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Two Rival Theories of Mixed Legal Systems

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I am very much honored to give the Wilson Memorial Address this evening. It seems especially fitting that we should meet in the oldest mixed jurisdiction in the world in order to explore the subject of mixed legal systems. Over the next three days The World Society of Mixed Jurisdiction Jurists will hold its Congress in the very city and in the same distinguished University where so much was initiated, accomplished and written on behalf of the mixed jurisdictions. Here the spiritual founder of our organization, the late Sir Thomas Smith, after holding the chair of Scots law at Aberdeen, held successively the chairs of Civil Law and Scots Law. He is very much present tonight both in our thoughts and our affections.

This lecture is in memory of Professor W.A. Wilson, an illustrious member of this faculty whose teaching and writing made a significant contribution to Scots law. I was not privileged to know Professor Wilson personally, but what I have learned from his writings makes me regret that fact very much. There is one statement he made that I found striking and would like to quote. In an essay in the *Juridical Review* in 1982 he spoke of the distinctive contribution that the academic lawyer can make to his students and to the profession:¹

“The first task of the academic lawyer, and the one which students, the legal profession and the public at large most strongly expect of him, is to know what the law is.” But to know the law was only the first task for he then spoke of a higher contribution: “It can be argued that a jurist’s opinion as to what the law is, is of much less importance than his analysis of the setting in which the decision as to what the law is has to be made. Perhaps, indeed, analysis is the characteristic activity of the academic lawyer.” Wilson seemed to accept that analysis transcended territorial boundaries and linked legal minds in different systems. Analysis could enlighten lawyer or judge

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¹ “Knowing the Law and Other Things” 1982 *Juridical Review* 259, 269.

wherever situated. He gave as an example a distinction drawn by the American academic Thayer between “primary facts” and “secondary facts”. He wondered why this distinction had not been accepted and used in Scotland. He stated that Thayer’s insight could hardly be “brushed off” with the dictum that “it is no part of Scots law” since this sort of analysis is “a matter of logic rather than law.” Professor Wilson’s willingness to consider logic emanating from any legal source, from abroad, at home or over the border, reveals a critical intellect who had a faith in the role of reason, or as Peter Birks would say, a faith in the rational rather than the national.² It suggests that he was open to the use of comparative law ideas as a source of data and persuasive analysis. If he were among us now, I feel sure that he would be critically examining our papers and presentations. I can best honor his memory by trying, however modestly, to emulate his example.

I. INTRODUCTION

A Dispersed Unity

By way of introduction to my subject tonight, let me set the stage by saying that the mixed jurisdictions, up until relatively recently, have lived their entire existence in a kind of physical and intellectual isolation, cut off from family members around the world. They have been great solitaries, separated by the oceans, the currents and the continents. Each seemed to be one of a kind, something unique and peculiar, a wayward child who was destined to develop introspectively, conscious of its “otherness”, unclear as to the nature of its laws, uncertain what to call itself, ambiguous as to its place among the world’s legal systems. It is only recently, as mixed jurisdiction studies and scholarly exchanges have increased, that this feeling of isolation and estrangement has begun to change. The opening of this World Congress can be viewed as another step in a very necessary exchange of ideas and intercultural development.

Dispersed as they are around the globe, such places could be easily dismissed as a series of disconnected dots and dashes on the maps. All efforts at classification in standard works have resulted in their marginalization and have not succeeded in giving closer analysis to their common traits and shared experiences. A few years ago, in a work devoted to the comparative treatment of these systems, I argued that the unity of the mixed jurisdiction “experience” is palpable from the perspective of the jurists who live within them. I called them a third family.³

“The systems are mutually intelligible. Their jurists enjoy the possibility of great complicity and close understanding, stemming from their knowledge of civil law, common law and the English language. They speak similar bijural dialects and do not feel alien in the other’s legal culture.”

In the papers of the First World Congress published by the *Tulane Law Review* I wrote:⁴

Mixed jurisdiction jurists are separated by oceans, by history, and by many cultural and linguistic differences, yet they tend to understand one another very easily and do not feel alien in each other’s culture. They are brought together, it seems, by their knowledge of both common law and civil law and how these traditions interact within the same system,

² “The Foundation of Legal Rationality in Scotland”, in Robin Evans-Jones, *The Civil Law Tradition in Scotland* (1995), at p 82.

³ Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 3 (CUP 2001)

⁴ Vernon Valentine Palmer, “Salience and Unity in the Mixed Jurisdictions: The Papers of the World Congress” 78 *Tul. L. Rev.* 1, 2 (2003).

and the English language serves as their channel of international communications. Their desire for closer, more permanent relations led to the founding of a new organization, The World Society of Mixed Jurisdictions, and steps are already underway to convene a second World Congress in Scotland...

An Uncertain Identity

I begin with a problem that may be troubling to colleagues as we gather in the next three days. There is no consensus among us as to the meaning we should give to the expressions “mixed legal system” or “mixed jurisdictions” (they are frequently used interchangeably, but with different meanings and applications). It apparently cannot be simply assumed that we agree upon *what* is a mixed legal system and *who* is a mixed jurisdiction jurist.

The subject of classification, though often regarded by lawyers as barren and boring, is actually vital and significant to jurists in the mixed jurisdictions. Obviously the way we classify legal orders affects attitudes, perceptions, self-esteem and cultural identities. Almost every mixed system has known its own *bellum juridicum*, its polemical literature on the nature of its system. Almost all of the skirmishes over the reception of controversial transplants like the floating charge, the trust, or free testation have been at the deeper level debates over the nature of these systems.

My Louisiana colleagues may remember well that a famous law review article published in 1937 by Gordon Ireland proclaimed that Louisiana had ceased to be a civil-law state.⁵ The article provoked an uproar of denial⁶ and at the same time it launched an impressive program of reform. Actually it touched the neuralgic nerve of the civilian identity so profoundly that this event and its aftermath are usually characterized as the beginning of the civilian renaissance in Louisiana.

What is often forgotten is that the art of classifying legal systems, as René David counseled, should be used purely for explanatory purposes. All classifications have their utility and none are completely wrong. “It all depends on the point of view adopted by the writer in question and the aspects of the matter which interest him most.”⁷ Individual objectives and perspectives thus play a significant role.⁸ Indeed it is to be expected that the perspective of mixed jurisdiction jurists like ourselves may be quite different than that of European and American colleagues.

The chief benefit of a formal classification should be to provide “the basis for a relatively uniform and internationally understood nomenclature, thereby simplifying cross-referencing and retrieval of information.”⁹ It is supposed to cut through to the really essential distinctions. It should allow us to understand what is included and excluded and to know why. If a grouping is

⁵ “Louisiana’s Legal System Reappraised” 11 Tul. L. Rev. 585 (1937)

⁶ H.L. Daggett, et al “A Reappraisal Reappraised; A Brief for the Civil Law of Louisiana” 12 Tul. L. Rev. 12 (1937).

⁷ *Les Grands Systemes de Droit Comparé*, 22

⁸ It can be assumed, for example, that a Martian visitor could well be disinterested in the classification of legal systems on Earth. From an extraterrestrial perspective it might be just enough to know they were all a single family – the family of “human laws”. In the same way, but to a different degree, the perspective of Socialist jurists was markedly different than that of the Western comparatists. The Socialist jurists showed very little interest in distinctions between common law, civil law, religious law and so forth. They tended to make but one distinction—that between socialist and “bourgeois law”. All others were regarded as secondary. See for example, Gyula Eörsi, *Comparative Civil (Private) Law* (Budapest 1979) who divided law types into (a) natural (pre-capitalist) civil law; (b) capitalist civil law; (c) socialist civil law).

⁹ Encyclopedia Britannica, vol. 14, p 1089.

well-justified, a presumption of similarity may ensue. The comparatist may treat one or two countries within the group as representative and concentrate upon them.¹⁰ Further, the criteria may lead us to comparable systems never previously considered as being similar to ones we already know, and thus we may discover a new field of comparative law.

A Classificatory Vacuum

It is however clear by now that the great writers on comparative law have to a large extent failed the mixed jurisdictions. They have found no way or no desire to classify these systems at all. The so-called mixed systems receive at best a kind of “negative definition”. They are the odd-men-out who do not fit the scheme. As Jacques du Plessis has well put it, the mixed jurisdictions have been condemned to “classificatory limbo”.¹¹ They have languished there without compass or map or means of exit for many years. As we presently celebrate the 300th anniversary of the birth of Carl Linnaeus and the founding of the Edinburgh faculty of law, this anomalous situation must be regarded as a serious disadvantage. Mainstream comparative law theoreticians have been unwilling to deal with complex mixtures and fractional identities. Every system must apparently be of a single type and there is no place for hybrids in their typology.

There is an historical parallel to this state of affairs in the physical world where biologists in the time of Linnaeus divided all organisms into two Kingdoms, plants and animals, but then later discovered that there were intermediate types of organisms (zoophytes) such as the sponge or coral that did not fit exactly into either of the two Kingdoms. And then later, with the discovery of the microscope, a host of new microscopic forms of life appeared. Many of these microorganisms also displayed both animal and plant characteristics and could not be classified in either Kingdom. This caused the two-Kingdom theory to break down and it was necessary to move to a more elastic and reticulated classificatory system in biology. So too in comparative law, closer study by anthropologists, sociologists, and comparative lawyers have brought the world’s legal systems into microscopic focus and made evident the existence of legal phenomena that we can only describe at present as mixed systems. It is time to rethink what this means for comparative law.

