

Career Paths into Legal Academia in Scotland

By ANDREW SWEENEY, Hamburg*

Contents

I. Introduction	351
II. Talent pool – law students	353
III. Requirement of a Ph.D.	356
IV. Ph.D. programme	359
V. Post Ph.D.	361
VI. An international law school	363
VII. Publication culture	364
VIII. The Research Excellence Framework – assessing the quality of publications	366
IX. Open access research and the Research Excellence Framework	369
X. Theory vs. practice	370
XI. Equality and the broader legal profession	371
XII. Conclusions	373

I. Introduction

This contribution deals with the smallest country represented at the symposium. Its size, however, is not the sole feature that distinguishes Scotland from the others. As a legal system, Scotland sits exactly neither with the Continental systems (represented here by Germany, France and Italy), nor with England. It is, instead, often described as a mixed legal system, sharing features with both Civilian and Common-law systems.¹ In this regard, it is

* I thank Dr. Andrew Steven, Dr. Alisdair MacPherson and Luca Kaller for their comments on earlier drafts. All opinions and errors are mine. All internet sources cited were last accessed on 15 January 2020.

¹ A mixed legal system, however, does not describe only those based on both Civil and Common law. For example, some mixed legal systems, such as that of Pakistan, are based on Islamic law and Common law.

often placed alongside South Africa, Louisiana and Quebec. Whilst its private law is mixed, Scotland, in relation to the career path of its legal academics, sits closer with the English tradition than with the Continental, Civilian systems. This is not a great surprise. Much of the Civilian “part” of Scots law was developed before the Act of Union with England in 1707, long before academia – as we now recognise it – began to take shape. Furthermore, Scotland and England have much in common. Being within the same state and sharing a common language allows there to be an obvious association between law schools throughout the United Kingdom and the cross-fertilisation of talent across the border. Scottish legal academia appears as international and as practically focused as that of England and the wider Common-law world.² A German audience – which makes up the bulk of the symposium – may find that the law schools in Scotland and the rest of the UK are more international and flexible.

Whilst Scotland and England are closely connected, divergences allow us to treat the Scottish system as unique and distinct from that of its southern neighbour. There is no haughtiness in treating the position of Scottish legal academia separately, but rather doing so merely acknowledges the differences (which are often subtle) that can be seen there. Legislative power in relation to education is devolved to the Scottish Parliament,³ and this allows for a unique funding system under its governance. The state-funding of undergraduate fees, which contrasts with the position in England, immediately springs to mind when considering the impact of the Scottish Parliament. And it is to be expected that a separate Scottish legal system and Scots law degree has resulted in a distinct Scottish legal academic “culture”. This talk therefore focuses primarily on the position in Scotland. But much of what is discussed will be equally applicable to an English academic, and it is easy to overstate the differences between the two jurisdictions. Where interesting differences exist between the two jurisdictions, an attempt has been made to point them out.

An analysis of academic career paths may perhaps be best undertaken by someone at the end of their career. As a Ph.D. candidate, however, I can look at full-time academia only from the outside or, at the very most, from the start of my career. Much of what is said here is from the viewpoint of a spectator, rather than an active participant. Space constraints also restrict the assessment to a select few of the myriad of subjects which the topic of academic career paths could include, and some of those selected are permitted only a cursory glance. Particular focus is given to a career in private law, and

² In fact, because they work within a mixed legal system, Scottish academics may have more opportunities to study jurisdictions from both the common law and civilian traditions.

³ For matters reserved to the UK Parliament, see the Scotland Act 1998 Sch. 5. As education is not listed here, it is devolved.

it must be borne in mind that differences – sometimes significant ones – exist in other areas such as criminology,⁴ legal theory and legal history.

II. Talent pool – law students

The first step on the academic career path is taken by entering law school.⁵ Whilst completing a law degree is not the sole route through which one can enter legal practice in Scotland – an alternative-to-university apprentice route is available⁶ – the overwhelming majority of lawyers, whether they are solicitors or advocates,⁷ have studied law at bachelor's level. And there is no great lack of universities offering such studies, with ten providing the professionally qualifying LL.B. course⁸ – and one the B.A. in law.⁹ The number of institutions offering the study of law in Scotland has seen a sharp rise in the last 20 years, and, although the number of law schools in Scotland is undeniably smaller than the numbers in England, Germany, France or Italy, there are ample teaching institutions. After the LL.B., those who wish to qualify as a lawyer are required to pass the practice-orientated Diploma in Professional Legal Practice,¹⁰ which is a one-year programme (or two years if taken part-time) offered at only six universities in Scotland.¹¹

⁴ At some universities criminology is located outside of the law school.

⁵ Not to be forgotten are the large numbers of academics who have completed their studies abroad or in other parts of the UK. Just one example is Professor Alexandra Braun, who holds the Lord President Reid Chair in Law at the University of Edinburgh. The current focus, however, is on the students studying at Scottish universities. We will, of course, return to the international nature of law schools in Scotland below.

⁶ On this, see <<https://www.lawscot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/alternatives-to-university/>>.

⁷ Advocates, with their rights of audience in the highest courts, are equivalent to barristers in England. There are also solicitor-advocates who, whilst they usually undertake the work of a solicitor, also have a right to appear before the highest courts. To be a solicitor-advocate you must sit further exams and undertake more training than that required to be a solicitor. The role of a solicitor-advocate remains relatively new after its establishment in 1993.

⁸ The University of Aberdeen, the University of Abertay, the University of Dundee, the University of Edinburgh, the University of Glasgow, Glasgow Caledonian University, Edinburgh Napier University, Robert Gordon University, the University of Stirling and the University of Strathclyde. Some of these universities also offer a non-qualifying law degree in addition to the LL.B. The University of Aberdeen, for example, offers an M.A. in Legal Studies.

⁹ The University of the West of Scotland. The B.A. alone does not, however, permit someone to become a solicitor or advocate. Some Scottish law schools even offer the English law LL.B. However, no non-Scottish university offers the Scots law LL.B.

¹⁰ Formerly known as the Diploma in Legal Practice.

¹¹ <<https://www.lawscot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/diploma-in-professional-legal-practice/where-can-i-study-the-diploma/>>.

By generally requiring practising lawyers to have completed a degree in law at a Scottish university, Scotland appears to sit alongside its continental cousins and away from England where – as I will come to explain – the university study of law was never a requirement to become a lawyer. By contrast to England, there is a rich history of Scots obtaining a university education in law.¹² At first Scots travelled abroad, initially to France, and from the mid-17th century to the Netherlands, before tuition in law was consistently offered at Scottish universities.¹³ Such an education – whether abroad or in Scotland – was deemed necessary to pass the entrance examination on Roman law held by the Faculty of Advocates (more or less equivalent to the English Inns of Court).¹⁴ Aspiring lawyers no longer look towards the continent for the legal education and, since 1862, can be awarded an LL.B. from a Scottish university.¹⁵

To obtain the necessary degree from a university, most students of law take the full-time, four-year LL.B. (Honours) programme designed for undergraduates.¹⁶ For Scottish students, and those from the wider EU,¹⁷ the fees for this undergraduate degree are funded by the Scottish Government. This is seen – by some – as allowing those from a less affluent background to study law.¹⁸ Although those taking the four-year LL.B. make up the bulk of the student body, a significant minority is made up by graduate students, who follow a shorter two-year degree which largely replicates the first two years of the four-year honours degree.¹⁹ Those already holding an undergraduate degree have a greater chance of being accepted to study law. From those who apply as graduate law students, the acceptance rate at the University of Edinburgh is over 80%, whereas from undergraduates it falls to

¹² Although it is said that Scots law took little notice of its professors until after 1850. See *Kenneth G. C. Reid, The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland*, in: *Scots Law into the 21st Century*, ed. by Hector L. MacQueen (1996) 39.

