Thai Legal Studies (2021) Vol. 1 | 47–75
https://doi.org/10.54157/tls.246988

Law and Identity: The Case of the "Common Law" of Scotland with Comparative Insights from Thailand

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Abstract

This article will first focus on the "mechanics" of the "mixed legal system" in Scotland, the product of the nineteenth century and rooted in nineteenth-century conceptions of "legal science." On the other side of the globe, the Thai legal system arose from historical contingency by which the nation sought both international recognition and self-consolidation after the colonial era. Against this backdrop, Thai legal scaffolding has been formed and imprisoned by its legal historiography as an intellectual imagination; in particular, the grand narrative creates local adherence to great legal tradition and rationalisation of Thai traditional values. Thai and Scots law may have had a completely different path of historical contingency, but what the two systems share is an exaggeration of grand narratives that obscure the nature of each legal system. To view these systems of law from a post-positivistic approach, a different approach is needed. After an initial discussion about Scots law, the influence of the civilian tradition upon Thai law will be investigated, followed by a summary of the main conclusions.

Keywords: Scotland — Thailand — Mixed jurisdictions — Colonialism — Legal history

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> Historical consciousness . . . leaves you, as does maturity itself, with a simultaneous sense of your own significance and insignificance. Like Friedrich's wanderer, you dominate a landscape even as you're diminished by it. You're suspended between sensibilities that are at odds with one another; but it's precisely within that suspension that your own identity—whether as a person or a historian—tends to reside. [1]

I. INTRODUCTION

The concept of "identity" mentioned in the quotation above plays an essential role in many facets of life. As a means of signalling belonging, it also fulfils a necessary function concerning legal systems and their ideologies, since it enables scholars of comparative law to identify and group legal systems into families or trees based on shared commonalities. Undoubtedly one of the most significant of these groups in the history of comparative law is that of the civilian legal family, namely those legal systems influenced by Roman law and its subsequent legacies.

In this article, we will explore two different narratives of "belonging" in the context of two separate legal systems that have both been influenced by the civilian tradition, namely Scotland and Thailand. Although these systems are quite different, with Scotland being classified as a "mixed legal system," drawing its rules of law initially from the civilian and subsequently from the common law tradition, and Thailand as a codified civilian system, we aim to demonstrate that the sense of "belonging" in these two systems, which is rooted in the civilian tradition, can have negative consequences if legal scholars within these systems become fixated upon a specific historical conception of the civilian tradition.

More specifically, as we will argue, the grand narratives of the creation of German legal science in the 19th century continue to impact discussions concerning the systematisation and civilianisation of these two legal systems. As we will show, the tenor of these discussions is that Scots law is insufficiently civilian. In contrast, Thai law is stigmatised for attempting to catch up to the West while at the same time struggling to remain distinct in the context of the codified civilian tradition. Despite their different contexts and premises, Scots and Thai law have had similar experiences which have harmed the fluidity of both systems. The purpose of this article is to make a case for the fluidity of the legal normativity of both systems by looking at the mechanics of legal systems from a post-positivistic perspective.

The structure of this article is broadly symmetrical. In the next three sections, the focus is on Scots law. In the two sections following those, the focus is on Thai law. In both these parts, broadly similar questions, namely current debates concerning the nature of each system and its "mechanics" (how the system operates regarding matters such as sources of law and the use of court decisions), will be investigated. In the final part of the article, a unified conclusion will be presented.

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[1] John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (1st edn, Oxford University Press 2004) 8.

II. THE DEBATES ABOUT A "MIXED LEGAL SYSTEM"

In a series of articles published between 2004 and 2018, Rahmatian critically examined the Scottish conception of "mixed jurisdiction."[2] Although one might disagree with certain aspects of this analysis, it is beyond dispute that he has identified three fundamental elements of the "mixed jurisdiction" debate, which has been the focus of much scholarship in Scotland and elsewhere since the 1990s. In first place, despite the extensive body of scholarship accumulated on the issue, there is little scholarly agreement about the nature/essential features of a "mixed legal system."[3] This first point may be subdivided into two further issues: the nature of the mixture (whether "simple" or "complex"), and whether this nature can ever really be captured at a granular level of individual rules/areas of law. In second place, as Rahmatian has shown, the debate concerning the notion of Scotland as a "mixed legal system" has, at times, acquired a political element, primarily until the start of the 1960s when certain Scots lawyers viewed the English influence upon Scots law as an opposing force which had to be resisted through "re-civilianisation."[4] In final place, taking into account the current shape and contours of Scots private law, it is unlikely, according to Rahmatian, that a wholesale codification of Scots private law in the civilian sense will occur in the foreseeable future, given the changes in Scottish "legal culture" which would need to happen to facilitate such a development.[5]

Given the nebulous nature of the discussion concerning Scotland as a "mixed jurisdiction" and the complexities highlighted by Rahmatian, one might wonder whether there is any point in contributing yet another article to this debate. In view of that, this article will take a different approach. Rather than revisiting specific areas/rules of law and the controversies surrounding their origins, this article will focus on the "mechanics" of the "mixed legal system" in Scotland. The reason for choosing this focus is as follows: in his sustained critique of the concept of the "mixed legal system" in Scotland, Rahmatian premised many of his statements on the fact that the "mechanics" of Scots law—which may be broken down into issues such as the Scottish conception of "legal science," the role of the courts in the creation of law, and the nature and function of statute law—are quite different from the corresponding matters in a codified civilian system, specifically those forming part of the Germanic legal family. Such a comparison, while helpful, should however not be taken too far. It should not be forgotten that the current "mechanics" of codified civilian systems,

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[2] Andreas Rahmatian, "Codification of Private Law in Scotland: Observations by a Civil Lawyer" (2004) 8 The Edinburgh Law Review 31; Andreas Rahmatian, "The Political Purpose of the 'Mixed Legal System' Conception in the Law of Scotland" (2017) 24 Maastricht Journal of European and Comparative Law 843; Andreas Rahmatian, "Alchemistic Metaphors in Comparative Law: Mixed Legal Systems, Reception of Laws and Legal Transplants" (2018) 11 Journal of Civil Law Studies 231.

[3] Rahmatian, "Alchemistic Metaphors" (n 2) 239–40.

[4] Rahmatian, "Political Purpose" (n 2) 850–52.

[5] Rahmatian, "Codification of Private Law" (n 2) 50–51.

especially in the Germanic legal family, are by no means ancient. They are a product of the 19th century and rooted in 19th-century conceptions of "legal science."[6] When this comparison is pushed too far, there is a danger of returning to Enlightenment notions of "progress" and the notion, propagated by some of the more overtly legally nationalist supporters, that it is the ultimate fate of Scots law to morph into a codified civilian system, preferably one aligned with the Germanic legal family.[7] The aim of this article is, therefore, to focus not on the perceived shortcomings of Scots law *qua* codified civilian systems, but on the "mechanics" of Scots private law, and to argue that there is indeed something *sui generis* about the Scottish legal system itself which is deserving of study in its own right, without the need to be linked to larger narratives of "progress" or "convergence."

III. THE CURRENT STATE OF PLAY

Arguably, one of the best ways to obtain an overview of the nature of the Scottish legal system is to conduct a survey of introductory textbooks on the Scottish legal system published between the 1960s and 2019.[8] The reasons for choosing these works as our focus is twofold. First, these tend to be written by Scottish academics teaching in the field. This gives them an insider view not often found in "national reports" commissioned in the context of comparative law projects. Second, since they are textbooks, they are likely to substantially impact the next generation of Scots legal practitioners. Thus, while providing a current snapshot, they also inform the future debate. Three issues broadly deriving from Rahmatian's critique will be investigated using the statements in these textbooks: namely, the "scientific" nature of Scots law; the sources of Scots law and the hierarchy of those sources; and the grounds for the sources' authority.

Regarding the first issue, that of "legal science," some background information

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[6] Raymond Westbrook, "The Early History of Law: A Theoretical Essay" (2010) 127 Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte 1, generally, for a survey of the origins of the debate in eighteenth-century Enlightenment thought. See also Hermann Kantorowicz, *Savigny and the Historical School of Law* (Stevens 1937), generally, as well as Frederick C. Beiser, *The German Historicist Tradition* (Oxford University Press 2015) 1–26, 214–52.

[7] Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press 2001) 259, on this notion. On the role of Scots law in all this, see specifically, Jan M. Smits, "The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory" (2002) 31 The Georgia Journal of International and Comparative Law 79; Jan M. Smits, "Applied Evolutionary Theory: Explaining Legal Change in Transnational and European Private Law" (2008) 9 German Law Journal 477.

[8] David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (3rd edn, W. Green 1969); Robert S. Shiels, *Scottish Legal System* (Green/Sweet & Maxwell 1999); Christina Ashton et al., *Fundamentals of Scots Law* (Thomson/W Green 2003); Nicole Busby, *Scots Law: A Student Guide* (3rd edn, Tottel Publishing 2006); Dale McFadzean, *Scots Law for Students: An Introduction* (Dundee University Press 2007); Bryan Clark, *Scottish Legal System* (2nd edn, Dundee University Press 2009); Megan H. Dewart and others, *The Scottish Legal System* (6th edn, Bloomsbury 2019).

is required. In the civilian tradition, it is a concept closely associated with the 19th century. Because of intellectual currents in the newly united German Empire, scholars across many academic disciplines began to elevate the nature of their discourse by rendering it more "scientific."[9] In law, the discourse in Germany concerning the law as a "science" became part of a debate between eminent jurists concerning the desirability of a codification. Once codification had taken place, the elements of the new German "legal science" were canonised.[10] These include first of all a commitment to "rational reasoning," to use Winkel's phrase, based on deduction and deriving from the *regulae iuris* contained in the Civil Code.[11] The second element of this "legal science" involves viewing law as a "system" that is intellectually coherent. For this to function, a clear consensus among all members of the legal community concerning the hierarchy of legal sources and their interaction must be agreed on and maintained. It is worth noting that the conception of "legal science" created in German legal scholarship during the late 19th and early 20th centuries was overtly legally positivist.[12] The Pandectists and their intellectual successors, the Legal Positivists, did not advocate a close and necessary connection between law and morality, but focused instead on the "rationality" underlying the system and its *regulae* to ensure that justice was done.