Contemporary Taxonomy: Three Flaws

I shall pass quickly over the failure of existing classificatory schemes (for fear that the subject may be as boring as many say it is). Many of these attempts are already familiar to you.¹² It is paradoxical, however, that with globalization advancing the horizons of comparative law seem to be contracting and looking more Eurocentric than ever. Twenty years ago in their 1987 edition Zweigert and Kotz recognized as many as eight legal families in the world (Romanistic, Germanic family, Nordic family, Common Law family, Socialist family, Far Eastern systems and Hindu Law), but ten years ago this was reduced to only four. These four are said to be the “great legal systems of the world”, yet all of them originate in Europe and within the European Union.¹³ They are the Romanistic family, the Germanic family, the Nordic family and the Common Law

¹⁰ Michael Bogdan observes that the greater the cohesiveness of a family, the more the comparatist will tend to bring out differences. On the other hand, when comparing systems from different families, the more s/he will tend to bring out similarities. *Comparative Law*, 82-83 (Kluwer 1994).

¹¹ ECJL. Vol 9.3, October 2005, Editorial.

¹² From Esmein to Arminjon, Nolde & Wolffe, to Rene David, to Zweigert and Kotz.

¹³ Introduction to Comparative Law(3rd ed. 1998)

family. Apparently nothing in Africa or Asia has a sufficiently distinctive style or content to warrant its own grouping. Even if we put aside the appearance of Eurocentrism, there are still three problems in this tableau. Firstly, hardly without recognizing it, we are forced to use private law terminology as a kind of proxy for judging the nature of entire legal systems. Terms like “Common Law”, “Civil Law” and “Muslim Law” are continually used even though they say little or nothing about the constitutional, administrative or criminal laws in such systems. The flaw lies in making it insufficiently clear that this is a classification of the world’s private-law systems, not their entire legal systems. Secondly, these signifiers are not adequate even to describe the whole of a private law system. The words Common Law or Civil Law, for example, simply refer to one of the oldest or best-known taproots of the system. All other roots and branches—the mixtures—are put aside. It is a technique, as Patrick Glenn has underscored, of “limited feature classification”¹⁴ which leaves out all other important elements such as the law merchant, the canon law and so forth. The flaw here is that by dint of massive reductionism a private-law system is characterized as a single type rather than the mixture of many things. Finally the third defect is the most serious, even if it is only a sin of omission: Existing classification schemes make no space for hybrids or mixed systems. Yet according to a recent census by the Ottawa civil-law faculty, mixed systems outnumber all other kinds in the world.¹⁵ This omission therefore seems to mean that a universal legal phenomenon is ignored and left untreated.

Incidentally the standard disclaimer for failing to classify the ‘classical’ mixed systems is that it is too soon to know what they are or what they will become. We should “wait and see” whether they would eventually move in the direction of one of the established families. Yet since these systems have shown resiliency and stability for centuries and as there is actually no evidence of any movement to join another family, this approach seems to be the equivalent of waiting for Godot to arrive.¹⁶ Another suggestion that has been made is to use the principle of “predominance” and to ask to which family does the mixture *predominantly* belong?¹⁷ To my mind here is a prescription for worse confusion. Under the principle of predominance, Scots private law may, depending on the evaluator, be deemed a common law system given the extent of English law influence, or it may be called a civil law system in light of its Romanist elements. But according to this approach it must be one or the other and not a mixture of both. South African private law, on the other hand, could be deemed to be a civil law system, or perhaps a common law system, or even a customary law system if the African laws followed by the majority of the population are considered the predominant factor. Again South Africa must be one of the three rather than the sum of its parts. Obviously the predominance principle results in the suppression of mixtures that otherwise embarrass a traditional ordering scheme.

¹⁴ H. Patrick Glenn; *supra* at p 438

¹⁵ N. Mariani & G. Fuentes, *World Legal Systems* 35 (W&L 2000). As indicated on p. 35, the study estimates that around 60% of the legal systems are mixed. The study’s methodology, however, is perhaps flawed because it unwarrantedly assumes, as a point of departure, that 40% of the systems are “pure” (civil law, common law, customary law and Muslim law). The assumption violates the study’s stated criteria for identifying a mixed system and necessarily undercounts their number. See Appendix A for details of the mixtures recognized in the study.

¹⁶ This seems deficient as a scientific approach to comparative law. I would submit that if a biologist were to inform his readers that he had discovered a new and uncatalogued form of life, he would surely not claim that it is unnecessary to attempt to classify it, nor would he postpone such a task by arguing that the newly discovered life form may one day cease to be new or could draw closer to the previously-classified forms of life.

¹⁷ Peter de Cruz, *Comparative Law in a Changing World* 35 (2nd ed 1999).

This leads me at last to my theme tonight. In light of this classification vacuum, how do mixed jurisdiction jurists perceive themselves? How do they use and define the words “mixed legal systems”?

II. TWO RIVAL THEORIES OF MIXED SYSTEMS

Introduction

There are two rival theories as to what these terms mean and how they should be applied. These give us different answers and different insights into the questions “What is a mixed jurisdiction and who is a mixed-jurisdiction jurist? The first theory—which I believe is traditional and today more prevalent—produces a limited grouping which is sometimes denominated as the ‘classical’ mixed jurisdictions. The theory of selection has a prescriptive basis and has arisen, in part, for historical reasons. The second theory, on the other hand, yields an unlimited category because it results from a factual rather than a prescriptive way of determining legal mixtures. This theory has arisen under the influence of legal pluralism. Before beginning this paper I assumed that the first theory was the better of the two and was essential to maintain because the second theory was defectively wide and imprecise. It will soon be apparent that my views have evolved. I hope to show that that these rival theories are not in conflict. They are complementary ideas. Once aware of their meaning and implication it becomes clear that our differences of opinion as to what constitutes a mixed jurisdiction are quite relative, more apparent than real. I believe we need both conceptions to make sense of the world we inhabit.

III. THE TRADITIONAL VIEW

The first theory, or if theory is too grand a word, then at least the first approach, may be regarded as traditional and somewhat restricted in scope. As early as around 1900 and thereafter, a few writers brought to the world’s attention a group of systems whose private law was a western hybrid, characterized by a core of common law and civil law elements. These were geographically dispersed and societally-different countries. Ranging over four continents, they included Scotland, South Africa, Quebec, Louisiana, Puerto Rico and about ten more countries.¹⁸ It had not before been appreciated that such a group existed, it being counterintuitive that they might have much in common. These writers insisted however that a certain natural unity existed and the jurisdictions in this class were *numerus clausus*. They actually had a detailed knowledge of these systems and wrote from first-hand experience and study. The story is instructive, and with your indulgence, I will briefly trace an outline. I believe that if ever the hundreds of varieties of mixed systems in the world were to be successfully classified on a rational basis, the process would have to start inductively, not in an armchair, but searching through one related cluster at a time, much in the manner of these earlier writers.

¹⁸ These are listed in Jacques du Plessis, p 484 in *Oxford Handbook of Comparative Law* (2006) and in Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, p 4 (CUP 2001).

Historical Development

It is helpful to begin with Sir Thomas Smith and his intellectual predecessors. As previously indicated, in his writings Smith would use the term “mixed jurisdiction” in a restrictive and selective sense to signify a group of countries in which common law and civil law elements in the private law interacted and vied for supremacy. Obviously he regarded his native Scotland as a paradigm of a mixed jurisdiction. Interestingly, he always carefully placed the term in quotation marks. At times, for literary variation, he substituted the words “mixed system” but this did not change the countries to which he was referring, and this phrase too was within quotation marks. In 1963 he introduced the expression “mixed jurisdiction” into the title of one of his essays, the first author ever to do so,¹⁹ and on that occasion he ventured a definition. He wrote that a mixed jurisdiction was “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.”²⁰ This step occurred during an extensive international campaign in which Smith wrote a great deal on the subject and made extended visits to Louisiana, South Africa and Quebec.²¹

Within ten years writers from Quebec, Louisiana and Scotland such as Jean-Louis Baudouin, Joseph Dainow, Albert Tate and David Walker had adopted his terminology and his loose definition as well.²² When Smith in 1973 contributed a chapter to Volume six (edited by F.H. Lawson) of the *International Encyclopedia of Comparative Law*, he could now entitle the entry *Mixed Jurisdictions* with no quotation marks. The concept had become of age. The chapter begins with these words:

The “mixed” or “hybrid” jurisdictions with which this subchapter is concerned are those in which CIVIL LAW and COMMON LAW doctrines have been received and indeed contend for supremacy. Other hybrid systems where, for example, customary law or religious law coexists with western type law are not considered.²³

Smith made clear that there were other kinds of mixed legal systems which he was omitting and not considering. He was obviously aware that the narrow group of systems he described were but a genus of the mixed species. He acknowledged that other mixed systems might be more “complex” than those in Scotland, Louisiana, South Africa or elsewhere.²⁴ It now seems clear why he had been so carefully placing quotation marks around the term. They were intended to

¹⁹ “The Preservation of the Civilian Tradition in “Mixed Jurisdictions” in Yiannopoulos (ed) *Civil Law in the Modern World* (LSU 1965). He had used the term ‘mixed’ in the title of an earlier essay published in South Africa, but provided no description or definition in the body of the article. See T.B. Smith, “The Common Law Cuckoo: Problems of a ‘Mixed’ Legal System with Special Reference to Restrictive Interpretations in the Scots Law of Obligations”, [1956] Butterworth’s SALR 147.