¹³ An in-depth assessment of the history of Scottish legal education can be found in: *John W. Cairns, Historical Introduction*, in: *A History of Private Law in Scotland*, ed. by Kenneth G. C. Reid/Reinhard Zimmermann (2000) 14.

¹⁴ *John W. Cairns, The Origins of the Glasgow Law School: The Professors of Civil Law, 1714–1761*, in: *Enlightenment, Legal Education, and Critique: Selected Essays on the History of Scots Law*, vol. II, ed. by idem (2015) 113, 115.

¹⁵ *Elsbeth Reid, The Impact of Institutions and Professions in Scotland*, in: *The Impact of Institutions and Professions on Legal Development*, ed. by Paul Mitchell (2012) 59, 70.

¹⁶ For a history of this degree, see *Reid, The Third Branch of the Profession* (n. 12).

¹⁷ But not students from other parts of the UK – a quirk of EU law.

¹⁸ In order to become a solicitor or advocate, however, a law student must pass the Diploma in Professional Legal Practice after completion of the LL.B. This can cost over £8,000 (at some universities the cost is lower), but student loans and grants are available. In order to keep to its budget, the Scottish Government restricts the numbers of Scottish undergraduate students who can be accepted to study at Scottish universities.

¹⁹ At the University of Aberdeen, for example, some of the professional courses are typically taught in the third year. A 2-year LL.B. student will take these in the second year.

around 20%.²⁰ This is a result of a Scottish Government cap on the numbers of Scottish and EU undergraduate students that can be accepted and therefore have their fees funded. By contrast, graduate fees are not funded by the Scottish Government, and universities are free to accept as many as they are able to teach.

By the very nature of this shorter degree, graduate students do not sit any honours courses (those beyond the “ordinary” courses necessary to become a practising lawyer) during their law degree,²¹ but they do graduate with an LL.B. and this does not hinder them from further research and a career in academia if this is the path which they wish to choose. Indeed, this path of reading law at university as a graduate degree is a well-trodden one, with many top lawyers, whether academic or practising, having followed this route.

By way of a potential contrast,²² there is no requirement of the completion of an LL.B. to become a practising lawyer in England. For those who have not completed a law degree there is of course the necessity of completing the Graduate Diploma in Law (GDL), which involves an introduction to the main subjects such as contract, property and equity, but it is only a one-year programme and thus significantly shorter than the LL.B. (even the two-year route). No equivalent to the GDL exists in Scotland. The absence of a required role for universities in the teaching of law appears deep-rooted in England, with Tony Weir, in an article on English legal academia, writing that “[t]he insignificance of universities has been one of the most striking facts of English social history.”²³ Obtaining a university education in a subject other than law is actively promoted by some individuals, including former Supreme Court Justice Lord Sumption,²⁴ and by many of the larger law firms in England. To summarise this view held by some, I can do no better than to quote from one Queen’s Counsel:²⁵

“I do not decry academic study of law. It is just that it is so very different from practising it. I adhere to the view that anyone who might want to practise law should not waste their time at university studying it.”²⁶

²⁰ On this, see <<https://www.ed.ac.uk/student-recruitment/admissions-advice/admissions-statistics>> and the links therein. Of course, graduate students do not benefit from the funding available to undergraduate students.

²¹ They have, however, already completed a degree beforehand.

²² As stated above, there is no absolute requirement to have an LL.B. before becoming a solicitor in Scotland.

²³ *Tony Weir*, Recruitment of Law Faculty in England, *Am.J.Comp.L.* 41 (1993) 355, 355.

²⁴ See <<https://www.thetimes.co.uk/article/lord-sumption-dont-do-an-undergraduate-law-degree-78wr085fx>>.

²⁵ Advocates (or barristers in England) can become a Queen’s Counsel (QC) for distinguished practice at the highest courts. Becoming a QC is known as “taking silk”.

²⁶ *Alistair Bonnington / Patrick Phillips*, LLB Confidential, *Journal of the Law Society of*

Some may argue that the graduate route in both Scotland and England are roughly equivalent, but the Scottish system does bring the future practising lawyer into a university setting. Whether the LL.B. ought to be a requirement to become a practising lawyer is a debate that will continue to be fought between two sides that are likely never to agree, but it is interesting to discuss – especially amongst legal academics – a system that does not require legal academics to have a significant role in the education of future lawyers.

III. Requirement of a Ph.D.

For those wishing to become a legal academic in the other European countries represented at this symposium, a period of formal postgraduate research study is a requirement after the completion of a law degree. There is, in Germany, not only the pre-requisite of a *Dissertation*, but also a lengthy *Habilitation*. A Ph.D. in France can often take ten years to complete, and this process appears to combine both the *Dissertation* and *Habilitation* found in Germany. Neither the German nor the French system can be said to have any equivalent in Scotland.

An increasing number of Scottish private law academics have written doctoral theses, to be sure, but this is a result of more funding and greater encouragement from certain academics rather than it being a formal requirement before applying for an academic position. It could even be said that there are no formal requirements to teach law. The increasing number of Ph.D.s written by Scottish academics in private law may mean that it will become a strict requirement to have written a thesis,²⁷ but currently a typical advert for a lectureship requires a Ph.D. *or an equivalent research profile in the subject area*.²⁸ This requires some form of research experience, but it does not need to come in the form of a Ph.D. A series of articles, for example, may be sufficient if coupled with other experience.²⁹

Scotland, 17 July 2006 (online edition, <<http://www.journalonline.co.uk/Magazine/51-7/1003218.aspx#.XXtxmX9S-71>>).

²⁷ Although many legal academics hope that this does not occur.

²⁸ In other law school areas, such as criminology, it appears that a Ph.D. is normal. Criminology academics have not usually studied law at undergraduate level, but there are some exceptions, such as Dr. Alistair Henry at the University of Edinburgh. They are more likely to have studied criminology or sociology before progressing towards their Ph.D. In some universities, especially in Canada and North America, criminology does not form a part of law school at all. I thank Dr. James Gacek, Assistant Professor at the University of Regina, for his thoughts on this.

²⁹ It is possible to obtain a Ph.D. by publication, which is designed to recognise academics who have published to a high standard in a particular area.

Finding the exact cause of this divergence between the UK and the Continental legal systems may be an insurmountable task and without doubt one beyond the brief introduction given here.

