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Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing

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INTRODUCTION

The vagaries of history have made the Commonwealth Caribbean a microcosm of mixed jurisdictions in both their traditional and non traditional forms. The traditional form is one of mixity of different European legal systems – of common law and civil law – and most examples result from the ebb and flow of military success in the imperial clashes of the 17th to early 19th century, coupled with the colonial doctrine of reception. Three examples in the Commonwealth Caribbean are Guyana, Trinidad and Saint Lucia, where the mix is between British common law and Roman-Dutch, Spanish and French civil laws, respectively. Of the three, Saint Lucia is the clearest example of ongoing mixity, as Spanish law in Trinidad gave way almost entirely to the common law in the mid 19th century and only vestiges of Roman-Dutch law in Guyana survived an early 20th century reform.

The three jurisdictions also provide examples of possible non traditional forms of mixed jurisdictions.[1] Guyana raises the issue of mixity between European and aboriginal law; Trinidad poses the question of formal mixity between secular and religious (Hindu and Muslim) law; and Saint Lucia provides an example of informal mixity between European law and African custom.

This paper looks at the process of reception (*mixing*) and assimilation (*unmixing*) which is at the heart of the traditional analysis of mixed jurisdictions, before considering possible non traditional forms of mixity (*remixing*). But first, a few words of introduction to the three Commonwealth Caribbean examples are in order.

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[1] Levasseur, A and McCreary, JM (2002-03) 'Book Review –Mixed Jurisdictions Worldwide: The Third Legal Family' (63) *Louisiana Law Review* 69 at 70 (suggesting that a country could be regarded as a mixed jurisdiction if its legal system 'were a mixture of written law and customary law, or religious law and secular law').

Guyana, the only one of the three countries located on mainland South America, is the largest of the three, at 83,000 square miles.[2] It consists of a narrow but fertile coastal plain (muchof which lies below sea level and is protected by a Dutch-introduced system of dikes) where about 80% of the population live, and an extensive but sparsely inhabited upland interior where most of the Amerindian population live. It is drained by numerous rivers, and the name 'Guyana' (formerly Guiana) comes from an Amerindian word meaning 'land of waters'.[3] Guyana is the second most populous country of the three, at around 750,000 people, almost half (43%) of whom are of East Indian descent, almost half of African (30%) or mixed (17%) descent, and the rest made up of Amerindians (9%) and a catch-all 'others' (1%). The economy is based mainly on agriculture (notably sugar and rice), with mining (especially gold and bauxite) playing an increasingly important role. It is the poorest country of the three, with a GDP per capita of US $ 4,439, and ranks lowest (103rd) on the United Nation's Human Development Index.

Trinidad, an island of about 1,900 square miles, is located just off the South American mainland and is a geographical extension of it. Trinidad consists mainly of rolling fertile plains, with some low mountains along the northern coast. It is the most populous of the three countries, at just over a million people (about 1,050,000) who, like Guyana, are divided mainly between descendants of African slaves and East Indian indentured labourers, in almost equal proportions (38% African, 40% East Indian), with the remaining being mixed (20%) or others (2%). Agriculture (notably sugar) continues to play an important economic role, but it is being replaced by petroleum ('black gold'). It is the richest country of the three, with a GDP per capita of US $12,182 (although the wealth is unevenly divided and 21% live below the poverty line). Its Human Development Index ranking (57th) is the highest of the three.

Saint Lucia is the smallest of the three countries, at 238 square miles. It is located in the middle of the Windward chain of islands in the south-eastern Caribbean; it is a volcanic island and thus mountainous, but with some broad fertile valleys. Its population of some 168,000 people is largely African (83%) or mixed (12%), with East Indians making up only 2% and other, 3%. As in the other two countries, agriculture dominated until recently (originally sugar, then bananas – 'green gold'), but tourism ('white gold') now drives the economy.[4] Saint Lucia ranks about midway between the other two countries in its economic indicators (GDP per capita of US $6,324) and social development (76th on the Human Development Index).

MIXING

Mixing of civil and common law in Guyana, Trinidad and Saint Lucia was triggered by Britain's success in the global struggle between the colonial superpowers of the late 18th and early 19th centuries. But the stage was set several centuries earlier, with Columbus' voyages of discovery.[5] All three countries were sighted by Columbus (Guyana and Trinidad in 1498, Saint Lucia in 1503), and Guyana and Trinidad were then claimed by Spain.

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[2] The factual information in this paragraph is drawn mainly from Central Intelligence Agency, *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html> and from the Guyana Bureau of Statistics *2002 Population and Housing Census*, available at <http://www.statisticsguyana.gov.gy/>.

[3] Hawkins, J (ed) (1986) *The Oxford Reference Dictionary* Clarendon Press at 363.

[4] Payne, A (2006) 'The End of Green Gold: Comparative Development Options and Strategies in the Eastern Caribbean Banana-producing Islands' (41:3) *Studies in Comparative International Development* 25.

[5] 'Columbus did not, of course, discover [the New World] [...]. What Columbus did was to establish contact between two worlds, both already very old; between the restless, expansionist, technologically advanced states of

Spanish presence in Guyana was limited at best,[6] and Dutch traders met with little opposition when they established up-river trading posts in the late 1500s and a first precarious coastal settlement in 1613. A Dutch presence was formalised in 1621 with the creation of the Dutch West India Company (*West-Indische Compagnie*) along the lines of the East India Company, and was formally recognised by Spain in 1648.[7] Dutch Guiana consisted initially of three colonies: Essequibo in the west bordering Venezuela (site of the first Dutch settlement), Berbice in the east bordering Surinam (established by the Dutch in 1626), and Demerara in the middle (founded in 1770).[8] Essequibo and Demerara were subsequently united into a single colony (Essequibo-Demerara) but Berbice remained separate, although both colonies remained under Company control. The two colonies were captured by the British in 1796, restored to the Dutch by the Treaty of Amiens 1802, and recaptured by the British in 1803. British sovereignty was confirmed by the Treaty of London 1814. The colonies were ultimately united as British Guiana in 1831.

Spanish settlement in Trinidad was more extensive and long-lasting than in Guyana. Interest in the colony was initially spurred (1530s) by its strategic importance at the mouth of the Orinoco watershed in neighbouring Venezuela, reputed site of the fabled El Dorado, and was later fuelled by the production of tobacco (late 1500s and early 1600s) and cocoa (a century later).[9] The first permanent settlement dates from 1592[10] although for most of the Spanish period, Trinidad remained 'neglected and undeveloped; a "colonial slum" of the Spanish empire'.[11] In fact, the island's population did not increase significantly until Spain issued a *Cédula de población* [Population Decree] in 1783 to encourage immigration from the nearby, mainly French, islands.[12] The result was that the population of Trinidad was largely

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Western Europe and the Amerinidian communities of Central and South America': Brereton, B (1981) *A History of Modern Trinidad 1783-1962* Heinemann Educational Books at 1.

[6] The limited Spanish presence was mainly in the most westerly area (Essequibo), and this forms the background to an on-going boundary dispute between Venezuela and Guyana today: see Donovan, TA (2004) 'Challenges to the Territorial Integrity of Guyana: A Legal Analysis' (32) *Georgia Journal of International and Comparative Law* 661. However, the Spanish 'largely avoided' the remaining areas, 'long known as the Wild Coast': 'Guyana', *Encyclopaedia Britannica*, available at <http://www.search.eb.com>.

[7] Bisschop, WR (1908) 'Modern Roman Dutch Law' (24) *Law Quarterly Review* 157 at 167; Besson, J (2003) 'History, Land and Culture in the English-speaking Caribbean' in Williams, AN (ed) *Land in the Caribbean: Issues of Policy, Administration and Management in the English-speaking Caribbean* Terra Institute at 3; Donovan supra n 6 at 670.

[8] The three colonies were named after three of the major rivers draining the interior of Guyana.

[9] Eg Leiter, J and Harding, S (2004) 'Trinidad, Brazil and Ghana: Three Melting Moments in the History of Cocoa' (20) *Journal of Rural Studies* 113. Cocoa was also responsible for an increased Spanish population in the late 1800s, as a second cocoa boom drew workers from Venezuela (the so-called 'cocoa panyols' [espanols]). Hulme, P (2006) 'Book Review of Forte, Maximilian C *Ruins of Absence, Presence of Caribs: (Post)colonial Representations of Aboriginality in Trinidad and Tobago*' (12) *Journal of the Royal Anthropological Institute* 957. See also Moodie-Kublalsingh, S (1993) *The Cocoa Panyols of Trinidad: An Oral Record* British Academic Press.

[10] Forte, MC (2004-05) 'Writing the Caribs Out: The Construction and Demystification of the "Deserted Island" Thesis for Trinidad' (VI:3) *Issues in Caribbean Amerindian Studies* at 3, available at <http://www.centrelink.org/Papers.html>.

[11] Brereton supra n 5 at 8. Trinidad, like the Spanish colonies in Guyana, was under the Captaincy-General of Venezuela during this period: Dupont, J (2001) *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* Rothman Publications at 295.