It is against this backdrop that the Scottish conception of "legal science" should be viewed. The Scottish context is informed by two other pieces of evidence. The first is the reform of Scottish legal education which took place during the late 19th century. These reforms, by way of legislation, were the product of what Cairns and MacQueen have described as a "general dissatisfaction" with the state of Scottish legal education and a desire to raise the level of "scientific" discourse along German lines.[13] As a second piece of evidence, it must be remembered that the law degree in its current form, an undergraduate degree lasting four years, was only introduced in 1960. Before 1960, the study of law was delivered part-time as a postgraduate M.A.—the entry requirement for an honours degree in another subject.

When surveying the statements from introductory textbooks, it is evident that the concept of "legal science" is not discussed in great depth. There is only one textbook, first published in 1959 and quoted here in its third edition published in 1969, which raises the issue explicitly:

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[9] Mathias Reimann, "Historical Jurisprudence" in Markus D. Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press 2018).

[10] Georg Essen and Nils Jansen, *Dogmatisierungsprozesse in Recht und Religion* (Mohr Siebeck 2011) 1–22 (by Nils Jansen), for a survey of this issue.

[11] Lourens Winkel, "The Role of General Principles in Roman Law" (1996) 2 Fundamina 103.

[12] Hans-Peter Haferkamp, Klaus Luig and Tilman Repgen, *Wie pandektistisch war die Pandektistik?: Symposium aus Anlass des 80. Geburtstags von Klaus Luig, am 11. September 2015.* (Mohr Siebeck 2017) 1–16.

[13] John W. Cairns and Hector L. MacQueen, *Learning and the Law: A Short History of the Edinburgh Law School* (School of Law, University of Edinburgh 2002) ss III and IV.

> Law is truly a science, that is, a systematic body of coherent and ordered knowledge about institutions, principles, and rules regulating human conduct in society.[14]
>
> The scientific element in law consists in that a system of law comprises a body of reasonably consistent principles and rules, susceptible of arrangement under heads and sub-heads and of systematic study . . . .[15]
>
> Law must not be thought of solely or even primarily as a body of professional knowledge, the stock in trade of the practitioners of a certain profession, or as purely a practical or applied science.[16]

Two aspects of this suite of quotations are worth noting. First, the emphasis is clearly on jurisprudence (in the sense of the academic study of law) rather than legal practice, and the author is careful to separate the two. Second, Walker is at pains to stress the place and the continued existence of both branches of legal study (jurisprudence and legal practice) and to argue that the latter should not dominate the former. This "scientific" view of Scots law is not repeated in any of the other introductory textbooks surveyed. The latest textbook, the sixth edition of White and Willock published by Dewart in 2019, approaches the nature of law from a surprisingly legally realist perspective, especially in chapter 1 (Introduction—"Laws as ways of getting things done").[17] It is important to stress, however, that these two positions are of course not universally held by everyone in the legal community. Nevertheless, since they have made it into print, one may assume that they are sufficiently reflective of reality and are supported widely enough to be accepted. Given the distance between these two positions, it is therefore not difficult to see why Rahmatian holds a negative view on "legal science" —in the codified civilian sense—in Scots law. The essence of his critique is twofold.[18] First, the concept of "legal science" in Scots law remains ill-defined. Second, Scottish legal academics tend to eschew doctrinal analyses of their legal system. When they engage with doctrine, according to Rahmatian, it tends to be limited to a specific principle.[19]

Although there are elements of truth in Rahmatian's critique, its significance should not be overstated. His template for "legal science" is the Germanic legal family where, under the influence of Pandectism, the matter unfolded in a particular manner during the 20th century. There is no reason why the conception of "legal science" in Scots law should be identical to that of the Germanic legal family. Indeed, it would be surprising if it were. Even if, as Frankenberg has argued, the civil law represents "a method" more than anything else, it should not be forgotten that this "method" antedates the 19th-century conception of "legal science" created in the civilian tradition

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[14] Walker, *Scottish Legal System* (n 8) 6.
[15] ibid 7.
[16] ibid 8.
[17] Dewart and others, *Scottish Legal System* (n 8) 68–69.
[18] Rahmatian, "Alchemistic Metaphors" (n 2) 236 and 242.
[19] ibid 239.

by a considerable period of time.[20] As the entire history of the *ius commune* has shown, it is perfectly possible to form an approach to law based on "rational reasoning" and a "systemic view" of law without adopting the dictates of 19th-century conceptions of "legal science."[21] In addition, Rahmatian's elevation of "doctrinal analyses" in the study of law as a critical element lacking in the Scottish conception of "legal science" deserves further comment. While "doctrinal analysis" is conventionally linked closely to the civilian tradition, it must not be forgotten that it is by no means the total contribution of the civilian tradition. Furthermore, "doctrine" is not a unitary concept, not even in the codified civilian tradition.[22] As recent research has shown, the civilian tradition is about so much more than merely a "doctrinal" approach to law and legal reasoning.[23] A focus purely on "doctrine" within the civilian tradition has become problematic owing to its legally positivist associations. Even in the Germanic legal family, it is by no means as central as it used to be, precisely because of the pressure on its positivist nature. In light of all this, perhaps the limited focus on "legal science" in Scots law identified by Rahmatian is a virtue rather than a shortcoming. Since Scots law is uncodified, it stands to reason that the concept of "legal science" in Scotland could be more fluid because it is not tethered to principles canonised by a civil code enacted at a certain point in history. There is good evidence of this fluidity in one of the large-scale surveys of Scots private law conducted in the early 2000s. Thus, Whitty recognised this when he wrote:

> In many of its branches, Scots private law has experienced a momentous change from rule-based judicial decision-making to a discretionary jurisprudence of justifications. As part of the most important change in the modern law, namely that from form to substance, it is likely to be, and ought to be, irreversible in many respects.[24]

This is not an unimportant observation. "Legal science" cannot and should not be a static concept. Instead, it should adapt to satisfy the needs of a particular system. In this sense, therefore, there is virtue in ambiguity since it allows for greater flexibility. The current pressures on the positivist conceptions of legal science in Germany are a warning in this regard.

The second of the three issues to be investigated relates to the sources of Scots law and their hierarchy. Across the introductory textbooks surveyed, there appears to be broad agreement in acknowledging the existence of "formal" and "informal" sources

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[20] Günter Frankenberg, "Critical Histories of Comparative Law" in Markus D. Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press 2018) 47.

[21] Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013) 2–5.

[22] See Horatia Muir Watt, "The Epistemological Function of La 'Doctrine'" in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013) 123–32.

[23] Mark Van Hoecke and François Ost, "Legal Doctrine in Crisis: Towards a European Legal Science" (1998) 18 Legal Studies: the Journal of the Society of Public Teachers of Law 197.

[24] Niall R. Whitty, "From Rules to Discretion: Changes in the Fabric of Scots Private Law" (2003) 7 Edinburgh Law Review 281.

of Scots law. Within the former category, a distinction is drawn between "major" and "minor" formal sources, seemingly reflecting the extent to which the individual textbook authors regard the legal significance of each source. There appears to be no empirical evidence upon which these estimations are founded; or if there is, it has not been cited anywhere.

Since the notion of the "sources" of Scots law has a long history, a few historical comments are required. To understand the current sources of Scots law, it should be recalled that during its Institutional phase (from the 17th to the 19th century), it was settled, based on Roman legal scholarship, that Scots law consisted of written and unwritten law. The former was interpreted as statute, while the latter was interpreted as the Scottish "common law," a nebulous concept with links to the *ius commune* tradition on which Scots law is based.

In terms of the individual sources, most textbook authors agree that statute (whether U.K., E.U. or specifically Scottish) is the primary source of Scots law. We are told explicitly that: "Legislation may be considered the primary source of law . . . . The volume of legislation affecting Scotland has increased significantly over the years."[25]

It is worth remembering that legislation is, of course, not a new source. Even during the Institutional phase of Scots law, the legislation of the Scottish parliament (before the union of parliaments in 1707) and that of the Westminster parliament (post-1707) are frequently mentioned. During this period, Scottish statutes represented—according to modern scholarly opinion—specific written deviations from the pan-European *ius commune*.[26] Thus, their function as a source was somewhat different. It should also be recalled that both the extent and the volume of legislation have undoubtedly increased in the modern period; its place at the pinnacle of the sources of Scots law is a recent development.

As far as case law forming judicial precedent as a source of law is concerned, most textbook authors regard it as the second most important source of Scots law. In addition, in most textbooks, case law forming judicial precedent is grouped (along with a few other "minor sources" to which we will return presently) under the term "common law." Again, it is worth stating that case law also appears in the Institutional phase of Scots law. There is a long tradition of the recording of cases in the Scottish *Practicks*.[27] That being said, the use of case law forming judicial precedent is a recent development and, as has been pointed out, it was concretised during the 19th century.

Before moving on to the other parts of the "common law," it is worth reflecting on the relationship between statute and common law in contemporary Scots law. Since the original conception of Scots law formed during the Institutional phase was based on the notion of a European "common law" in the form of the *ius commune* together

[25] Clark, *Scottish Legal System* (n 8) 9.

[26] John W. Cairns, "The Civil Law Tradition in Scottish Legal Thought" in David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots law: Aberdeen Quincentenary Essays* (Duncker and Humblot 1997) 191 for a survey.

