne pourrait le croire...".[80]

Ancel argues that comparative law can play the role which Roman law played in the eighteenth century in creating an international community of justice. Juristic nationalism and legal positivism are the evils which have prevented this development.

Imre Zatjay discusses the two great waves of reception; that of the Roman law in Europe and of the

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[78]M.Ancel, supra n.29 at p.29.

[79]Ibid at p.15.

[80]Ibid at p.21.

reception of the French Code civil and Zatjay points to the lack of comparative analysis in each case.[81] Zatjay discusses the role of the Universities in the two great waves of reception. He describes how, with the reception of Roman law in Europe, the ideas were generated in Bologna and were received by other universities in Europe.

In some countries, he tells us, the reception was accompanied by a practical reception; a reception of the substantive law rules elaborated. Zatjay uses this as an example of the creative use of doctrinal writing. After the errors of the Ecole de l'Exegese, (Rémy would disagree with this[82]) one now realises that doctrinal writing can be creative, can be constitutive of law. The purpose of la doctrine and la jurisprudence is not only interpretation and application of written law, it also has an important creative function. Law is not only what the legislator has decreed.

Writing in 1957, Zatjay argued that the political situation in Europe was not ripe enough to attain a supranational character but that the science of law is, by its very nature, supranational, as the reception of Roman law in Europe showed us.[83]

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[81] I.Zatjay "La Réception des Droits Etrangers et le Droit Comparé" 1957 Rev.int.dr.comp. 686.

[82] P.Rémy "Eloge de l'Exegese" 1982 R.RJ. 254 reprinted in (1985) 1 Droits 115.

[83] Supra n.81 at p.710.

Zatjay's emphasis on the creative function of la doctrine and la jurisprudence is a concern echoed by many comparative lawyers, especially in the field of the unification of law. The role of comparative law in the international unification of law has been one of the most popular themes of comparative law since its development in modern times.[84]

Professor Cairns has critically analysed this development in modern comparative law. Cairns has criticised René David's prognosis for the creation of a new ius commune by legal scholars.[85] David argues that unification is being defeated by national sovereignty and that courts and legal scholars can place unification on a simple doctrinal level. This, for René David, is the task of comparative law.[86] Cairns questions :"[I]f there is a major diversity of views as to the nature of one legal system, what possibility is there of a scholarly consensus sufficient to create a new ius commune".[87] Cairns suggests that the difficulties raised by the possible unification of contract law in Scotland and England show

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[84]By this I mean the roots of the modern movement of comparative law dated as 1900, when the First International Congress of Comparative was held in Paris.

[85]Supra n.77.

[86]R.David "The Methods of Unification" (1968) 16 A.J.C.L. 13 at p.27.

[87]J.W.Cairns supra n.77 at p.281.

that much more is at stake than simple doctrinal management of rules.[88]

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[88]Ibid at p.283.

CONCLUSIONS.

Comparative law, the reception of laws and the taxonomy of legal systems can be manipulated to demonstrate that the law of another jurisdiction is a rival to our own. In the Western legal tradition this treatment has become popular since the emergence of the nation states of Europe. In Scotland and Québec, one can witness the rise of juristic nationalism. In Scotland this has led to a particular doctrinal structure-- "the institutes" linked to the very existence of Scots law. What does this imply for legal education in the university? How should one characterize the legal traditions in Scotland and Québec? These are the questions which I shall proceed to discuss in the next chapter.

CHAPTER 2.

LEGAL EDUCATION AND LEGAL TRADITIONS.

This thesis argues that a nationalistic conceptualisation of law is not only futile, but is largely rhetorical in the form it takes in Scotland and Québec. One would expect that this nationalistic concern would be institutionalised in the university; law is conceived of as a body of national doctrine and the purpose of legal education in the universities is to expound this body of doctrine.

In the last chapter, I looked at comparative law concepts and how they effect our interpretation and characterisation of law. In this chapter I shall look at legal education and the legal traditions in Scotland and Québec.

To a certain degree, legal education maintains a tradition and reflects the elements of that tradition.[89] The rising national consciousness in Western states led to a differentiation of the ius commune and the establishment of university teaching of national law. From that time, law

[89]Hastings Rashdall remarks "educational traditions are marvellously tenacious, quite apart from institutional machinery such as that of the Universities: and education itself must always be, from the necessities of the case, a tradition", H.Rashdall The Universities of Europe in the Middle Ages, (Oxford: Clarendon Press, 1895) vol.II, Part II, p.711.

is looked at from a national perspective and legal education from a nationalistic one.

René David has contrasted the image of French universities in former times with those of today and suggests that: "l'université n'est plus regardée aujourd'hui comme constituant seulement un centre privilégié de réflexion...on est venu...à lui donner un autre rôle: celui de former des techniciens, dans notre cas particulier des practiciens du droit...".[90]

René David believes that the future of law and law teaching requires a new approach to the treatment and integration of "foreign" law. He writes: "Le droit a été envisagé dans les facultés de droit français, depuis la codification napoléonienne, sous un angle purement national."[91] David's remarks might extend to Scots and Québec legal education.

In this chapter I shall look at the establishment and character of legal education in the universities in Scotland and Québec and modern paradigms in university

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[90]R.David "Méthodes d'enseignement" in Proceedings of the XIth Colloquim of Comparative Law, p.192. Up until the French Revolution, faculties taught Roman law and Canon law. They were not concerned with "national" law nor with "positive" law. It was a more pre-legal education. The teaching of Roman law and Canon law :"visait à decouvrir et populariser un droit idéal de vocation universelle, un modèle d'organisation sociale que l'on proposait aux juges et juristes dans les divers pays," ibid at p.190. The universities were reorganised by Napoleon in 1805 and universities were then dependent on the state and taught French law.

[91]R.David Le Droit Comparé: droits d'hier, droits de demain, (Paris: Economica, 1982) at p.43.

legal education which have been influential.

THE ROLE OF THE UNIVERSITY AND THE WESTERN LEGAL TRADITION.

"Universities, like cathedrals and parliaments, are a product of the Middle Ages", wrote Charles Haskins[92]. The genius of the Middle Age showed itself in the creation of institutions. Universities did not exist in the most cultivated societies of the ancient world; the tradition was handed down from Paris and Bologna rather than Athens and Alexandria.[93]

All the machinery of instruction, represented by faculties and colleges, courses of study, examinations and academic degrees emerged in the twelfth and thirteenth centuries.[94] We are accustomed to the institution in its present form, where teachers are united into a corporate body enjoying a certain privilege and autonomy, and studies are grouped into particular Faculties, but these features are an institutional development of an earlier era; they are not given features of an institution of higher learning.

It is neither self evident that teachers of different

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[92]C.H.Haskins The Rise of the Universities, (New York: Henry Holt & Co., 1923) at p.3. See also H.Rashdall supra n.89 at p.709.

[93]Supra n.89 at p.710.

[94]Haskins asks "What then is our inheritance from the oldest of universities?" and he answers that it is as an institution that the legacy of the medieval tradition is most direct. The name and organization of the university has remained, as has the notion of curriculum of study, and the many degrees themselves--the bachelor, the mastership, the master and the doctor. Supra n.92 at p.4,31,34,35. See also supra n.89 at p.711.

subjects teach in the same place and be united in a single institution, nor that an attempt be made to make the teaching body representative of the whole cycle of human knowledge. All this we owe to the Middle Ages.[95]

Historically, the word "university" has no connection with the universe or the universality of learning; it denotes only the totality of a group, whether of barbers, carpenters, or students.[96] In their form of union, the students seem to have followed the example of the guilds already common in Italian cities. Only in time did "university" come to be limited to guilds of masters and students.[97]

Law was the leading Faculty in a great number of medieval Universities, and one of the most important results of the Universities was the creation, or at least the enormously increased power and importance, of the lawyer-class.[98] The rapid multiplication of Universities during the fourteenth and fifteenth centuries was due to a

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[95]Rashdall continues :"It is not necessary that a definite line of study should be marked out by authority, that a definite period of years should be assigned to a student's course, or that at the end of that period he should be subjected to examination and receive, with more or less formality and ceremony, a title of honour", ibid at p.710.

[96]The students of Bologna first organized such a university as a means of protection against the townspeople, as the price of rooms and other necessities rose rapidly with the new student tenants, supra n.92 at p.14.

[97]Ibid at p.13.

[98]Supra n.89 at p.708.

demand for educated lawyers and administrators.[99] According to Hastings Rashdall, lawyers and Roman law were a civilizing force.