[12] Under the *Cédula*, immigrants had to be Catholics and subjects of nations friendly to Spain (ie France); white immigrants were granted an area equivalent to 30 acres for themselves and for each family member, and 15 acres for each slave; free coloured were granted half that amount. The *Cédula* extended a practice started in the mid 1770s, which was aimed initially at French planters from islands ceded to Britain in 1763 after the Seven Years War, and later at those loyal to the French crown in the revolutionary period; its slave-based land grant formula transformed the island into a slave society: Brereton supra n 5 at 11-14.

French when the British captured the island in 1797.[13] British control was confirmed by the Treaty of Amiens 1802.

As for Saint Lucia,[14] it was – like many of the island colonies – 'visited, settled, abandoned, and resettled, handed about from one owner to another in the competition of nations, thrown first into one scale and then into the other, in order to adjust for the time being the claims of rival governments.'[15] Like Guyana, Saint Lucia was under proprietary rule for most of its early history, although the picture is complicated by the fact that both the English and French crowns, as well as the Carib Amerindians, claimed the right to grant the island. Several conflicting conveyances and unsuccessful attempts at settlement followed, until a French grant of the island to the French West Indies Company (*Compagnie des Indes occidentales*) in 1642 resulted in the first successful settlement the same year. Saint Lucia continued to be tossed between the two countries over the next 150 years[16] until it, like Guyana, fell into British hands for the last time in 1803. British sovereignty was confirmed in the Treaty of Paris 1814.

Reception

When the three colonies were taken by the British, they became 'colonies of conquest' in which, under the doctrine of reception and British colonial practice, the laws and customs in force at the time of conquest remained in force, generally speaking, until subsequently changed. The usual practice might be reaffirmed, supplemented or varied by articles of capitulation, proclamations, instructions, treaties, and the like.[17]

In Guyana, the principle of continuity was affirmed in the Articles of Capitulation of Essequibo and Demerara dated 18 September 1803, which provided not only that the Dutch 'Laws and Usages of the Colony' were to remain in force and be respected[18] but also that the

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[13] After the *Cédula*, the old Spanish elite, 'impoverished and isolated, lost all influence over the affairs of their native island. Some of them joined the Spanish armed forces, others emigrated to the continent; a number relapsed into poverty and obscurity, and disappeared from the historical record': Brereton supra n 5 at 20. The first British governor, Picton, is reported to have observed in 1802 that 'there were only six or seven Spaniards "of any respectability" in Trinidad': Forte supra n 10 at 16, citing Newson, *Aboriginals and Spanish Colonial Trinidad* at 194.

[14] The discussion of Saint Lucia draws largely on Matthews Glenn, J (1997) 'Civilian Survival: Upper and Lower Canada and the Saint Lucia Civil Code' in Brierley, JEC et al (eds) *Mélanges Paul-André Crépeau* Éditions Yvon Blais 327.

[15] Lucas, CP (1888) *A Historical Geography of the British Colonies* Clarendon Press vol ii at 14, as quoted in Reis, CE (1914) 'Spanish Law in the British Empire' (14) *Journal of the Society of Comparative Legislation* (New Series) 24 at 28.

[16] Including a brief exchange during the Seven Years War, when the British captured Saint Lucia in 1762 but returned it to France under the Treaty of Paris 1763 in exchange for Quebec. Contemporary opinion was that France got the better of the bargain: Voltaire's dismissive '*quelques arpents de neige*' ['several acres of snow'] still rankles Canadians, but some British opinion was equally dismissive, comparing adversely the 'frozen wastes of Canada' to the valuable sugar islands of the Caribbean: Belleau, C (1984) 'The Law of Civil Procedure in the Province of Quebec with Special Reference to the Field of the Execution of Judgments as Compared to the St. Lucia Experience' in Landry, RA and Caparros, E (eds) *Essays on the Civil Codes of Québec and St. Lucia* University of Ottawa Press 265 at 267

[17] See generally Côté, JE (1977) 'The Reception of English Law' (15) *Alberta Law Review* 29; see also Reis supra n 15 at 28-30; Lennard, FB (1933) 'Some Aspects of Colonial Law' (19) *Transactions of the Grotius Society* 41 at 56. The leading English case on reception and continuation of law, *Campbell v Hall* (1774), Cowp 204, 98 English Reports 1045, arose in relation to the nearby island of Grenada.

[18] Janki, M (nd) 'Customary Water Laws and Practices: Guyana' at 1, available at <http://www.iucn.org/themes/law/pdfdocuments/LN190805_Guyana.pdf>; see also Lee, RW (1914) 'Roman-Dutch Law in British Guiana' (14) *Journal of the Society of Comparative Legislation* (New Series) 11 at 12. This protection was, in a sense, continued in the letters patent of 1831 unifying British Guiana, which provided

existing institutions of governance were to be continued.[19] These provisions were not repeated in the Treaty of London 1814.

In Trinidad, the Articles of Capitulation were silent on the retention of Spanish law, but the British military commander issued a proclamation several days after capitulation guaranteeing the continuation of Spanish civil and criminal law and the maintenance in office of all judicial and administrative officers until the permanent nature of the island's government could be decided.[20] This position was reiterated some sixteen years later in a Royal Proclamation issued on 19 June 1813:

> that all such public acts and judicial proceedings which before the surrender of the said island to us were in the name of his Catholic Majesty shall henceforth be done, issued, and performed in our name; and that the same Courts of Judicature which subsisted in the said island previous to its surrender thereof to us shall be continued in the exercise of all the judicial powers belonging to them, in all criminal and civil cases, and that they shall proceed according to the laws by which the said island was then governed.[21]

In Saint Lucia, retention of existing law was provided for in a Proclamation of the military authorities issued shortly after conquest, on 23 June 1803, which stipulated:

> Although the said Island was taken by storm and without a surrender or stipulation of any sort, nevertheless, to reassure the inhabitants and property owners about their present status pending a declaration of His Majesty, their Excellencies guarantee them full and complete enjoyment of all their property, under the laws existing in the Colony in the period immediately preceding the last cession.
> All duly constituted authorities are charged to conform to this proclamation.[22]

The Treaty of Paris 1814 similarly guaranteed the continuation of existing French laws,[23] but concerns remained and in 1817 the Governor of the colony issued a further reassurance: 'The laws, customs and regulations in force in the Colony at the moment of publication of the present ordinance will continue to be followed and enforced.'[24]

In the result, some or all of the old laws continued in force in Guyana, Trinidad and Saint Lucia. What laws were these?

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that 'nothing herein contained shall extend, revoke or abrogate any law or lawful usage now in force in the said United Colony of Demerara and Essequibo or in the said Colony of Berbice respectively': Lee at 12.

[19] Ramkarran, HN (2004) 'Seeking a Democratic Path: Constitutional Reform in Guyana' (32) *Georgia Journal of International and Comparative Law* 585 at 586.

[20] Brereton supra n 5 at 33; Reis, supra n 15 at 29-30; John, AM (1988) 'The Smuggled Slaves of Trinidad 1813' (31) *The Historical Journal* 365 at 365.

[21] *Report of His Majesty's Commissioners of Legal Inquiry on the Colony of Trinidad* (1827) (*Trinidad Report* 1827) as quoted in Reis supra n 15 at 30.

[22] Reproduced (in French) as No 4, Appendix II, Saint Lucia Revised Ordinances, 1957 [author's translation]. Although the reference to 'the period immediately preceding the last cession' is said to refer to the period prior to an earlier capture by the British on 26 May 1796 (it was subsequently returned to the French by the Treaty of Amiens 1802), the generally accepted cut-off date for retention of French law is 23 June 1803: Liverpool, NJO (1984) 'The History and Development of the Saint Lucia Civil Code' in Landry and Caparros (eds) supra n 16, 303 at 307. See also Wood Renton, J (1909) 'French Law within the British Empire' (10) *Journal of the Society of Comparative Legislation* (New Series) 93 and 250 at 103-104.

[23] The Treaty provision is not reproduced in the historical appendix to the Saint Lucia Revised Ordinances.

[24] As quoted (in French) in Liverpool supra n 22 at 308 [author's translation].

Old law

The applicable laws in force in the three colonies at the time of British conquest were the Roman-Dutch, Spanish and French laws as they themselves had been received into the former colonies at the time of their earlier settlement or subsequently introduced. The content of law might therefore vary from country to country of the same Imperial power; however, the sources of law in civilian Guyana, Trinidad or Saint Lucia have a familiar ring to someone familiar with the legal history of, say, South Africa, California or Quebec.