[27] John W. Cairns, "Institutional Writings in Scotland Reconsidered" (1984) 4 The Journal of Legal History 76 for a survey.

with statutes and custom which represented deviations from the "common law," it stands to reason that the concept continues to play a significant role in the conception of Scots law. In contemporary terms, the matter is governed by a decision of the House of Lords (as it then was) from 1972, *McKendrick v. Sinclair* (1972 SLT 110), the *ratio decidendi* of which was that the common law of Scotland does not lose its force as law merely because of non-use. The effect of this rule is that the common law is presumed to apply until it has been altered by, for example, statute.

In terms of the relationship between the common law and statute, the authors of the introductory textbooks suggest the following:

> Common law was originally the body common to the whole country based on ancient customs and worked out and built up in the courts by the process of declaration of rules and their application to cases. Much of the common law has now been superseded by statute law, but it is still very important in Scotland in many areas.[28]

From such statements, it seems clear that in the opinion of the textbook writers, statute law has become dominant as a source of law and is increasingly altering the existing "common law." It should be noted that, while there is likely truth in this position, quantitative research on the matter remains a *desideratum* since none of the textbook authors cites any recent works in which empirical research has shown the extent to which the "common law" is being altered by statute. Again, this position, while seemingly treated as settled, is based on little more than a vague sense.

As to the relative "weighting" of the "common law" *qua* statute law, the matter seems less settled in the minds of the textbook authors. They write: "In the Scottish legal system . . . there is in effect a hierarchy of sources . . . . If one source is incorporated into a higher source, the original source will lose its authority."[29] Thus, in summary, according to the textbook authors, Scots law has seen a more significant influence of statute law in the recent past. This increase has harmed the existing Scottish "common law" in the sense that many areas previously regulated by the "common law" have since been placed on a statutory footing. In addition, although not as clear-cut as in codified civilian systems, there is a broad acceptance that statute has greater authority than the common law. Furthermore, once a matter has been regulated by statute, the existing "common law" no longer governs the point. In this sense, therefore, Rahmatian's criticism is a valid one. The matter of the hierarchy of sources is not canonised as in codified civilian systems. Nonetheless, the rules appear tolerably clear, and, as pointed out above, there may be a virtue in fluidity in this regard.

Having set out a broad view of the sources of Scots law and their hierarchy, it remains to speak about their "authority." Most textbook authors adopt a statist approach: "Although these historical and philosophical influences account for the origins of Scots law, they do not explain where the current binding rules of law derive

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[28] Ashton et al., *Fundamentals of Scots Law* (n 8) 35.

[29] ibid.

their authority from. Any specific binding rule of law must be derived from one or more sources of law, known as 'formal sources.'"[30] Without wishing to enter a debate about the authority of law and its connection to the state, which in the case of Scotland is rather complicated and is likely linked to the Act of Settlement by which the United Kingdom was created, it seems clear from the textbook writers that, in their view, the "authority" of legal rules in Scots law is ultimately derived from the state, whether through legislation or the operation of the courts. This is not an untenable position since, in almost all cases, the recognition of "sources of law" is a matter of court practice—the *stylus curiae* identified in the civilian tradition during the early-modern period—and in this regard, Scotland is no different.

IV. "DEBATABLE FRINGES"

Within the recognised "sources" of Scots law, specifically, the "common law" component, "minor" sources include custom, equity, and writers from the Institutional phase (the 17th to 19th centuries) of Scots law. Given that these works have a historical component, in the sense that they stretch back further into the formative period of Scots law than, say, most case law or statute, the construction of their "authority" and their use by the courts deserves closer scrutiny—especially considering views, such as the one quoted above, that the "historical and philosophical influences" have no bearing on the current "authority" of those rules of law.

However, before this can be done, a few observations are required about the status of the Institutional Writers as a "source" according to the textbook authors.[31] The matter is a common trope in textbook accounts of Scots law:

> Statements as to the law made by legal writers have varying degrees of authority, but always less than that of statute and case-law in that in case of conflict the rule laid down by statute or worked out by the courts has undoubtedly to be given effect to, notwithstanding anything in the books. The highest degree of authority attaches to the writings of a small number of writers, who all treated in their works of the whole law of Scotland, or at least of very large tracts of it.[32]

> A statement in one of them, in default of other authority, will almost certainly be taken as settling the law." [Footnote text: *Drew v Drew* 1870 9 M 163 at 167 per Lord Benholme; *Kennedy v Stewart* (1889) 16 R. 421, at 430 on Kames.].[33]

> Although the scope of [the Institutional Writers'] authority has dwindled they are still referred to on occasions where there is no statute or precedent to cover the issue of law in question . . . . A statement in an institutional writing may be given the same authority

[30] Nicole Busby, *Scots Law: A Student Guide* (3rd edn, Tottel Publishing 2006) 21.

[31] Andreas Rahmatian, "The Role of Institutional Writers in Scots Law" (2018) 1 Juridical Review 42.

[32] Walker, *Scottish Legal System* (n 8) 361.

[33] ibid.

> as one of the Inner House.[34]
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> With the exponential rise in legislation seen over recent years coupled with the adoption of a strict system of judicial precedent and comprehensive case reporting systems, the importance of Institutional Writers as a formal source of law has diminished greatly. However, if the law is otherwise found wanting, then a principle expounded by an institutional writer may be considered as a valid source of law and may be cited in court as such. Institutional works are primarily of historical interest, especially in establishing the origins of many areas of Scots law and in determining how the Scottish legal system has been influenced by other schools of legal thinking.[35]
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> In any case, although the Institutional Writers were of enormous importance in the past, it would be very unusual for any court today to justify its decision solely by reference to one . . . . It is rare for the Institutional Writers even to be cited in court, in part because the tide of precedent and statute has washed over so much law in the last 100 years . . . . Their primary role today is thus, perhaps, to supply a moral and intellectual sheet anchor for the law, providing stability while not excluding change.[36]

These quotations reveal an important perception about the value of the historical component of the Scottish "common law" reflected in the works of the Institutional Writers. Although there does not appear to be any recent comprehensive empirical study of case law or academic works on which this perception is based, the textbook authors all seem to broadly agree that the "authority" of the Institutional Writers has declined in the last few decades. This sense of decline is founded on two premises, the first being the increase in statute law and the second, the volume of case law forming judicial precedent. A further notable point visible across these quotations is that the notion of their function as laying down the law, while strongly advocated as late as 2003, has since been replaced by statements to the effect that their role is mainly "historical," "intellectual," and "moral."

To the historian of law, this perceived shift in the function of Institutional Writers as a source of law is a curious one and worthy of closer scrutiny. Three aspects of this shift will be discussed in greater detail—namely perception, authority, and history.

Under the first heading, "perception," it should be noted that none of the textbook authors surveyed has done any empirical research as to the perceived decline of the use and citation of Institutional Writers across various levels of Scottish courts. Since Institutional Authority is a "source" of law acknowledged as such by the courts through their *stylus curiae* during the 19th century, it stands to reason that the practices of the same courts (as the engine of the "common law") should be investigated. In 2008, Cairns and Du Plessis made an essential contribution to the research of this kind by demonstrating that Roman law, the bedrock of much of the works of the Institutional Writers, was rather more frequently used in Scottish courts

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[34] Ashton et al, *Fundamentals of Scots Law* (n 8) 59.

[35] Clark, *Scottish Legal System* (n 8) 41–42.

[36] Dewart and others, *Scottish Legal System* (n 8) 269 and 270.

than contemporary writers would have one believe in the period 1998–2008.[37] Building upon this work, an investigation was undertaken into a larger period, namely 1985–2019, to assess whether the findings of Cairns and Du Plessis could be given more significant context. More specifically, the introduction of greater devolved powers under the Scotland Act of 1998 was investigated to establish whether any trends could be ascertained.

In choosing cases for inclusion in this research, two benchmarks were set. First, only cases with sustained engagement (rather than merely intellectual "cladding") were chosen. In the second place, only cases where a point of view/position espoused by Institutional Writers had a demonstrable impact on the court's reasoning and the eventual outcome of the case were included. The results of this investigation have been surprising. In the years 1985–2019, there were 119 cases across all levels of Scottish courts in which Institutional Authority (specifically of Roman-law origin) formed a core part of the court's reasoning and eventual decision. This may not sound like a great deal but given the small amount of case law produced in Scotland, the number is not insignificant. In addition, this number merely represents the cases where Institutional Authority formed a core part of the courts' reasoning. When lesser citations are added, the number rises exponentially. In addition, it is worth noting that in the period under discussion, there seems to be a significant increase (twofold) in the number of references to the Institutional Writers after the promulgation of the Scotland Act in 1998. Although more research over a broader period is needed, this increase suggests some aspect of "legal culture," to borrow a term of socio-legal studies.[38]

If there is a dissonance between the perception of the textbook writers and the reality of legal practice in the courts, the reasons for this must be explored further. One factor which cannot be discounted is a change in the "legal culture" of Scotland. As Whitty pointed out already in the early 2000s, a shift could be detected from a more legally positivist conception of law ("rule-based") to one which was less so ("discretionary jurisprudence"). As Du Plessis recently demonstrated, aspects of the legal culture of Scots law in the period 1900–1960 were no doubt legally positivist.[39] Similarly, as Reid and Zimmermann showed in their works on the history of the law of property and obligations in Scotland, there has been a shift towards a "post-positivist" conception of Scots law during the 20th century.[40] The impact of this change in "legal

[37] John W. Cairns and Paul Du Plessis, "Ten Years of Roman Law in Scottish Courts" (2008) 29 The Scots Law Times 191.

[38] See Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Routledge 2017); David Nelken, "Using the Concept of Legal Culture" (2004) 29 Australian Journal of Legal Philosophy 1; Lawrence M. Friedman, "Legal Culture and Social Development" (1969) 4 Law & Society Review 29; Lawrence M. Friedman, "Is There a Modern Legal Culture?" (1994) 7 Ratio Juris 117, generally.

[39] Paul du Plessis "Conceptions of Roman law in Scots law: 1900–1960" in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury 2019) 221–38.