Two probable causes can be identified. First, law in the UK is viewed more as a practical subject rather than an academic one. The teaching of law at Scottish universities is designed primarily (if not exclusively) to service the profession. Perhaps the clearest example of this is the traditional way of teaching conveyancing at Scottish universities. Until 1980, the teaching of private law was divided into the three broad areas of Scots law, mercantile law and conveyancing.³⁰ There was no attempt to teach an overarching law of property. Although professors of Scots law were academic lawyers, land law was seen a purely practical subject, to be taught by practising conveyancers. As a practical subject, law was to be taught by those with practical experience, rather than those with an extended university education in the form of a Ph.D. The requirement of having a research profile before applying to an academic position within a university is also relatively new – it was not uncommon for those appointed as lecturers in the 1980s to have not published. Although a research profile is now required, there remains no requirement for an applicant to have undertaken a formal period of postgraduate study.

A second cause is the greater funding sources available outside of the UK. When compared to the Continent, UK university fees are expensive. Whilst undergraduate fees for Scottish and non-UK EU students (following EU law and, as already pointed out, thereby excluding English, Welsh or Northern Irish students) are funded through the Scottish Government-sponsored SAAS agency,³¹ postgraduate fees are not. Ph.D. students are, as a rough example, required to pay close to £5,000 a year and almost double this for the one-year LL.M.(R).³² In France, by contrast, fees are rather low (a token 400 Euros), Germany requires an enrolment fee of between 100 and 400 Euros a semester, and in Belgium and the Netherlands there is apparently no cost (there is, of course, an obligation to teach rolled into a student's employment contract with the university).³³ Whether high fees can be justified is

³⁰ *George L. Gretton*, *The Rational and the National: Thomas Broun Smith*, in: *A Mixed Legal System in Transition: T.B. Smith and the Progress of Scots Law*, ed. by Elspeth Reid/David L. Carey Miller (2005) 30, 37ff. See also *Andrew J.M. Steven*, *A Golden Era? – The Impact of the Scottish Law Commission on Property Law*, in: *Modern Studies in Property Law*, vol. VIII, ed. by Warren Barr (2015) 13, 16ff.

³¹ SAAS pays less than £2,000 per annum per student to the University. This appears rather low for a full-time education, especially in law. For information on this, see <https://www.saas.gov.uk/_forms/fees_student.pdf>.

³² An LL.M.(R) is a research degree that can be equated with the first year of a Ph.D. Instead of writing a 100,000-word thesis, a 30,000-word thesis is submitted after one year. This degree can be used as a stepping-stone for those who plan to complete a Ph.D. thereafter.

³³ Excluding the small administration costs that are often charged.

not the immediate concern; however, they must be a discouraging factor. Aside from the fees, the funding opportunities for postgraduate research in Scotland are fewer than can be found elsewhere. In both Germany and France, it is likely that a doctoral student will be granted an employment contract with a university or research institution or even a law firm as a research assistant (*wissenschaftlicher Mitarbeiter*) and will benefit from structured holidays and illness leave. And, indeed, Germany has the Max Planck Institutes (MPI), which assist doctoral students and early-career researchers both financially and educationally. In Scotland, tutoring opportunities are available but both the MPI and employment contracts have no functional equivalents, especially in relation to private law research. With both higher fees and a perceived lack of funding, there is less of a desire for students to stay on at university after the years required before they can enter practice.

Without the opportunity of employment contracts, prospective Ph.D. students in Scotland need to self-fund their studies or find a scholarship. Loans are always available – whether from a state-funded body or a private lender – but this will undoubtedly dampen any desire once held for further education, especially if the salaries on offer for academics do not match those for practising lawyers. In terms of scholarships, there is no Scottish equivalent to the intriguing and impressive German *Studienstiftung*. Perhaps the closest institutions are the Arts and Humanities Research Council (AHRC) and the Economic and Social Research Council (ESRC), which annually offer a small number of scholarships selected through a competitive process. However, only the AHRC will fund research into private law, with the ESRC funding more in the areas of socio-legal studies and criminology. Those with a Masters degree (whether taught or research)³⁴ have a greater chance of successfully receiving this funding,³⁵ but the number of those undertaking such a degree in Scotland after their LL.B. is not large. This is because there is no requirement to hold an LL.M. before entering practice, and there is no demand from law firms for applicants to have obtained such a degree. This obviously reduces the opportunities for funding yet further. Outside this small government pool of funds, finance is provided by private trusts. In Scotland, there is the Carnegie Trust, the Clark Foundation for Legal Education and the trust which many of those researching private law in Scotland – including myself – have to thank, the Edinburgh Legal Education Trust (ELET).

ELET was established in 1996 by academics within the Edinburgh Law School with the purpose of funding students who wished to undertake re-

³⁴ A taught masters (LL.M.) generally consists of seminars, exams and a final thesis of 10,000 words, whereas a research masters (LL.M.(R)) is assessed through a single thesis of 30,000 words.

³⁵ See <<https://www.ed.ac.uk/student-funding/postgraduate/uk-eu/research-councils/ahrc>>.

search into Scots private law at that Law School, thereby increasing scholarship in that area. The trust is mainly funded by seminars given by academics to practising lawyers. A scholarship has the same value as that provided by the AHRC, but ELET is solely focused on funding research into private law in Scotland and has undoubtedly had the positive effect of increasing the number of younger researchers in that area.³⁶

This financial uncertainty for prospective Ph.D. students can be compared to what is on offer for those applying for traineeships in practice. Large commercial law firms recruit their future trainees very early, and the students therefore often decide upon practice before considering writing a thesis. This is not a surprising decision, and one that cannot be criticised. A law student offered the choice between a guaranteed traineeship, a salary and a likely future job as a solicitor, on the one hand, and the gamble of obtaining a scholarship at some point in the future, on the other, will likely choose the former. Scholarships cannot offer funding as far in the future as traineeships are offered. ELET, however, has found a possible solution and funds students who can, if they have a traineeship secured and can obtain the agreement of their employer, delay this for the duration of their Ph.D. It is, however, likely only to be the larger law firms that can agree to defer a traineeship.

IV. Ph.D. programme

In a 1997 article looking at Scotland, attention was drawn to the large swathes of private and commercial law that lay under-researched.³⁷ Although some of the ground has subsequently been the subject of research, a future Ph.D. candidate is left with much choice when deciding upon a research topic. As Professor George Gretton wrote in 1999 on Scots law: “What other discoveries await us about our own system?”³⁸ This is a mixed blessing. With such a large range of subjects to choose from, finding a topic can take some time. Whilst those writing a thesis outside of private law may find that their choice of subject is influenced by funding opportunities and the subject specialisations of a host institution, this is generally not a factor for those wishing to write a thesis on Scots private law. Scotland also lacks the concept of a *Lehrstuhl*, within which all the students are generally focused on one broad research area. It is also rare for doctoral research topics to be specified by universities or supervisors, and they are instead chosen by the candidate

³⁶ Many of those with a Ph.D. scholarship from ELET have spent a year at the MPI in Hamburg under Professor Zimmermann.