[99]Ibid at p.707.

SCOTLAND.

Legal education in Scotland began with the Church.[100] In medieval Scotland, almost all lawyers were clerics.[101] Stein has told of the clerics who were lured by the lucrative roles of judge or procurator; one young cleric was said to be more occupied by the court (curia) than by the cure (cura) of souls.[102]

From a very early date, Scots travelled to obtain their legal qualifications. At first, they travelled to England, where they attended Oxford.[103] Lord Cooper comments on the publication of eighteen letters written by a Scottish student (W.deBernham) at Paris and Oxford

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[100]In medieval Scotland most civil disputes, apart from feudal matters, were disposed of in the Church courts where the judges were well versed in the Canon law and often in the civil law as well, P.Stein "The Influence of Roman Law on the Law of Scotland" (1964) 8 J.R.205 at p.206.

[101]The Notary Public, ancestor of the procurator and the solicitor, was appointed by papal authority from the thirteenth century onwards, A.R.Brownlie "The Universities and Scottish Legal Education" (1955) 67 J.R. 26. at p.28. From 1469, the Notaries Public could only be appointed by the King, see The Stair Society Sources and Literature of the Scots Law, vol.1, (Edinburgh: R.Maclehouse & Co. Ltd., 1936) at p.23.

[102]Supra n.100 at p.211.

[103]Hastings Rashdall attributes the spontaneous development of Oxford University to a cause ab extra: the migration of academic scholars from Paris. Rashdall dates the beginnings of Oxford as a Studium Generale to 1167 or early 1168, supra n.89 at p.328-332.

As for law teaching in Oxford and Cambridge, René David informs us that :"Des chaires de droit romain ont été institutées en Angleterre par le roi Henry VIII, au XVIème siècle, pour contribuer à la formation des diplomates qui représenteraient l'Angleterre dans les rapports avec les pays du continent européen, où le droit était fondé sur la tradition romaniste", supra n.32 at p.9.

between the years 1250 and 1260. These letters, writes Cooper, afford "welcome confirmation of the extent to which the new study of the revived Roman law had penetrated into the rank and file of the Scottish Clerics as early as the middle of the thirteenth century; and they show that such knowledge was already being used, not as an ornamental accomplishment, but to practical ends."[104] The foundation of "The Auld Alliance" between France and Scotland in 1295 resulted in Scots students studying law in France and elsewhere on the continent.

It has been suggested that providing the country with educated lawyers was a prominent object with the founders of the medieval Universities in Scotland.[105] Provision had been made in the Universities of St.Andrews, Glasgow and Aberdeen from their inception in the fifteenth century for the teaching of Civil Law and Canon law.[106] Information as to the scope and effectiveness of this

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[104]In "A Scottish Law Student at Oxford in 1250" (1944) 56 J.R.S. at p.61.

[105]Supra n.89 vol.II, Part I, at p.296. See also P.Stein supra n.100 at p.213-214, and T.B.Smith supra n.1 at p.64.

[106]St.Andrews was founded in 1413, by Henry Wardlaw, Bishop of St.Andrews (the Bull of Benedict XIII was granted in this year). Glasgow was founded in 1450 by William Turnbull, Bishop of the See, under a Bull of Nicolas V, its de facto existence appears to date from 1453. Like the two other medieval universities, Aberdeen was founded by a Bishop, William Elphinstone, in 1494, granted by a Bull of Alexander VI. Even more so than the Universities of St.Andrews and Glasgow, Elphinstone aimed at making his university a school of law.

teaching is scant, but it does not appear to have been highly successful.[107] For Professor Smith, the practice of Scottish law students travelling abroad right up until the Napoleonic Wars is an indicia that the law faculties were not held in the greatest esteem.[108]

Though the study of Canon Law was a prominent object with all the Founders, the Faculty of law maintained a slender, at times a nominal, existence in medieval Scotland.[109] The only Faculty which really succeeded in the early days of the Scots Universities was the Faculty of Arts; and the traditions of the Scots Faculties of Arts were derived ultimately from Paris, and more immediately from the Universities of Northern Germany and the Low Countries, which were much frequented by Scots.[110] This

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[107]Supra n.100 at p.214. T.B.Smith informs us that "Not very much is known about the scope and methods of teaching in the pre-Reformation foundations of St.Andrews, Glasgow and Aberdeen...[A]t St.Andrews there was no revival even in the eighteenth or nineteenth century. At Glasgow, instruction in the law apparently went into abeyance until 1713, when it was revived, and William Forbes was appointed to the Regius Chair of Civil Law...up to 1860, the Civilists in Aberdeen seem to have evaded or delegated their duties", supra n.1 at p.64,66,67.

[108]Supra n.1 at p.64,65.

[109]Supra n.89, vol.II, Part I, at p.296.

[110]The design of Scottish degree course in arts can be seen to have evolved directly from the seven liberal arts of classical times as they were interpreted by the universities of Western Europe. "The idea of a liberal education can be traced back to the seven liberal arts of classical times-- the trivium (grammar, rhetoric and dialectic) and the quadrivium (arithmetic, geometry, astronomy and music). The equivalent of the trivium is now to be found in the study of language, literature, and philosophy or logic. "Grammar for the Greeks and Romans meant, of course, the grammar of the native tongue, but so dominant has the

tradition had its bearing upon the course of legal education, as a general degree in arts had to be completed before embarking upon the LL.B..[111]

Members of the bar began to teach privately at the end of the seventeenth and the beginning of the eighteenth century,[112] and it is from the early eighteenth century onwards that law has a continuous history in the Scottish universities.

After the Union of the Crowns the universities began to give more attention to the native law. Despite this, Brownlie has dated the demise of Scottish legal education as an academic enterprise and the infiltration of the English "pragmatic" style of teaching to post 1707, barely one hundred years after its beginnings.[113] Perhaps it

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influence of classical learning been that, until, comparatively recently in Scotland, it was the study of the classical languages which was the essential ingredient in a liberal education", supra n.15 at p.23.

[111]Ibid at p.12. Brownlie, supra n.101 at p.37. This requirement was changed in 1960.

[112]"The first three known to have done so were Alexander Drummond in 1699, John Spottiswoode in 1702, and John Cunninghame (or Cunningham) in 1705", (they all taught both civil law and Scots law), J.W.Cairns in "Rhetoric, Language and Roman Law: Legal Education and Improvement in Eighteenth-Century Scotland" (1991) 9 Law and Hist.Rev. 31 at p.31. See also J.W.Cairns "John Millar's Lectures on Scots Criminal Law" (1988) 8 O.J.L.S. 364 at p.383, 384, and R.K.Hannay The College of Justice, (Edinburgh: W.Hodge & Co.Ltd., 1933) at p.162.

[113]"It has been said that Scottish legal education prior to 1707 was more "academic" in outlook than today when it follows English law at a distance", supra n.101 at p.36. Brownlie is at pains to point out that Scots law is fed from a different source from English law and that differences between them are innate and should be preserved to the benefit of the Scots. Roman law is especially important to the study of

was true that the legal education which legal pracitioners in Scotland had received on the continent was academic, but legal education in Scotland was not a blossoming academic enterprise in this period.

As T.B.Smith has pointed out, "Edinburgh University, situate in the Capital and seat of the Supreme Courts, was surprisingly late in entering the field of legal education".[114] It was at the time of the Union in 1707, that the regius professorship of public law and the law of nature and nations was founded in Edinburgh. This was followed in 1710 and 1722 by professorships in civil law and Scots law respectively.[115]

In the University of Glasgow, the regius professorship of civil law was established in late 1713 and first filled in the following year. This record follows on from the previous century when many attempts had been made at establishing chairs in law.[116]

The establishment of chairs of national law in the university was associated with the teaching of Scots law as a national system and was linked to the production of

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Scots law (Brownlie contends that it is more important to study Roman law in Scotland than in common law countries), (at p.51).

[114]Professor Smith canvasses a possible explanation: "Advocates who had themselves studied abroad and gave private classes in Edinburgh may also have resented professional competition", supra n.1 at p.68.

