1 Scots Commercial Law in a Global Context

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People study commercial law at college or university for all kinds of reasons. It may be as part of a law degree, where a detailed knowledge of the subject will be called for and other legal subjects will be studied. Equally the subject may be studied as part of an accountancy or business management degree or college course. Students from other subject areas may decide to study it as an elective, realising that a basic level of knowledge of the subject would be useful to a person with a career in engineering, computing, business or the creative arts. Increasingly, students are electing to study all or part of their programmes abroad, and universities offer their programmes at various overseas campuses, or by distance learning, with the result that students might find themselves studying Scots law at a campus in places far from Scotland such as Bangladesh or Mauritius, or an international student might be studying at a university or college in Scotland. This chapter seeks to explain the relevance of Scots law to students whose main specialism is not law, and to those who live, work and study thousands of miles away from Scotland, or who come from another country and spend a short time studying in Scotland. It also gives practical advice on how to study and write about commercial law. Equally, this book is suitable as a course text for those who are from Scotland and studying the subject in Scotland.

How does Scots Law fit into the global family of legal systems?

Legal systems are products of their history. Until 1707 Scotland and England were separate countries and had separate legal systems, and spent many centuries fighting each other. From 1603 they had the same king but separate parliaments and governments before fully uniting in 1707. After the Acts of Union of 1706-7, some aspects of the legal system of Scotland continued to be distinct: Scotland retained separate courts and much of its own substantive law, though all legislation thereafter came from the parliament in Westminster, London. Because England and Scotland had such a turbulent past and the two countries were often at war in the years before the union of the parliaments, Scots lawyers preferred to take ideas from Roman law and continental legal systems such as the Netherlands, France and Italy, rather than from English law. These legal systems were based on Roman law. After the union of the parliaments, the main influence started to come from England, and Scots law is said to be a mixed legal system, drawing on both the common law tradition (England) and the civil law tradition (continental legal systems).

Later, after the union of the parliaments, English influence became more pronounced. These influences were very different, as two different legal traditions were in play. Other legal systems have grown up in other parts of the world as a result of the development of various political and religious systems. Examples are socialist legal systems and Islamic legal systems but there are many others.

During the late twentieth century, as Scotland came to have a rather different political outlook from England, demand arose for devolution of law-making powers to Scotland, and since 1999 there has been a Scottish parliament and Scottish government at Holyrood in Edinburgh with devolved powers in certain areas of law. Over time the devolved powers have expanded, and Scotland now has some tax-raising powers. It is likely that this move towards further devolution of powers will continue in future. There was a referendum in Scotland in 2014 on possible independence from the rest of the United Kingdom, but the vote was to remain as part of the UK.

The common law family

English law was the first member of this family. Historically, the principal source of law in these legal systems was the courts, which decided and developed the law through its application in cases. This approach is quite pragmatic. English law was applied throughout its colonies in the colonial era. Members of this family include Scotland (though as stated, Scots law is a mixed system), the USA, Canada, and many commonwealth countries such as Nigeria. In the common law legal tradition, the law advances incrementally from case to case, as precedents are applied to later cases, which enables it to develop as society's needs change. The legal system of Malaysia, which is discussed in Chapter 4, is a member of this family, as a consequence of being a former British colony.

The Romano-Germanic family (civil law)

These legal systems had their origin in the *ius civile o*f Roman law. In this legal tradition principles of the law are codified, starting from the later period of the Roman Empire, and there is a close link in this family between law and ethics. Principles from the codes are then applied in cases. Countries whose legal systems are part of this legal tradition include France, Germany, Italy and the Netherlands, and civil law was also exported to Louisiana in the USA, to Japan and to Egypt. Former French colonies such as Algeria are part of this tradition. In this legal tradition, there is less emphasis on judicial precedent than in the common law tradition. The legal system of the United Arab Emirates, discussed in Chapter 3, belongs to this family of legal systems, though Shari'a law is also applied there.

Interestingly, these two families of legal systems have had to work with each other in the European Union, where European law needs to apply to countries from both legal traditions, which often necessitates a great deal of compromise.

Socialist legal systems

Many of the countries that adopted communism were previously members of the Romano-Germanic civil law tradition. When countries adopted communism, it usually happened by revolution, as in Russia, whereupon former laws were repealed and new socialist laws enacted. In some communist states, private law, particularly law on private property, was very limited. China, which is a communist country, is now considered to have a