²⁰ T.B. Smith, “The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’” in A.N. Yiannopoulos (ed.) *Civil Law in the Modern World* (LSU Press 1965, pp 2-3.

²¹ See Kenneth Reid’s essay, in *A Mixed Legal System in Transition* (Edinburgh Univ. Press)

²² See J-L Baudouin, “The Future of Civil Law in a Mixed Jurisdiction” (the Bailey Lecture at LSU in 1972); See generally Dainow (ed) *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (LSU 1974) where the editor and contributors to the volume use the expression fluently: David Walker (at p. 202) “Scotland is today one of the mixed systems”; J-L Baudouin, at p. 2 and passim; Judge Albert Tate (at p 23) (obviously paraphrasing Smith) “Louisiana is a mixed jurisdiction: our basically civilian tradition has been partly overlaid and replaced by Anglo-American common law.”; A.G. Chloros, *Codification in a Mixed Jurisdiction* (Holland 1977).

²³ Encyclopedia, Vol. 6, Property and Trust, F.H. Lawson (ed) (1974), p. 115, no. 228.

²⁴ Ibid.

place in relief his restrictive and selective meaning. There was also another reason. T.B. Smith was the inventor and popularizer of the term “mixed jurisdiction”, and therefore he was apparently quoting himself.

Maps and Foyers: Oxford and McGill

Professor Kenneth Reid has rightly pointed out that the “idea” of a mixed jurisdiction existed before Smith popularized the expression. It was incubating from the turn of the 20th century until mid-century, during the heady days of empire and colonialism. It seems clear the parentage is Anglo-Scottish and that Smith may have borrowed the idea from more than one source. At this time English jurists tended to conceive of the world’s systems in bipolar terms. The map fell into two parts, on one side the empire of Common Law and on the other the empire of Civil Law. Their special vocation, however—novel at the time—was to point out, and indeed to champion, a small number of jurisdictions that straddled or combined the two laws and did not exactly adhere to either one. Thus the idea of mixed jurisdictions was born, in Professor Reid’s words, “the product of a failure of classification.”²⁵

If there were any particular foyer of this thinking it appears to have been at Oxford and McGill universities during the first decades of the twentieth century. Oxford had attracted a coterie of intellectuals and comparatists who were in various ways (by birth, legal training, field experience and intellectual interest) intensely and intimately connected to these common law and civil law hybrids. Notable in this group were F.P. Walton, R.W. Lee and F.H. Lawson, all of whom wrote important articles stressing the value and desirability of studying the mixed jurisdictions from a comparative law point of view.²⁶ The first two authors had experienced these systems on an intimate basis, and McGill attracted both of them to Montreal to serve as dean of the law school. Walton and Lee had strong connections to Scotland, Quebec, Ceylon, South Africa and Egypt. After taking degrees in classics at Oxford, Walton studied law in Edinburgh and was called to the Scots bar. He lectured in Glasgow on Roman law for a number of years and wrote several treatises on Scots law. In 1897 he left for Montreal to become the dean of the McGill law school where he remained until 1914, writing penetrating studies on the dual traditions in Quebec. Afterwards he became director of the Khedivian school of law in Cairo and wrote a treatise on the Egyptian law of obligations. In retirement he returned to Oxford to serve as secretary of the faculty club.²⁷

Lee was another Oxford classics scholar who left for Ceylon in 1891 where he spent three years as a local magistrate. The experience awakened a life-long interest in Roman-Dutch law. He returned to England for reasons of health, practicing mainly before the Privy Council as a

²⁵ Kenneth G.C. Reid, “The Idea of Mixed Legal Systems” 78 *Tul. L. Rev.* 5, 8 (2003).

²⁶ Sheldon Amos, “The Common Law and the Civil Law in the British Commonwealth of Nations”, 50 *Harv. L. Rev.* 1249 (1937); F.P. Walton, “The Civil Law and the Common Law of Canada”, 11 *Jurid. Rev.* 282 (1899); F.H. Lawson, “The Field of Comparative Law”, 61 *Jurid. Rev.* 16 (1949)(esp. pp 26-29 discussing “hybrid” systems)

²⁷ Walton wrote major works on Scots law (e.g. *Scotch Marriages, Regular and Irregular* (1893), *Quebec Law (The Scope and Interpretation of the Civil Code of Lower Canada* 1 (M. Tancelin ed.,reprinted 1980)), *Egyptian Law (The Egyptian Law of Obligations* (1920), *French Law (Introduction to French Law* (1935, with Sheldon Amos) and *Roman Law (Historical Introduction to Roman Law* (1903)) It is said that “He never wrote anything which was not first-rate.” He returned to Edinburgh in 1932 where he died in 1948. See D.N.B. 1941-1950, entry by H.G. Hanbury. On his views about legal education at McGill, see Roderick Macdonald, “The National Law Programme at McGill; Origins, Establishment, Prospects” 13 *Dalhousie L.J.* 211, 243-248 (1990)

specialist in appeals from Ceylon. From 1906 on he held the chair of Roman-Dutch law at London University. In 1914 he replaced Walton as dean of the McGill faculty.²⁸ In 1915 he published his classic work *An Introduction to Roman-Dutch Law*, and in 1921 returned to Oxford to take up the chair of Roman-Dutch law, which he held for thirty six years until retirement in 1956.

For chronological reasons, it may have been Lee and Lawson who made an impression upon TB Smith during his studies at Oxford. In a *festschrift* essay for Lawson, written in @, Smith acknowledged that Lawson was first among a mere handful of English jurists who had attained a deep knowledge of Scots law. Lawson once sought a chair of law at Edinburgh and had a Scottish wife. In his inaugural essay as holder of the chair of comparative law at Oxford in 1949, he referred to “a most interesting group of laws, which, because they display the influence of English law on a body of doctrine already profoundly Romanized, stand between the common and the civil law systems, and accordingly were regarded by the late Professor Lévy-Ullmann as the most likely focus around which a future uniform law of the world might group itself.”²⁹ Concluding a three page discussion of these systems, he ended by saying, “I have spoken at length about these hybrid laws because I regard them as peculiarly favourable fields for comparative work in an English university. Most of the literature is in English and Quebec law leads one naturally into French law. Besides we have with us, and can always hope to have, one of the greatest masters of Roman-Dutch Law [referring to R.W. Lee].”³⁰

In his first year as dean of the McGill Law School in Montreal, Lee published an unusual article in the *Michigan Law Review* entitled “The Civil Law and the Common Law—A World Survey”.³¹ Serving as a frontispiece to the article was a most interesting full-page map that Kenneth Reid drew to our attention to at the First World Congress in 2002. A copy is found in Figure 1 below. The map filled in the common-law countries around the globe in black ink, and represented the civil law countries by dotted marks. As against these two monoliths the map showed a third category, the demi-monde of “mixed jurisdictions”, which were designated by the use of horizontal stripes. The striped areas were Louisiana, Quebec, Guyana, South Africa, Ceylon, Scotland, and Egypt/Sudan. The words “mixed jurisdiction” were printed on the legend of the map but did not actually appear anywhere in the text. They would not appear in anyone’s text until T.B. Smith began to write on the subject four decades later. Yet obviously the idea of a mixed jurisdiction was clearly alive and well in Montreal and no doubt in other places long before.

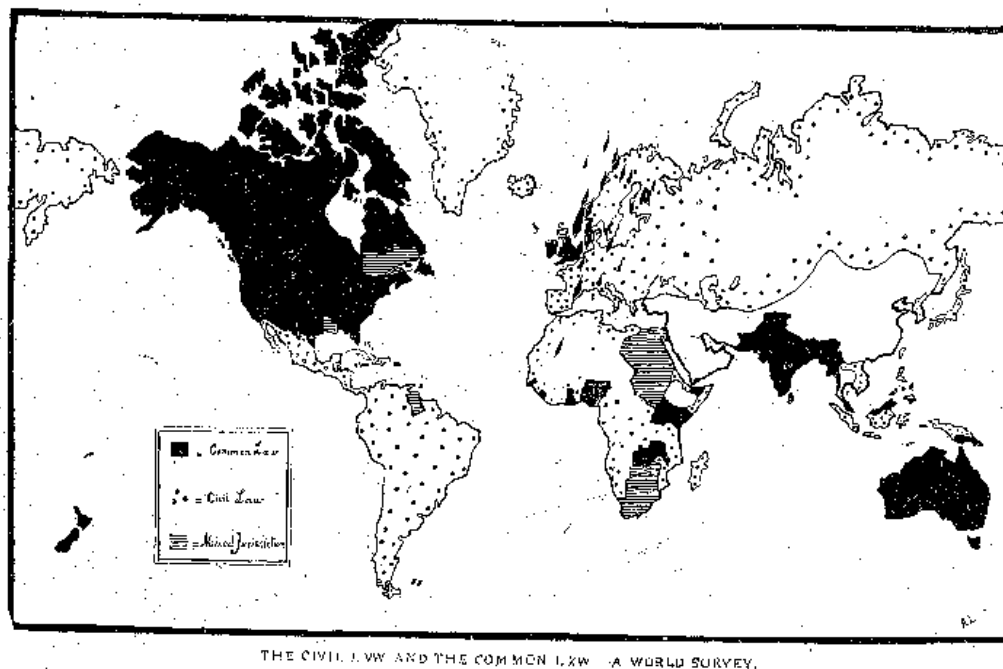
²⁸ For an assessment of Lee’s deanship at McGill, see Macdonald, *supra* at 249-256.