[40] Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland. Vol. 1,* (Oxford University Press 2000) 2.

culture" is most clearly visible in the issue of the "authority" of sources of law. Whereas, according to a legally positivist view, the relationship between the authority of sources of law and other external factors is irrelevant, a post-positivist view sees authority as contingent. Thus, according to recent work by scholars such as Del Mar, the notion of the "normativity" (or authority) of legal sources cannot be separated from their contexts and must be constructed historically.[41]

But what would this mean, in practical terms? This will speak to the final matter under discussion, namely "history." It is perhaps best to start with what it does not mean. It does not mean that the history of Scots law, whether "external" or "doctrinal," should be consigned to the dustbin. All law is, in a sense, historical, since a legal system looks both forward and backward at the same time. A legal system would cease to function without its history. A post-positivist approach does not subscribe to the notion that "doctrinal history" is the sum total of legal history, however. It does not support the idea of "law office histories"—in other words, poorly researched and overtly determinist "histories" created for teleological purposes.[42] With the decline in legal doctrine across many legal systems, an even greater awareness of "external legal history" is required. This does not imply a diminution of the "authority" of existing "historical sources" of Scots law—quite the opposite. Instead, as Del Mar has argued, a post-positive approach to "normativity" demands a greater awareness of the historical contingency of "authority" and the reasons for its emergence. As Festa has recently suggested, the past must be "usable" by the courts.[43] There is no reason why, when confronted with historical sources presented as "authority," courts cannot take a broader and indeed more critical approach to these sources. This will necessarily involve a broadening of the intellectual scope and function of the historical origins of Scots law and a greater awareness of their contexts.[44]

V. A SMALL CIVILIAN COUNTRY IN THE EAST: THE "CIVILISATION" OF THE THAI LEGAL SYSTEM

The contemporary legal system of the Kingdom of Thailand emerged due to colonial influences. While it has been claimed that Thailand was never colonised, the country was in fact subjected to political and economic subjugation by colonial powers and thus exposed to the discourse of Western modernity, including the notion of a "modern

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[41] Maksymilian Del Mar, "Legal Norms and Normativity" (2007) 27 Oxford Journal of Legal Studies 355. For an opposing view, see Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford University Press 2010) 95–137, and generally.

[42] David T. Hardy, "Lawyers, Historians, and 'Law-Office History'" (2015) 46 Cumberland Law Review 1.

[43] Matthew J. Festa, "Applying a Usable Past: The Use of History in Law" (2008) 38 Seton Hall Law Review 479.

[44] Richard A. Posner, "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship" (2000) 67 The University of Chicago Law Review 573.

legal system" during the 19th century. This situation can be termed "semi-coloniality."[45] From the mid-19th century onwards, the modern Thai state attempted to systematise its legal system and institutions along European lines.[46] This led to the displacement of the pre-existing legal system which was based on a localised Hindu–Buddhist legal tradition. To achieve this modernising aim, the absolutist Siamese government decided to follow the continental civilian tradition of codification, even though some elements of English precedent had already been adopted where no Siamese law existed or where the pre-existing law could not deal with the problem adequately.[47] Modern Thai law, thus, is not a mirror of Thai society at all but emerged as a matter of administrative convenience.[48] The result of these 19th-century reforms was a contingent influx of Western frameworks of law such as allocation of rights, the division between civil and criminal law, European-inspired law, and latterly such problems as the American socio-economic development constitution, globalisation and law, legislation dictated by international legal standards, etc., all of which were unfamiliar to the Thai people.[49]

The law reform process begun in the 19th century also resulted in the reorganisation of the judiciary and the adaptation of the curricula of law schools to be compatible with its new legal system. From the 20th century onwards, Thai legal studies has in general focused on foreign legal doctrines and judicial precedents.[50] One of the most influential textbooks on the Thai legal system, written by an authority in the Thai academic world, Yut Saenguthai, notes that:

> In modern times, the Codes of Thailand were copied and analogised from continental countries' codes with a few from the Indian Code. Since we did not adopt the Anglo-Saxon legal system, apart from some aspects of procedural law or the law of evidence, we should only study the evolution of continental laws. The study of the continental

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[45] See Peter A. Jackson, "The Performative State: Semi-Coloniality and the Tyranny of Images in Modern Thailand" (2004) 19 Sojourn: Journal of Social Issues in Southeast Asia 219; Thongchai Winichakul, "Siam's Colonial Conditions and the Birth of Thai History" in Volker Grabowsky (ed), *Southeast Asian Historiography: Unravelling the Myths: Essays in Honour of Barend Jan Terwiel* (River Books 2011) 21–43.

[46] Ted L. McDorman, "The Teaching of the Law of Thailand" (1988) 11 Dalhousie Law Journal 915, 919; มุนินทร์ พงศาปาน, ระบบกฎหมายซีวิลลอว์: จากระบบกฎหมายสิบสองโต๊ะสู่ประมวลกฎหมายแพ่งและพาณิชย์ (วิญญูชน 2562) [Munin Pongsapan, *The Civil Law Systems: From the Twelve Tables to the Thai Civil and Commercial Code* (Winyuchon 2019)] (Thai) 289–91.

[47] Andrew J. Harding, "The Eclipse of the Astrologers: King Mongkut, His Successors, and the Reformation of Law in Thailand" in Penelope Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Brill 2008) 318.

[48] ibid 322–23.

[49] ibid 311, 322; Andrew J. Harding, "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'" in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 208.

[50] Munin Pongsapan, "Legal Studies at Thammasat University: A Microcosm of the Development of Thai Legal Education" in Andrew J. Harding, Jiaxiang Hu, and Maartje de Visser (eds), *Legal Education in Asia: From Imitation to Innovation* (Brill 2017) 309.

> evolution of continental laws will help us to understand our law better.[51]

From a theoretical point of view, this quotation shows that Thailand seemingly became part of the European legal family, almost as if it had joined the European legal tradition of the *ius commune* itself at the start of the 20th century.

After the Siamese revolution in 1932, state institutions such as the monarchy, military, and legislature were substantially reformed. Still, the judiciary remained unaltered since it hardly mattered in the minds of revolutionary leaders.[52] Siam/Thailand was faced with political turbulence because of the clash between the royalist and democratic factions. The judiciary at times acted politically and legitimated the constitutionality of military coups.[53] Nevertheless, the institution continues to enjoy a respected status in Thai society and retains a close connection to the monarchy.[54] Such impunity, therefore, has provided almost no room for direct criticism of the judiciary or the broader legal system. Although the judiciary has remained largely unaffected by the changes introduced since 1932, it is broadly agreed that the newly received legal system has become chaotic it its operation. One possible cause for this has been offered: "Lawyers are likely to be narrow-minded and too legalistic, regardless of reality and societal changes. Furthermore, there appears to be a problem with the morality and ideology of lawyers."[55]

Preedee Kasemsup, a German-educated law professor from Thammasat University, asserted that the leading cause of the problem was the unreflective adoption of Western positivistic jurisprudence. The newly created legal profession could not fruitfully appropriate the received Western law into indigenous society, and legislative power was seen as an omnipotent means of social control, regardless of traditional values (Buddhism) and the "jurisprudential spirit" operative within in legal development.[56] The reception of Western law in Thailand during modernisation in the 19th century was problematic because Western conceptions of legislative power and sovereignty were exaggerated.[57]

To promote the reintroduction of such values and spirit, Kasemsup proposed a

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[51] Yut Saenguthai, *Lecture on Introduction to Law* (4th edn, Faculty of Law, Thammasat University 1971) 80–81.

[52] James Wise, *Thailand: History, Politics, and the Rule of Law* (Marshal Cavendish Editions 2019) 30–31.

[53] ibid 32–34; David Streckfuss, *Truth on Trial: Defamation, Treason, and Lèse-Majesté* (Routledge 2011) 118–21.

[54] Ted L. McDorman, "The Teaching of the Law of Thailand" (1988) 11 Dalhousie Law Journal 915, 920; Nidhi Eoseewong, "The Thai Cultural Constitution" (*Kyoto Review of Southeast Asia*, 15 March 2003) <https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/>; Kasian Tejapira, "The Irony of Democratization and the Decline of Royal Hegemony in Thailand" (2016) 5 Southeast Asian Studies 219, 229.

[55] Somyot Chuethai, "Introduction" in Somyot Chuethai (ed), *Essays in Honour of Preedee Kasemsup* (Faculty of Law, Thammasat University 1988) 3.

[56] Preedee Kasemsup, "Reception of Law in Thailand, A Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (3rd edn, Routledge 2013) 294–95.

[57] ibid 294.

three-layer theory of law that, in his view, best suited Thai society. The theory proposes three categories of law according to the evolution of society. The general idea is that law is, by nature, not manufactured but comes into existence "without any human purposive" effort from simple people's law (*Volksrecht*). During the second stage, this peoples' law is then converted into systematised jurisprudential law created by jurists (*Juristenrecht*). The third layer is state-legislated law (*Satzungsrecht*) which emerges through conceptions of sovereignty and human will.[58] Within this theory, he acknowledges the prestige of Western legal traditions by praising their rational, systematic, modern, efficient, humane, and progressive characteristics.[59] Interestingly, Kasemsup especially expressed admiration for the spirit of the *ius aequum* of German legal science rather than that of the *ius strictum* of the French code. In his view, it would be fair to consider various systems of law and cultural backgrounds when employing the jurisprudential spirit of this theory.[60]

Despite the call for the recognition of traditional values instead of Euro-centric values, the former have paradoxically been asserted to be compatible with European jurisprudence. For instance, Kasemsup has contended that the reception of the law of Thammasat, influenced by Indian legal culture, should be regarded as *Juristenrecht* and that it is as sophisticated as Roman law.[61] Prokati, one of Kasemsup's notable successors, even claimed that article 4 of the Civil and Commercial Code of Thailand (CCC), which lists the sources of law, is a skilful product of the appropriation of foreign law into the ideology of the Thammasat.[62] The Thammasat has been claimed to be equivalent to "the constitution" of the pre-modern Siamese/Thai state, morally constraining the ruler's exercise of power.[63]

Concerning the sources of law, Thai legal scholarship has nevertheless adopted a doctrinal and positivistic approach. The sources may be divided—according to modern scholarly opinion—into two categories, namely written and unwritten law. The former is systematised through a Kelsenian hierarchical structure of the legal order—namely the constitution, organic acts, acts, emergency decrees, administrative and subsidiary legislation, local legislation, and the announcements and edicts of military coups.[64] The latter comprises customary law and general principles of law which operate where no written rules are applicable.[65] Although judicial decisions are mentioned, textbooks tend to reject judicial decisions as a source of law owing to the

[58] ibid 269–71.