The Dutch West India Company colonies in Guyana thus received Roman-Dutch law generally similar to their sister colonies under the East India Company. It was set out in a Company order (*Ordre van Regieringe*, or Order of Government) of 13 October 1629, sanctioned by the States-General, as including:

> Art. 59. In matters of marriage, rights between husband and wife, in intestate succession and the drafting of wills, and all that is connected therewith, there shall have force of law over all countries, towns and peoples belonging to the dominions of the States-General and the West India Company, and everywhere be observed as law, the political ordinance issued by the States of Holland in the year 1582, as its provisions are best known, can be easily used as the common custom of South Holland and Zeelandt, and will introduce the least obscurity and change.
> Art. 60. All conveyances, as well as bonds or mortgage deeds [...] to grant proprietary rights or real rights, shall be passed before the said three members of the committee of civil justice, and the letters to be made thereof shall have to be sealed by them, and thereupon be registered in a register to be kept by the assessor, also in conformity with what is customary in the United Provinces.
> Art. 61. In other matters of diverse contracts and transactions the ordinary *beschreven Rechten* [written law] shall be followed.[25]

A further statement was provided some 150 years later, in a resolution of the States-General dated 4 October 1774 and relating to the colony of Demerara-Essequibo. It identified the applicable law as being,

> all the laws of Holland in general and more particularly all Laws, Statutes, Resolutions, and Ordinances of Their High Mightinesses [ie the States-General] or of the Committee of Ten with the approbation of Their High Mightinesses, heretofore transmitted, or hereafter to be transmitted, to the Director General and the Court of Essequibo, or to the Commander and Court of Demerara.[26]

Matrimonial matters were to be governed by the Political Ordinance of Holland and West Vriesland of 1580; intestate succession, by the law of North Holland; civil matters, by the enactments of the Council of Ten; and all other matters, by written law (i.e. the statute law of Holland and, failing that, Roman law).[27] In applying the law, the courts were to look first to the laws and customs of the colony, followed by those of the United Provinces and ultimately Roman law if necessary. But in practice, Bisschop argued, application of the laws

[25] As quoted in Bisschop supra n 7 at 167. For a detailed discussion of Guyanese legal development generally, see Ramsahoye, FHW (1966) *The Development of Land Law in British Guiana* Oceana Publications.
[26] As quoted in Ramsahoye supra n 25 at 307; see also Lee supra n 18 at 12.
[27] Lee supra n 18 at 12. Similar provisions applied in the colony of Bebice, with the exception of intestate succession which was to be governed by the law of South Holland: id citing Charter of Berbice, 6 December 1732, art 30.

and customs of the United Provinces in the colonies would have been difficult, as the inhabitants came from different provinces and printed material was scarce; local courts thus most probably looked immediately to Roman law (as expounded by such leading authors as Grotius, van Leeuwen, Voet, Groenewebern, van der Linder and van der Keessel) if local laws and customs did not provide a solution to the issue at hand.[28] This was echoed by Lee:

> In these circumstances the exported law lost sharpness of outline. It furnished a somewhat blurred background to a picture, the details of which were supplied by the legislative authorities competent in the colony in question. The administration of the criminal law left much to the discretion of the judges. In civil matters, when a judge or advocate had occasion to go behind the local ordinances to inform himself as to the fundamental principles of the law, he would have recourse for the most part to the well-known textbooks, the *Inleiding* of Grotius, Van Leeuwen's *Roomsch-Hollandsch Recht*, Voet's *Commentary on the Pandects*.[29]

The law applicable in Trinidad, as elsewhere in Spanish America, was found in a variety of specific and general sources, including instructions to governors, royal orders (*Ordenamientos*) adopted from time to time for the colonies, and statutes (*Fueros*) setting out the ancient customs of the realm. The *Ordenamientos* and *Fueros* included:[30] the *Fuera Real de España* (1255) governing such matters as public officials (including judges, lawyers and notaries), procedure, and matrimonial and inheritance rules; the fundamental *Siete Partidas* [Seven Parts, or Books] (1260) setting out canon law, the decrees of the great councils of Spain, the rules concerning judgments, contracts and testaments, and criminal law provisions;[31] the *Leyes de Estilo* (1525) dealing with the functions of notary publics; the important *Recopilación de las Leyes de las Indias* (1681) compiling all laws, *cédulas* and orders enacted for the colonies; and finally the *Leyes de Bilbáo* (1732) governing commercial relations. The applicability of these laws in Trinidad was confirmed in an 1807 trial by a number of expert witnesses who, in response to a question about 'the law of Old Spain and the island of Trinidad, or either of them' at the time of surrender in 1797, responded in substantially the same terms:

> The laws that existed in Old Spain and this colony at the time of the capture of the island in 1797 are the same as those in force now. They are the Recopilacion des Indies, the Recopilacion de Castilla, the Laws of the Seven Partidas, and warranted by [such

[28] Bisschop supra n 7 at 167-169. He also mentioned the importance of a compilation of ordinances adopted by the East India Company in 1642 and approved by the States-General in 1650 (the Statutes of Batavia) which were followed generally (id at 164-167); but their use appears to have been limited to East India Company colonies, and not followed in West India Company ones.

[29] Lee, RW (1930) 'What has Become of Roman-Dutch Law?' (12) *Journal of Comparative Legislation and International Law* (Third Series) 33 at 35.

[30] List drawn from Reis supra n 15 at 27, who referred to the *Trinidad Report* 1827, supra n 21. See also Glenn, HP (2005) *On Common Laws* Oxford University Press at 40-41 and 75-78

[31] The importance of the *Siete Partidas* has been described as follows: 'At the time of its compilation it was not only superior to anything of the kind that had ever been attempted at the time of Justinian; it stood alone and unrivalled in the medieval world; and for over six hundred years it remained not only the greatest textbook of Spanish jurisprudence but the greatest exclusively national code of laws of Europe': Burke, UK *A History of Spain*, vol i at 282, as quoted in Reis supra n 15 at 27. See also Lobingier, CS (1913) 'Las Siete Partidas and Its Predecessors' (1) *California Law Review* 487; and Lobingier, CS (1929) 'Las Siete Partidas in Full English Dress' (9) *Hispanic American Historical Review* 529.

> authors as] Elizondo, Colom, Febrero, Martinez, Bobadilla, Curia Phillipica and Herrera.[32]

As for Saint Lucia, the applicable law at the time of surrender consisted of the *Coutume de Paris*, the *Ordonnances*, Edicts and Declarations of the French monarchy relating to matters of a general nature, other laws relating to colonial matters emanating from the Governor or the Intendant in the name of the King and published in the *Code de Martinique*,[33] and Roman law and the works of French writers, particularly Pothier. The *Coutume de Paris* was said to apply 'because the 33rd Article of the *arrêt* [decree] of the "*Conseil d'État du Roi*," of May, 1664, establishing the *West India Company*, expressly declares its obligatory effect in the *West India Colonies*, as it had been established in the French Colonies in the East'.[34] The best-known statement of the ancient French law in Saint Lucia is that of Mr Justice Porter Atthill, Chief Justice of Saint Lucia:

> It is, however, necessary here to state, that the Civil Law of the Island, besides the local *Ordonnances*, the Maritime and Commercial law, are nearly the whole of the French Laws anterior to 1789, which are scattered over a great number of authorities, such as the *Coutume de Paris*, which is part of the ancient '*lex non scripta*' of *France*, the *Ordonnances*, Edicts and declarations of the French Monarchy, the *Code de la Martinique*, *Pothier, Merlin, Ferrière, Denisart, Domat, Pigeau, Jousse*, and many others unnecessary to mention.[35]

In sum, at the time of their conquest, all three colonies were subject to laws of some antiquity, but with substantially similar sources in that they included a wide range of specific instructions or general rules applicable in the colony or a group of colonies (eg decrees and regulations issued by the King or his representative, company by-laws, etc) as well as a large body of law applicable in the mother country and found in a disparate range of statutes, regulations, compilations, general principles and doctrine. The extent to which the latter was available for consultation, or even known, in a given colony is a matter of conjecture.

Received law

How much of this old law continued to be applicable in the British colonies following conquest? Did a colony become a mixed jurisdiction at the time of conquest, automatically by the very fact of conquest? Or did it become a self-enclosed, but unmixed, enclave of old law, with mixity coming later with incremental changes to the law? Part of the answer is provided for a given colony by a close analysis of the terms of the articles of capitulation, proclamations, instructions, treaties, etc. issued at the time of conquest. But part of the answer might be found by looking at the general principles of the doctrine of reception.

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[32] Howell, TB and Howell, TJ (eds) (1822) *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* (Vol XXX 1806-1808) Longman & TC Hansard at 594-596.
[33] A five-volume work containing the local laws of Saint Lucia, then administratively part of Martinique.
[34] Per Woodcock, Chief Justice of Tobago, speaking for the majority of the Court of Appeal for the Windward Islands, in the leading case of *DuBoulay v DuBoulay* (1867-69) LR 2 PC 430 (JCPC) at 434. This *arrêt* became effective on its subsequent registration, on 5 November 1681, with the *Conseil supérieur de l'Île Martinique.*It has been carried forward and reprinted, in the original French, in the various compilations of the laws of Saint Lucia (see presently Saint Lucia Revised Ordinances, 1957, No. 1, Appendix II (on 'Ancient French Law (*Ancien Droit Français*)'). See also Wood Renton supra n 22 at 103-104 and 117-118.
[35] Speaking in dissent at the Court of Appeal, in *DuBoulay* supra n 34 at 438 [italics in original].