[115]J.W.Cairns "Rhetoric, Language and Roman Law: Legal Education and IMprovement in Eighteenth Century Scotland", supra n.112

[116]Professor Cairns mentions these failed attempts, ibid at p.31.

institutional writings.[117] It is in this same period that examination in the municipal law first becomes a means of gaining admission to the Faculty of Advocates. Professor Stein suggests that it was only extraordinarily that candidates might be permitted to substitute the examination in the civil law for an examination in the municipal law of Scotland, and that this was considered the less honourable way of entering the profession.[118] It was in 1750 that examination on Scots law for all intrants became a requirement. [119]

Cairns suggests that the stress on the national law for admission to the bar in Scotland, and the success of the teaching of Scots law in the universities must have made study in the Netherlands seem both unnecessarily expensive and of decreasing worth.[120] The new emphasis on Scots law as a national system of law contradicted the gaining of a legal training abroad.[121]

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[117]One of the basic features of the institutes was that they were designed for instruction, see supra n.71 at p.95.

[118]Supra n.100 at p.222.

[119]See J.W.Cairns "The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and the Scottish Enlightenment" in N.MacCormack, P.Birks eds., The Legal Mind, (Oxford: Clarendon Press, 1986) 253 at p.255-57. See also The Stair Society Introduction to Scottish Legal History, vol.20, (Edinburgh: R.Cunningham & Sons Ltd., 1958) at p.52, and supra n.71 at p.95.

[120]Supra n.71 at p.98.

[121]T.B.Smith interprets the establishment of national legal education as a consequence of political developments in Europe: "During the seventeenth and eighteenth centuries, however, the Law Schools of

Although the teaching of Scots law was regarded as succesful after its instigation, by the end of the nineteenth century, William Galbraith Miller wrote of the "ridiculous position now assigned to law in the University".[122] At the time of the Reformation in Scotland in 1560, John Knox set out his scheme for the teaching of law in the First Book of Discipline, but "In 1560, Glasgow was little more than a village of four streets. In 1889, it is the centre of a district containing a million inhabitants, and yet it has not the law school that Knox thought necessary in 1560".[123]

The only degrees granted by the Scottish universities were honorary. Miller regards this as the only redeeming feature of legal education in this period. The

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the Netherlands often proved more attractive...[t]his European orientation of Scots law continued until the Napoleonic Wars, but was then interrupted, not only by war, but also by the tide of codification which passed Scotland by", in supra n.1 at p.xiii.

The more persuasive analysis is, I believe, offered by Cairns, and his conclusion seems to be supported by Professor Paton: "[W]ith Scots law becoming an independent system and the need for study abroad of the civil law diminishing, Chairs of Law were founded in the Universitites. In Edinburgh the Chair of Public Law and the Law of Nations and Nature in 1707, of civil law in 1709, and Scots law in 1722. In Glasgow the Chair of Law was revived in 1707." G.C.H.Paton "The Eighteenth Century and Later" in The Stair Society, supra n.119 at p.61.

[122]W.G.Miller The Faculty of Law in the University of Glasgow, (Glasgow: J.Smith & Son, 1889). Miller wrote "it is no rhetorical exaggeration to say that there is not one subject properly represented by a professor of law at Glasgow", (at p.9). Although Miller's comments are directed towards the Senate in the University of Glasgow, he does not regard any of the other law faculties in Scotland any more highly, Edinburgh is better in certain details only.

[123]Ibid at p.13-14.

Commissioners appointed under the Universities (Scotland) Act of 1858 established an Ordinance creating the degree of LL.B.: "as a mark of academical and not of professional distinction".[124] In an act of 1889, this same Commission also confirmed the practice which had grown up of conferring the B.L. degree.[125]

[124]A.R.Brownlie supra n.101 at p.29, 30.
It is part of the European tradition to designate the degree from the study of law LL.B. This designates that one is baccalaureus utriusque juris or bachelor of both laws; the civil and the common.

[125]This degree did not require a previous degree in arts and required less passes than an LL.B.. Miller despairs of the existence of the B.L., "In a word, the B.L. degree is the peculiar product of an age of adulteration...at no other period of the world's history...would it have occured to men to dignify the holder of such a school examination certificate with the title of a law graduate", supra n.122 at p.21.

MODERN PARADIGMS IN UNIVERSITY LEGAL EDUCATION.

Harold J. Berman has suggested that the teaching of law in the universities is a crucial feature of the formation of the Western legal tradition :"The legal professionals, whether typically called lawyers, as in England and America, or jurists, as in most other Western countries, are specially trained in a discrete body of higher learning identified as legal learning, with its own professional literature and its own professional schools and other places of training".[126]

In keeping with the dichotomies which are forced upon the Western tradition of law, contrasts are made between legal education in the common law world where law schools existed outside of the universities, and legal education in the civil law world where European law schools grew inside the universities. In his comparison of continental and American legal education, Riesenfield writes: "It is no surprise that a system of education which deals with a subject matter first taught in the inns of court is different in its trend from a system that goes back to the lecture halls of the medieval jurists in Bologna, Pavia,

[126]H.J.Berman, supra n.37 at p.8.

and Padua...".[127] By contrast to this, "the study of law in continental Europe has been associated for centuries with instruction at the university. To a significant extent this defines the salient characteristic of the civil law tradition".[128]

In the debate between "common law" and "civil law" methods of teaching, civil law methods are perceived to be more intellectual and critical and less slave to the dictates of the profession. By contrast to this, common law teaching is said to have a trade school mentality, geared to the needs of the profession and is, therefore, less open-minded.

Illustrations of these different paradigms in legal education are the French and the U.S. concepts of a law faculty.[129] From this perspective, law can be associated

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[127]S.Riesenfield "A Comparison of Continental and American Legal Education" (1937) 36 Mich.L.R. 31 at p.51.

See also L.C.B.Gower "English Legal Training" (1950) 13 M.L.R. 137, and R.C.Van Caenegem Judges, Legislators and Professors, (Cambridge: Cambridge University Press, 1987) at p.53-65.

[128]D.S.Clark "The Medieval Origins of Modern Legal Education :Between Church and State" (1987) 35 A.J.C.L. 653 at p.653. Clark proceeds to describe how :"In England and the United States, by contrast, it was not until the twentieth century that law school education replaced apprenticeship as the dominant avenue to legal careers", (at p. 654). See also J.H.Merryman supra n.7 at p.59-64, 115-117. See also J.P.Dawson, supra n.55. Also A.R.Brownlie supra n.101 at p.26.

[129]Thomas Carbonneau has juxtaposed their competing philosophies; the law programme in French Universities is an undergraduate course of study, established for students who lack any previous university training and fixed professional goals, whereas the law programme in North America represents graduate-level study designed to inculcate, in students with well-defined career ambitions, certain professional

with the "social sciences" or it can be taught for practical purposes. If these are the two alternatives then it can be taught as general legal culture, or as if it were a vocational subject. Thomas Carbonneau points out that despite these differences, the French and the U.S. law school also share a common pedagogical goal. This common goal is to give students an understanding of the law.[130]

In both Scotland and Québec, civilian methods and ways of working are revered; all facets of law teaching should conform to the civilian model. In Québec, comparisons are made between its ways of working and French methods, differences are perceived as proof of corruption of the civilian "system".[131]

Louis Baudouin, writing in 1951, has discussed whether McGill should teach civil law as it is taught on the continent of Europe. He believed that there was enough similarity between the two legal cultures and in the structure of the codes, which favoured the teaching of civil law in this way :"la structure du Code, l'agencement

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values and basic skills that are deemed requisite to the practice of law, T.E.Carbonneau "The French Legal Studies Curriculum: Its History and Relevance as a Model for Reform" (1979-80) McGill L.J.445 at p.474.

[130]Ibid at p.475.

[131]"If the mother system had not been meticulously followed the conclusion was often drawn that the affiliate system had been "corrupted" by the common law and thus was really nothing more than a bastardized civil-law system," J.-L.Baudouin supra n.18 at p.2. This criticism spills over into arguments about styles of legal education and method.

des matières, la similitude des textes entre le Code français et le Code du Québec, en bref la forme et le fond".[132] He added that the French language in Québec also favours the maintenance of the cartesian tradition.

Baudouin described the spirit of examining a code: "le juriste, le professeur, l'étudiant, procèdent du principe, ou tout au moins de la règle énoncée, pour descendre au cas d'espèce. C'est la forme par excellence de l'esprit logique, qui s'oppose à la technique anglaise répugnant précisément à la logique."[133] As Mignault said, the Code is more than a British statute, and to interpret it as such would be to kill its spirit.