[59] ibid 290–91.

[60] ibid 294–95.

[61] ibid 288.

[62] กิตติศักดิ์ ปรกติ, การปฏิรูประบบกฎหมายไทยภายใต้อิทธิพลยุโรป (พิมพ์ครั้งที่ 4, วิญญูชน 2556) [Kittisak Prokati, *The Reformation of Thai Legal System under European Influences* (4th edn, Winyuchon 2013)] (Thai) 231.

[63] See Dhani Nivat, "The Old Siamese Conception of the Monarchy" (1947) 36 Journal of The Siam Society 98.

[64] รวินท์ ลีละพัฒนะ, ความรู้ทั่วไปเกี่ยวกับกฎหมาย (พิมพ์ครั้งที่ 4, วิญญูชน 2561) [Rawin Leelapatana, *General Introduction to Law* (4th edn, Winyuchon 2018)] (Thai) 24–30.

[65] ibid 30–31.

juristic method of civilian legal tradition. One textbook claims that: "In the civil law tradition, judicial decisions are not a source of law, except precedents which have been followed. In other words, such decisions become precedents when it is without any reversion or rebuttal . . . . Although, in a civil law country, the case is an exception."[66]

The theory of law introduced by Kasemsup can be seen as an attempt of Thai scholarship to solve the dilemma of its modernity—"how to be like the West yet to remain different."[67] On the one hand, the newly formed legal system seeks legitimacy by being rational, scientific, and systematic—in other words, "authentically civilian." This traps the Thai legal system within the dichotomy of civil-common law of the Thai jurisdiction to which the liberal law discourse strictly adheres. On the other hand, the system is also seeking to sustain its indigenous values, which have been claimed to be systematic and rational. This leads to a dichotomy of "Western" and "Thai" values, which give rise to intellectual myths that conceal the dynamic nature of the Thai legal system.

VI. THE NATURE OF THE THAI LEGAL SYSTEM

The notion of Thai law as a civilian legal system obscures the reality of the nature of Thai law as part of Southeast Asian legal culture. More importantly, the over-exaggeration of the "civilian" element has left Thai scholarship perpetually under the shadow of the civil-common law dichotomy. As will be shown in the remainder of this article, it is possible to challenge this grand narrative of the adoption of civil law by observing three main aspects of the Thai legal system.

A. The Stigma of Self-Civilisation

The claim that Thai law is based on the systematic civilian tradition is rooted in the stigma of its colonial encounter during the 19th century. The main narrative of Thai historiography depicts the success of the transplanting of the European legal tradition into the soil of Siam as a positive development designed to avert threats of colonisation, and to end the practice of extraterritoriality prevalent during this time.

This article will not delve into the debate as to whether the legal transplant in modern Siam/Thailand was successful. This would require a much larger project. Instead, it will be argued that the narrative conceals various dynamic interactions between discourses of the global and the local. In adopting Western civil law, Siam/Thailand became linked to the discourse of modernity and the judgement of European laws as the standard of "civilisation." "Uncivilised" laws, in the eyes of

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[66] สมยศ เชื้อไทย, คำอธิบายวิชากฎหมายแพ่ง: หลักทั่วไป (พิมพ์ครั้งที่ 10, วิญญูชน 2547) [Somyot Chuethai, Explanation of the Study of Civil Law: General Principles (10th edn, Winyuchon 2004)] (Thai) 92

[67] Tamara Loos, "Competitive Colonialisms: Siam and the Malay Muslim South" in Rachel V. Harrison and Michael Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010) 135.

colonisers, could not function as the premise for individual rights and responsibilities in a "civilised" country.[68] The adoption of Western law, which is one of many indicators of being "civilised," became a precondition for Siam to enter the European–American global stage. In this respect, non-Western countries such as Siam/Thailand had to "self-civilise" to conform to this global system.[69] Phrased differently: adopting a European model of legal codes acted as the basis for gaining recognition from Western powers. Asserting that the adoption of civilian tradition had occurred would demonstrate a successful transition, or at least the development of the Thai legal system on the same track of modern European law.

Another half-truth hidden by the grand narrative of an exceptional non-colonised country is the local authority's attempt to appropriate the Western legal system to fit local needs. The exaggeration of the adoption of European codes was marked as a heroic act of modernisation, making Siam/Thailand competitively equivalent to civilian countries (*tud tiam nana araya prathet*); but at the same time, this narrative marginalises the appropriation of modern law as an instrument to consolidate local authority over indigenous peoples. One of the aims of law reform was to restore the judicial power of the sovereign, since the establishment of extraterritorial rights, which was a legal invention to facilitate international trade between the native government and foreigners in the 19th century, had come to deprive the Siamese kings of their authority over local subjects.[70] These law reforms were not seen as a priority until the Siamese government lost its control over its indigenous subjects. Apart from that, the modern unitary law would facilitate local attempts to imperialise their pre-existing tributary states, since the contemporary administrative and legal models would strengthen the centralised power of the Bangkok absolutist state compared to the pre-colonial situation.[71] Therefore, the project of law reform paints Siam not only as a victim of imperial power, but also as a coloniser of other regions.[72]

Despite the issues mentioned above, the narrative based on the Europeanisation of law is vital in affirming the image of Thailand as being a civilian

[68] David P. Fidler, "A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalised Civilisation" (2000) 35 Texas International Law Journal 387, 392.

[69] Jackson, "Performative State" (n 45) 234.

[70] In particular, the local government began to see extraterritoriality as problematic when local natives submitted to become western subjects. See Francis Bowes Sayre, "The Passing of Extraterritoriality in Siam" (1928) 22 The American Journal of International Law 70. Nevertheless, one should not exaggerate the extraterritoriality as the humiliation of judicial independence. Wasana argues that legal immunity granted to Chinese merchants facilitated commercial activities between Siam and western foreigners. See Wasana Wongsurawat, *The Crown & The Capitalists: The Ethnic Chinese and the Founding of the Thai Nation* (Silkworms Books 2020).

[71] Jackson, "Performative State" (n 45) 234; Tamara Loos, *Subject Siam: Family, Law and Colonial Modernity in Thailand* (Cornell University Press 2006) 2–3.

[72] Loos, *Subject Siam* (n 71) 2–3.

country and part of a group of civilised (*Siwilai* in Thai) communities.[73] The main reason seems to be rooted in the colonial encounter, which left Thailand under the shadow of the self-conscious claim of a civilising mission.[74] Jackson terms this cultural mode of power a "regime of image"; by portraying the image of Siamese law as a "civilised" country developing a European legal system, it would conceal the true nature of rule-by-law tyranny.[75] Additionally, since the nation entered into a global market under the *Pax Britannica*, conforming to Anglo-European legal standards would provide an element of trust to foreign traders. This is akin to the legitimacy-generating typology of transplant suggested by Miller. Developing countries, desperate for a prestigious foreign model as a source of legitimacy to fix the limits of other types of legitimacy, adopt foreign law.[76] It stands to reason that the rational and unified efficacy of the Western legal tradition would have fulfilled the ambitions of local leaders. Moreover, Thai legal historiography tends to depict law reform—the so-called Chakri Reforms—as if the nation followed in the footsteps of European modernity. While non-legal Thai historiography has reconstructed their understanding of alternative modernity,[77] Thai legal history by Thai scholars is still under the shadow of the Chakri Reform narrative and royal nationalist

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[73] Regarding the quest for the civilisation of Siamese elites, see ธงชัย วินิจจะกูล, คนไทย/คนอื่น: ว่าด้วยคนอื่นของคนไทย (ฟ้าเดียวกัน 2560) [Thongchai Winichakul, *Thai/Other: Essays on Otherness of Thainess* (Samesky Books 2017)] (Thai) ch 2.

[74] Werner Menski, *Comparative Law in a Global Context* (2nd edn, Cambridge University Press 2006) 37.

[75] Jackson, "Performative State" (n 45) 234.

[76] Jonathan M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 The American Journal of Comparative Law 839, 856–57.