It is well accepted that, under the doctrine of reception's presumption of continuity, the private law applicable in colonies of conquest continues in force following conquest absent specific provisions to the contrary. However, the position as to public law is not as clear-cut. Walton, writing about Quebec in 1907, suggested an approach of discontinuity of public law: 'The conquest of Canada in 1763 had the effect of substituting the public law of England for that of France.'[36] This would mean that all colonies of conquest became fully mixed jurisdictions by the very fact of conquest coupled with the interplay of the two presumptions, continuity of private law and discontinuity of public law. But approaches elsewhere are more nuanced. As one author put it, 'Great obscurity attaches to the result of the change of sovereignty in its effect on a system of law which is not English. How much of the public law of England is thus introduced *by the mere fact of the change*?'[37] There is general agreement about the immediate application of Imperial legislation in force *proprio vigore* and of some or all principles of constitutional law touching the Royal prerogative. And it is also generally accepted that laws contrary to public order (such as torture) would not survive the conquest, although this principle is not uniformly applied.[38] The terms of the articles of capitulation can also affect reception of public law.

A more nuanced approach, according a larger place to continuity of public law, is suggested by the practice in the three colonies. Continuity is clearest in Guyana, where the Dutch government structure remained in place until it was substantially modified in 1891 and ultimately abolished and replaced by a more familiar British structure in 1928. According to HN Ramkarran,

> The British inherited Dutch institutions of governance which were the Court of Policy, the College of Electors, the College of Financial Representatives, and the Combined Court, and were obliged to continue them by Article 1 of the Capitulation Treaty. These continued until 1891 when the Constitution was amended to enlarge the Court of Policy, abolish the College of Electors, directly elect a section of the Court of Policy, and create the right of the Governor to dissolve the Court of Policy.
> The [British] Crown Colony Constitution was enacted in 1928. The Court of Policy and the Combined Court were abolished and replaced by the Legislative Council and the Executive Council. This constitutional formula of a legislature and a cabinet, with a majority of members nominated by the British-appointed governor, constituted the type of Crown Colony favoured by Great Britain.[39]

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[36] Walton, FP (1907) *The Scope and Interpretation of the Civil Code of Lower Canada* Wilson & Lafleur at 26-27, as quoted in Côté supra n 17 at 42. See also Walton, FP (1913) 'The Legal System of Quebec' (33) *Canadian Law Times* 280 at 281 ('it is generally agreed that there are certain rules of law and especially certain rights and privileges of the subject which belong to public and not to private law. As part of the constitutional law of the British Empire they are the same in all portions of it, and, therefore, the same in the province of Quebec as in the rest of Canada. It can hardly be disputed for example that such charters of liberty as Magna Carta or the Bill of Rights formed part of the law of Quebec as soon as English sovereignty was introduced. [However] [...] the line of demarcation between public and private law is in some cases by no means easy to draw') and Côté at 42 ('One need only look at the Quebec cases to note that the discussion of constitutional principles and the prerogative, or indeed of public law generally, is always in terms of English law and never that of France or any province of old France'). However, even Quebec followed the practice of maintaining the existing court structure in place until changed, but that could be regarded as coming with a guarantee of on-going private law (ie treating court structures as part of private law, rather than public law).

[37] Keith, AB (1916) 'Book review of C Reis, *The Government of Trinidad* (London: Sweet & Maxwell, 1915)' (16) *Journal of the Society of Comparative Legislation* (New Series) 87 at 87 [emphasis added].

[38] See below, the text at note 40.

[39] Ramkarran 'Seeking' supra note 19 at 586. See also Dupont *Common Law Abroad* supra note 11 at 208-210; Osgood, HL (1891) 'Book review of C.P. Lucas, *An Historical Geography of the British Colonies*, 2 vol.

However, this might have occurred because continuation of the existing institutions was expressly provided for under the Articles of Capitulation, as Ramkarran points out.

There is some evidence of continuity in Trinidad as well. For example, the 1807 court case mentioned above was in fact the trial of the first Governor, Thomas Picton, for the misdemeanor of causing torture to be inflicted on a free coloured woman,[40] and the issue in the case was whether or not torture was acceptable under the Spanish law applicable in Trinidad immediately prior to conquest. This supports the principle of continuity of public law, and casts doubt on the existence of a 'public order' exception to it. As well, the *cabildo* (a multi-faceted body fulfilling legislative, administrative and judicial functions at both the central and municipal levels in Spanish colonies) continued to play a role after conquest.[41] But as in Guyana, the proclamation issued in Trinidad immediately following capitulation guaranteed the maintenance of judicial and administrative offices[42] until the nature of the new government was decided, and this did not happen until 1832 (as decision about the form of government was caught up in concerns about the slave trade and abolition of slavery).[43] The *cabildo* was not formally abolished until 1840.

In Saint Lucia, finally, the *Conseil superieur* continued to exercise legislative as well as judicial powers, as it had done under the French regime, until it was stripped of its legislative powers in 1817. In the case of Saint Lucia, the continuity of public law was not provided for under the terms of surrender, as the proclamation issued immediately following capitulation was in private law terms only.[44]

The effect in principle of conquest on the public law of a colony is thus an open question. However, it seems likely that the public law rules of the conqueror, if not introduced automatically on conquest, would be rapidly introduced subsequently (which makes the longevity of Dutch institutions in Guyana particularly interesting). What of private law?

(Oxford: Clarendon Press, 1888 & 1890)' (6) *Political Science Quarterly* 369 at 371. For a detailed description of the change from Dutch to British institutions, see Penson, LM (1926) 'The Making of a Crown Colony: British Guiana, 1803-33' (9) *Transactions of the Royal Historical Society* (4th Series) 107.

[40] 'Proceedings before the Court of King's Bench, Westminster, in the Case of Thomas Picton, Esq., sometime Governor and Commander in Chief over and in the Island of Trinidad in the West Indies, on an Indictment for a Misdemeaner, in causing the Torture to be inflicted upon Luisa Calderon, a free Mulatta, in the Island of Trinidad aforesaid, A.D. 1804-1812' in Howell and Howell supra n 32.

[41] The 'illustrious *cabildo*' has been described as 'a "body corporate, that partook of the mixed nature of an ecclesiastical council, a parish vestry, a municipal corporation, a council of government, and a legislative and executive council, over which the Spanish governor presided". This corporation was a self-elected body, exercising jurisdiction partly general, partly municipal and judiciary. It had power to levy duties and taxes, and to appoint alcaldes (judges)': Reis supra n 15 at 26, quoting Joseph (1933) *History of Trinidad* at 146. As late as 1832, for example, the *cabildo* tried to delay the imposition of imperial rules to better the conditions of slaves by invoking a Spanish public law rule that Ordinances restricting property rights had to be suspended until the King's pleasure was known: Brereton supra n 5 at 62.

[42] See above, the text at note 20.

[43] Eg John supra n 20. Putting off a change in form of government meant that Imperial policies to improve the lot of slaves and free coloured adopted in response to humanitarian pressures in England could be tried out in Trinidad before being applied more generally, as 'the island had no elected assembly that could resist legislation unpopular with the slave-owners': Brereton supra n 5 at 52. Trinidad was preferred over Guyana and Saint Lucia for this purpose as the colony's Spanish legal heritage was thought to make slavery there 'milder than in those territories where the legal tradition was French or Dutch': id at 58.

[44] See above, the text at note 22.

UNMIXING

Following conquest, Guyana, Trinidad and Saint Lucia were three enclaves of civil private law in a British empire in which the common law obviously dominated. They thus came under pressure to assimilate, which each colony resisted with varying degrees of success. Generally speaking, assimilation seems to have taken place in three stages. The first stage was one of informal assimilation, with local officials and judges ignoring or changing laws with which they disagreed or did not understand. For example, Brereton wrote that by the early 1810s, 'the legal system in Trinidad [...] was a confusing and uneasy mixture of Spanish law and British procedures. Spanish law had been greatly modified, partly through ignorance, and partly through the hostility of British judges and officials to laws that they tended to regard as unnecessarily complex and often obsolete.'[45] The second stage was the piecemeal introduction of English law and procedure in a number of discrete areas. During this stage, the on-going civil law continued as the general norm, with common law exceptions engrafted on it. The third phase was a generalised, wholesale introduction of the common law which reversed the hierarchy between the two systems, with the common law now being the general norm and civil law enclaves remaining as exceptions to it. RW Lee captured the flavour of the difference between the last two stages as follows:

> What we call a system is in many respects a conglomeration. It is not so entirely one that great sections of it cannot be modified, or even replaced, without fatal results to the whole. Constitutional law depends on political allegiance, commercial law is peculiarly responsive to external influences, great changes in procedure may leave the substantive law unchanged. As compared with these, what we call specifically the civil law of a country is stubbornly unwilling to change. If this, the kernel of the legal system, retains its character substantially unaltered through successive ages, we shall say that the 'system' continues to exist.[46]

All three stages of assimilation were substantially completed in Trinidad and Guyana, and but Saint Lucia continues to resist the last stage.