³⁷ Reinhard Zimmermann / Johann Andreas Dieckmann, *The Literature of Scots Private Law*, Stellenbosch L.Rev. 8 (1997) 3.

³⁸ George L. Gretton, *Scots Law in a Golden Age*, in: *Now and Then: A Celebration of Sweet & Maxwell's Bicentenary 1999*, ed. by Anthony J. Kinahan (1999) 163, 164.

with guidance from a prospective supervisor. This guidance is usually offered long before applying to the university and applying for scholarships (there is scope for altering the focus of the thesis thereafter, however).

Doctoral candidates have a principal and a secondary supervisor. Although one will automatically be described as “principal”, how the relationship between the candidate and her two supervisors develops is for them to decide. Some find that the supervisors take a joint role, whereas others have one that takes the lead. Whatever the relationship between supervisor and supervisee, most supervisors take a hands-on role, reading their supervisee’s work on a regular basis and ensuring that they are on track. This can be compared to a supervisor who allows his student to research and write without much influence or guidance. Usually Scottish supervisors are deserving of the title of *supervisor*, overseeing the quality and direction of the thesis. In this regard they differ from the role of the *Doktorvater* in Germany who, whilst evidently available for advice and support, takes perhaps a more distant position in relation to the work of their doctoral candidates. This difference may spring from the greater number of doctoral candidates a *Doktorvater* will have when compared to a supervisor in Scotland. A *Doktorvater* is also involved in examining the final thesis and therefore may not feel as able to take as active a role as that of a supervisor in the UK. Despite the hands-on approach that a supervisor will often take in the work of their supervisee, the structure and direction of a thesis will always be for the latter to decide. Naturally the advice of a supervisor is welcome, and their experience will usually be of undoubted value, but the final choice is – and ought to be – always one for the supervisee. It is only her name attributed to the thesis.

Despite this more hands-on role taken by a supervisor in Scotland, there is no career-long connection between student and supervisor. This is in contrast to the Italian concept of *maestro*, a supervisor with whom the doctoral student is associated through that individual’s career. It appears that such a *maestro* exerts considerable influence over the academic views and future careers of their doctoral candidates. Academia does not seem as tribal in Scotland. A Scottish Ph.D. candidate will certainly be working in an area of interest to her supervisor, but beyond this link, a supervisor’s views will not necessarily follow a candidate throughout her academic career.

There is also much talk of “schools” of students who have worked under a particular professor in continental Europe – and the competition or even animosity between such schools. Again, there is no feeling of this in Scotland. This may be the result of a far smaller number of doctoral candidates, and therefore a reduced feeling of competition between them. In particular, there is no perception that students ought to agree with their supervisor’s views – whether on the topic of their thesis or more generally. In such a debate, a student is, as expected, not always confident of coming out successful, but this does not usually lead to ill-feeling or a split from the super-

visors. A thesis is, as mentioned above, not examined by the candidate's supervisors, and so there may not be as much pressure to agree with their views. All of this is not to say that the choice of supervisor is not important in Scotland; each supervisor will expect their particular standards to be met by their students. Whilst the *maestro* concept cannot be said to exist in Scotland, the name of a supervisor is, as will be the same everywhere, difficult to hide from.

Once a topic is chosen and supervisors appointed, a full-time Ph.D. will typically take four years, but it is not unheard of for someone to hand in their thesis after barely two years. However, such candidates who submit very early typically work outside of private law and have often already completed a Masters. Time to consider and improve your writing style and research skills is one of the great benefits of the Ph.D., and so I have been encouraged to use the full length of time available. It could even be said that the writing process ought to be enjoyable. But it is unusual to take longer than four years as funding is normally restricted to three or four years, and universities actively encourage their students to complete their theses within that time-frame.

V. Post Ph.D.

Instead of a postdoctoral position, which is rare in private law, the next step is usually to become a lecturer, but often other positions such as that of a teaching or research fellow (which are often time-limited positions) do become available. These positions are advertised publicly, especially now on websites specifically directed towards academics, and they are certainly not restricted to those with a Ph.D. or those already within academia. No national exam exists to regulate the entrance of lecturers and professors, leaving individual universities to choose employees according to their needs and interests at that time.

Those appointed to the position of lecturer can be as young as 24 or 25. To many this may seem startlingly young,³⁹ and it could be questioned whether they are too inexperienced to take up such a role. But this perhaps exaggerates the differences between the Scottish position, on the one hand, and the French and German, on the other. The roles of an early-career lecturer in Scotland and those writing their *Habilitation* in Germany or those in the final stages of their Ph.D. in France are similar and could be called functional equivalents. Is such a person the finished article, clad with the skills necessary for 40 years of an academic career, after completing a Ph.D. at the

³⁹ Although, as has been pointed out to me, this is not much younger than those who become judges in certain European countries.

age of 25? Probably not. The aim of writing a Ph.D. is pedagogical, but so are the first years of an academic career, i.e. the years as a lecturer. A lecturer will be a part of a larger team within the law school, as will often be the case for a *Habilitand* or a doctoral student in the later stages of her research in France. They are all early-career researchers who also lecture to undergraduates and lead Masters seminars, and they are certainly not left without support or mentoring from the senior members of staff.

It could even be said that the rise up the career ladder is more gradual in Scotland (and the UK) than elsewhere. Although an early-career academic – having just completed her Ph.D. – may be able to become a lecturer, the climb up the career ladder, assuming the apotheosis to be the position of professor, will take much longer, and it is far from unusual for this to include at least one change of university. It is often also the case that an academic will never reach the position of professor, and may choose not to do so.

There are to my knowledge no figures on the average age of those who reach a professorship in the law in Scotland, but it would not seem to be out of the ordinary if they are in their mid-to-late forties. This may even be older than the average age of those becoming a law professor in either France or Germany.

The top of the career ladder is the position of professor. A professor holds a chair. Chairs are either (i) personal, being those created for a particular individual and ceasing when the holder leaves the post, or (ii) established, which continue after the current holder. Although established chairs continue to be created, many can be traced back for decades if not centuries. For example, the Chair of Scots Law in Edinburgh can be traced back to 1722,⁴⁰ and some of the most influential commentators on Scots private law, including John Erskine, Baron Hume, George Joseph Bell, Sir John Rankine, Sir Thomas B. Smith, Eric Clive and Kenneth Reid, have held this chair.⁴¹ Within the established chairs, a small number are *regius* professors, created by Royal endowment, such as the Regius Professor of Law at the University of Glasgow established under Queen Anne. The only other Regius Chair of Law in Scotland is the splendidly titled Regius Professor of Public Law and the Law of Nature and Nations, which was also established under Queen Anne as the first chair in law at the University of Edinburgh.⁴²

⁴⁰ There is also an established Chair of Scots Law at Aberdeen (held by Professor Roddy Paisley) and a personal chair at Glasgow (held by Professor John Finlay).

⁴¹ For a fuller discussion on this Chair by the current holder, see *Kenneth G. C. Reid, Smoothing the Rugged Parts of the Passage: Scots Law and its Edinburgh Chair*, Edin.L.R. 18 (2014) 315.