[77] Regarding alternative Thai modernity, for example, see ธเนศ อาภรณ์สุวรรณ, "จากความเป็นสมัยใหม่มาสู่ความ(ไม่)เป็นสมัยใหม่" ใน ธเนศ อาภรณ์สุวรรณ (บรรณาธิการ), ความ(ไม่เป็น)สมัยใหม่ (ศยาม 2560) [Thanet Aphornsuvan, "Introduction: From Being Modern to Being (Not) Modern" in Thanet Aphornsuvan (ed), *Being (Not) Modern* (Siam Publishing House 2017)] (Thai); Loos, *Subject Siam* (n 71); Rachel V. Harrison, "Introduction" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010); ธงชัย วินิจจะกูล, เมื่อสยามพลิกผัน: ว่าด้วยกรอบมโนทัศน์พื้นฐานของสยามยุคสมัยใหม่ (ฟ้าเดียวกัน 2562) [Thongchai Winichakul, *Siam at a Turning Point on the Foundational Mentality of Modern Siam* (Samesky books 2019)] (Thai) ch 1; ธงชัย วินิจจะกูล, รัฐราชาชาติ (ฟ้าเดียวกัน 2563) [Thongchai Winichakul, *Royal Nationalist State* (Samesky books 2020)] (Thai) ch 5; กุลลดา เกษบุญชู มี้ด, ระบอบสมบูรณาญาสิทธิราชย์: วิวัฒนาการรัฐไทย (ฟ้าเดียวกัน 2562) [Kullada Kesboonchoo Mead, *The Rise and Decline of Thai Absolutism* (Samesky books 2019)] (Thai); Chaiyan Rajchagool, *The Rise and Fall of the Thai Absolute Monarchy* (White Lotus 1994); Michael Herzfeld, "The Conceptual Allure of the West: Dilemmas and Ambiguities of Crypto-Colonialism in Thailand" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010); Trais Pearson, *Sovereign Necropolis: The Politics of Death in Semi-Colonial Siam* (Cornell University Press 2020); Kongsatja Suwanapech, "The History of the Initial Royal Command: A Reflection on the Legal and Political Contexts of Kingship and the Modern State in Siam" in Andrew J. Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Tamara Loos, "ISSARAPHAP: Limits of Individual Liberty in Thai Jurisprudence" (1998) 12 Crossroads: An Interdisciplinary Journal of Southeast Asian Studies 35.

historiography.[78] As a result, the conventional narrative, which may be termed the self-civilised narrative, disguises the chaos within the Thai legal system behind the image of a smooth transition to modernity. The existing studies on Thai legal history on this "critical juncture,"[79] which founded alternative modern law outside the West, have not been sufficiently acknowledged in the Thai legal world.

B. The Dichotomy of Western vs. Thai Legal Values

Even though the civilian nature of Thai law remains a hyperactive narrative in Thai legal studies, there have been calls for the recognition of traditional Thai law. In the eyes of certain Thai legal scholars, legal positivism has come to be seen as an evil contaminant of the modern Thai legal system.[80] Nevertheless, the binary opposition of the Thai and Western legal traditions is problematic and rather too simplistic. This bifurcation results from an intellectual strategy of picking and choosing in response to the colonial encounter. According to Thongchai Winichakul, this strategy separates the spiritual and material world in order to negotiate between the power of Western modernity on the one hand, and local culture and identity on the other. The West represents material supremacy in contrast to the spiritual truth of Thai Buddhism. That being said, "the West," according to Thai understanding, is not necessarily the actual West but rather a localised understanding of the West based on the bifurcated strategy.[81] In particular, in some respects, Western legal theory is portrayed as being deficient in asserting the superiority of so-called Thai traditional values premised in state-centric Thai Buddhism.

The above bifurcation has impacted the understanding of modern law and traditional Thai law itself. On the one hand, legal positivism was indeed influential during the foundation of current Thai law; the imposition of European law by a modern sovereign came with formalities of state law that overlooked customary practices.[82] On the other hand, the strong allegation against "Western" strict and positivistic law seems to be grounded in a reductionist understanding of the Western conception of law, appropriated by the local discourse, to contrast it with an Eastern legal identity. Ironically, this local understanding originated with Robert Lingat, a

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[78] Thongchai, *Royal Nationalist State* (n 77) 184; Thongchai, a prominent Southeast Asian historian, proposes alternative legal historiography about the foundation of modern Thai law under the absolute Buddhist monarchy. This results in a legally privileged state and the royalist rule of law.

[79] See Jaakko Husa, "Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law" (2018) 6 The Chinese Journal of Comparative Law 129.

[80] See Preedee, "Reception" (n 56); ปรีดี เกษมทรัพย์, นิติปรัชญา (คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2557) [Preedee Kasemsup, *Legal Philosophy* (Faculty of Law, Thammasat University 2014)] (Thai); กิตติ ศักดิ์ ปรกติ, การปฏิรูประบบกฎหมายไทยภายใต้อิทธิพลยุโรป (พิมพ์ครั้งที่ 4, วิญญูชน 2556) [Kittisak Prokati, *The Reformation of Thai Legal System under European Influences* (4th edn, Winyuchon 2013)] (Thai); แสวง บุญเฉลิมวิภาส และ อติรุจ ตันบุญเจริญ, ประวัติศาสตร์กฎหมายไทย (พิมพ์ครั้งที่ 18, วิญญูชน 2562) [Sawang Boonchalermviphas and Atiruj Tanbooncharoen, *The Thai Legal History* (18th edn, Winyuchon 2019)] (Thai).

[81] Loos, "Competitive Colonialisms" (n 67) 137–39.

[82] Harding, "Eclipse" (n 47) 323–24.

French professor later regarded as the main authority in the field of Thai legal history, who proposed a binary opposition between Western and Eastern legal traditions. In this regard, according to Lingat, while Western law is derived from legislature and authority on the consent of those to whom it is applied, the conception of law in the Far East was based on custom, which may be altered in a gradual process following social conditions.[83] This argument recurs in traditional Thai legal historiography, particularly the comparison of the Thammasat to a modern constitution and *ius naturale* whereby the *Dhamma* constrains the rulers' will.[84]

To re-examine the Western versus Thai dichotomy, it should be born in mind that Thai traditional law, as understood by Thai legal scholarship, has already been westernised, just as modern Western law has been localised.[85] Regarding Lingat's argument, for instance, Chris Baker and Pasuk Phongpaichit point out that his bifurcation of Western and Eastern legal traditions is misleading because the tradition of the West has long debated issues such as whether the law was based on custom, on morality from religion or philosophy, or on the will of the ruler. They further observe that Lingat's explanation of Eastern custom-based legal tradition tends to be like Fitz Kern's narrative of old Germanic customary law.[86] To add fuel to the fire, Lingat's Thai successors' comparison of the Thammasat to a constitution and *ius naturale* instead of human will, is anachronistic. Despite them being blamed for Western-infected modern Thai law, the local explanation has paradoxically rationalised and romanticised pre-modern Thai law by appropriating Western legal theory; in this respect, the three-layer approach of law is very similar to the ideas of the pre-war German Historical School, which consolidates national identity and prominent roles of jurists against arbitrary legislation.[87] Furthermore, viewing the Thammasat and the Three Seals Code as a single customary law appears to be Bangkok-centric, retroactive, and anachronistic. Evidence suggests that under extraterritoriality, "customary law" was appropriated and reinvented by foreign consular courts, resulting in a hybrid legal practise. As a result of this legal colonial frontier, the ethnography of law became a

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[83] Robert Lingat, "Evolution of the Concept of Law in Burma and Thailand" (1950) 38(1) Journal of Siam Society 9, 9 (see translation into Thai); Robert Lingat and Thapanan Nipithakul, "Evolution of the Conception of Law in Burma and Siam" (2020) 13 Naresuan University Law Journal 1.

[84] For instance, see Preedee, "Reception" (n 56); Kittisak, "Reformation" (n 80); Chachapon Jayaphorn, *Thai Legal History: Pre-Reformation* (Winyuchon 2018); Kanaphon Chanhom, "Codification in Thailand during the 19th and 20th Centuries: A Study of the Causes, Process and Consequences of Drafting the Penal Code of 1908" (PhD Dissertation, University of Washington 2010).

[85] This process is not unique to Thailand. In colonies like the African region, the reformulation "customary law" is found. See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 109–137; Chris Baker and Pasuk Phongpaichit, "The Child is the Betel Tray: Making Law and Love in Ayutthaya Siam" (2021) 1 Thai Legal Studies 1, 2–6

[86] Chris Baker and Pasuk Phongpaichit, "Introduction to the Thammasat" in Chris Baker and Pasuk Phongpaichit (eds), *The Palace Law of Ayutthaya and the Thammasat: Law and Kingship in Siam* (Cornell Southeast Asia Program Publications 2016) 27–28.

[87] Gerhard Dilcher, "The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization" [2016] Rechtsgeschichte-Legal History 20, 26–30.

primary source of ethography of law.[88] This supports the claim that "authentic" Thai law arose as a result of colonial encounters rather than pre-modern times, and that it does not fully reflect the spirits of multiethnic Siamese peoples as claimed.

On the other hand, while Western legal positivism is chastised for emphasising the importance of human will, evidence suggests that the kings' edicts played a significant role in developing the pre-modern legal system. In this regard, the Ayutthaya legal system developed from cases, decreed into general laws by the king and syncretised into the Thammasat; which, particularly in Siamese legal culture, was a method to sacralise the ruler's edicts as part of the cosmic code of law.[89] Laws legislated by royal will were concealed, rather than constrained, under the cloak of the Thammasat cosmic order. Therefore, at the time of modernisation, the rule-by-law concept of the pre-modern Siamese legal system had already been rendered compatible with a positivistic view of sovereign law under the Siamese absolute monarchy. Still, the local discourse has consistently cast blame on Western legal positivism.[90] In this regard, local legal imagination regarding Western law appears to be haunted by legal positivism, as if the bifurcation of Western versus Thai law represents an eternal struggle between good and evil.

Kasemsup's admiration of German legal science over that of the French has been mentioned; he also advocates the appropriation of Western law to suit Thai society. According to him,

> when the great system of natural law was fully developed and embodied in the Napoleonic Code, Law became an articulated, fixed system, emphasising the certainty of the law, that is, the spirit of the *ius strictum* . . . . Law became a machine of logic, ready to be employed by lawyers indiscriminately. Their only role was to press the deductive logic button and let the machine automatically work out the prearranged conclusion and was in this way divorced from morality.[91]

By contrast, in his view, German law includes the spirit of the *ius aequum*, containing provisions on good faith, public order, good morals, and prohibition of the abuse of rights.[92] Kasemsup's narrative over-simplifies the historical contexts of Franco-German codifications and creates a binary opposition between moral and fixed laws of the two traditions. The ideology of French codification, in the beginning, was to exclude uncertainty and arbitrariness in the application of the law; distilled from a long history of Natural Law, the code was to be the sole guide of the judge and was

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[88] Pearson, *Sovereign Necropolis* (n 77) 47–49.