This alignement with the civil law tradition is also respected by certain Scottish jurists. Typically, one emphasises how law and the universities in Scotland have had a "long and intimate connection".[134] This is witnessed by T.B.Smith in one essay, where he attempts to establish a link between the civilian tradition in Scotland and how it was reflected in university teaching;[135] T.B.Smith reiterates that the law schools for practitioners in Scotland, as on the continent, grew within the

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[132]Supra n.21 at p.439.

[133]Ibid at p.440.

[134]A.R.Brownlie, supra n.101 at p.26.

[135]T.B.Smith, supra n.1.

universities.[136]

In Scotland and Québec, definitions of law are often couched in nationalistic terms and this permeates attitudes toward legal education. There is a tendency to define Scots and Québec legal cultures with reference to the civil law tradition and in opposition to the common law tradition which is regarded as a threat to their independence. The nature of these legal cultures is often masked or obscured by sole reference to one doctrinal influence.

In one article which considers the treatment of English law in Scottish literature the authors suggest that: "It has been customary until quite recently to emphasize the differences both historical and present between Scots and English law, but this is greatly to over-simplify what has been a very complex inter-action at all times since the middle ages".[137]

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[136]Ibid at p.64. T.B.Smith tells us that Scots law developed as a civilian system mainly through the Scottish advocate and judge, trained abroad.

[137]W.J.Windram, H.L.MacQueen "The Sources and Literature of the Scots Law: A Selected Bibliography" in New Perspectives on Scottish Legal History, at p.12.

QUEBEC.

Legal education flourished in Québec universities from a very recent date.[138] In 1935, radical reform of the conditions for admission to the Bar were proposed and the General Council of the Bar decided that the study of philosophy constituted the very foundation of juridical training; the basis of la formation juridique.[139] The proposals which were formulated in 1935 were implemented in 1947, when it was definitively established that a university degree in law was a pre-requisite for call to the Bar.

The character of legal education in Québec remained the same in the following period. Jacques Boucher has described how university legal education had a markedly professional orientation until the 1960's.[140] Before the 1960's, law professors were practitioners first and

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[138]For early teaching of law in French Canada see L.Lortie "The Early Teaching of Law in French Canada" (1976) 3 Dal.L.J. 521, and also S.Frost "The Early Days of Law Teaching at McGill" (1984) 9 Dal.L.J. 180.

Although law has been taught in Québec since the last century, it had a very different character from that of today.

[139]It was thought beneficial that candidates hold a university degree in law, and that this degree be partly taken in philosophy, W.S.Johnson "The Education of The Lawyer as Québec views it" 1935 Can. Bar Rev.386.

The question of the fundamental character of the teaching of law in the university is still one which is discussed, and it is interesting to note that when law teaching was placed in the university, the idea was to institute a fairly general curriculum in the study of law.

[140]J.Boucher in Proceedings of the XIth Symposium of Comparative Law, supra n.90, at p.138.

foremost, and taught part-time: "Les cours se donnent tôt le matin, tard l'après-midi, pour permettre aux avocats ou notaires qui dispensent l'enseignement ainsi qu'aux étudiants, de vaquer à des occupations plus importants...les professeurs de carrière, une innovation, se comptent sur les doigts d'une main".[141] It was between the 1950's and 1960's that law became established in the universities. There was an increase in student numbers and a significant increase in the amount of "career professors".[142]

André Poupart has described the radical transformation that has been effected in the character and pattern of legal education: "En effet, l'histoire des facultés de droit est toute jeune. Il n'y a pas encore quarante ans d'écoulés depuis la nomination du premier professeur de carrière à plein temps...Dans une période assez brève, une évolution remarquable des programmes et des enseignements s'est produite."[143]

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[141] Ibid at p.140.

[142] These developments were commented upon by Dean Ivan Bernier of the Faculty of Law at Laval University in a paper recounting the changes wrought during 1970-1980 in the Faculty. He writes :"Il faut se souvenir, en effet, que la Faculté de droit du début des années '60 était loin de ressembler à celle que nous connaissons maintenant. A cette époque, l'enseignement était dispensé essentiellement par des chargés de cours, juges et avocats...", I.Bernier "La Faculté de droit de l'Université Laval de 1970 à nos jours" (1982) 7 Dal.L.J.356 at p.356.

[143] A.Poupart "Le rapport Arthurs et les études de premier cycle en droit" (1984) 44 Rev.du Bar.619 at p.619.

The Association de Professeurs de Droit du Québec (the A.P.D.Q.), in their submissions to the Guérin Commission in 1972, commented on the recent association of law teaching with the university.[144] The A.P.D.Q. pointed out that the universities were then at the height of their achievement: "l'A.P.D.Q. soumet que cet enseignement est présentement au sommet de toute l'histoire des facultés et que la qualité des programmes offerts est supérieure à celle de tout autre dans la brève histoire des facultés".[145]

There was also a significant difference in the legal literature which appeared in the 1960's. Previously, lawyers and notaries produced a large amount of legal literature, but, since the beginning of the sixties, a great amount of the literature has been produced by the professeurs de carrière. This links the idea of a law faculty in Québec with the law faculties in France, which have an important role to play in the production of la doctrine. In the 1960's, legal education was more firmly planted in the universities and stability continued from this date.

Three of the faculties of law in the Province date from the last century. McGill dates from 1853 and is the

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[144]Bureau de Direction de l'Association des Professeurs de Droit du Québec, mémoire soumis à M.le juge Guérin, le 14 février 1972.

[145]Ibid at p.7.

oldest faculty in Québec.[146] McGill is an English language institution,[147] and alongside the possibility of obtaining a degree in either the civil law or the common law, it is also possible to spend a period of four years in the "National Programme" which leads to a degree in both the common law and the civil law, since this programme was created in 1968. Professor Brierley suggested that the national law programme, with an integrated curriculum in the civil law and the common law acknowledges the "dual origins of Canadian law"[148] and is a unique programme.[149]

The faculty of law at Laval University was founded in 1854[150] and that of the University of Montréal in 1878.

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[146]See J.E.C.Brierley "Developments in Legal Education at McGill 1970-1980" (1982) 7 Dal.L.J. 364, see also R.A.MacDonald "The National Law Programme at McGill: Origins, Establishments and Prospects" (1990) 12 Dal.L.J. 211, and S.B.Frost, D.L.Johnston "Law at McGill: Past, Present and Future" (1981) McGill L.J. 33.

[147]Although, as Professor Brierley points out :"There has always been a significant proportion of the student population claiming French as their mother tongue and this is the case today, even though the Faculty remains primarily an English language institution" in "Developments in Legal Education at McGill 1970-1980", supra n.146, at p.370.

[148]Ibid at p.365.

[149]The University of London and the Université de Paris organized a four year degree programme in 1979 which leads to two degrees at the end of two years in each institution, see the notice in "Maitrise en droit. Mention Droits Français et Anglais" (1978) R.I.D.C.841. The University of Ottawa is organized into two distinct "sections" in civil law and common law.

[150]See Y.Pratte "The Faculty of Law at Laval University" (1965) U.of T.L.J.175. See also I.Bernier, supra n.142.

The faculty of law at the University of Montréal is the largest faculty of law in Canada and one of the largest in North America and one could suggest that in this detail it is similar to a French law faculty.

Three faculties have been created more recently. The section de droit civil was created at the University of Ottawa in 1953 when legal education was decentralised in that Province. This places this faculty in the same position as those in Québec and, like McGill, Ottawa has a national programme where it is possible to obtain a degree in the common and civil laws. The faculty of law was created in Sherbrooke in 1954 and the département de sciences juridique was created at the Université de Québec à Montréal in 1973.

The département de sciences juridiques has been described by Professor Brierley as "the most original of any Québec or Canadian institution".[151] As such, this institution has a very articulate formulation of its attitude to education and its program is directed towards social change :"we consciously aimed directly at the heart of the social system and at questioning the law, not only by exposing it as a language whose principal function is to make a social reality oppressive to the majority and to legitimize the interests of the minority, but especially by

[151]J.E.C. Brierley "Québec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" 1986 10 Dal. L.J. 6 at p.32/33.

proposing to use it as an instrument of advancement and political, economic and social change in our society".[152]

Aside from this institution, legal education in the Province of Québec has been described by J.E.C. Brierley as conservative: "From the earliest times undergraduate legal education in Québec has been resolutely and frankly conceived as a training intended to prepare for the practice of law...an overall homogeneity continues to reign."[153]

Brierley also suggests that it is a "cultural paradox" that Québec has paralleled the American experience in developing its philosophy of legal education in the university. It could also be that the tradition of polyjurality in Québec has not been completely stifled and that the Québec legal tradition is receptive to other traditions, whether common law or civil law.