⁴² *John W. Cairns, The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment*, in: *Enlightenment, Legal Education, and Critique* (n. 14) 82.

VI. An international law school

So far only the career path of someone with a purely Scottish university education has been discussed. However, Scotland – a country that geographically sits on the edge of Europe – has a more international feel to its law schools than would perhaps be expected. Non-Scottish students compose a large segment, perhaps even the majority, of the Ph.D. students in law in Scotland and, perhaps accordingly, there are a significant number of non-Scottish academics at its universities. According to one opinion, an increasing number of academics in junior positions at Scottish law schools did not complete their undergraduate degree in Scots law.⁴³ This may not be applicable to those teaching in the field of private law, but it does demonstrate that there is a genuine international imprint within law schools in Scotland. The same can, of course, be said for universities throughout the UK, and even in other Commonwealth nations.

The English language certainly plays a leading role in encouraging non-British academics to come to the UK.⁴⁴ But perhaps there is also a lack of home-grown scholars, thereby requiring Scottish law faculties to supplement them with the wealth of talent from abroad. This influx of foreign-educated academics undoubtedly brings invaluable expertise and raises the standard of research and teaching. A Scottish law school's ability to employ non-domestically educated lawyers may also be due to the absence of final exams that are designed only to test a student's knowledge of the national law – with the *Staatsprüfungen* being the direct comparison. While the first two years of a law degree include the core subjects of Scots law, there is certainly no requirement for an academic to have experienced, and succeeded in, the same exams for which they are preparing their students.

With a greater number of non-Scottish education academics, there may be a concern that fewer academics will be willing and able to teach and research in the core professional courses, i.e. those that a student must take to become a lawyer. Such subjects include Scots property law, contract law and delict. But this does not appear to be materialising. Instead, those academics who do take up positions at Scottish universities often teach and research on Scottish-focused law, whilst bringing an invaluable comparative element to their work.

⁴³ Sue Farran, Scotland: "Is the Tartan Fading?", in: *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended*, ed. by idem / Esin Öricü / Seán Patrick Donlan (2014) 13, 19.

⁴⁴ There must be far more non-native English speakers willing and able to teach in English than English-natives who can and want to teach in another language.

VII. Publication culture

Having secured a position at a university, an academic with a research role will seek to publish.⁴⁵ It seems clear that the quality and regularity of publications is important for the prospects of any academic, and there is some truth in the well-known phrase of “publish or perish”. Current Scottish legal academics are certainly not shying away from this. A lack of publications in the mid-20th century, combined with the courts’ refusal to read a book until its author was dead (the policy of “not read till dead”⁴⁶ or even “not read at all”⁴⁷) could easily have led to the demise of Scots law and its assimilation with English law.⁴⁸ Thankfully, academic publishing in Scots law – especially private law – is now not only far from perishing but has enjoyed a self-declared “golden age” since the mid-1990s.⁴⁹

From a “dark age”, Scots law has been propelled into this “golden age” by the work of a series of pro-active academics. For example, beyond funding postgraduate research, ELET also often publishes the work of Scots law researchers in its “Studies in Scots Law” series.⁵⁰ Many of these publications deal with areas that have not been the subject of any in-depth research for over 100 years.⁵¹ Before this, the Scottish Universities Law Institute, created in 1960 under the influential Professor T. B. Smith, began publishing monographs written by more senior academics. It has published on a range of subjects, and the research often takes a historical and doctrinal focus. Of those already in print are treatises on leases,⁵² delict,⁵³ personal bar⁵⁴ and bankruptcy.⁵⁵ Edinburgh University Press and Avizandum Publishing have regularly published monographs on Scots law, and this is likely to continue after the former’s recent acquisition of the latter. A great resource for any student, academic or practising lawyer is the Stair Memorial Encyclopa-

⁴⁵ Some lecturers are employed on teaching-only contracts.

⁴⁶ *Reid*, *The Third Branch of the Profession* (n. 12) 46.

⁴⁷ *Gretton*, *The Rational and the National* (n. 30) 31.

⁴⁸ *Gretton*, *Scots Law in a Golden Age* (n. 38) 166.

⁴⁹ *Reid*, *The Third Branch of the Profession* (n. 12).

⁵⁰ *Ross G. Anderson*, *Assignment* (2008), *Andrew J. M. Steven*, *Pledge & Lien* (2008), *Craig Anderson*, *Possession of Corporeal Moveables* (2015), *Jill Robbie*, *Private Water Rights* (2015), *Daniel J. Carr*, *Ideas of Equity* (2017) (Carr’s research was not funded by ELET), and *Chathuni Jayathilaka*, *Sale and the Implied Warranty of Soundness* (2019). At least two more are expected before long (*Alisdair MacPherson*, *The Floating Charge*, and *Alasdair Peterson*, *Prescriptive Servitudes*). Some funded theses are, as yet, unfortunately unpublished.

⁵¹ Prior to Dr. Steven’s thesis (n. 50), the most appropriate source for information on pledge and lien would have been Glog and Irvine’s treatise: *J. M. Glog / W. M. Irvine*, *Law of Rights in Security* (1897).

⁵² *Robert Rennie*, *Leases* (2015).

⁵³ *Joseph M. Thomson*, *Delict* (2007).

⁵⁴ *Elsbeth Reid / John Blackie*, *Personal Bar* (2006).

⁵⁵ *Donna W. McKenzie Skene*, *Bankruptcy* (2018).

dia,⁵⁶ which addresses almost all areas of law and is regularly updated by both academics and practitioners. The Stair Memorial Encyclopaedia can be said to be the Scottish equivalent of the commentaries found in codified legal systems. Collections of essays written in dedication to a particular academic – *Festschriften* – are also becoming more common,⁵⁷ although they remain far from universal, and when published they are shorter than those seen in Germany.

These, monographs and *Festschriften* are perhaps too detailed for an undergraduate student audience (especially those students in the first two years of their studies), and they will instead use an array of dedicated student textbooks. Such books are mainly written by those who lecture to the students, and there is at least one dealing with each of the core subjects, including “Property, Trusts and Succession”,⁵⁸ “Contract”,⁵⁹ “Delict”,⁶⁰ “Family”,⁶¹ and one on the study of Scots law more generally.⁶²

Aside from monographs, both the *Juridical Review* and the *Edinburgh Law Review* are journals focused on publishing academic legal research in the form of articles, and the *Scots Law Times*, whilst perhaps directed more towards the profession, often also includes articles by academics.⁶³ The *Journal of the Law Society of Scotland* also contains comments from those in academia, especially on recent or proposed reforms to the law, and can be read online for free. These journals are professionally edited by academics or publishing companies, but since 2009 there has been a rapid rise in the number of student law reviews in Scotland. The impact of articles published in such journals is limited; however, many of those who have gone on to become academics have first published in one of the student law journals. In their insightful article, Dr. Alisdair MacPherson and Dr. Alasdair Peterson, two former editors-in-chief of the *Edinburgh Student Law Review*, empha-

⁵⁶ Published by LexisNexis.