[89] Therefore, Lingat's narrative obscures the localisation of the Hindu-Indian Dharmasastra into local Deravada–Buddhist Thammasat and deprives the legal culture of a central role in the law-making of Siamese kings in reality. See Chris Baker and Pasuk Phongpaichit, "Thammasat, Custom, and Royal Authority in Siam's Legal History" in Harding and Munin (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Michael Barry Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press 1978) 101–3.

[90] Thongchai, *Royal Nationalist State* (n 77) 185.

[91] Preedee "Reception" (n 56) 294.

[92] ibid.

believed to sufficiently comprise values which neither judge nor citizens had to look beyond.[93] On the one hand, it is true that, by this logic, the judge mechanically applied the rules, thus becoming positivistic, as Kasemsup claimed, because the result of codification in France was that the fixation on written code triumphed over the higher values which had been the original ideology.[94] On the other hand, it is still misleading to portray the French code as being opposed to morality because it marginalises the initial attempt of Naturalist lawyers to solve the arbitrariness of human will by way of the code. As for the development of the German code, the result, despite the initial attempt of the Historical School to connect law and social conditions, was also an exaggerated rationalisation by Pandectist jurists in the form of positivist, abstract, and systematic conceptions of law—far from the romantic ideology.[95] This later led to a reactionary school of sociology, that of Jhering and Kantorowicz, to reduce the power of jurists.[96]

The point here is that Kasemsup's assumption regarding European legal history creates a binary opposition between the French and German codes to portray an opposition between legalism and moralism, embodied by the two codes respectively. French and German law have both experienced the same tensions between human will, strictness, and justice, but have solved the issues differently. Kasemsup's conclusion is of course over-simplified, but it seems to imply that the Western legal model is compatible with the Thai legal system, which had been governed by the Hindu–Buddhist law of Thammasat, in theory. By contrast, the legal certainty premised in legal positivism has had little voice in Thai society. In contrast, the arbitrariness hidden behind the cloak of the ambiguous Dhamma or morality has mainly gone unmentioned.[97] Kasemsup might have been aware of the problems arising from the reception of codified law, despite his acceptance of its rational and systematic nature, and tried to propose the ideal civil law model for the local situation. Yet, his Western demon is not evil, as both he and local discourse claimed it to be—and monsters, if they exist, are not limited to the West, as the local imagination suggested.

In sum: the Thai conception of law has been localised to assert Buddhist morality in the name of the Thammasat as a "unitary" Thai legal identity. At the same time, the understandings of Buddhism and pre-modern Thai law have been rationalised to negotiate modern legal discourse, while Western legal developments have been localised to seek a suitable Western legal model. Legal scholarship, like

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[93] John Maurice Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 312.

[94] ibid 313.

[95] Dilcher, "Germanists" (n 87) 53; Kelly, W*estern Legal Theory* (n 93) 324.

[96] Dilcher, "Germanists" (n 87) 24.

[97] Worachet Pakeerut, a prominent Thai legal scholar of Thammasat law school, is one of the scholars who challenge Preedee's over-generalised narrative on legal positivism. He attempts to challenge the one-sided grand narrative of legal positivism by promoting the positivist characteristic of legal certainty and the dynamic development of legal positivist movements. See วรเจตน์ ภาคีรัตน์, "กฎหมายคืออะไร #4 วรเจตน์ ภาคีรัตน์: คำสั่งรัฐอันธพาลเป็นกฎหมายหรือไม่" (ประชาไท, 26 พฤจิกายน 2554) [Worachet Pakeerut, "What Is Law? #4 Worachet Pakeerut: Is a Gangster State's Order Law?" (*Prachatai*, 26 November 2011)] (Thai) <https://prachatai.com/journal/2015/11/62643>.

other contemporary discourses, has been bifurcated into an intellectual strategy of Thai modernity. This is reminiscent of the concept of "the third space of hybridity" provided by Bhabha, whereby:

> The theoretical recognition of the split-space of enunciation may open the way to conceptualising an international culture, based not on the exoticism of multiculturalism of the diversity of cultures, but the inscription and articulation of cultural hybridity. To that end, we should remember that it is the "inter"—the cutting edge of translation and negotiation, the in-between space—that carries the burden of the meaning of culture . . . and by exploring this Third Space, we may elude the politics of polarity and emerge as the others of ourselves.[98]

C. Myths of Modern Thai Law

The co-existing narratives of civil law and Thai law permeate the collective intellectual imagination of the Thai legal system. This, in turn, obscures the understanding of the nature of the Thai legal system in various respects. Like Scots law, the over-exaggeration of the systematic legal landscape results in overlooking the nature of the sources of law. In other words, the Thai legal system becomes even more problematic when the formal sources of law obscure the legal epistemology of lawyers trying to understand the characteristics of the local system. Indeed, Thai legal scholarship should be aware of the issues that arise from these dichotomies in order to understand the complex features of the Thai legal system.

Firstly, the self-civilised narrative misleads Thai legal scholarship into overlooking a systematic problem regarding the interrelation between sources of law. While Thai academics still affirm that judicial precedent, as opposed to common law tradition, is not regarded as a source of law, the explanation for this phenomenon in Thai legal scholarship can do no more than indirectly legalistically criticise the application of legal rules in the decisions and the use of precedent. In reality, precedents have had a significant influence on the Thai legal system as a semi-formal source of law—as the Thai Bar and the Judicial Committee, which govern the recruitment of judiciary officers, tend to emphasise in the Supreme Court judges' application of rules.[99] Nevertheless, with very few exceptions, a full version of judicial decisions is not accessible to all. However, human rights, privacy and information legal activists have called for greater access to these to promote the transparency and accountability of the judiciary.[100] Given the adherence to civil law by academics, universities and courts seem to live in different legal worlds within the same

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[98] Homi K. Bhabha, *The Location of Culture* (2nd edn, Routledge 2004) 56, cited in Rachel V. Harrison, "Introduction" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West* (n 67) 22.

[99] Munin, "Legal Studies" (n 50) 308–9.

[100] ทีมข่าวกระบวนการยุติธรรม, "รายงาน: ความโปร่งใสในยุคออนไลน์ เมื่อศาลอังกฤษนำคำพิพากษาขึ้นยูทูบ" (ประชาไท, 2556) [Justice System Reporters, "Report: Transparency in Digital Age When the English Court Publicise Decisions on Youtube" (*Prachatai*, 2013)] (Thai) <https://prachatai.com/journal/2013/02/45495>.

jurisdiction. Legal reasoning developed by universities, therefore, is mainly conducted through selections of shortened decisions. This leaves the question to what extent legal reasoning provided by judicial precedent, for the sake of the integrity of the legal system, should be confluent by both the academic and the judicial world.

This issue is compatible with Bedner's observation on jurists' *habitus*: Indonesian academics affirm that precedent is not binding because of the characteristics of civil law tradition and tend to focus on terminology and legal sources within legal circles.[101] The independence of the judiciary, mostly in an authoritarian regime, has gone too far. This has led to a lack of consistency of interpretation within the legal system. In particular, it causes a lack of coherent interactions between academic and judicial institutions in digesting law into the system; the civilian narrative promoted by the academic world obscures the digestion of legal sources into the system in a practical world.[102]

Secondly, the civil law versus common law dichotomy becomes a simplistic assumption for appropriating foreign law into Thai society, regardless of the contextual variations within these legal families influenced by the two great legal traditions.[103] This leads to lawyers' normative assumption based on the archetype of a "mature" legal system. Asanasak observes that one of the causes of this is "historical interpretation" only by tracing back the foreign origins of the codes.[104] The donor systems may have already evolved beyond or abandoned the characteristics usually assumed by Thai legal scholarship.[105] Therefore, the claim to be civil law fosters a regional understanding of Western legal systems, while at the same time obscuring the dynamic nature of legal developments. Kasemsup's observation on the French versus German systems and legal positivism is one notable example of this.

Our argument here is not to abandon the difference between the two great legal traditions. Instead it should not be understood in a strict and over-generalised sense as a self-civilised narrative that stereotypes the perception of Euro-American legal

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[101] Adriaan Bedner, "Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions" (2013) 5 Hague Journal on the Rule of Law 253, 263–64.

[102] ibid 260.

[103] Jean-François Gaudreault-DesBiens, "On the Relative Pertinence of the Civil Law/Common Law Dichotomy When Reflecting on the Relationship between Comparative Law, Development Law and Living Law. Some Observations in the African Context." (Social Science Research Network 2017) SSRN Scholarly Paper ID 2948564 12–14 <https://papers.ssrn.com/abstract=2948564>; Tom Ginsburg, "Authoritarian International Law?" (2020) 114 American Journal of International Law 221, 221–22.

[104] Suprawee Asanasak, "Transplanting Regular Impact Assessment in Thailand: A Curious Case of Perfunctory Effect and The Legal Culture of Method" (Asian Law Junior Faculty Workshop, Singapore, January 2021) 21; Korrasut points out that the Thai legal system is a mixed legal system based on the mixed nature of English, civilian, and local customary law. Despite that, his argument is still in line with historical interpretation. There is much room for studies on transplanted law in a recipient legal culture, interactions of legal institutions with sources of law that need to be filled in. See กรศุทธิ์ ขอฟ่วงกลาง, "ระบบกฎหมายผสม" (2550) 36 วารสารนิติศาสตร์ 568 [Korrasut Khopuangklang, "Mixed Legal System" (2007) 36 Thammasat Law Journal 568] (Thai) 568.