Piecemeal introduction

A detailed consideration of the piecemeal legislative changes in each colony would be overly fastidious, and various authors have identified different patterns of introduction.[47] At the risk of over-generalisation, one might suggest that piecemeal introduction of English law reflected the concerns of the English elite (planters and merchants): the more influential the elite, the more rapid the pace of assimilation. One set of concerns would be to be able to acquire, keep and dispose of their wealth and possessions in the manner with which they were familiar, so

[45] Brereton supra n 5 at 71-2.
[46] Lee supra n 29 at 34.
[47] See eg Lee, RW (1915) 'The Civil Law and the Common Law: A World Survey' (14) *Michigan Law Review* 89 at 94-100; Anthony, KD (1994) 'The Reception of the Common Law Systems by the Civil Law Systems in the Commonwealth Caribbean' in Doucet, M and Vanderlinden, J (eds) *La réception des systèmes juridiques: Implantation et destin* Bruylant 15 at 31-36; and Lennard supra n 17. See also, for Guyana, Lee supra n 18, and Ledlie, JC (1917) 'Roman-Dutch Law in British Guiana and a West Indian Court of Appeal' (17) *Journal of the Society of Comparative Legislation* (New Series) 210; for Trinidad, (1897) 'Modes of Legislation in the British Colonies' (2) *Journal of the Society of Comparative Legislation* 258 at 291-98, and Reis supra n 15 (Trinidad); and for Saint Lucia, Wood Renton supra n 22.

that English mercantile law (company law, sale of goods, bills of exchange, insurance, bankruptcy law, etc)[48] and English family property law (separation of matrimonial property, freedom of testamentary disposition,[49] English form of wills, etc) would be among the first to be introduced. Another set of concerns would be to be governed and protected in a way they could trust, and this would mean the introduction of English forms of government, English criminal law and English judicial institutions and procedure. This pattern is borne out in the three colonies, with a key step leading to assimilation being the naming of a Commission in 1823 to enquire into the administration of criminal and civil justice in the West Indian and South American colonies.[50] The Commission reported in 1827 for Trinidad, 1828 for Guyana and 1830 for Saint Lucia,[51] and in each case the result was an increased pace of piecemeal assimilation.

Generalised introduction

The pressures to assimilate were strongest in Trinidad, and Spanish law gave place almost entirely to English once the colony was granted a local (albeit nominated) Legislative Council[52] in 1831, as the 1827 Commission report had recommended, and the Governor was given permission in 1842 to proceed with law reform. The ensuing flood of piecemeal legislation was such that it brought in its wake, implicitly, the generalised introduction of English law. This is illustrated in an 1897 article by Clarence Bourne, the then Examiner of Titles for Trinidad and Tobago, about legislative changes in the field of property which, in essence, imported a series of 19th century English statutes up-dating some of the more antiquated provisions of its feudal-based property law.[53] The Trinidad copies thus contained an array of detailed provisions expressed in the technical language of common law property with no reference to Spanish law. Bourne described it as English legislation being 'dumped down on a Spanish foundation', and asked whether the legislature, 'while replacing Spanish bricks by English, [had thereby] substituted the foundations on which alone the latter could

[48] Macdonell, J (1916) 'The Codification of the Commercial Law of the Empire' (16) *Journal of the Society of Comparative Legislation* (New Series) 265 at 266 ('Of a Civil Code for the Empire there can be no question; there exist within it profound differences in the legal systems in force. No doubt these are being effaced. [...] But even if the assimilation were complete as to contracts and torts, the differences in the law as to status are likely to remain for a considerable time. No similar obstacles bar the way to an assimilation of mercantile law; it would be only the completing of a work already far advanced'); Lee 'Civil Law' supra n 47 at 97 ('As regards commercial and maritime law there has scarcely been a struggle. The principles and rules of English Law have prevailed in all the British Colonies, whether in consequence of statutory enactment or by tacit acceptance and judicial decision').

[49] Lee 'Civil Law' supra n 47 at 98 ('No legal proposition seems so ingrained in the Common Law as that a man may leave his property to whom he will, and that no one, not even a child, has any claim upon a testator's bounty').

[50] See especially Anthony supra n 47.

[51] *Trinidad Report* 1827 supra n 21; *Second Report of the Commissioners of Enquiry into the Administration of Criminal and Civil Justice in the West Indies and South American Colonies, United Colony of Demerara and Essequibo and Colony of Berbice* (1828) (*Guiana Report* 1828); *Third Report of the Commissioners of Enquiry, Saint Lucia* (1830) (*Saint Lucia Report* 1830).

[52] The council consisted of the leading local government officials (the 'official members') and private citizens selected by the governor from amongst the major landholders (the 'unofficial members'). Trinidad was thus an example of a 'pure' Crown Colony, and this remained the case until 1924: Brereton *History* supra note 5 at 136. On Crown Colonies generally, see Bryce, J (1907) 'Some Difficulties in Colonial Government Encountered by Great Britain and How They Have Been Met' (30) *Annals of the American Academy of Political and Social Sciences* 16.

[53] Bourne, HC (1897) 'Real Property Law in Trinidad and Tobago' (2) *Journal of the Society of Comparative Legislation* 318.

rest'.[54] The issue was not put to rest until 1914, when the *Judicature (Amendment) Ordinance* set 1 March 1848 as the general date of reception of English law in Trinidad.[55] However, Spanish law continues to apply, through transitional provisions in the piecemeal legislation, to the construction of deeds made before 10 June 1844, the disposition of property made by wills made before the same date, the form of wills made before 13 January 1845, the institution of the heir in cases of birth before 12 March 1846, intestacy and succession before the same date, and the succession rights between mother and illegitimate child born before 12 March 1846.[56] These transitional provisions are basically spent, but they provide a theoretical after-life for some elements of Spanish law in Trinidad today.

Guyana resisted assimilation more successfully than Trinidad, and it was not until the early 20th century that English law was generally received into the colony. The 1828 Commission report for British Guiana recommended adoption of English criminal procedure and court structure, but was more supportive of retaining Roman-Dutch civil law than was its Trinidad counterpart of Spanish law, writing that 'the examinants in both Colonies [Essequibo-Demerara and Berbice] concurred in stating that the Civil Law in force there, as contra-distinguished from the Criminal Law, is simple and well adapted to the wants and usages of the people.'[57] Although piecemeal changes were made to the civil law during the ensuing years, these did not seriously affect the underlying principles of Roman-Dutch law[58] until the pace of change rapidly accelerated following the move towards a more English form of government in 1891.[59] By the 1910s, 'The result of all this comprehensive legislation was to leave the Roman-Dutch law [...] a mere "husk", a "skeleton", a "shattered remnant"'.[60] A commission was therefore appointed in 1912 to consider the advisability of making changes

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[54] Id at 319 and 321-2.

[55] No 23 of 1914, s. 2 ('Subject to the provisions of any written law in operation on 1st March 1848, and to any written law passed after that date, the Common Law, Doctrines of Equity, and Statutes of general application of the Parliament of the United Kingdom that were in force in England on that date shall be deemed to have been enacted and to have been in force in Trinidad as from that date': see now Laws of Trinidad and Tobago, chapter 4:01, s.12. The 1st March 1948 is the date on which Ordinance No 4 of 1848 was adopted, which repealed Spanish law 'so far as the same relates to actions and rights of action and the forms of actions, and the form and mode of procedure in the same, and as to costs' (Reis supra n 15 at 31) and provided every person with 'the like relief in equity, or the like remedy by action at law, as he would be entitled to and have in the like cases in England' (Bourne supra n 53 at 321).

[56] Reis supra n 15 at 32; Lee 'Modes' supra n 47 at 294-295.

[57] Lee supra n 18 at 13, quoting *Guiana Report* 1828 supra n 51 at 3. Although the author of the Report, Jabez Henry, was common-law trained, he was equally at home in Roman-Dutch law, having served as President (ie Chief Justice) of Essequibo-Demerara from 1813-1816 and authored a ten-volume translation (published in 1828) of van der Linden's *Institutes of the Laws of Holland* during the period he served on the Commission. See Graham, D (2001) 'Discovering Jabez Henry: Cross-border Insolvency Law in the 19th Century' (10) *International Insolvency Review* 153.

[58] The most extensive change was the wholesale introduction of English mercantile law in 1864: Ledlie supra n 47 at 214. See also eg the entries on 'British Guiana' in the annual 'Review of Legislation': for 1913, Crossley Rayner, T and 1914, Nunan, JJ (1916) 16 *Journal of the Society of Comparative Legislation* (New Series) 183; for 1915, Nunan (1917) 17 *Journal of the Society of Comparative Legislation* (New Series) 169; for 1916, Nunan (1918) 18 *Journal of Comparative Legislation and International Law* (New Series) 227; for 1917, Nunan (1919) 1 *Journal of Comparative Legislation and International Law* (Third Series) 159.

[59] See above the text following note 38.