²⁹ Lawson, *supra* p. 26

³⁰ Lawson, *supra* p. 29. Lawson made passing reference to a world beyond common law and civil law, pointing briefly to the existence of ‘oriental and primitive law’, but he had little interest in pluralism. His use of the word ‘primitive’ is one clue to his outlook, but even better is his statement that “The range of primitive law in British colonial territories is truly terrifying and the tendency to find common traits in widely different regions must be kept in check much more consciously than when dealing with civil or common law” (at p 34). In his best-known work he stated: “Common lawyers, and for that matter civilians too, are disposed to say that all western law belongs either to the Common Law or to the Civil Law systems.” but he noted that this was only half correct: “The Scandinavian laws ...are really independent; and there are many systems, some of considerable importance, which are hybrids, as it were balanced between the two blocs and possessing many of the characteristics of both.” *A Common Lawyer Looks at the Civil Law*, 2 (Greenwood 1953).

³¹ 14 Mich. L. Rev. 89 (1915).

Figure 1



The Original Allure of the Mixed Systems

The early efforts seem rather innocent of any grand taxonomic purpose, nor was there an evident interest in legal pluralism as such.³² It appears they were simply building out from the conventional duality of their time and merely seeking to add a new in-between category. Why were they interested in this particular type of system? Aside from the novelty and the freshness of the subject, these systems were appealing for three general reasons. First, it seems that in the early part of the twentieth century there was far greater doubt than now as to the comparability of common law and civil law.³³ The study of the mixed jurisdictions was thought to be a means of helping common lawyers and civil lawyers reach across an epistemological gulf and gain better understanding of the tradition on the other side. But using a half-way house approach, an Englishman attempting to understand French law and culture might make a first approach through Scots law, presumably because he/she would understand familiar common-law signposts and could assimilate civil law concepts more easily in the process. As Lawson pointed out, such

³² As noted earlier, *supra* note 30, Lawson spoke of the “terrifying diversity” of ethnic laws and chose to restrict himself to the European traditions.

³³ This was the same type of doubt, incidentally, that existed only twenty years ago about the comparability of western law and socialist law.

systems could be excellent pedagogic devices in English-speaking law faculties.³⁴ Second, such study might eventually be of benefit to Europe by pointing the way for the future unification of private law, as Lévy-Ullmann had famously argued. Third, and this would be T.B. Smith's main focus, cross-comparative work within the group could help the beleaguered mixed jurisdictions like Scotland—where in his words the “eleventh hour” had already struck—overcome their intellectual isolation and assist in efforts to preserve and maintain the civilian tradition.

The Boundless Neighborhood

Smith was deeply impressed by the affinities between Scotland and South Africa. His 1959 essay “Scots Law and Roman-Dutch Law: A Shared Tradition” emphasized the historical connections, shared civilian traditions and mutual challenges facing the two systems. Despite the geographical distance, he saw a certain intellectual proximity which made them “neighbors in law”:

Separated by two continents, Scots law and South African law during the 19th and first half of the 20th century were destined to work out, more or less independently, problems of remarkable similarity. Each system recognized essentially the same basic principles; the external factors correspond closely.³⁵

He would later add that “lawyers in these systems have hitherto tended to work in isolation, and to forget that ‘neighbors in law’ are not necessarily those closest geographically.”³⁶ The notion of “neighbors in law” meant for Smith a compatible legal order based on similar interests, methods and sources. Many of these similarities have been recently reviewed by Professor Zimmermann and in the following remarks I am indebted to his outline.³⁷ Both systems were decisively molded by the reception of Roman Law and Canon Law while retaining elements of indigenous customary law. Given these receptions one could say there was already a mixture in place well before English influence was introduced.³⁸ The systems were far-flung provinces of the old *ius commune*, and since each remained uncodified, they were more open to accepting legal ideas and persuasive authority from one another. Secondly, both of their private-law systems came under the influence of English law, although this happened at an earlier time in Scotland. Thirdly, in both cases a reaction against the English influence occurred in the form of a neo-civilian renaissance in the second half of the twentieth century.

Beyond these broad parallels, however, there were also specific historical ties that linked the two systems. Each was intellectually indebted, though in different degrees, to old Dutch authorities. There was a famous intellectual connection between the two most respected institutional writers of the two countries. Ld. Stair (sometimes called the “Scottish Grotius”) spent six years in exile

³⁴ This utility still seems to be well appreciated, as evidenced by the prodigious use of mixed jurisdiction cases and examples in basic student texts on comparative law. See e.g. Schlesinger, Baade, et al, *Comparative Law* (6th ed 1998) which sets forth at length reported cases from the Philippines, South Africa, Guyana, Louisiana, and Puerto Rico.

³⁵ Smith, *supra* p 46.

³⁶ Introduction, p ix, *Studies Critical and Comparative* (1959)

³⁷ “ ‘Double Cross’: Comparing Scots and South African Law” in Zimmermann, Visser, Reid (eds) *Mixed Legal Systems in Comparative Perspective* (OUP 2004) at pp 12-13..

³⁸ The phrase “Roman-Dutch law”, which Simon van Leeuwen invented in 1652 in his work *Paratitla Juris Novissimi*, acknowledges this fact. On the use of this phrase, see R.W. Lee, *An Introduction to Roman-Dutch Law*, 2 (5th ed. Oxford 1953). See also, D. Carey Miller, “South Africa: A Mixed System Subject to Transcending Forces” in *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996) at pp 166-169.

in the Netherlands and was influenced by Hugo Grotius, who is considered the father of South African private law. Works by leading Dutch jurists were regularly cited in Scottish legal practice and exercised influence on the institutional writers.³⁹ Scottish students flocked to the law faculties of the Netherlands in great numbers during the 17th and 18th centuries.⁴⁰ They returned to Scotland with knowledge of the *ius commune* and, to some extent, the *ius proprium* of countries where they had studied. They returned with continental lawbooks to place in Scottish libraries.

The Bands of Unity

Today Scottish/South African legal studies may be described as flourishing. In the past ten years, in addition to many fine studies, we have been given three monumental works devoted to the connection between the two systems. Spearheaded by Reid, Visser and Zimmermann this trilogy,⁴¹ coming to more than 2000 pages and engaging more than 100 contributors, has not only greatly enriched the two systems doctrinally, but has produced an unprecedented intellectual exchange. It can no longer be seriously questioned whether the terrain for close comparative collaboration is as favorable as T.B. Smith imagined.⁴² It is probably more fertile than he supposed. The papers from the First Worldwide Congress on Mixed Jurisdictions, totaling more than 500 pages, have been published⁴³ and will soon be augmented by the papers from this Congress. We also have impressive books and articles by Jan Smits, William Tetley, Jacques du Plessis, Hector MacQueen, Kenneth Reid, Lord Rodger, who have all made insightful contributions to this subject. I should also mention a new comparative study underway between Louisiana and Scotland involving 15 academics. As Jacques du Plessis has well said, the movement that was once a one-man band has become an entire orchestra.

The opportunities are clear and can be extended to the other mixed jurisdictions. The affinities and connections are neither fictitious nor exaggerated. The parallels that have been described in the case of South Africa and Scotland could be roughly repeated if we were to examine a different pair of jurisdictions, such as Louisiana and Puerto Rico, or Quebec and Scotland.⁴⁴ Here

³⁹ Stair, for instance, relied on Vinnius and Grotius more than his direct cites to them would indicate. Bankton often echoes Johannes Voet without telling the reader. Zimmermann, *supra* at pp 9-10.

⁴⁰ Professor Zimmermann points out that in the period 1676-1725 Leyden University received 825 Scottish law students, 422 of them matriculating. In that same period the records of the Faculty of Advocates show that about 275 lawyers who were admitted to the bar (out of 637) had studied in the Netherlands. “ ‘Double Cross’: Comparing Scots and South African Law” in Zimmermann, Visser, Reid (eds) *Mixed Legal Systems in Comparative Perspective* (OUP 2004), at p. 9. See further, J.W. Cairns, ‘Importing our Lawyers from Holland: Netherlands’ Influences on Scots Law and Lawyers in the Eighteenth Century’ in G.G. Simpson (ed) *Scotland and the Low Countries 1124-1994* (1996). This flow of students dried up by 1750 with the Napoleonic wars and the success of codification movements in France, Prussia, Austria and the Netherlands, together with a decline in the study of Roman law. Interestingly, students from the Cape were also sent for legal training to the Netherlands’ universities in considerable numbers in the same century. Van der Merwe, Du Plessis and De Waal, *South Africa Report 2*, p 146, note 150 in V.V. Palmer (ed) *Mixed Jurisdictions Worldwide* (CUP 2001).

⁴¹ *Southern Cross*: (1996); *History of Private Law in Scotland*, Vols I-II (OUP 2000); *Mixed Legal Systems in Comparative Perspective* (OUP 2004).

⁴² A reviewer in the *Edinburgh Review* said that the “resemblances and differences are presented, sometimes as if Scottish and South African law are the emanation of one and the same system of thought.” Review by Sjef van Erp, *EdinLR* Vol 11 285-288.

⁴³ “First Worldwide Congress on Mixed Jurisdictions” 78 *Tul. L. Rev.* 1-501 (2003).