⁵⁷ See, for example: *A Scots Conveyancing Miscellany: Essays in Honour of Professor J.M. Halliday* (1987); *Essays in Conveyancing and Property Law: In Honour of Professor Robert Rennie* (2015); *Nothing so Practical as a Good Theory: Festschrift for George L. Gretton* (2017). Some are published in memory of a particular academic, see: *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018). For an index (now slightly outdated) on Common-law *Festschriften*, see: *An Index to Common Law Festschriften: From the beginning of the genre up to 2005*, ed. by Michael Taggart (2006).

⁵⁸ *George L. Gretton / Andrew J.M. Steven, Property, Trusts and Succession*³ (2017); *Craig Anderson, Property: A Guide to Scots Law* (2016).

⁵⁹ *Gillian Black, Woolman and Black on Contract*⁶ (2018); *Hector L. MacQueen / Joseph M. Thomson, Contract Law in Scotland*⁴ (2016).

⁶⁰ *Joseph M. Thomson, Delictual Liability*⁵ (2014).

⁶¹ *Anne M. O. Griffiths / John M. Fotheringham / Frankie McCarthy, Family Law*⁴ (2015); *Joseph M. Thomson, Family Law in Scotland*⁷ (2014).

⁶² *Hector L. MacQueen, Studying Scots Law*, ed. by Megan H. Dewart⁵ (2016).

⁶³ It appears that the REF (on which, see below) has reduced the number of articles written by academics published in the SLT.

sised what they believed were the two main functions of a student law review in Scotland: (i) as an educational tool, and (ii) to spread the research of students.⁶⁴ In relation to an academic career path, student law reviews undoubtedly provide an opportunity for those who may become academics to publish before or during work on their doctoral thesis.⁶⁵ They also offer invaluable editing experience for those on the publishing side of the journal.

VIII. The Research Excellence Framework – assessing the quality of publications

Jointly organised by the Scottish Research Council, Research England, the Higher Education Funding Council for Wales, and the Department for the Economy (Northern Ireland), the Research Excellence Framework (REF) is the format for assessing the quality of the research undertaken at UK universities.⁶⁶ I hesitate to discuss the REF. It seems that all systems designed to rank academic institutions and place them within league tables are inescapably destined for harsh criticism for putting pressure on academics and failing to recognise the value of certain members of staff.⁶⁷ Opinions on it are also better found elsewhere, especially from those with some experience to share. But being assessed is an important aspect of the life of any academic and the UK is no different. Therefore, at least a brief introduction is necessary.

The REF is planned for every six or seven years, with the last being the REF 2014 and the next taking place in 2021. The purpose is to assess each area of research (called unit of assessment (UOA)) within a research institution, such as a university. Law is one such unit of assessment. Each unit of assessment provides a submission to the REF, within which there is information about all staff with “significant responsibility for research”, the research outputs from such staff, the impact of their research and the “environment” of the UOA. All academics deemed to have this “significant responsibility for research” are required to produce at least one and up to four research outputs (whether monographs, journal articles or conference papers) for inclusion within the assessment submission from the UOA. These

⁶⁴ *Alisdair MacPherson / Alasdair Peterson*, *The Rise of Student Law Journals in Scotland*, *Jur.Rev.* 2017, 207. I have paraphrased their exact words.

⁶⁵ See, as an example, *Kasey L. McCall-Smith*, *The European Voice in International Human Rights*, *EdinSLR* 1:3 (2010) 31; *Alasdair S. S. Peterson*, *Keeping up Appearances: Prescriptive Possession of Servitudes*, *EdinSLR* 2:1 (2013) 1; *Alisdair D.J. MacPherson*, *A Vicious Circle: The Ranking of Floating Charges and Fixed Securities*, *EdinSLR* 2:2 (2014) 67.

⁶⁶ Replacing the Research Assessment Exercises (RAE).

⁶⁷ For an example of such criticism, see <https://www.theguardian.com/education/2018/dec/05/our-research-funding-system-is-shortchanging-the-humanities?CMP=Share_AndroidApp_Tweet>.

research outputs must be published within the REF period, which, for the REF 2021, is between 1 January 2014 and 31 December 2020. They will be included within the submission from the researcher's UOA, which is then assessed according to three broad criteria: (i) outputs, (ii) impact,⁶⁸ and (iii) environment.⁶⁹

For universities the results of the REF are important. They are used to publicise the quality of the research undertaken at a particular institution, and it is expected that a higher score will attract more students. Public bodies also provide significant funding for universities, and the REF is one way of making universities accountable for the money they receive.⁷⁰ As a result, universities, seeking improved assessment scores, are likely to employ and promote individuals conducting research that scores better in the REF.

A key aspect of the REF is the assessment of the impact of research. This is achieved through "impact case studies" that provide the best examples of a research institution's impact on the wider world. Although the case studies will focus on particular academics, they are designed to assess the impact of the UOA rather than individuals. Each UOA must provide a number of case studies proportionate to the number of academics within the UOA.⁷¹ With the impact of research accounting for a quarter of the assessment, researchers could be nudged towards more fashionable topics that will score highly in the REF. This is not necessarily unfavourable and could of course increase the research into areas having the most relevance for society at large. For legal research that is concerned with social-policy or that is cross-disciplinary, there is a clear desire to influence politicians and perhaps the opinion of the wider public.⁷² It may be thought that doctrinal research in law does not have such an obvious impact, and this could have been the cause of an underlying thought that "doctrinal research was looked upon less favourably in the recent [...] Research Excellence Framework (REF) exercise than empirical (or, it might be added, highly theoretical) work."⁷³

⁶⁸ Impact is defined as the "effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life, beyond academia"; REF, Guidance on submissions, <https://www.ref.ac.uk/media/1092/ref-2019_01-guidance-on-submissions.pdf> at para. 297.

⁶⁹ A research environment will be assessed in terms of its "vitality and sustainability", including the approach to enabling impact from its research, and its contribution to the vitality and sustainability of the wider discipline or research base." See REF, Guidance on submissions (n. 68) at para. 26.

⁷⁰ In Scotland, the Scottish Funding Council, which has a reported annual budget of £1.8 billion, provides funding for research within universities.

⁷¹ Where, for example, a UAO has 50 academics with significant responsibility for research, five case studies will be required.

⁷² Such research can even have an impact on judges. On this, see Lady Hale's speech to the Impact and Law Reform Conference 2019, <<https://www.supremecourt.uk/docs/speech-190611.pdf>>.

⁷³ See the excellent discussion on this in *Andrew Burrows*, Challenges for Private Law in the

Much research in law – especially private law – is done to clarify the current position and allow the law to develop in a certain direction. But does it count if an article is cited in court, even if rejected by the judge?⁷⁴ How can a change in the practice of solicitors be assessed? The best example of the impact of legal research is in law reform, but such reform may be based on years of work and research by several academics rather than a recent research output. Such examples of impact are thankfully caught within the REF case studies, which can contain impact based on legal research that has taken place many years ago. Thus legal reform taking place between 1 August 2013 and 31 July 2020 can be included in the REF 2021 as long as the research underpinning this reform was produced after 1 January 2000 and before 31 December 2020.⁷⁵ Of course, this requires patience over several REF cycles.