[60] Ledlie supra n 47 at 215, quoting the 1914 *Report of the British Guiana Common Law Commission* (*Common Law Commission)*. Ledlie observes, echoing Bourne's analysis of the Trinidad situation (supra the text at note 54), that because the earlier changes were adopted 'not on any definite system, but rather piecemeal, as the exigencies of the time seemed to call for them, and without reference to the provisions of Roman-Dutch law which they superseded, the relation between the new (English) law thus imported and the existing (Roman-Dutch) law was often a matter of great difficulty to determine, and the resulting confusion and uncertainty was considerable': id.

to the common law of the colony 'and whether such changes, if any, should be made by the substitution of English law or otherwise'.[61] The Common Law Commission, as it came to be called, reported in 1914 and recommended a sweeping introduction of the English common law

> in regard to all mercantile matters, to all domestic relations (including marriage, judicial separation and divorce, the law of husband and wife, parent and child, guardian or curator and minors, and master and servant), to the law of delict or torts, agency, suretyship, liens, intestate succession, and in fact *to all the law of persons, things, obligations, inheritance, and every other description of matters whatsoever not dealt with by legislation, or otherwise expressly exempted*.[62]

Only the law of immovables was spared, as the commissioners expressed 'no desire to introduce the complicated incidents of (English) real property law'.[63] A second commission, the Statute Law Commission, was then struck to consider how to give effect to the recommendations of the Common Law Commission.[64] Its 1916 report formed the basis of the *Civil Law of British Guiana Ordinance, 1916*,[65] which came into effect on 1 January 1917. The heart of the legislation is section 3, which provides in large and general terms for the abrogation of Roman-Dutch law[66] and the introduction of English common law,[67] although some aspects of Roman-Dutch property law are specifically preserved, notably the principle of absolute ownership of land[68] and the rules relating to conveyancing by judicial transport, mortgages and real servitudes.[69] In the result, therefore, the old law in Guyana gave way almost completely to the English common law in 1916. Only vestiges of Roman-Dutch law, notably relating to land,[70] remain.

Saint Lucia has been the most successful of the three countries in resisting the assimilation of its French civil law heritage, although it faced similar pressures to do so. Piecemeal substantive reform and anglicisation of the judicial system (replacement of the existing court structure by an English model, with English-trained judges and English rules of procedure in 1831; adoption of English as the language of the courts in 1842) took their toll

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[61] Id at 215, quoting instructions to the Common Law Commission.
[62] Id at 216, quoting *Common Law Commission* [emphasis added].
[63] Id at 217, quoting *Common Law Commission*.
[64] Both of these Commissions were chaired by JJ Nunan, then Solicitor-General and later Attorney-General of the colony, who thus played a key role in the process. Ledlie describes the Common Law Commission report, in particular, as 'a document of considerable legal and historical interest': id at 216.
[65] No 15 of 1916. See now *Civil Law of Guyana Act*, Laws of Guyana, chapter 6:01.
[66] S 3(a): 'the law of the Colony relating to [a long list of general areas of law, including 'tacit and legal hypothecs or mortgages', 'movable or personal property', and 'immovable or real property and chattels real'] and the law of the Colony relating to all other matters whatsoever, whether *eiusdem generis* with the foregoing or not, shall cease to be Roman Dutch law, and as regards all matters arising and all rights acquired or accruing after the date hereof [ie 1 January 1917], the Roman-Dutch law shall cease to apply to the Colony'.
[67] S 3(b): 'the common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at anytime hereafter administered by the courts of justice of England'.
[68] S 3(d)(i). This is also implicit in the introductory provision to s 3(d) assimilating real property to personal property.
[69] S 3(d)(ii): 'the law and practices relating to conventional mortgages or hypothecs of movable or immovable property, and to easements, profits *a prendre*, or real servitudes, and the right of opposition in the case of both transports and mortgages, shall be the law and practice in those matters now administered by the Supreme Court'.
[70] Some traces may still remain in matrimonial law. See Patchett, KW (1959) 'Some Aspects of Marriage and Divorce in the West Indies' (8) *International and Comparative Law Quarterly* 632 at 643-647, 351-352.

there, as in the other two colonies. However, the adoption in 1876 of the Saint Lucia Civil Code, modelled on the Civil Code of Lower Canada (ie Quebec),[71] did much to curb the erosion of the civil law in the colony, although this was not its principle purpose at the time. Like its Quebec precursor, the Saint Lucia Civil Code was adopted as 'a technical reordering of a complex body of norms that was intended to make this private law more accessible in both its language and substance to legal professionals'.[72] But in Saint Lucia, unlike Quebec, the Civil Code has not taken on the larger role of defining its society, so that the country has been less vigilant in carving out a special place for itself and protecting its distinct civilian heritage in subsequent regional structures.[73] This helps explain why it agreed to revise its Civil Code in the 1950s so as to 'assimilate the Code to the Law of England where they differ, in the light of the present needs of the Colony'.[74] A main reason for this was the drive towards federation:

> It has long been recognized that it is necessary to bring up to date the whole body of the Civil law and align it with current thought and practice in the West Indies. In this connection the value of the French civil law as the basic law of the colony requires reassessing and it is probable that a larger infusion of English law is necessary if the law of St. Lucia is to be put on a more satisfactory footing. This is of particular importance having regard to the possibility of West Indian Federation.[75]

Reform of the Code thus began in 1954; the revised Code was adopted as the *Civil Code (Amendment) Ordinance* in 1956;[76] and it came into force on 30 June 1957. The main technique of reform was to retain the existing provisions of the Code but to engraft upon them, by open receptions clauses, large areas of the common law, particularly in regard to torts, contract, agency, trusts, guardianship and matrimonial offences.[77] This technique, which

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[71] Saint Lucia's Code is sometimes said to be based on the Napoleonic Code. However, this Code never applied in Saint Lucia as the island came under British control in 1803, a year prior to the adoption of the Napoleonic Code. The 1866 Civil Code of Lower Canada was itself a codification of French customary law. On the history of Code, see Liverpool supra n 22; see also Cenac, WF (nd) *Coutume de Paris to 1988: The Evolution of Land Law in St. Lucia* Voice Publishing. For additional information on the Canadian connection, see Matthews Glenn supra n 14.

[72] Brierley, JEC and McDonald, RA (eds) (1993) *Quebec Civil Law: An Introduction to Quebec Private Law* Emond-Montgomery at 25. As Sir Robert Torrens, then Governor of Barbados and the Windward Islands, put it in an address to the Saint Lucia Legislative Council in 1845: 'The Head of the Local Government, the Judge on the Bench, the Law Officer, the Barrister, the Special Magistrate and Justice of the Peace are each unprovided with [ie lack] an entire manual of the laws, which, in their various spheres, they are to administer and enforce, and which it is their duty to know: and her Majesty's subjects in St. Lucia have no means of general acquaintance with the laws under which they live save by hearsay, custom and such uncertain means': as quoted in Liverpool supra n 22 at 326-327, citing Colonial Office Document 321/22.

[73] Anthony, KD (1988) *The Mixed Legal System of Saint Lucia: Its Establishment and Decline* PhD thesis, University of Birmingham at 574.

[74] Laws of Saint Lucia (Reform and Revision) Ordinance, No 21 of 1954, s 4 (3).

[75] Saint Lucia, Legislative Council Meeting [undated], as quoted in Anthony, KD (1984) 'The Viability of the Civilist Tradition in St. Lucia: A Tentative Appraisal' in Landry and Caparros (eds) supra n 16, 33 at 58.

[76] Ordinance No. 34 of 1956.

[77] Anthony, KD (1995) 'The Courts and the Interpretation of a Civil Code in a Mixed Legal System: Saint Lucia Revisited' (5) *Caribbean Law Review* 144 at 195. Other than the introduction of the trust, which would obviously have an effect, property law went largely untouched. As a leading Saint Lucia civilian observed, 'It would be lamentable if the complicated English law of real property were ever substituted for the simple system which we inherited from France through Quebec. The fundamental right called ownership and the owner's liberty to burden his radical title with emphyteuses, leases, servitudes, usufructs, hypothecs and other encumbrances are concepts intelligible to the simplest layman': Floissac, VF (1985) 'The Interpretation of the Civil Code of Saint Lucia' in Landry and Caparros (eds) supra n 16, 339 at 353.

might be described as 'incorporation by interpretation' rather than 'repeal and replace', is illustrated by the provision relating to delict, which provides that

> the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to this Colony, and provisions of [the relevant articles of the Code] shall be construed accordingly; and the said Articles shall cease to be construed in accordance with the law of Lower Canada or the 'Coutume de Paris'.[78]

The result is an intense intermingling of the common and civil law, and the Saint Lucian legal system is sometimes described as 'hybrid':[79] the phrase 'the delict of trespass'[80] does not ring too strangely to Saint Lucian ears. The 1956 revision reinforced the tendency, already strong in the common law-trained Bench and Bar, to have 'uninhibited recourse'[81] to English authorities in deciding cases; at the same time, however, Saint Lucian jurists continue to cite Quebec decisions of the Privy Council, and the Privy Council continues to apply the civil law in deciding cases from Saint Lucia.[82]

Saint Lucia now appears to be at a crossroads in protecting its civilian heritage. In 2000, the then government of Saint Lucia announced plans to revise the Code to have it reflect the 'values and beliefs underpinning the society', which have changed dramatically since 1879, particularly in the area of family law;[83] this societal emphasis was echoed in a statement by the then Minister for Justice in 2003: 'That is what the law and important laws like the Civil Code really are, they define our culture, define our social relations, defining who we are and how we relate to each other';[84] the project had the support of the then government of Canada, and is to draw upon Quebec's experience in reforming its Civil Code in 1994. On the other hand, the 2000 announcement identified as a key goal of the project 'to assist in developing a more positive legal framework for private sector development', a statement also echoed in 2003: 'We also want to reflect the interests and values of our business community, which is why the business sector is so well represented by way of committee membership in this project'. Foreign direct investment is important in Saint Lucia's tourist-driven economy, and most of the investors come from common law jurisdictions. And governments change, so the

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[78] Art. 917A (1). However, subsection (3) provides, somewhat contradictorily, that 'Where a conflict exists between the law of England and an express provision of this Code or of any other statute, then the provisions of the Code or of such statute shall prevail'.