⁴⁴ F.P. Walton pointed to the legal resemblances in his article “Relationship of the Law of France to the Law of Scotland” 1 *Can. L. Rev.* 442 (1901)

too we would find that initially a civil law was implanted that was shaped by the reception of Roman and Canon law, that a tide of common-law influence later ensued, and a neo-civilian reaction to that influence occurred in the 20th century.⁴⁵ But this by no means circumscribes the metes and bounds of their unity. There are other elements in common.⁴⁶ For example, (i) in all these systems the civil law is brought to life through Anglo-American institutions, meaning that judges with creative mindsets and courts with inherent powers interpreted the civil law. The substance of the law was thus been insensibly shaped by actors and institutions that were more than neutral conduits. (ii) Court decisions are accorded strong precedential value whether the civil law happens to be codified or not; indeed in three systems, court decisions are accepted as an official source of law second only to legislation. (iii) Civil procedure is adversarial and Anglo-American. The emphasis upon common law remedies has left a visible imprint on substantive civil law. (iv) Common-law influence follows a discernable pattern, penetrating the most porous points of entry, such as the law of delict, while leaving resistant institutions like property law relatively unaffected. (v) Anglo-American commercial law has everywhere replaced the law merchant originally in place, partly because of relatively weak cultural attachment to the latter, but more decisively because of pressure to conform to the norms of the dominant economy.

Shared characteristics such as these confer an identity or inner relationship to the cluster of ‘common law/civil law’ systems. It is true of course that several members in this ‘classical’ group have more than one private law system in place. South Africa and Sri Lanka, to go no further, concurrently combine religious, oriental and African personal laws which further complexify the private law picture. Even if a comparative law researcher is primarily interested in the western law elements in those systems, s/he should know from her own legal history that the effects of these other personal laws can hardly be ignored, for they will be interacting with western law at some level in the society and will in time produce new internal combinations. These non-western personal laws are indeed the *fil conducteur* that may lead to the classification of other clusters of mixed systems. To explain this point more clearly, however, I now turn to the rival theory of mixed systems.

IV. THE PLURALIST CONCEPTION OF A MIXED LEGAL SYSTEM

Introduction

More and more jurists and colleagues have been influenced by the insights of legal pluralism and have thereby been led to recognize a wider class of mixed legal systems. The principal criterion of the pluralist conception is simply the presence or interaction of two or more kinds of laws or legal traditions within the same system or “social field”.⁴⁷ The existence of a mixed system in this sense sounds like a factual question. The mixed nature of a legal system can be discovered and confirmed in an objective manner by research and observation. The characterization does not depend upon an interpretation of “legal styles” or a subjective judgment about the

⁴⁵ That is by no means the end of history. The competitive dialectic will undoubtedly produce further stages.

⁴⁶ V.V. Palmer, *supra* pp 76-80.

⁴⁷ Griffith’s definition of pluralism, which is indebted to Moore, is “that state of affairs for any social field, in which behavior pursuant to more than one legal order occurs.” Quoted from Menski, at p. 114. Michael Hooker’s concept was similar.

“predominance” of one type of law over another. Nor does it necessarily depend upon what the subject of law perceives, though the subjective point of view is not entirely discarded.⁴⁸

I need not try to define legal pluralism because it is clear that there is no widely accepted definition⁴⁹ nor do I wish to go into pluralism’s battles with legal positivism, legal centralism, and Eurocentric biases about the meaning of law.⁵⁰ I merely want to draw attention to the general legal orientation and the fields of law (official and unofficial) that interest the legal pluralist.

Personal Laws and Private Laws

Pluralists tend to study post-colonial societies in Africa and Asia in which various personal laws coexist and interact with western law as continuing effects of legal history. A more liberal conception of the mixed legal system necessarily follows from their broader pursuit of legal phenomena, as when they study not only customary law, tribal law, and religious law recognized by the state, but also the unrecognized and unofficial laws which escape state control and constitute the living law.⁵¹ The focus may be upon the Hindu, the Muslim, Jewish or African customary laws which govern different communities within the same territory and which may necessitate the use of interpersonal conflict rules to determine which personal law applies to whom. There are of course differences between the notion of ‘personal law’ and ‘private law’.⁵² For purposes of this discussion personal law may be regarded as a subset of private law, a restricted list of topics (perhaps the most culturally significant legal areas) within the larger area of private law.⁵³ In this sense personal law may signify an ethnic enclave or niche in the midst of official law.⁵⁴ Personal law and private law are therefore intertwined and overlapping ideas, and it is necessary to grasp their cultural connection in order to understand the characteristic structure of the mixed systems.

The creation of a mixed system, historically speaking, has often taken place when a people has lost its political sovereignty, yet somehow has preserved the right to keep living in accordance with its personal or private laws. Whether the personal law was the custom of an African people or the Coutume de Paris in Quebec, or the Roman-Dutch law of the Boers is only a difference in

⁴⁸ Masija Chiba argues that the subjective perspective has significance when people living in pluralism may be formally allowed to choose among one or even competing legal rules. *Legal Cultures in Human Society* 182 (Shinzansha Intern’l; Tokyo 2002)

⁴⁹ M. Chiba, p 179.

⁵⁰ See John Griffith, “What is legal pluralism?” 24 *Journal of Legal Pluralism and Unofficial Law* 1-56 (1986); Masiji Chiba, *supra*; Werner Menski, *Comparative Law in a Global Context* 115-116 (2nd ed CUP 2006); M. Hooker, *Legal Pluralism* (OUP); T.W. Bennett, “Comparative Law and African Customary Law”, in M. Reimann and R. Zimmermann (eds) *Oxford Handbook of Comparative Law* (OUP 2006) at pp 666-671; G.J. van Niekerk, “Legal Pluralism” in J.C. Bekker, C. Rautenbach and N.M.I. Goolam, *Introduction to Legal Pluralism in South Africa* (2nd ed LexisNexis 2007) at pp 5-14.

⁵¹ The distinction, for Niekerk, *supra* n. 50, lies in the difference between “state” pluralism and “deep” pluralism.

⁵² In some systems the term ‘personal law’ may not be recognized as such. For example, it was unknown to classical Islamic jurists and did not gain currency until near the turn of the 20th century. Jamal Nasir, *The Islamic Law of Personal Status* (2nd ed. London 1990).

⁵³ For example, the topics of Jewish personal law recognized in India only relate to successions and marriage/divorce, whereas though Hindu personal laws in India have a somewhat broader coverage (successions, marriage and divorce, guardianship, adoption; joint family and partition, and religious institutions) they by no means fill the field of private law. The topics of Muslim personal law in India have similar scope. See Christa Rautenbach, “Phenomenon of Personal Laws in India: Some Lessons for South Africa” xxxix *CILSA* 244 (2006).

⁵⁴ See W. Menski, *Comparative Law in a Global Context* 243 (2nd ed CUP 2006).

detail, for in each case there was a similar aspiration. The ‘struggle for personal law’ has been a hallmark of the classical mixed jurisdictions⁵⁵ as well as the *raison d’être* of complex pluralism in many parts of the world. No people that I am aware of has ever willingly given up its personal law or willingly accepted a different personal law than its own. In South Africa, when the Cape fell into British hands, the Roman-Dutch law was the personal/private law of the Dutch settlers, and retention was allowed. At the same time African custom was the personal law of various South African peoples, and that custom was retained as well. This has occurred throughout history and not, it seems, because of an international law norm (as has often been supposed),⁵⁶ but rather on account of cultural tenacity and political calculation. I would have to agree with Esmein’s observation that the policy of allowing a subjugated people to retain their personal law is often not a matter of choice but a kind of necessity imposed upon the conqueror. “There is in effect a necessity which is imposed on the conqueror, *of allowing their laws to be conquered*, every time that a conquest brings together two races too different in the degree and form of the civilization. This is what is done in our time in great measure by the French in Algeria, by the English and the French in India and in Indo-China.”⁵⁷ It also explains British policy in southern Africa, which Bennett describes as “no more than a frank acceptance of the fact that colonial administrations were in no position to force their subjects to comply with Roman-Dutch law.”⁵⁸

Pluralism’s Wide-Angle Lens

As stated previously, according to the pluralist viewpoint any interaction of laws of a different type or source—indigenous with exogenous, religious with customary, western with non-western—is sufficient to constitute a mixed legal system. This of course casts the net so widely that the quasi-totality of the legal systems of the world suddenly qualify as ‘mixed legal systems’. Surprisingly, this extremely inclusive position has not been seen as a drawback or deterrent to its growing use. Professor Tetley, for example, treats Iran, Egypt, Syria, Iraq and Indonesia as

⁵⁵ See Palmer *supra*, at pp 21-29.. The history of Quebec is one of the more transparent examples of the struggle. Thus Tancelin refers to Quebec private law as “a law of survival” for the French-speaking community of Quebec. See his “Introduction” (at p 25) to F.P. Walton’s *The Scope and Interpretation of the Civil Code of Lower Canada* (Butterworth 1980).

⁵⁶ The usual reference to this norm is Lord Mansfield’s statement in *Campbell v. Hall* (1774) 98 ER 1045, at 1047, that “The laws of a conquered country continue in force, until they are altered by the conqueror.” For discussion and criticism, see Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, pp 20-29 (CUP 2001)

⁵⁷ A. Esmein, *Cours élémentaire d’histoire du droit français* 50-51 ((Paris 1950) (emphasis mine). To Esmein, these considerations explained why Germanic tribes, after the collapse of Rome, allowed the Romans to keep their own law: “It was an even more imperious necessity for the Barbarians” he writes “as the Roman law was far superior to the Germanic custom.” Similarly Guterman points out that “Since the laws of the barbarians were tribal and, therefore, personal laws, it would have been difficult to apply them to the conquered people without transforming the latter into Germans. This plan was obviously not feasible....” *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* 29-30 (Peter Lang 1990). Kuhn adds, “‘Il n’a pas de conquérant si impitoyable soit-il, qui puisse changer les habitudes et les coutumes d’un peuple par sa seule volonté. Il faut en exterminer les membres; mais aussi longtemps que leur communauté de vie existera, il demeurera aussi un certain résidu d’identité juridique qui offrira autant de chances de modifier la loi du conquérant que d’être modifié par elle.” Arthur Kuhn, “La fonction de la méthode comparative dans l’histoire et la philosophie du droit” in Vol I, *Introduction à l’Etude du Droit Comparé* (recueil d’études en l’honneur d’Edouard Lambert (Paris 1938), at pp 318-319.