Although research is important, a university should not forget about its quality of teaching. The Research Excellence Framework, in keeping with its name, centres only on research, but teaching quality and engagement ought to be focused on somewhere. A Teaching Excellence Framework exists in England,⁷⁶ and whilst it can be opted into by Scottish institutions, universities in Scotland have recently favoured an equivalent Scottish review process (the Enhancement-Led Institutional Review (ELIR), which is published every five years).⁷⁷ There is also the National Student Survey which is sent to final-year undergraduate students and is used to publish student satisfaction results for each university. The results from this survey are often used by prospective undergraduates to decide which university to apply to, but it does not seem that these student satisfaction surveys have a meaningful impact on a university's funding. A well-performing university cannot increase the fees charged to students because they are set by the Scottish Government. It may be said, however, that a poor result can cause a reduction in the number of students applying to a particular institution.

Despite this teaching review, the focus of the universities appears to be taken up by the REF, and there can often be a notable lack of discussion on the value of teaching, despite this function being at the heart of a university.

Twenty-First Century, in: *Private Law in the 21st Century*, ed. by Kit Barker / Karen Fairweather / Ross Grantham (2017) 29, 32 ff.

⁷⁴ *Douglas Cusine*, *The Impact of Publications in Legal Journals*, 2018 SLT (News) 77.

⁷⁵ A good example from the REF 2014 is the impact of research on land registration in Scotland. This research spanned many years and culminated in the enactment of the Land Registration etc. (Scotland) Act 2012 (ASP 5). For the impact case study, see <<https://impact.ref.ac.uk/casestudies/CaseStudy.aspx?Id=23974>>.

⁷⁶ See <<https://www.officeforstudents.org.uk/advice-and-guidance/teaching/tef-outcomes/#/tefoutcomes/>>.

⁷⁷ Institutional reviews are found online, but the website is rather difficult to navigate. See <<https://www.qaa.ac.uk/scotland/en/reviewing-higher-education-in-scotland/enhancement-led-institutional-review/elir-reports>>.

The undeniable aim of the REF is not to assess individual academics, but if heavy reliance is placed on the REF, there will surely be reason to favour those with good REF scores to the detriment of those with teaching-only contracts or predominantly teaching roles (who are of course excluded from the REF because they do not have “significant responsibility for research”). This is despite such teaching-only members of staff making up much of a university’s front-line. It is these people who often encourage and inspire their students to take up further research and follow a career in academia. Perhaps there needs to be a greater balance between research and teaching when assessing funding.

IX. Open access research and the Research Excellence Framework

In all likelihood, nobody would disagree with the need to ensure that both court decisions and legislation are freely available. A wider question is whether legal research ought to be open to the public at no cost to the reader. Open-access research is premised upon a noble idea: if research is funded by the public, the public should have access to its results. The dissemination of research to as wide an audience as possible is a laudable endeavour and certain institutions designed primarily to research and develop the law – the Scottish Law Commission springs to mind – have their publications available online without restrictions.⁷⁸ For more academically focused research projects, there is a greater trend towards open-access publications,⁷⁹ facilitated by the internet.⁸⁰ Law is no stranger to this trend, but most monographs and journals in Scotland still need to be purchased or subscribed to through databases such as Westlaw or LexisNexis.⁸¹ Despite this, the open-access trend is something that is likely to gather pace in Scotland, even for law publications. For the forthcoming REF 2021, all journal articles and conference papers will be required to be in open-access format within 24 months

⁷⁸ The Scottish Law Commission publishes discussion papers (formerly Consultative Memoranda) and final reports. To access these, see <<https://www.scotlawcom.gov.uk/publications/>>.

⁷⁹ Built on the Max Planck Society’s open-access policy is the Max Planck Institute for Comparative and International Private Law Research Paper Series, see <<http://www.ssrn.com/link/Max-Planck-Comparative-RES.html>>.

⁸⁰ The underlying assumption being that internet access is available and people are literate. On this, see the discussion on open access to legal research in South Africa in: *Siviwe Bangani*, Open Access to Legal Resources in South Africa: The Benefits and Challenges, 2018 *Library Philosophy and Practice* (e-journal), <<https://digitalcommons.unl.edu/libphilprac/1892/>>.

⁸¹ The Edinburgh Law Review publishes on a Green Open Access policy with the offer of Gold Open Access upon the payment of a fee. Green Open Access allows the author to upload a pre-print version of his research project to his personal webpage.

of their publication.⁸² This requirement, as yet, does not apply to monographs, but it does look likely that this will be the case for the subsequent REF scheduled for 2027.

X. Theory vs. practice

Writing a thesis does not bar you from a career outside academia. Many, after completing their studies, have gone into practice, becoming solicitors or advocates,⁸³ and some have even become judges.⁸⁴ Transitioning between academic study and the practice of law is also not uncommon and produces close ties between academic and practising lawyers. Practising lawyers also provide updates on recent changes in the law through case reports and legislation commentaries, and judges sometimes write books.⁸⁵

As practising lawyers, advocates or judges can bring an academic dimension to their work, so Scottish academics can have a real impact on practice. The most obvious route for such an impact is through the publication of articles and books, with courts taking these opinions into account. A court is, however, restricted to the facts presented before it, leaving wider policy concerns aside. These wider issues can be taken into consideration by an institution that is most commonly found in Commonwealth countries: a Law Commission.⁸⁶ Set up by the Law Commissions Act 1965, the Scottish Law Commission publishes reports that normally contain draft Bills which can then make their way through the Scottish Parliament to become Acts. Occasionally, projects are undertaken on a UK-wide basis in conjunction with the Law Commission for England and Wales where the project requires coordination throughout the country. A good example is the comprehensive review of insurance law, which has been ongoing since January 2006 and has already been responsible for two Acts of Parliament.⁸⁷

⁸² A short 12-month period is given for articles outside the arts, humanities and social scientists. The article must also be uploaded to a searchable repository within three months.

⁸³ Dr. Ross Anderson has become an advocate, and Dr. Peter Webster has been called to the bar in England.

⁸⁴ As an example, see Lord Gill's Ph.D. thesis completed in 1975: *Brian Gill, Crime of Fraud: A Comparative Study* (unpublished Ph.D. thesis, University of Edinburgh, 1975), <<https://era.ed.ac.uk/handle/1842/20529>>. Gill went on to become the highest judge in Scotland. Lord Rodger of Earlsferry wrote a D.Phil. thesis at Oxford and sat in the House of Lords and thereafter in the Supreme Court. The next President of the Supreme Court will be Lord Reed, a Scottish judge who also wrote a D.Phil. at Oxford.

⁸⁵ *Lord Drummond Young, The Law of Corporate Insolvency in Scotland*^d (2011), co-authored with John St Clair, and *Lord Gill, Agricultural Tenancies*^d (2017) are but two examples.

⁸⁶ Any discussion on the Law Commissions ought to begin with: *Fifty Years of the Law Commissions*, ed. by Matthew Dyson / James Lee / Shona Wilson Stark (2016).