[79] White, D (1981) 'Some Problems of a Hybrid Legal System: A Case Study of St. Lucia' (30) *International and Comparative Law Quarterly* 862; Huxley, A (1984) 'How Hybrid is Saint Lucian Law?' in Landry and Caparros (eds) supra n 16, 371.

[80] *Ferry v Gifford and LeJeune* (unreported, 1968) as cited in Anthony supra n 77 at 208.

[81] Id at 146. See also Anthony, KD (1992) 'Which Estoppel in the Law of Saint Lucia?' (2) *Caribbean Law Review* 149 (discussing the courts' preference for the English law of estoppel, rather than the Quebec notion of *fin de non recevoir* and the relevant articles of the Code).

[82] See eg *Polinere et al v Felicien* [2000] 1 WLR 890 (JCPC) at 893 ('Their Lordships consider that anyone attempting to interpret the Civil Code must bear in mind that it is derived, in most cases word for word, from the Quebec Civil Code of 1865 […]. In adopting the St. Lucia Civil Code, the legislature must in their Lordships' view have intended that its terms should be construed with due regard to what they had been understood to mean in Quebec and France. The jurisprudence which has been attached to the provisions of the Code by the courts and legal writers of those countries must at the very least have considerable persuasive authority. Their Lordships therefore consider that it was unwise for the judge and the Court of Appeal to have attempted to construe them without any reference to their civilian background').

[83] Government of Saint Lucia (2000) 'Throne Speech, 4th Session, 7th Parliament' at 15, available at <http://www.stlucia.gov.lc/addresses_and_speeches/governor_general/throne_speeches/ThroneSpeech2000.pdf>

[84] Government of Saint Lucia (2003) 'Civil Code Reform Project Committee Members Appointed', available at <http://www.stlucia.bov.lc/pr2003/civil_code_reform_project_committee_members_appointed.htm>.

extent to which Civil Code revision remains a priority for the present governments of either Saint Lucia or Canada is no longer clear.

The three jurisdictions thus provide examples of traditional mixed jurisdictions, where the mixity is between different European legal systems, and their story of mixing and unmixing is a familiar one. What of non traditional mixity?

REMIXING

Some have argued that the concept of mixed jurisdictions should not be restricted to its traditional form, but should be extended to encompass other forms of mixity. Three possibilities are mixity between European and aboriginal law, between secular and religious law and between formal and informal law, and these possibilities are illustrated by Guyana, Trinidad and Saint Lucia, respectively.

European and Aboriginal Law

The clearest example among the three colonies of possible mixity between European and aboriginal law is Guyana,[85] where Amerindians make up some 9% of the overall population and constitute the majority of people living in the country's vast interior. Amerindian rights were recognised in some measure by the Dutch prior to conquest, when their relationship reflected partnership more than power – a relationship captured in the notion of the 'middle ground':

> In this "Middle Ground", settlers and indigenous peoples met and "constructed a common, mutually comprehensible world", in which the institutions of the two groups accommodated each other, found new meaning and established a shared basis for interaction. The Middle Ground depended on the inability of both sides to gain their ends through force. The Middle Ground was created because both parties wanted to trade, neither had a monopoly on power, and they had to find mutually intelligible and acceptable means of dealing with each other.[86]

The British continued this recognition after conquest, although Amerindian rights were continually eroded by demands for their lands to support ranching, forestry and mining activities. The Amerindians are governed by the paternalistic *Amerindian Act*, first adopted in 1951 as a compilation of a number of laws adopted in the early 20th century and revised in 1976.[87] A new Act was adopted in 2006, but it is not supported by the Amerindians, who

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[85] There is no aboriginal population remaining in Saint Lucia and few, if any, in Trinidad. See Forte 'Writing' supra note 10 (suggesting that descendants of the original inhabitants remain in Trinidad). The information about Guyanese Amerindians is drawn from Colchester, M (1997) 'Guyana: Fragile Frontier' (38:4) *Race & Class* 33; Colchester, M; LaRose, J and James, K (2002) *Mining and Amerindians in Guyana* North-South Institute, available at <http://www.nsi-ins.ca/english/pdf/guyana/guyana_final_report.pdf>; James, T (2003) 'Indigenous Land Rights in Guyana: Past, Present and Future', available at <http://www.cpsu.org.uk/downloads/Land_Rights_Guyana.pdf>; Colchester, M and MacKay, F (2004) *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent* Forest Peoples Programme, available at <http://www.forestpeoples.org/documents/law_hr/fpic_ips_text_only_aug04_eng.pdf>; Bartlett, T (2005) 'Amerindian Development in Guyana: Legal Documents as Background to Discourse Practice' (16) *Discourse & Society* 341; and Janki supra n 18.

[86] Colchester and MacKay supra n 85 at 3, quoting White, R (1991) *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* Cambridge University Press at ix-x.

[87] Ordinance No 22 of 1951; Act No 6 of 1976; see now Laws of Guyana, chapter 29.01.

challenge its constitutionality.[88] The British had made recognition of Amerindian land rights a condition of independence in 1966; an Amerindian Lands Commission set up at that time recommended granting indigenous communities title to about a quarter of Guyana (half of what the communities had claimed). The on-going process of titling is slow, however, and its very existence casts doubt on the nature of their title: is it a recognition of pre-existing rights, or a grant of new rights?

In a leading Canadian article on the doctrine of reception, JE Côté describes how the doctrine as applied in the early colonies of the New World (ie the Americas and Australia) largely ignored aboriginal law: either the presence of indigenous peoples was disregarded and the colony classified as terra nullius and hence a colony of settlement where British law applied, or they were regarded as having no laws or perhaps laws and customs that were 'too unfamiliar, or too primitive, to justify compelling British subjects to obey them'.[89] However, these attitudes began to change with the spread of British colonisation in the more settled east and southeast Asia, and resulted in a recognition of personal laws, with Europeans being governed by English law and local inhabitants being governed (except for some areas of commercial practice) by their own religious and customary practices. 'This was an eminently practical solution, but it owes nothing to the old theory of settled and conquered colonies, and if anything is quite subversive of that theory'.[90]

Our attitudes to aboriginal law have changed considerably since the 1970s, and aboriginal rights are presently understood in terms that parallel the doctrine of reception. A Canadian authority on the doctrine of aboriginal rights, Brian Slattery, describes it as having two main sources, ancient custom and basic principles of justice, which operate in tandem. The 'principal source' is 'an ancient body of inter-societal custom that emerged from relations between British colonies and neighbouring Indian nations in eastern North America' as informed by 'the actual circumstances of life in America, the laws and practices of indigenous societies, imperial law and policy, and broad considerations of comity and justice'.[91] These customs eventually coalesced into a distinct branch of unwritten British colonial, or imperial, law.

> The doctrine of aboriginal rights developed at the same time as other basic doctrines of British imperial law and shared essentially the same juridical character. Just as imperial law governed such matters as the status of colonies and their lands, *the application of English law*, and the relative power of local assemblies and the Imperial Parliament, it also harboured rules concerning the status of indigenous peoples and their lands, the operation of their laws, and the relationship between aboriginal and colonial institutions.[92]

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[88] Act No 6 of 2006. See Rainforest Foundation (2006) *Annual Report* at 10, available at <http://www.rainforestfoundation.org/files/RF2006annualreport.pdf>.
[89] Côté supra n 17 at 38.
[90] Id at 39.
[91] Slattery, B (2000) 'Making Sense of Aboriginal and Treaty Rights' (79) *Canadian Bar Review* 196 at 200. See also Slattery, B (1987) 'Understanding Aboriginal Rights' (66) *Canadian Bar Review* 727 (identifying a key issue as follows (at 735): 'Assuming that the Crown did, in some way, gain sovereignty over native Canadian peoples, how did this affect their legal position? What happened to their laws, property rights, and political institutions? Did these disappear overnight, to be replaced by a new set of rights and rules? Or did they survive the transition basically intact, or in some modified but recognizable form?')
[92] Slattery supra n 91 at 200 [emphasis added].