⁵⁸ T.W. Bennett, “The Conflict of Laws” in *Bekker, Rautenbach and Goolam, Introduction to Legal Pluralism in South Africa* (2nd ed LexisNexis 2007) at p 17.

“mixed jurisdictions”. He describes Egypt as “an intriguing mixed legal system blending civilian rules fashioned, in style, structure and content, on the model of the French civil code of 1804, with the law of Islam and, in family law areas, with a variety of religiously-founded personal laws.”⁵⁹ Orücü, Attwooll and Coyle have a particularly eclectic list of systems they regard as mixed, including Australia, Basque Country, Algeria, Hong Kong and the European Union.⁶⁰

The reason behind this exponential expansion is clear. The world’s legal systems may all be described as diversified blends with unlimited possible recombinations: chthonic laws, religious laws (Jewish, Hindu, Islamic or Canon Law), law merchant, natural law, Roman Civil Law, Common Law and so forth. It should not be at all surprising to discover five or six layers of exogenous elements in any single private law system one cares to examine. A visualization of this diversity is afforded by a color-shaded map (Figure 2 below) and also by the chart of mixed systems found in Appendix A to this paper. Both documents were devised by the Ottawa Faculty of Law.⁶¹

Figure 2



⁵⁹ William Tetley, “Mixed jurisdictions: common law vs civil law (codified and uncoded)” www.cisgw3.pace.edu/cisg/biblio/tetley.html at p 15.

⁶⁰ *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996).

⁶¹ See N. Mariani & G. Fuentes, *World Legal Systems* (W&L 2000)

Implications for the ‘Classical’ Mixed Systems

Of course as this viewpoint gains acceptance, it goes without saying that the classical mixed jurisdictions like Scotland or Louisiana are entirely absorbed. Suddenly they are no longer odd and insular—and no longer alone. Instead they become only another subgenus of the mixed species of laws. At this point the quality of being mixed must inevitably lose whatever pejorative cast it once had. Seeing hybridity as a universal fact is the first step in seeing our proper (though more banal) place in the world. It will necessarily alter the familiar attitudes and prejudices. For example, would it any longer seem useful or appropriate to speak of the classical systems as historical accidents⁶² or to regard them as marginal cases in a binary civil law/common law world? How could mere ‘accidents’ happen so often and become so generalized? Furthermore, does it make sense to “wait and see” whether they move in one direction or another? Obviously wherever they move (if in fact they do move) they can only move in a sea of mixed laws anyway. Further, if mixed systems have been all along at the center rather than the periphery of legal evolution they cannot be regarded as unusual or strange. Logically, it is not easy to cast them both as paradigms and pariahs at one and the same time.⁶³ Perhaps then a useful classification scheme for the 21st century will have to begin with their centrality as a point of departure.⁶⁴ But we will have to abandon the conceit that ‘pure’ legal systems are somehow privileged or preferred, or that some mixtures are superior to others, or that the ‘utility’ of mixed systems lies in the incidental lessons or insights they may have for others rather than for themselves.⁶⁵ It has often been said that Scotland, Louisiana and others are ‘laboratories of comparative law’ and other systems may benefit from studying their experiences or their practices. In reality, however, all systems are laboratories of comparative law and any system’s experience could be of some value for others.

Hector MacQueen has observed (in words which can be endorsed as an elevated approach to the study of plural systems generally) that “it is contrary to the spirit of mixed legal systems [to analyze them] on the basis that one part of the mix is good and the other bad. Instead, the mixed systems need to be evaluated on their own terms—that is as neither civil law nor common law—and analysts must accept that a mixed past means a mixed future.”⁶⁶ Thus if we wish to speak of their ‘value’ it is surely not in the form of their incidental or vicarious value to others, but rather in what they can reveal about the formation and evolution of legal systems everywhere. Their value to legal science can be better understood in terms of why they were originally formed, why

⁶² Glenn compares them to anomalies in the world of science where complex structures may represent “frozen accidents”. “Quebec: Mixité and Monism” in *Studies in Legal Systems: Mixed and Mixing* (Orucu, Attwooll and Coyle eds) (Kluwer 1996) at pp 2, 14.

⁶³ Cf. Maurice Tancelin’s pained exclamation: “But all that is established is that a mixed system is an atypical phenomenon; an embarrassment, indeed, to anyone attempting to make an ordered and systematic presentation of the national systems of law.” Maurice Tancelin, *supra* note 27 at p 1.

⁶⁴ Esin Orücü argues that all legal systems are overlaps and mixes to varying degrees and thus their mixed nature should be the starting point of comparative classification. “Family Trees for Legal Systems: Towards a Contemporary Approach” at p 363 in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004).

⁶⁵ For example, it has been asserted that Israel’s continental drafting may reassure England of the feasibility of changing its drafting style; that Scots law or the McGregor code may serve as a template for the single European code; that Louisiana law may indicate to Europeans how common law/civil law ideas can be conciliated within a single civil code. See Kotz, *supra* p438; Giuseppe Gandolfi, pp v-xi, Preface, *Contract Code Drawn Up on Behalf of the English Law Commission* (Giuffrè 1993).

⁶⁶ MacQueen, 78 *Tulane Law Rev.* 411, 412.

they recurrently evolve, and what they have done for the profession and the peoples they have served.⁶⁷

European Systems in the Pluralist Lens

But the pluralist theory of mixed legal systems also tell us something valuable about those countries we customarily think of as being purely ‘common law’ or purely ‘civil law’. This theory makes us reexamine the foundation of their identity. Perhaps the world is not ready to accept it, surely not just yet, but England, Canada, France, Germany and Switzerland, though hitherto thought of as common law or civil law systems are all mixed private law systems in a factual sense. Indeed, this view is increasingly accepted by legal scholars. It may of course suit their own projects and views about the future of Europe, but the disarming factual basis of the assertion seems unquestioned. Thus it is said that England is or soon will be a mixed legal system, that European transnational law is destined to be a mixed system, that the EU is becoming a mixed supra-national system. Isolated legal subjects such as Admiralty or contracts are also discussed as mixed systems.⁶⁸ It may be simply a question of time before we hear that Roman law itself was a mixed legal system almost from the beginning. Reinhard Zimmermann, for example, seems to be in the forefront of a pluralist-historical view of European private law:

All our national private laws in Europe today can be described as mixed legal systems. None of them has remained ‘pure’ in its development since the Middle Ages. They all constitute a mixture of many different elements: Roman Law, indigenous customary law, canon law, mercantile custom and Natural Law theory, to name the most important ones in the history of the law of obligations.⁶⁹

It will be noticed that the learned author is pointing to the imbedded, historical mixtures in European private law, and uses the word ‘mixed’ in a factual way to reveal what lies underneath the private law label. These elements, however, are not the product of a common law – civil law interaction and have nothing to do with that distinction. The mixture occurred before that distinction existed, that is, before there was a common law or civil law to differentiate.

I will return in a moment to the subject of mixed laws in contemporary Europe. I would like at this time to make a somewhat broader historical point about the antiquity of plural systems.

⁶⁷ The value-added in being mixed, I am suggesting, can be seen best from the internal rather than the external point of view. This is the light in which I interpret Lord Rodger’s statements that “If mixed systems do have a value, it is, surely, precisely in being mixed... For me one of the chief advantages of being a mixed system is that it has been expounded in the past by reference to some version of the [Roman law] template...at least we have these systematic expositions of the law ...long before there was anything similar in English law.” 78 Tul. Law Rev. 425-426.

⁶⁸ Thus the title of a conference in Edinburgh in 2004 “Principles of European Contract Law: Another Mixed System?” which resulted in the book by Macqueen and Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (Edin. Univ. Press 2006); as to the asserted mixed character of admiralty law, see William Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncoded)*, available at cisgw3.law.pace.edu/cisg/biblio/Tetley.html.

⁶⁹ *Roman Law, Contemporary Law, European Law* 159 (OUP 2001)

The Antiquity of Mixed Systems

Historically speaking, mixed systems have repeatedly incubated in conditions of increased contact, commerce and communication between peoples. Within ancient and modern empires mixing becomes unavoidable (and legal ‘purity’ unsustainable) once there is sufficient social and intellectual networking between foreign peoples. I would submit there is a recurrent historical pattern of mixed systems in the Roman, Ottoman and European colonial empires but for reasons of space I will confine my discussion to developments at Rome.