⁸⁷ Consumer Insurance (Disclosure and Representations) Act 2012 (c. 6) and the Insurance Act 2015 (c. 4).

There has always been an academic presence within the Law Commission, and so far as seniority is concerned such individuals are equal to those who have come from legal practice.⁸⁸ Indeed, academic Commissioners have been responsible for initiating some of the most important developments in Scots law in recent memory. Only a few can be named here. Professor Kenneth Reid was responsible for the report that preceded the abolition of feudal tenure;⁸⁹ Professor George Gretton wrote the report that contained the draft Bill that was to become the Land Registration etc. (Scotland) Act 2012 (the Act that significantly changed the working of the Land Register in Scotland);⁹⁰ and Professor Hector MacQueen was responsible for the report that brought about the Contract (Third-Party Rights) Act 2017.⁹¹ A more recent example is the project led by Dr. Andrew Steven on moveable transactions, which seeks, amongst other things, to alter the law on security over corporeal moveables in Scots law, where it still remains the case that an item used as collateral must be handed over to the creditor before a pledge can be created.⁹²

XI. Equality and the broader legal profession

As a final topic, we arrive at the equal opportunities for those in the Scottish legal profession and more specifically in legal academia. The obstacles in the way of a smooth journey through an academic career in law are the same that obstruct most other careers. Mental-health support can always be improved, especially considering the large teaching and marking load that seems to fall on academic staff. Attracting people – both men and women – from poorer, more disadvantaged backgrounds is something in respect of which universities as a whole could do more. The current consideration, however, will be confined to equal opportunities between the genders. Although this is not the sole issue affecting equality, it is pertinent considering that it is nearly 100 years since Madge Easton Anderson, a Scot who studied at the University of Glasgow,⁹³ became the first female lawyer in the UK.⁹⁴

⁸⁸ The only exception to this is the chairperson, who is customarily chosen from the judges of the Court of Session (Scotland's highest civil court).

⁸⁹ Report on Abolition of the Feudal System (SLC Report No 168, 1999).

⁹⁰ Report on Land Registration (SLC Report No 222, 2010).

⁹¹ Report on Third Party Rights (SLC Report No 245, 2016).

⁹² Report on Moveable Transactions (SLC Report No 249, 2017). As an aside and considering the location where this paper is being presented, it must be noted that there is often a strong comparative element within these reports.

⁹³ Achieved through the Sex Disqualification (Removal) Act 1919 (c. 71).

⁹⁴ Despite the 1919 Act, her acceptance to the profession was not straightforward after the Law Society rejected her application citing the fact that her training had begun before the

Equality cannot be said to have been reached in the legal profession. A look at a few figures will demonstrate this. Female solicitors outnumber male solicitors,⁹⁵ and this percentage of women is expected to rise in the future with 67% of trainees – those who are currently undertaking their practical training to be solicitors – being women.⁹⁶ If we were striving for a perfect balance between men and women, this number perhaps ought to be 50%, but what will not come as a great surprise is that men still make up the majority of the highest echelons of the profession. Whilst women are more successful at securing places at university, and are rightly rewarded for their grades at school, there remains a hindrance to reaching the top. A look at the highest court in Scotland bears this out. Of those who sit in the Inner House of the Court of Session (i.e. the final civil court of appeal in Scotland before the Supreme Court of the United Kingdom), only four out of eleven are women,⁹⁷ and a woman has never held the position of Lord President, the highest judicial office in Scotland.⁹⁸ This imbalance is also present on the shrieval bench (i.e. the Sheriff Court), where most of the civil and criminal cases are heard. Of the six sheriffs principal, only two are female, and only 28 of approximately 130 permanent sheriffs are women.⁹⁹

After some rough research on the websites of three law schools,¹⁰⁰ it seems that the picture is rather similar at universities. Taken as an average between Glasgow, Edinburgh and Aberdeen, circa 75% of professors in law are male. This is despite the majority of lecturers in law (excluding senior lecturers) within the same universities being female. If anything is learnt from those working in practice, it is that there is a glass ceiling which prevents women rising up the career ladder. Translating the greater numbers of female lecturers in law to the top of the profession may take time, and there is no time here to discuss how this can be achieved, but it is imperative to open up the profession to those who were previously excluded or discouraged. As we have seen with the direct impact they can have on practice (through the

1919 Act had come into force. An appeal to the Court of Session – Scotland's highest civil court – was, however, successful.

⁹⁵ As an important caveat I must say that the figures are taken from those who identify as male or female and I have found no solicitors that identify as neither – this may be the result of deficiencies in my research.

⁹⁶ Source: *Law Society of Scotland, Profile of the Profession 2018* (December 2018), <<https://www.lawscot.org.uk/media/361498/lss-pop-report-final-december-2018.pdf>>.

⁹⁷ In the Outer House, the High Court being the closest institution in England and Wales, only a quarter are female (six out of 24).

⁹⁸ Before Lady Dorrian was appointed to the position in 2016 there had never been a female Lord Justice Clerk (the second highest member of the Court of Session). Although the current President of the UK Supreme Court is Baroness Hale, only three of the twelve Justices are female. After Lady Hale's retirement, in January 2020, Lord Reed (a Scottish judge) will be the President of the Supreme Court.

⁹⁹ See <<http://www.scotland-judiciary.org.uk/36/0/Sheriffs>>.

¹⁰⁰ Time constraints restricted this research to three universities.

Scottish Law Commission and other law reform projects), law academics are important for the future development and study of the law, and so they ought to be representative of society. After the recent addition of Dr. Frankie McCarthy, four of the five commissioners of the Scottish Law Commission, including the chair, are now female. This is undoubtedly good news. But to date there has never been a female Professor of Scots Law at Edinburgh or Aberdeen, nor a female Regius Professor of Law at Glasgow.¹⁰¹ This is surely the next step.

XII. Conclusions

A rough map of the key stages of an academic career in law has been drawn here from the perspective of someone who remains a relative spectator. What becomes clear – to my mind at least – is that there is no one specific academic career path to be followed. The route into academia is instead flexible and can – but does not have to – include periods of studying for a non-law degree, a period in practice, studying for an LL.M. or writing a Ph.D. The value of a Ph.D. may be high, but lacking one does not inhibit a career in academia. Those in academic positions can enter practice, and those in practice can apply for an academic position. This lack of a requirement for a Ph.D. and the flexibility to move from practice to academia and vice versa is a great strength of legal academia in Scotland. By having no strict application requirements, there are opportunities in Scotland – and the wider UK – for academics from throughout the world, whereas other jurisdictions look almost exclusively at their domestically-educated lawyers. By avoiding having “one” academic career path and choosing to accept those from a variety of backgrounds, Scottish law schools, and their mixture of academics from throughout the world, have excellent research outputs with both a Scottish and international focus. This openness and opportunity is something that we should be proud of and seek to continue.

¹⁰¹ Since giving this presentation, Professor Laura Macgregor has been appointed to the Chair of Scots Law at the University of Edinburgh.