[105] Suprawee, "Regular Impact Assessment" (n 104) 22; See also Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61 Modern Law Review 11.

traditions and simplifies the variations of world legal families. For instance, civil law countries no longer strictly adhere to the principal codes. In contrast, common law countries have increasingly come to rely on general statutes or restatements of areas of law.[106] Law can be migrated vertically from supranational to national level or horizontally from the situated legal system, with no relation to classic classification.[107] The U.S. jurisdiction, furthermore, also shows how misleading it is to divide civil and common law strictly; German legal science has co-evolved beyond nationalistic purpose and has seeded schools of legal realism, law and society and law and economics, particularly in the American legal world.[108] The self-civilised narrative reinforces the notion of transplant bias by which legal borrowing is based on general prestige, rather than an adequate scrutiny of the legal rules themselves.[109] In this respect, the Thai legal system remains obsessed with the prestige of civil law rather than the actual variations of both donor and local systems and becomes an "over-fitting" civil law country.[110] Notably, one must not forget that both the civil and common law traditions share Western liberal discourse, which societies outside (and a few inside) the West distance themselves from and ingest more or less with obsession and reluctance.

This brings us to the third point, namely how the Thai legal system could be perceived in the future. To begin to understand the complexity of the Thai legal system, it should be contextualised within the Southeast Asian colonial framework and legal culture. The nature of cross-fertilisation in the region is characterised by the fact that "local societies were willing to absorb foreign ideas but were absent where genuine ideas were stronger."[111] Concerning the legal aspect, Andrew Harding proposes that the Southeast Asian legal systems could be characterised as "syncretic" whereby layers of received law exist within a local legal culture under a Western framework.[112] Perhaps this legal culture is reflected by the localisation of the Thammasat as a framework with local customary law during the waves of Indianisation. In Westernisation, the grand narratives of civil law and unitary Thainess have concealed these layers of the legal landscape.

The constellation of laws can become tangible when law clashes with culture to gain legitimacy within the system. When a civilised model of the law came with the

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[106] Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 79.

[107] Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1319–20.

[108] Mathias Reimann, "Nineteenth-Century German Legal Science" (1990) 31 Boston College Law Review 837, 894–97; Siems, *Comparative Law* (n 106) 77–78.

[109] Alan Watson, "Comparative Law and Legal Change" (1978) 37 The Cambridge Law Journal 313, 327.

[110] See Mathias Siems, "The Curious Case of Overfitting Legal Transplants" in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014).

[111] Janos Jany, "Societies of Buddhist Law" in Janos Jany (ed), *Legal Traditions in Asia: History, Concepts and Laws* (Springer International Publishing 2020) 272 <https://doi.org/10.1007/978-3-030-43728-2_9>.

[112] Harding, "Comparative Law" (n 49) 208–9.

wholesale-package transplantation, there seemed to be a lack of grammar to digest the new and unfamiliar sources of law in the pre-existing Hindu-Buddhist legal tradition. For instance, a conception of civil rights based on individuality, despite the affirmation after the democratic revolution, is likely to be a mantra in legal texts but seems to lack the power of enforcement in reality; in particular, there are laws providing privileges and immunities to exceptional classes.[113] Apart from that, the Buddhist *Dhamma* and the conception of Buddhist kingship have contested and superseded the rule of law and constitutionalism.[114] So far, the misuse of *lèse majesté* laws as blasphemy in a Buddhist state exempts legality and due process in Thai criminal justice,[115] and the impenetrable impunity of the modern judiciary due to its interconnection to the Buddhist kingship, which is regarded as the fountain of justice, law, and the government, has been mostly untouched by the Thai legal academic world.[116]

Apart from that, rights-based justice provided by official sources of law is not compatible with the non-state consciousness of justice rooted in pre-existing pluralistic tradition. According to Engel, regional non-state customary law and the Buddhist law of karma have deterred citizens from asserting the rights entitled to them by positivistic law; legal modernity imposed in the reign of King Chulalongkorn did not seem to replace the consciousness of justice based on pre-modern beliefs.[117] Therefore, the adherence to Bangkok-centric modern codes of law disguised the nation under the cloak of modernity. At the same time, invisible harmony-based traditions have often been marginalised by the formal legal discourse in certain spheres. The legal missions to avoid colonial threat conceal the very nature of the colonial mentality of modern Thai law.[118]

These examples of contestation and interaction between legal culture and modern law discourse cannot be easily observed while Thai legal studies are still based on a positivistic approach. Merely tracing back to positive foreign laws would be little different from donating foreign books to a local library where even a librarian could not digest them. On the other hand, asserting Thai unitary values, given how hybrid and pluralistic they are, would create a binary opposition which obscures the understanding of legal developments and of existing pre-modern Thai law. Thailand could neither return to its traditional system nor be a small European legal system outside the West. More engagement is needed to understand the socio-historical

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[113] Thongchai, *Royal Nationalist State* (n 77) 177.

[114] See Eugénie Mérieau, "Buddhist Constitutionalism in Thailand: When Rājadhammā Supersedes the Constitution" (2018) 13 Asian Journal of Comparative Law 283; Kongsatja, "Initial Royal Command" (n 77); Thongchai, *Royal Nationalist State* (n 77) 184.

[115] See Streckfuss, *Truth on Trial* (n 53).

[116] See Thongchai, *Royal Nationalist State* (n 77) ch 4; Björn Dressel, "Thailand: Judicialization of Politics or Politicization of the Judiciary?" in Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge 2012) 79–97.

[117] David M. Engel, "Rights as Wrongs: Legality and Sacrality in Thailand" (2015) 39 Asian Studies Review 38.

[118] อานันท์ กาญจนพันธุ์, "พรมแดนความรู้เรื่อง Legal Pluralism" (2548) 3 วารสารนิติสังคมศาสตร์ มหาวิทยาลัยเชียงใหม่ 3 [Anan Ganjanapan, "Knowledge Boundary of Legal Pluralism" (2005) 3 CMU Journal of Law and Social Sciences 3] (Thai) 9.

conditions of the contextualisation of the Thai modern legal system into Thai soil. That is why history matters to the law.

VII. CONCLUSION

The central theme uniting the Thai and Scots legal systems is their sense of "belonging" to the group of legal systems which classify themselves as "civilian." As we have shown in this article, however, this association can also be problematic, especially when what counts as "civilian" has become ossified within the respective national discourses occurring within these two systems. This is best explained by summarising the main conclusions arising from a survey of the two systems.

On balance, there is much to commend in Rahmatian's critique of the current debates surrounding Scots law as a mixed legal system. Although one might not agree with all elements of his critique, he has undoubtedly exposed some of the more vexing questions surrounding the concept. Perhaps the single most outstanding contribution of his analysis is to demonstrate that the current paradigm of the mixed legal system has run its course. There is little more that can be added to this debate if the focus is to remain solely or even predominantly on grand narratives about the nature of the mixture and individual rules or doctrines. Instead, as has been advocated in this piece, the "mechanics" of the mixture—in other words, how the concept of Scots law functions as a legal order—should be the focus of any further investigation. And when the focus is shifted to the "mechanics" of a legal order—in other words to the notions of "legal science," "legal sources," and "authority/normativity"—it becomes clear, as this article has shown, that the Scottish legal order is indeed quite different from the codified civilian tradition. In addition, once this difference is acknowledged, further questions must be asked concerning the interaction of its primary sources of law, namely statute and "common law." And it is in this latter concept, as has been argued here, that the role of history should be amplified. Current conceptions of legal history in Scots law, as "sources" for current law, approach the past in a positivist and determinist way. Since most legal scholars acknowledge that a legal order is "socially nested" in its current circumstances, this narrow conception of the relevance of these historical sources requires a revision.[119] By acknowledging the past, beyond the narrow conceptions of "authority" found in the Institutional Writers, there is an opportunity for Scots law to grow and to mature further.

The Thai legal system arose from historical contingency, by which the nation sought both international recognition and self-consolidation since the colonial era. Against this backdrop as an intellectual legacy, Thai legal scaffolding has been shaped and imprisoned by its legal historiography; in particular, the grand narrative has forced local adherence to the Western legal tradition and the rationalisation of Thai traditional values. Although history has little power of enforcement in a legal system,

[119] Kitty Calavita, *Invitation to Law et Society: An Introduction to the Study of Real Law* (University of Chicago Press 2010), 189.

the conventional narrative either mirrors or reproduces the bifurcate intellectual strategy of West versus Thai legal identity. While some lawyers have highlighted the struggles between modern and traditional legal traditions, the calls for a suitable Western legal model and Thai unitary legal identity continue to be state-centric and misleading. As has been argued in this piece, in order to understand the nature of the Thai legal system, the adherence to a classic category of legal tradition is no longer adequate to understand the variations of the world legal system and pluralistic nature of the Thai legal system. It would not be possible to return either to an authentically traditional law or a fully Westernised system. Thai legal scholarship should be aware of the underlying civil versus common law dichotomy and the authenticity of Thai tradition since both have been hybridised into a local legal culture. The main thrust is not a call to abandon all categorisation; but rather, not to exaggerate it. One should always be aware that the most fundamental rationale behind the classifications of legal traditions is to describe and understand foreign laws;[120] not to misunderstand them. The future may include drawing lessons from legal mechanisms in mixed pluralistic systems, to rethink and move beyond the myths of "legal science."[121] Thai and Scots law may have had a completely different path of historical contingency, but what the two systems share is an exaggeration of grand narratives that obscure each legal system's nature. To view these systems of law from a post-positivistic perspective, a different approach is needed.

[Date of submission: 01 April 2021; Revision: 25 June 2021; Accepted: 01 November 2021]

[120] Siems, *Comparative Law* (n 106) 85.

[121] Mérieau, for example, conducts critical legal studies using area studies and constitutional law as an alternative to Euro-American liberal legal narratives. She looked into Southeast Asian constitutional law's marginalisation, the concealment of religious and ethnic diversity, conflict, and lessons learned from the covid epidemic environment. See Eugénie Mérieau, "Area Studies and the Decolonisation of Comparative Law: Insights from Alternative Southeast Asian Constitutional Modernities" (2020) 51 International Quarterly for Asian Studies 153.