David Howes has argued that legal education in Québec enjoyed a golden age in the mid 19th century when law was first taught in the university.[154] In this era, law was conceived of as a dialogue between historians, philosophers and the exponents of different legal traditions. After this

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[152]R.D.Bureau, C.Jobin "Les sciences juridiques à l'Université de Québec à Montréal: Fifteen Years Later" (1987) 11 Dal.L.J.295.

[153]J.E.C. Brierley, supra n.151, at p.30.

[154]D.Howes "The Origin and Demise of Legal Education in Québec" (1989) 38 U.N.B.L.J. 127.

period, other traditions were regarded as threats to the purity of the civilian system, as alternatives to this system.[155] Howes suggests several reasons for this evolution (or, as Howes calls it, "involution") of juridical thought in Québec. One is that law has ceased to be regarded as an oral tradition and has come to be regarded as a textual one--law is no longer looked upon as rhetoric but as legal science.

Howes elevates the period of Québec law in the era of Maximilien Bibaud who founded his école de droit in 1851. He suggests that at this period law was not demarcated from the study of philosophy and politics--an attempt was made to teach law with the understanding that philosohy and politics were integral to its workings.[156]

Howes laments the fact that law teaching came to be detached from these studies and he criticises the recent development of interdisciplinary studies.[157] In his

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[155]This refers back to Howes piece on "The Transformation of Québec Law : From Polyjurality to Monojurality", supra n.11.

[156]D.Howes, supra n.154, at p.128-129.

[157]I have a similar objection to the conclusions formulated in the report of the Royal Comission on Legal Services in Scotland. The Royal Comission propose that all law students study a social science or a modern language which is intended to broaden the mind. To quest in other faculties of the university for a subject which demends of the intellect shows a lack of imagination and, I believe a misconception of the purpose or possibilities of legal education. The Royal Comission wishes to encourage "cross fertilisation of law and subjects from other disciplines" (at p.249), they do not articulate why one's legal education would benefit from this, Royal Comission on Legal Services in Scotland, vol.1-2, (Edinburgh: Her Majesty's Stationery Office, 1980).

view, these concerns should be regarded as indispensable and internal to the study of law.[158] Howes appeals for a broad approach to law, which does not divide law into specialised subjects, and to a discursive approach to the teaching of law.[159]

This critique of specialisation has been alluded to by other jurists. Professor René David proposed reforms of legal education in France, and part of his criticism was directed at the practice of "specialization" (where a student in the final two years becomes either a privatiste or a publiciste).[160] David believes that this separation of "privatistes" from "publicistes" in the regime is uneccessary, and to distinguish the historians in each of these groups is even more artificial.[161]

David suggests that there is a problem with excessive specialisation and of the spirit which permeates law teaching in France. He asks: "arriverons-nous, grâce à cette spécialisation, à préparer nos étudiants à l'exercice

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[158]D.Howes, supra n.154, at p.129.

[159]Ibid at p.148.

[160]A form of instruction is needed that gives the student a more active role:"une bonne formation juridique demande autre chose que d'assister à des cours ou de les apprendre par coeur." Some reform of the courses has been initiated, the duration of studies has been extended from three years to four years and includes six practical subjects, René David "Regards sur l'enseignement," in Les avatars d'un comparatiste, (Paris: Economica, 1982).

[161]David recounts that he was present at some discussions in Paris on whether legal philosophy should be classed as private law or public law, ibid.

des différentes professions juridiques?"[162]

Philippe Rémy has criticised the phenomena of specialisation from an intellectual and pedagogical point of view. He suggests that:"la spécialisation est tout simplement l'éclatement du vieux droit civil en petits blocs de règles séparés".[163] For Rémy, this is the vulgar form of specialist. The other kind is the specialist who pretends that the object of his work is part of a distinct genre, with a brand new working method: "Le spécialiste prétend alors que l'objet de son savoir est un objet distinct, généralement neuf et que sa méthode est neuve aussi".[164] Rémy is scathing of the specialist's belief in the instrumental nature of law, in a kind of naive positivism; Rémy's criticism is linked to a critique of the different values involved in each approach.

Similar comments have been made on the phenomena of specialisation in Québec. Brierley links the decline of civil law scholarship with a rise in "new" and "specialized" concerns:"the decline in the relative importance of the Civil law, beginning in the late 1960's, was matched by the increased place given to a whole range

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[162]Ibid at p.192.

[163]P.Rémy "Les civilistes français vont-ils diparaître?" 1986 McGill L.J. 152 at p.155.

[164]Ibid at p.156.

of specialized concerns."[165] He describes how Lajoie & Parizeau, who carried out a major study of Québec legal practice and education have argued for a major re-orientation of educational priorities in favour of "public" and "social" law.[166]

Professor Brierley continues: "the real challenge in future curriculum planning is to avoid the creation of a multitude of little parcellings of courses in face of the vast statutory law now in place. The real need is to promote the kind of synthesis in these new subjects for which the systematized method of the Civil Code itself still provides a model".[167]

Howes argues his case (that there was a conceptual shift in juridical thought) through an examination of Maximilen Bibaud's philosophy of law and legal education. At this époque, the state of the law of Bas-Canada has been described as a babel légale, and to organize law for teaching purposes was an arduous task. Howes describes how Bibaud brought order to the chaos of Québec law, by adopting a method which he styled as "à la fois historique,

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[165]J.E.C.Brierley, supra n.151, at p.28.

[166]A.Lajoie, C.Parizeau La place du juriste dans la société québécoise, (Montréal: Centre de recherche en droit public, Université de Montréal, 1976).

[167]J.E.C.Brierley, supra n.151, at p.29.

méthodique, philosophique et pratique".[168]

He approves of the teaching methods which Bibaud used in his school and regrets the demise of the oral tradition in legal education and the emphasis on written examination as opposed to oral examination. The demise of this tradition was linked to the rise of textuality: of dogmatism in scholarship, and sterile, exegetical types of legal analysis.

What brought about this astonishing change in the conceptualisation of the civil law in Québec? Howes offers several explanations. The first is that it was the result of Québec jurists (circa 1910-20) coming to realize that the respect which they accorded foreign doctrine was not being reciprocated.[169] At about the same period, there was also an upsurge in the linguistic method or the argumente du texte, as a means of codal interpretation--law was what the legislator had dictated.[170] Finally, French-Canadian nationalism in the 1920's-1930's resulted in a consciousness of the boundaries of the nation.[171]

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[168]M.Bibaud Commentaires sur les lois du Bas-Canada, (Montréal: Cérat et Bourguignon, 1859) at p.4.

[169]D.Howes, supra n.154, at p.141. This continues his argument from an earlier article, supra n.11.

[170]Howes refers us to his article on "Dialogical Jurisprudence" in W.Pue ed. Law and Society: Issues in Legal History, (Ottawa: Carleton University Press, 1988) for elucidation of this argument.

[171]Again, Howes refers us to an earlier article, D.Howes "La domestication de la pensée juridique québécoise" (1989) 14 Anthropologie et Sociétés 103.

Howes advances two additional arguments as to why Québec legal education has become so parochial--the style in which the Code civil is now reproduced and the magisterial style of teaching which civilian professors use.[172]

The reasons which Howes proposes cumulate to a decisive shift in attitude on the part of legal educators and legal thinkers--a decisive shift in legal practices. However, the common law continues to influence Québec law, the U.S. model of legal education has wrought its effect, as Professor Brierley has noted.

Howes aligns his thesis with Professor Brierley's in a great many respects, but he does not qualify or explain Brierley's conclusion that: "Québec's development in legal education has in fact more closely duplicated the American and even the English experience than the French".[173] The repulsion of Québec law and law teachers towards the common law is more imagined than real, more rhetoric than

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[172]In the tradition inherited from France, there is an emphasis placed on the formal arrangement and the systematic treatment of a subject. As it is, the French model of legal education is based upon authority. The teacher speaks and the pupil listens. The professor assigns materials to the teaching assistant and largely controls what they do. The teachers in the faculties of law form a hierarchy and even in the travaux dirigés the hierarchical structure is maintained. See Claudine Bloch in "The Teaching of Law in France" (1989) 12 Dal.L.J. 476.