The Roman Empire in Construction and Collapse

Empire transformed the law of the Roman people into a mixed system and at the same time created a series of similar systems in Rome’s provinces. One reason for this development appears to have been the sheer number of foreign peoples brought together under Roman rule.⁷⁰ A second reason would be the value the Romans and others at that time attached to personal laws. Certainly prior to the 3rd century AD (but arguably even to the end of the Empire) the Romans followed the view that the law applicable to a person was determined not by the territory in which he lived but by the national group from which he came.⁷¹ This was consistent with the view of many early peoples that law is a privilege of the race: the stranger is not admitted to participation.⁷² The legal privileges of Roman citizenship were gradually extended to others (and in 212 AD citizenship became almost universal) but the personality principle still generally applied and ensured that Roman law was not imposed beyond the limits of citizenship. Indeed in reverse circumstances, it ensured that barbarian law would not be imposed upon conquered Romans.⁷³

The makings of a mosaic were therefore inherent in the confrontation between Roman political rule and the personal laws of different peoples brought into proximity. In principle, the law applied to the *peregrini* inside Rome was their individual native or personal law. If disputes arose, however, between peregrini of different nations, then two or more personal laws could conflict and needed to be reconciled. Here the peregrine praetor needed to build up a composite legal system, the *ius gentium*, as an alternative system of justice. This praetorian creation exercised great influence upon the *ius civile*.⁷⁴ Eventually parts of the *ius gentium* applied not only to transactions involving peregrines but to transactions between citizens. The *ius gentium*

⁷⁰ As to foreigners flowing in and out of Rome and the tribal networks, see Callie Williamson *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* pp 240-243, 262-267, 270-271 (U. Michigan Press 2005)

⁷¹ George Mousourakis, *The Historical and Institutional Context of Roman Law* 418 (Ashgate 2003); Barry Nicholas, *An Introduction to Roman Law* 59 (Oxford, reprinted 1996) (“Ancient law was in principle ‘personal’: ...Roman law applied to Roman citizens, Athenian law to Athenian citizens.”); Michael Lambris, *The Historical Context of Roman Law* 44,48 (Sydney, Law book Co. 1997). According to Mousourakis the personality principle was no longer followed in Rome after the 3rd century, but Simeon Guterman sees no break in the continuity. “In a very important sense the Roman law remained a personal law to the last days of the Roman Empire.” *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* 38 (Lang 1990). There may have been instances in which a people were admitted to the empire but did not retain their tribal custom, perhaps because they had already been sufficiently Romanized by living in close contact with the Romans society for several generations. See P.S. Barnwell, *Emperors, Jurists and Kings* 9-10, at www.JSTOR.org.

⁷² E. Chénon, *Histoire Générale du droit français public et privé des origines à 1815*, Vol I, 123.

⁷³ Claude Fleury, *The History of the Origine of the French Laws* 5 (English transl. 1724).

⁷⁴ Simeon Guterman, *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* 39 (Peter Lang 1990).

was thus partly ‘received’ by the urban praetor, just as the *ius civile* was partly ‘received’ by the peregrine praetor.⁷⁵ The two legal orders constituted in effect a mixed system at Rome.

The collapse of the empire in the West (by 476 AD) reversed the political position of Rome but it did not arrest the interaction between Roman law and other personal laws. The ascendant German tribes now lived by their laws and customs, yet they permitted Romans and the clergy to be governed by Roman law.⁷⁶ Fleury notes that Charlemagne, after reuniting the Franks, Burgundians, Goths and Lombards into one empire, “suffered” each nation to enjoy their own laws.⁷⁷ The Frankish capitulary of 768 AD stated: “All shall follow their own law, both Romans and Salians; and those who come from other regions shall live according to the law of their own country.”⁷⁸ Saint Agobard, archbishop of Lyon from 816 AD, was a first-hand observer of the multiplicity of personal laws: “It constantly happens that of five persons who are walking or sitting together, not one is subject to the same laws as another.”⁷⁹ Wessels notes that even fathers and sons or husbands and wives could live under different personal laws.⁸⁰ Some German kings tried to compartmentalize the laws to match the different peoples they governed. Hence codified rules for the Romans living in Gaul were contained in the *Lex Romana Visigothorum* issued by King Alaric II in 506 AD. At first this Lex was exclusively for the Romans and did not apply to the entire population, but by 654 AD it was extended to Romans and Visigoths alike.⁸¹ In the course of time socialization between these peoples overcame the need to govern on the basis of personal laws.⁸² Likewise Romans in Burgundy were governed by the *Lex Romana Burgondionum*, and Burgundians and Romans were deemed equal but distinct under the law.⁸³ Lupoi notes that this split arrangement came about because the Romans raised resistance to being put under a single law with the Burgundians.⁸⁴ According to Mousourakis respect for personal law was proved to be a major factor in the preservation of Roman law: “As in Italy, so in Gaul and Spain, Roman law was preserved, even though in a vulgarised form, through the application of the principle of the personality of the laws, but also through the medium of the church whose law was imbued with the principles and detailed rules of Roman law.”⁸⁵

⁷⁵ Thus it is believed that the actions *bonae fidei* were first introduced in the courts where foreigners were concerned and then borrowed from the *ius gentium* by the *ius civile*. H.F. Jolowicz, *Historical Introduction to Roman Law* 304-305 (CUP 1939). It is also clear that the contract of stipulation was made applicable to peregrines. Barry Nicholas, *An Introduction to Roman Law* 58 (Oxford, reprint 1996).

⁷⁶ Claude Fleury, *supra* pp 15-16;; J.W. Wessels, *History of the Roman-Dutch Law*, pp 45-49 “Personal Laws” (Lawbook Ex. Reprint 2005)

⁷⁷ *Ibid* at p 38.

⁷⁸ Quoted in Maurizio Lupoi, *The Origins of the European Legal Order* 394-95 (Cambridge 2000).

⁷⁹ Mousourakis, p 419.

⁸⁰ J.W. Wessels, *supra* at p 47.

⁸¹ Maurizio Lupoi, *The Origins of the European Legal Order* 77-78 (CUP 2000).

⁸² The Visigoths and Burgundians had settled among the Roman population as foederati and were among those Germans who most quickly and completely absorbed the old Roman traditions. Franz Wieacker, *A History of Private Law in Europe* 20-21 (Oxford 1995 Weir transl). Lupoi states that the Burgundians adhered even more closely than the Visigoths to Roman institutions and established their own parity with the Romans, allowing mixed marriages, instituting courts with a Burgundian and Roman judge, and so forth. Lupoi, *supra* p 81.

⁸³ *Ibid* p 82. On the Italian peninsula the Lombards permitted Roman subjects to be governed by the law of Justinian. Mousourakis, p 419.

⁸⁴ Lupoi, *supra* at p 82.

⁸⁵ *Ibid* 420. Lupoi *supra*, stresses however that this ‘principle’ was not spelled out in any source (p 388) and he does not regard it as a principle(p 393).

Neither the laws nor the populations to which they applied stayed within watertight structures. Directly or indirectly Roman law exercised influence over the Germanic law and vice-versa.⁸⁶ As Roman and German elements in the population fused progressively, Germanic customs tended to become Romanized and Roman laws tended to be barbarized. The ‘indigenous’ custom of these peoples came to mean a transformed personal law that was partly exogenous.⁸⁷ The local customs had become “a combination of elements of Roman law and Germanic customary law.”⁸⁸

The point, then, is that the Roman empire in the west, as much in its construction as in its disintegration, effectively generated mixed systems of private law from an early date. Of course the mixed elements in these systems would make it impossible to build any sort of ‘pure’ edifice of civil law out of their layered foundation. But these Romano-Germanic hybrid systems were a means of preserving and adapting personal laws, and at the same time they gave continuity to vulgarized Roman Law until the revival of Justinian’s law.

Contemporary English Law and the European Union—Mixed Systems?

It is interesting to consider the implications of the pluralist analysis in relation to English law. It is not uncommon to hear in recent years that English Common Law has become a ‘mixed’ system, but what is perhaps more remarkable to a foreign observer is that English lawyers are less inclined than in the past to deny that significant changes have indeed taken place.⁸⁹ Of course entry into the European Union has hastened harmonization of English law with the Continent. In Lord Denning’s famous allusion, “...the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.”⁹⁰ English law has absorbed close to twenty EC Directives affecting the area of traditional private law and has been required to adopt continental reasoning, including the principles of proportionality and legitimate expectation, the distinction between private law and public law, the use of teleological and purposive reasoning, the concept of good faith and continental drafting style.⁹¹ As an historical matter, however, England’s openness to transnational had begun centuries earlier. Seán Patrick Donlan points to eighteenth-century English law as a system in transition in which England finally absorbed its

⁸⁶ Lupoi describes the interactive nature of this development: “...Visigothic legislation was invariably modeled on Roman legal sources and the various sources of vulgar Roman law, which were influenced by it in their turn.” *Supra*, p 75. It is noted that King Euric was assisted in compiling his code by the Roman jurist, Leon of Narbonne. *Ibid*; See also, Imre Zajtay, “La reception des droits étrangers et le droit comparé”, 9 *Revue Intern. Dr. Comp.* (1957).

⁸⁷ Thus in de Ferriere’s *History*, the French customs are seen as undergoing a process of Romanization that lasted many centuries: “...our Customs have been partly taken from the Principles of the Roman Law; ...they are nothing but a Mixture of different Laws which our Kings of the First Race suffer’d their Subjects to use, as they saw best. Now amongst these the Roman Law was followed in many Particulars and all the rest had a great deal borrow’d from it...” *Supra* at p. 112.

⁸⁸ Mousourakis 421.

⁸⁹ See T.H. Bingham “‘There is a World Elsewhere’: The Changing Perspectives of English Law” 41 *ICLQ* 513 (1992); J.E. Levitsky, “The Europeanisation of British Legal Style”, 42 *Am. J. Comp. L.* 347 (1994); Xavier Lewis, “A Common Law Fortress Under Attack: Is English Law being Europeanized?” 2 *Colum. J. Eur. L.* 1 (1995).