[173]J.E.C.Brierley, supra n.151, at p.42.

reality.[174]

[174]Brierley concludes: "While history and politics have done much to promote the idea that Quebec is culturally distinctive in its French connection, it does very obviously share much of general North American values and aspirations, and this is strikingly so in the manner in which it has come to think about the university and the legal profession" (ibid at p.43), this is the paradox alluded to in the title of Professor Brierley's article.

CHAPTER 3.

SHOULD THE UNIVERSITIES BE THE "ANTE CHAMBERS" OF THE PROFESSIONAL BODIES?[175]

In the last chapter, the establishment and character of legal education in the universities was considered, and the paradigms which have influenced the two jurisdictions. Although civilian methods are the object of desire, in practice, both jurisdictions are eclectic in their choice of mentors, and draw on the French, English and American models, amongst others.[176]

In this final chapter, the role of legal professionals and the professional bodies will be considered. The role of the legal actors will be addressed from three different

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[175] L.Gagnon "Le droit vit-il à l'heure de la société?" (1978) 13 R.J.T. 231 at p.262.

[176] In a civilian jurisdiction, it is often stated that the professors have an important role in the development of law and in the production of la doctrine (it is also true, that the role of doctrine is important in the U.S.). The baroque development of the common law, and the development of the socratic method of teaching associated with the Deanship of Langdell at Harvard has resulted in the production of textbooks of cases and materials. In both Scotland and Québec, cases and materials are widely used, neither jurisdiction discriminates in this regard. In Scotland, for example, there is A.A.Paterson, T.St.J.N.Bates' casebook on The Legal System of Scotland, 2d ed., (Edinburgh: W.Green & Son Ltd., 1986); Enid Marshall's Scottish Cases on Contract, (Edinburgh: W.Green & Son Ltd, 1978; and recently W.J.Stewart's Casebook on Delict, (Edinburgh: W.Green & Son Ltd., 1991).

perspectives; the first questions whether the universities should be the "ante chambers" of the professional bodies, the next is a brief look at the attempt to teach professional ethics in the legal "finishing schools". Lastly there is a brief section on how the profession influences the dominant conceptions of law, (such as those which were discussed in the first chapter).

Max Weber believed that it was the honoratiores of the law who were the important legal actors, it was they who shaped the character of legal development. Similarly, Zweigert and Kotz have written that it is important which type of lawyer is regarded as representative in a given legal culture. In the Anglo-American culture it is the judge who is the "oracle of the law". In France the representative type of lawyer is the avocat, the lawyer who pleads before the courts, while the ideal German lawyer is the Doctor Iuris found among the ranks of professors, but also among judges and barristers.[1''] Seen in this light the question of who determines the content of legal education could be the determination of who the important legal actors are in a given jurisdiction.

Van Caenegem contrasts the importance of the German medieval professor with the English: "Can one think of a greater contrast than between the English universities of the nineteenth century and their German counterparts? On

[1'']K.Zweigert, H.Kotz, supra n.33 at p.134.

one side of the North Sea there were hardly any law faculties, and professors played a minor role in the life of the law; on the other, professors of law were so eminent and revered that there existed the practice of Aktenversendung, i.e. the consultation of a law faculty by a law court."[178]

The traditional antimony between civil and common law legal education is rather exaggerated. The idea that the medieval university was based upon a purely academic pattern is an exaggeration, for its professional character was marked: "That professional education, education for a profession, is the traditional principal object of the European universities, is a common place."[179]

Although the university has been described as a place of professional education and learning, it is not, however, a place of vocational learning.[180] Otto Kahn-Freund

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[178]R.C.Van Caenegem, supra n.127, at p.64.

[179]O.Kahn-Freund "Reflections on Legal Education" in Selected Writings, at p.361. Hastings Rashdall has affirmed this proposition that the medieval universities were places of professional education.

[180]David and de Vries comment "Many attempts have been made to explain the difference between Anglo-American and French law by characterizing the former as "lawyers' law", which developed through practitioners' techniques, and the latter as "professors' law", growing out of university systematization. Although this analysis may have significance today, it seemed at first as though the very opposite might occur...As in England, the avocats who pleaded before the parlements were, prior to the seventeenth century, in many instances not holders of university degrees. They were men who had recieved their legal education as apprenticeship...as university courses in law were at that time devoted solely to Roman civil law and canon law" R.David, H.P.de Vries The French Legal System, (New York: Oceana Publications, 1958) at p.24-25. In 1679, the first course in French law, taught in

exhorts that a legal training must fulfill the requirements which the terms formation or bildung describe: "The main stream of European development ran in another direction: universities were founded for the education of clergymen, of lawyers, of civil servants, of physicians, of teachers. It was and is the essence of a "learned" profession that apprenticeship while indispensable is not sufficient."[181]

In the Québec setting, the question of whether the universities should be the "ante chambers" of the professional bodies became crucial after the crisis in 1972, when student srikes, street marches and riot conditions occurred after a large number of students failed the August Bar examinations. A commission of enquiry under Judge Guy Guérin was created to examine legal education in the Province, and his report on the structure of legal education in Québec was handed down in June 1973. The faculties, student bodies, the Québec Bar and Notarial professions all presented competing visions of the proper purpose and content of legal education.

The Association des professeurs de droit du Québec (the A.P.D.Q.) criticised the narrow mandate of the enquiry

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the French language and referring to contemporary legislation was established by Louis XIV.

See also T.E.Carbonneau, supra n.129 at p.448-451, and R.David, supra n.90, at p.190, 192.

[181] O.Kahn-Freund, supra n.179, at p.361,

which was given to them. They believed that it was futile to have an enquiry which focused solely on the training of advocates, and thought it was important to have a more comprehensive view of the process: "L'expérience passée révèle une absence de philosophie globale de la formation juridique...".[182]

The submissions by the Québec Bar Association stressed their role in maintaining the standards of the profession and criticised elements of the current programme in the law faculties. [183] In contrast to the Bar's view, the A.P.D.Q. presented their view of a university education in law as something separate and distinct from practice and from the professional bodies which control the practice.

Ever since their creation as professional

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[182] Supra n.144.

[183] In their mémoire to Judge Guérin, they submitted that, "l'Etat a le devoir de s'assurer que les personnes qui exercent certaines professions soient compétents afin que le public ne soit pas lésé...il nous apparaît important de continuer à vérifier de façon sérieuse la competence des candidats qui veulent exercer la profession d'avocat, et ce, dans l'unique but de protéger le public contre des préjudices éventuels qui pourraient être causés par des avocats incompétents ou négligents."

They also made specific criticisms of law teaching in the universities. They pointed out subjects which were not taught in certain faculties, and they suggested that there should be a standard programme in the faculties. The Québec Bar also criticised elements of law teaching as it taught law as it should be rather than law as it is. In their view, the purpose of a law degree is to give the student a sound knowledge of the basics of the law, as most students want to be members of the Bar or Notarial professions.

associations, the Québec Bar and the Chamber of Notaries[184] have exercised control over admission to the practice of law, and this control went beyond setting qualifying examinations and has included the specification of the kind of training students must undergo in order to sit this examination.[185] The A.P.D.Q. wanted this control to be relaxed.[186]

Lon Fuller believed that the practical and academic aspects of legal education, "are so closely related that it is unrewarding to discuss which is primary and which is

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[184]J.-G.Cardinal remarks "Il est étrange de constater que, dans le Québec, contrairement à ce qui s'est réalisé en France par exemple, les groupes professionnels ont cherché à contrôler les facultés universitaires, à déterminer les critères de leur enseignement et à ne les considérer que comme des mandataires ou des serviteurs de la profession", in "La Faculté de Droit et le Notariat" (1967) 2 R.J.T.151 at p.157.

[185]M.Nantel has described the admission process in the nineteenth century: "pour être admis à l'étude du droit, il fallait avoir reçu une éducation libérale et posséder suffisament la langue française ou la langue anglaise, et la langue latine. Après une enquête sommaire sur les moeurs et les connaissances de l'aspirant, les examinateurs recommandaient l'octroi du certificat d'admission...", in "Les avocats à Montréal" (1942) 2 Rev.du Bar.445 at p.450, 457-458. He continues, "Les réformes de 1936 et de 1942 ont encore amélioré le système, en permettant une sélection plus sévère des candidats et en assurant à ces derniers une formation plus complète" (at p.458).