⁹⁰ *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418. For an appraisal of the effects in the 1990s, see B.S. Markesinis, *The Gradual Convergence* pp30-32 (OUP 1994).

⁹¹ Bingham, *supra* pp522-524; J.E. Levitsky, “The Europeanisation of the British Legal Style” 42 *Am. J. Comp. L.* 347 (1994); Diana Nestorovska, “Influences of Roman Law and Civil Law on the Common Law” 1 *Hanse Law Rev.* 79 (2005); Mark Attew, “Teleological Interpretation and Land Law” 58 *Mod. L. Rev.* 696 (1995). The incorporation in the year 2000 of the European Convention on Human Rights, thus effectively providing a written bill of rights for Britain, is another continental influence of major importance. See A.W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001).

civilian, ecclesiastical and equity jurisdictions.⁹² Hector MacQueen maintains that over the past two centuries English law has been transformed. The field of obligations has been restructured as a system once based upon the forms of action into a continental taxonomy “founded on the division of contract, tort and unjust enrichment.”⁹³

As to the European Union, it too is being described as a mixed supranational system.⁹⁴ For instance European contract law has been considerably harmonized by measures such as the Vienna Convention on the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, the Principles of European Contract Law, not to mention a host of Directives in the area of consumer law.⁹⁵ The much-discussed single Civil Code of private law, if this project someday materializes, will necessarily rely on these models and will produce a private law system based upon common law and civil law elements. Under the influence of the CISG a comprehensive concept of ‘breach of contract’ has already been achieved across Europe.⁹⁶

V. CONCLUSION

In conclusion, ladies and gentlemen, I have argued that there are two rival theories which help us to see the mixed systems in a proper light. The theories are different but complementary. The first theory points us towards the sister jurisdictions where comparative work is the easiest to carry on and where the results thus far are impressive. We should not let go of this guiding concept—the idea of finding our neighbors in law. The reason is surely not the desire to found an exclusive club, but rather to frame our comparative work. Yesterday in Edinburgh I participated in a group of nine Scots and six Louisianians who sat down to a full day of conferences and the discussion of papers. There was not a moment in which I thought to myself, “I don’t understand this reasoning or this terminology.” We conversed, it seemed to me, nearly as easily as if we were all Louisianians or all Scots. It was another example of the irrelevance of distance to jurists on the same wavelength. This ease of communication and association extends throughout the classical group, as Smith predicted.

The justification for the classical grouping lies in the deeper measure of comparability that one encounters. This is not to say that comparisons between more divergent laws and societies are an

⁹² “A System in Transition? Eighteenth-Century English Law”, a paper delivered at the Second World Congress on Mixed Jurisdictions, in Edinburgh (2007).

⁹³ Hector MacQueen, p 1. He cites a variety of evidence for this conclusion, including the decline of the doctrine of consideration, the continental pedigree of *Hadley v. Baxendale* and recent legislation which abolished the privity principle in order to bring English law into line with other jurisdictions of the European Union. Taking a longer historical perspective, David Ibbetson considers that the English law of obligations was fused with continental ideas from the time of Glanvil: “The Common law of obligations grew out of the intermingling of native ideas and sophisticated Roman learning.” *An Historical Introduction to the Law of Obligations*, 19 (1997)

⁹⁴ Thus Hein Kötz, “The Value of Mixed Jurisdictions” 78 *Tul. Law Rev.* 435, 439 (2003) (“It may sound a bit premature and starry-eyed, but I will say it nonetheless: let us hope that the gradual establishment of a European law as a mixed jurisdiction will allow us to combine the best of both worlds.”)

⁹⁵ Marco B.M. Loos, “The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization” 3-2007 *Europ. Rev. of Priv. Law*, p 515.

⁹⁶ This required a break with a long tradition in certain civil law countries. See, Jurgen Basedow, “Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG” 25 *Intern. Rev. of Law and Economics* 487 (2005).

impossible task, or an unrewarding one, but they may be more difficult and less fruitful than within the classical circle.

At the same time I have tried to show that the pluralist conception of mixed systems opens a new vista in understanding the classical systems and their place in the world. It throws into relief the non-occidental personal laws within the systems and suggests the need to draw them into the comparative law work as best we can. The interaction of personal laws with Roman-Dutch law in South Africa and Sri Lanka should not be ignored, for their legal compartments are always leaking structures.

The pluralist insight has important consequences in studying contemporary Europe. It points to the imbedded mixtures within European private law and helps to explain the inevitable remixing now taking place at the national and supranational level. Most importantly the pluralist theory demonstrates that the old catch words—common law, civil law, Islamic law, Hindu law—suppress more than they reveal and have lost their explanatory power. As we are ruled by predominantly mixed and plural laws, so it is perhaps time to recognize that *Mixitania rules the waves*. Someday the mixed systems should be the starting point—not the odd-men-out—of a new ordering of the world's legal systems.

Attempting to reclassify and reorder the mixed legal systems of the world in accordance with the information supplied by historical pluralism, ethnic pluralism, and transnational legal pluralism is the next daunting task of comparative law. If it can be accomplished, it would revolutionize the legal universe in a way comparable to the Copernican revolution on the old Ptolemaic system of astronomy. We are far from there at the present time. So far pluralism is an insight suggesting that the playing cards need to be reshuffled; it has yet to show how the cards can be redealt in a rational and coherent way. But I predict that if this task is one day accomplished, it will be done first by a mixed jurisdiction jurist, for he or she knows best that there is a need, and knows best the means to achieve the goal.

APPENDIX A – Mixed Legal Systems

The term “mixed”, which we have arbitrarily chosen over other terms such as “hybrid” or “composite”, should not be construed restrictively, as certain authors have done. Thus this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

MIXED SYSTEMS OF CIVIL LAW AND COMMON LAW

- BOTSWANA
- CYPRUS
- GUYANA
- LOUISIANA (USA)
- MALTA
- MAURITIUS
- NAMIBIA
- PHILIPPINES
- PUERTO RICO
(ASSOCIATED TO USA)
- QUEBEC (CD)
- SAINT LUCIA
- SCOTLAND (UK)
- SEYCHELLES
- SOUTH AFRICA
- THAILAND

MIXED SYSTEMS OF CIVIL LAW AND CUSTOMARY LAW

- BURUNDI
- BURKINA FASO
- CHAD
- CHINA
- CONGO, DEMOCRATIC
REPUBLIC OF THE CONGO,
- REPUBLIC OF THE CÔTE D’IVOIRE
- EQUATORIAL GUINEA
- ETHIOPIA
- GABON
- GUINEA
- GUINEA BISSAU
- JAPAN
- KOREA, NORTH
- KOREA, SOUTH

- MALI
- MADAGASCAR
- MONGOLIA
- MOZAMBIQUE
- NIGER
- RWANDA
- SAO TOME AND PRINCIPE
- SENEGAL
- SWAZILAND
- TAIWAN
- TOGO

MIXED SYSTEMS OF CIVIL LAW AND MUSLIM LAW

- ALGERIA
- COMOROS
- EGYPT
- IRAQ
- KUWAIT
- LEBANON
- LIBYA
- MOROCCO
- MAURITANIA
- SYRIA
- TUNISIA

MIXED SYSTEMS OF CIVIL LAW, COMMON LAW AND CUSTOMARY LAW

- DJIBOUTI
- ERITREA
- INDONESIA

MIXED SYSTEMS OF CIVIL LAW, COMMON LAW AND CUSTOMARY LAW

- CAMEROUN
- LESOTHO
- SRI LANKA
- VANUATU
- ZIMBABWE

MIXED SYSTEMS OF COMMON LAW AND MUSLIM LAW

- BAHRAIN
- BANGLADESH
- OMAN
- PAKISTAN
- QATAR
- SINGAPORE
- SUDAN
- UNITED ARAB EMIRATES

MIXED SYSTEMS OF COMMON LAW AND CUSTOMARY LAW

- BHUTAN
- HONG KONG (CN)
- MALAWI
- MICRONESIA, FEDERATED STATES
- MYANMAR
- NEPAL
- SIERRA LEONE
- SOLOMON ISLANDS
- TANZANIA
- UGANDA
- WESTERN SAMOA
- ZAMBIA

MIXED SYSTEMS OF COMMON LAW, MUSLIM LAW AND CUSTOMARY LAW

- BRUNEI
- GAMBIA
- KENYA
- INDIA
- MALAYSIA
- NIGERIA

MIXED SYSTEMS OF COMMON LAW, MUSLIM LAW AND CIVIL LAW

- IRAN
- JORDON
- SAUDI ARABIA
- SOMALIA
- YEMEN

MIXED SYSTEMS OF TALMUDIC LAW, CIVIL LAW AND COMMON LAW

- ISRAEL

Personal Laws in India

Vol. xxxix *CiLSA*, p. 244

Christa Rautenbach

Topics of Hindu personal law ²²	Topics of Muslim personal law ²³	Topics of Jewish personal law ²⁴
<ul style="list-style-type: none">▪ Succession• Marriage and divorce▪ Guardianship▪ Adoption• Joint family and partition▪ Religious institutions	<ul style="list-style-type: none">• Succession♦ Marriage, divorce and dower♦ Guardianship• Maintenance• Gift and wills• <i>Wakfs</i>♦ Pre-emption²⁵	<ul style="list-style-type: none">• Succession• Marriage and divorce

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