[186]The Guérin Commission favoured the institution of a <u>profile obligatoire</u> which would amount to two-thirds of the course credits for a law degree. The benefits of this scheme were suggested by the Commission: "Les cours à option offrent a l'étudiant des avantages indiscutables. Ils y trouvent l'occasion d'explorer en profondeur quelques sujets donnés avec un effort particulier et d'analyse et de synthèse. Ils permettent même très souvent à l'étudiant de placer le problème dans toutes ses dimensions voir dans l'interdisciplinalité", Commission d'Enquête sur la formation des jeunes avocats, June 1971, at p.17.

secondary".[187] Fuller also warned of the problem of over emphasising the bar examination. He believed that the legal community, through the bar examination itself, was deeply distorting the aims and methods of legal education. In 1961 he wrote that many law schools "struggle bravely under a shadow that reaches even into the first year."[188]

In Fuller's view, the North American law school has not maintained sufficient autonomy from the practical demands of the Bar. The status of the law school as a university institution is important, as it has the responsibilty for furthering the pursuit of knowledge and preserving intellectual traditions. The university acts as an impartial and independent repository of ideas.

In Québec, a programme of professional training, lasting for one academic year, was instituted in 1968.[189] Howes has written that the invention of the Québec Bar School is a result of the separation of theory and practice in modern legal education. He reminds us that in the nineteenth century, legal education was characterized by a union of theory and practice. This approach has been lost, but is now desired and the creation

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[187]L.Fuller, Randall "Professional Responsibility" (1958) 44 A.B.A.J. 1159.

[188]L.Fuller "The Academic Lawyer's House of Intellect" (1961-62) 14 J.Legal Ed. 153 at p.157.

[189]Y.-M.Morisette "Testing Professional Skills in the Québec Bar Admission Programme" (1988) 57 The Bar Examiner 13.

of a new institution (Bar School) is a renewed attempt to merge theory and practice.[190]

Jean Rivero has suggested how the creation and cultivation of a lawyer is a lifelong process and that limitations of time can be overlooked in an assessment of what law schools should be able to accomplish. What the student and society, might expect of legal training is that it enable them to understand and apply the succession of rules which they will encounter in the four or five decades of their professional life.[191]

Of the relation of university legal education to the requirements for professional practice in Scotland, Brownlie has written that, "the warfare which has raged elsewhere between academic and professional bodies has not...broken out openly."[192] When this article was published in 1955 it was possible to satisfy all the professional requirements by studying given subjects at university in the course of preparing for a law degree.[193]

It is still possible to gain exemption from the

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[190]D.Howes, supra n.154, at p.146.

[191]J.Rivero "Réflexions sur l'enseignement du Droit" in Mélanges offerts à M.le doyen Louis Trotabas,(Paris: Librairie générale de droit et jurisprudence, 1970).

[192]A.R.Brownlie, supra n.101, at p.47.

[193]However, Brownlie suggested that this "diploma privilege" of Scots degrees might have tended to make the curriculum too vocational, ibid at p.47.

professional examinations by a combination of subjects in the law degree, and this is the most popular option. This recalls Professor Brierley's remarks about the "precocious professional orientation" of Québec legal education, "The student population exerts a powerful influence on the homogeneity...simply by consistently opting for courses that relate to preconceived ideas about the nature and practice of law".[194]

It is still true that the relationship of the university to the professional bodies has not been debated in Scotland as vigourously as it has in Québec. Change in the structure of legal education in Scotland was effected in 1980, without serious challenge. This change revoked the "diploma privilege" of Scots degrees with the introduction of the Diploma in Legal Practice into each of the five Scottish universities offering the LL.B.[195] It was thought that the undergraduate curriculum was overloaded and there was concern over the general standards of apprenticeship training.

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[194]J.E.C.Brierley, supra n.151, at p.31.

[195]J.P.Grant "The Diploma in Legal Practice Mark II" (1989) 35 J.R.91 at p.91. The five Scottish universities which offer the LL.B. are Glasgow, Edinburgh, Strathclyde, Aberdeen and Dundee.

HOW THE STRUCTURE OF THE PROFESSION INFORMS LA FORMATION PROFESSIONELLE.

Of the many criticisms which can be made of the Diploma in Legal Practice course one of the most pertinent is the inclusion of a course in Professional Responsibility (which includes study of the disciplines of Professional Ethics, Lawyer-Client Relations and Office Systems)in the reformed Diploma in 1988.[196] "This", writes J.P.Grant, "reflected increased concern, as much from within the legal profession as from outside, with professional standards."[197]

Professor Glenn has argued that a professions' ethics are informed by the professsional structure within which they operate. This counters the idea which is prevalent in the U.S. that legal ethics are in the domain of individual choice.[198] It is an ethic which is passed from generation to generation, not by direct instruction, but through a process of institutional influence, and practice,

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[196]Changes were implemented by the universities in October 1988, after the review process was completed (a review was recommended by The Royal Commission on Legal Services in Scotland). See J.P.Grant, supra n.195, at p.95.

[197]Ibid at p.95. Forty hours of teaching are dedicated to this subject.

[198]"My argument is a very simple one, but it is today far from obvious. The argument is that professional structures are of profound ethical significance...No concept of professional ethics should therefore be isolated from the structure of the profession", H.P.Glenn in "Professional Structures and Professional Ethics" (1989-90) 35 McGill L.J.424.

and is informed by the profession's structure: "The standards of the profession itself may thus be enforced, by those familiar with them as a result of long practice...the professional ethic is conceived as being voluntarily assumed and more onerous in character than any standard which could be imposed by external means. Such standards must be learned, since they are not expected of the general population, and the authorities of each profession play a continuing and diversified role of both education and, where necessary, punishment, in deciding disciplinary cases."[199]

Professor Glenn argues that the idea of the professional ethic is one which unites the common law and the civil law traditions in Europe, but distinguishes the U.S. jurisdiction.[200] In France, for example, the structure of the profession dictated the relation of the avocat to his client and also dictated that until 1954 a partnership between avocats was considered

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[199]Ibid at p.428.

[200]The structure of the European profession manifests four characteristics: "First, European practice is divided amongst several professions; second, the boundaries of professional practice are fixed by defined incompatibilities, known as such, which prevent members of a profession undertaking specific activities; third, the professions exercise a strong corporate control over their membership; and fourth, they do so through enforcement of ethical standards the explication of which is one of the ongoing functions of the professional body itself", ibid at p.426.

incompatible.[201] Of the payment of fees to the avocat, it has been noted that they [les honoraires] were irrecoverable, but not through any rule of law: "l'interdiction de la poursuite des honoraires en justice n'était qu'une prescription d'ordre professionnel et non pas une règle de droit".[202]

In the nineteenth century, lawyers in America operated in a relatively free market, competing vigorously with both each other and with laymen. Only in the courtroom was their monopoly protected from outsiders. Because American lawyers belonged to a single profession they did not enjoy the protection afforded to the English bifurcated profession, or the even more numerous functional divisions found within the civil law.[203]

The American Bar Association (the A.B.A.) first adopted an ethical code in 1908 and thereafter concern with the content of ethical rules became a major preoccupation of the professional associations. The number of ethical codes have mushroomed, and there is much legislation in

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[201]O.Kahn-Freund, C.Lévy, B.Rudden A Source Book on French Law, (Oxford: Clarendon Press, 1973) at p.265.

[202]Found quoted in O.Kahn-Freund, C.Lévy, B.Rudden, supra n.201, at p.267

[203]R.L.Abel in American Lawyers, (Oxford: Oxford University Press, 1989) at p.6. In the depression era, the Bar, through self regulation sought to control competition. The organized Bar did nothing to encourage lawyers to offer pro bono legal services to those who could not pay. As late as the 1950's, the A.B.A. condemned the new British legal aid scheme as "creeping socialism".

this area. It is now the law which sanctions the lawyers. The profession defines the ethical dilemmas of lawyers as matters of individual choice.[204]

American lawyers have become an influential model for legal professions in many other countries.[205] Professor Brierley has noted its impact upon Québec legal practices[206], and the Professional Responsibility course in the Diploma in Scotland acknowledges the influence of the U.S. model. The American example serves to illustrate the perversity of the attempt to teach the "rules" of professional ethics, and what is implicated in this approach. However, both the universities in Scotland and the Barreau du Québec, following on from the American pattern, attempt to teach legal ethics to their students.

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[204]The response of the U.S. legal profession to the Watergate scandal (in which lawyers were implicated at all levels) was to compel law schools to require instruction in professional responsibility, R.L.Abel, supra n.203, at p.142

[205]The large law firm, pioneered in the U.S., has spread. Its size makes it viable for computerization. The idea of billable hours has exercised a potent influence upon the organization of the profession as one develops an exaggerated responsibility to one client, ibid at p.142-143.

[206]J.E.C.Brierley, supra n.151 at p.43.

THE LEGAL PROFESSIONALS

The final factor which I wish to consider is the influence of the legal professionals upon legal education. It is Alan Watson's thesis that the legal elite exert a powerful influence on the development of the law, and their desires shape legal development. It is his view that if there is lack of ingenuity in the creation and development of law, it is due to their whims as to the available sources of law.[207] "When ambiguities and weakness persist in the substantive law because of serious defects, these are obvious and known to the persons controlling these sources-- persons controlling these sources have an obvious disinclination against reform."[208]

Professor Watson is of the opinion that legal borrowing accounts for a large proportion of legal development. Of the factors which shape the extent and pattern of legal borrowing, the influence and respect accorded the donor law is one factor, national pride, language and accesibility are the others. It is national

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[207]A.Watson, supra n.4 at p.106,107. In Sources of Law, Legal Change, and Ambiguity, Professor Watson suggests that the history of the Western legal tradition demonstrates a profound indifference among the influential members of the legal community towards the available sources of law which has led to unresourceful and unimaginative law reform, supra n.51.

[208]A.Watson, supra n.4, at p.105.

pride which is the determinant factor in Scotland.[209]

The legal élite in Scotland are stalwarts in opposing the value or relevance of English rule or model.[210] It is felt that it is better to borrow consciously from Civil law than from the common law, because the former, but not the latter, is in conformity with Scottish legal principles and tradition. In Scotland, nationalistic doctrine does not suggest that law should be created de novo, rather, it should be borrowed from "civilian" sources, than from over the border. Watson writes that: "It cannot be too greatly emphasised that at no time has Scotland been a part of a continental legal tradition from which the English law was excluded".[211]

Watson suggests that to acheive modernity and greater certainty in the law of Scotland, one of two approaches might be used. The first is to approximate Scottish and English law. He notes that this approach finds little

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[209]A.Watson Society and Legal Change, (Edinburgh: Scottish Academic Press, 1977) at p.102.

T.B.Smith describes features which might favour or militate against the adoption or borrowing of legal principles and ideas--for example an English education of the Scottish legal elite or the use of a common language, T.B.Smith, supra n.1, at p.128-129.

[210]The Scottish Law Commission's reluctance to engage in joint excercises with the English Law Commission is well known, (Watson, supra n.209, at p.103).

[211]A.Watson, supra n.209, at p.104.

support amongst leading advocates and academics.[212]

The other approach would be for practitioners and academics to make a concerted effort to write books and articles establishing a modern framework for the law. He welcomes the recent developments in this regard establishing the Scottish Law Commission and the Scottish Universities Law Institute.[213]

Watson's conclusion that the legal elite do not favour a rapprochement of Scottish and English law is supported by Peter Stein. Professor Stein asks how a professor of Scots law should portray Scots law jurisprudentially.[214] The teacher of jurisprudence may inculcate a particular attitude to law in his students, and in deciding the way in which he should present the phenomenon of law, one must be guided by any conception of law regarded as traditional in one's jurisdiction.

Professor Stein argues that commentators on Scots law

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[212]T.B.Smith has described the attitude of the English in the export of their legal system as "imperialistic", by this he means that they have arbitrarily imposed their standards on to Scots law, T.B.Smith "Legal Imperialism and Legal Parochialism" (1965) 10 J.R. 39. He disagrees with Professor Lawson's description of Scots law as "being largely indistinguishable from English law" (F.H.Lawson The Comparison: Selected Essays, (Oxford: North Holland Publishing Company, 1977) at p.10-11). Lawson contends that differences are matters of local interest (such as land law and family law), Lawson would unhesitatingly place Scots law in the common law camp. T.B.Smith criticises this at p.4 of British Justice: The Scottish Contribution, (London: Steven & Sons Ltd., 1961).

[213]A.Watson, supra n.4, at p.107.

[214]P.Stein "Legal Thought in Eighteenth Century Scotland" (1967) 2 J.R.2

have been overconcerned to emphasise the differences between Scots law and English law, and that they have done this by pointing to the natural law thinking in Stair and Erskine and to point out its resemblances with the continental rationalist strain of natural law.[215]

Stein is looking at conceptions of law which might be described as traditionally Scottish; he is looking to the "classical" period of Scots law. He suggests that this kind of natural law thinking was challenged in Scotland by an anti-rationalist, sociological and flexible conception of law which might equally be said to be Scottish.[216] Stein suggests that the traditional opposition of Scottish and English attitudes to law should be examined further.

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[215] Ibid at p.20.

[216] Ibid at p.20.

CONCLUSION.

As we have seen, comparative law, the reception of laws and the taxonomy of legal systems can be manipulated to demonstrate that the law of another jurisdiction is a rival to our own. In Scotland and Québec this elevates the importance of the inheritance of the civil law. The existence of the common law and the civil law in Scotland and Québec can either be discussed in terms of the "clash" of legal traditions or the "confluence" of legal traditions.[217] I have chosen to discuss it in the latter of these terms.

The idea that legal systems exist as internally coherent, pure and systemic entities stifles legal growth and legal change.[218] Inevitably, these attitudes are reflected in legal education in Scotland and Québec. To a certain degree, legal education maintains a tradition and reflects the elements of that tradition.[219] In Scotland

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[217]G.Dargo has described the history of Louisiana law in terms of the "clash" of legal traditions, see supra n.24. Jean-Louis Baudouin, Pierre-Basile Mignault and T.B.Smith would also describe judicial phenomena in Scotland and Québec in this way.

[218]A.Watson in Sources of Law, Legal Change and Ambiguity, (supra n.51) canvasses this view most eloquently.

[219]"'Law schools', wrote Maitland, 'make tough law'. He was referring immediately to the durability of the Lombardic law of Pavia, but only by way of introduction to his thesis that the inns of court had saved English law in the age of the Renaissance", from J.H.Baker "The Inns of Court and Legal Doctrine" in T.M.Charles-Edwards, M.E.Owen, D.B.Walters eds., Lawyers and Laymen, (Cardiff: University of Wales Press, 1986).In this thesis, I have argued that the accent upon the menace of the common law is the "tough Law" which is made by some in the universities.

and Québec, this perpetuates the battle with the common law "system" and the rejection and denial of its influence.

In both Scotland and Québec, civilian methods and ways of working are revered; all facets of law teaching should conform to the civilian model. However, we find that legal methods and ideas are drawn from different sources, and that both Scotland and Québec are eclectic in their choice of mentors.

ABBREVIATIONS.

A.B.A.J.	American Bar Association Journal
A.J.C.L.	American Journal of Comparative Law
A.J.J.	American Journal of Jurisprudence
Am.J.Legal Hist.	American Journal of Legal History
C.de D.	Cahiers de Droit
Can.Bar Rev.	Canadian Bar Review
Can.Law Times	Canadian Law Times
Col.L.R.	Columbia Law Review
Dal.L.J.	Dalhousie Law Journal
Harv.L.R.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
J.Legal Ed.	Journal of Legal Education
J.L.S.S.	Journal of the Law Society of Scotland
J.R.	Juridical Review
J.S.P.T.L.	Journal of the Society of Public Teachers of Law
Law and Hist.Rev.	Law and History Review
Law and Phil.	Law and Philosophy
L.Q.R.	Law Quarterly Review
McGill L.J.	McGill Law Journal
Mich.L.R.	Michigan Law Review
M.L.R.	Modern Law Review
N.I.L.Q.	Northern Ireland Law Quarterly
O.H.L.J.	Osgoode Hall Law Journal
O.J.L.S.	Oxford Journal of Legal Studies
Rev.du Bar.	Revue du Barreau
Rev.Gen.du Dr.	Revue Générale du Droit
R.I.D.C.	Revue internationale de droit comparé
R.J.T.	Revue Juridique Thémis
Scand.Stud.Law.	Scandinavian Studies in Law
SCOLAG	Scottish Legal Action Group Newsletter
S.H.R.	Scottish Historical Review
S.L.T.	Scots Law Times
S.L.T.(News).	Scots Law Times, "News" Section
Stan.L.R.	Stanford Law Review
Tul.L.R.	Tulane Law Review
U.Chi.L.R.	University of Chicago Law Review
U.N.B.L.J.	University of New Brunswick Law Journal
Wisc.L.R.	Wisconsin Law Review
Yale.L.J.	Yale Law Journal

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