Slattery stresses that the doctrine of aboriginal rights, like other doctrines of imperial law, is a part of fundamental constitutional law and thus applied automatically to all new colonies, whether acquired by settlement or conquest. He continues:

> When the Crown gained suzerainty over a North American territory, the doctrine of aboriginal rights provided that the local customs of the indigenous peoples would presumptively continue in force, except insofar as they were unconscionable or incompatible with the Crown's suzerainty. *This provision resembles the imperial rule governing conquered or ceded colonies*, which holds that the local law of the colony remains in force, subject to similar exceptions. However, the doctrine of aboriginal rights has a broader application than the imperial rule regarding conquests and takes effect regardless [of] whether the territory was acquired by conquest, cession, settlement, annexation, tacit acquiescence, or some other method.[93]

As part of colonial or imperial law, the doctrine of aboriginal rights, and its principle of continuity would apply in Guyana in the same way that it applies in Canada.

Secular and Religious Law

A second example of possible non traditional mixity is between secular and religious law or, more precisely, between laws of general application and formal changes to them or in their application to accommodate the beliefs and customs of newcomers. This is illustrated by legislative changes in Trinidad[94] to accommodate indentured East Indian labourers and their descendents.

East Indians owe their presence in Trinidad, and elsewhere in the Caribbean, to the planters' need of a stable supply of manageable labour following the full emancipation of slaves in 1838.[95] This need was particularly acute in the larger, more sparsely settled colonies such as Trinidad, where the former slaves left the sugar estates in great number, mainly to squat on the available vacant land.[96] Attempts to encourage black immigration from elsewhere (nearby islands, the United States, Africa) were unsuccessful, and India became the solution of choice to the labour problem.[97] The British government authorised Indian immigration to Trinidad and other Caribbean colonies in 1844, and a steady stream of immigrants arrived in the colony from the first boatload in 1845 until the end of the programme in 1917.[98] Because the immigrants received free passage to Trinidad and, at the insistence of the Indian government, were entitled to free passage back to India, the programme was highly regulated to ensure that the Indians fulfilled their agricultural

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[93] Id at 201 [emphasis added].
[94] Similar changes occurred in colonial Guiana, as well as Jamaica: see generally Patchett supra n 70 at 653-665.
[95] Slavery was abolished throughout the British empire in 1834, but it was followed by a transitional four-year 'apprenticeship' period during which the former slaves had to continue working on the plantation.
[96] 'When, by an Act of the British Parliament, slavery was abolished in all British territories, the emancipated slaves left the sugar plantations in thousands, preferring to acquire their own plots and work the land for themselves. West Indian sugar planters were faced with severe labour shortage': Colonial Office of Information (1958) *The West Indies – A Nation in the Making* Reference Pamphlet No 30 at 49 as quoted in Patchett supra n 70 at 654. See also Matthews Glenn, J; Labossiere, RP and Wolfe, JM (1993) 'Squatter Regularisation: Problems and Prospects – A Case Study from Trinidad' (15) *Third World Planning Review* 249 at 251.
[97] See Ballinger, R (2006) 'Empire in the Present: Exploring the Indies through the Cultural Geography of the Commonwealth' (16) *Anthropological Forum* 277 (stressing the importance of 'colony-to-colony' relations).
[98] Brereton supra n 5 at 96-102; Brereton, B (1979) *Race Relations in Colonial Trinidad 1870 -1900* Cambridge University Press at 176. Application of the programme was suspended, for financial reasons, from 1848 to 1851. It ended in 1917 under pressure from the Indian government: Eldering, L (2005) 'The Bhojpuri Diaspora: A Rich Field for Comparative Acculturation Research' (17) *Psychology & Developing Societies* 237 at 243.

obligations. It was based on a system of indentures, backed by criminal sanctions, under which the immigrants contracted to work on the plantations for a period of tied labour (five years, later extended to ten) before being entitled to passage home.[99] In fact, a large majority of the immigrants did not return to India at the end of their period under indenture, and remained in Trinidad largely as agricultural labourers. In 1869 the Trinidad government opened up Crown land to small purchasers, and also began to grant labourers who had accomplished their indentureship 10 acres of land in lieu of return passage;[100] the commutation programme lasted until 1879, but it symbolised the extent to which the East Indian immigrants were not simply transient labourers. Many left the estates and became smallholding farmers either under the commutation programme or by purchasing land on their own.[101] They lived in their own villages which echoed the religious, social and governance structure of rural villages in India.

The Indian community has grown in size and social and political importance since 1917. They have not been assimilated but rather have 'retained their identity as an Indian community in which the Hindu and Muslim religions are paramount considerations'.[102] This explains why Trinidad, like Guyana and Jamaica, adopted legislation permitting marriage and divorce according to these religious rites. This was first provided for in the Immigration Ordinance, which permitted Indians brought in as indentured labour and their descendents to marry according to their religious law.[103] More general Trinidad legislation, encompassing East Indians who did not come within the scope of the immigration provisions, was adopted in 1936 for the smaller Muslim population and in 1946 for the Hindu majority.[104] The issue of marriage validity is important not only in regard to the status of husband and wife but also the legitimacy of their children and their maintenance and inheritance rights.

Mixity of secular and religious law is increasingly an issue, as states struggle to accommodate an increasingly multi-ethnic population in a globalising world. Canadian examples of formal mixity include legislative accommodation of religious courts[105] and judicial accommodation of religious practices.[106]

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[99] For details of the system, see Brereton supra n 5 at 101-102.
[100] Id at 107.
[101] Over 90% of indentured labourers remained in Trinidad: Singh, S-A (2005) 'Hinduism and the State in Trinidad' (6) *Inter-Asia Cultural Studies* 353 at 353.
[102] Patchett supra n 70 at 654.
[103] The secondary sources do not indicated the original date of this ordinance, but it could have been in 1851 when immigration of indentured labour resumed after a brief hiatus and the office of Superintendent (later Protector) of Immigrants was created: Brereton supra n 5 at 102.
[104] *Muslim Marriage and Divorce Ordinance*, see now Laws of Trinidad and Tobago, chapter 45:02; *Hindu Marriage Ordinance*, see now chapter 45:03. Hindis made up some 88% of the Indian population brought in under the indenture system: Singh 'Hinduism' supra note 101 at 353. For details of the legislation see Patchett supra n 70 at 660-665. See also Brereton supra n 98 at 182; and Singh supra n 101 at 356-357 (also discussing recognition of Hindu cremation traditions). In 1999, the *Orisa Marriage Act*, No 22 of 1999 (see now chapter 45:04) was adopted to accommodate the increasing number of persons adhering to this traditional African religion.
[105] See eg Saris, A (2006) 'Les tribunaux religieux dans les contextes canadien et québécois' (40) *Revue Juridique Themis* 353.
[106] See eg Landheer-Cieslak, C (2006) *La religion devant les juges français et québécois de droit civil* Bruylant/Yvon Blais; *Syndicat Northcrest v Amselem* [2004] 2 S.C.R. 551

Formal and Informal Law

A third possible example of non traditional mixity is between formal law and informal law. One example is the concept of 'family land', which is present in many Caribbean jurisdictions, most notably Saint Lucia.[107]

Family land is land that is regarded by the family as belonging to successive generations of the family and not just to its present members. The concept developed after emancipation of the slaves and some explain it as an on-going echo of customary land tenure in West Africa, the ancestral homeland of most of the former slaves.[108] Under formal private law, the owners for the time being hold the land in indivision (a form of co-ownership roughly equivalent to the common law's tenancy in common),[109] and the law recognises extensive property rights to the present owners of the land acting together (a right to sell the property in its entirety) and to individual family members acting alone (a right to use the land in conjunction with other family members,[110] a right to sell one's own share in the land, a right to chose one's own heir by will, and a right to apply to end the co-ownership by partition). Informal law, on the other hand, frowns upon individual recourse to formal law for reasons that are contrary to the spirit and purpose of family land, and informally limits the formally recognised private law rights. Formal law thus applies one set of rules, which informal law overrides in order to keep the land in the family. The inalienability of family land became a concern in the neo-liberal 1980s, and a 1984 reform package provided that one or more family members could be registered on title as trustees having the authority to sell or mortgage the property on behalf of all family members.[111] However, little use has been made of this possibility, illustrating the strength of the informal law.[112]

The Saint Lucia example of family land is somewhat similar to the Trinidad example of indentured labour, in the sense that it accommodates other customs and beliefs; it differs, however, in that the accommodation occurs informally rather than through changes to the formal law.

Other examples of informal law are less historically conditioned, and can range from the informal property laws applying in squatter settlements[113] through, perhaps, even to rules governing everyday comportment.[114]

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[107] Other Commonwealth examples include Guyana and Belize (in Central America). Family land is sometimes called 'heirs' land', 'children's land' or 'generation land'.

[108] Yelvington, KA (2001) 'The Anthropology of Afro-Latin America and the Caribbean: Diasphoric Dimensions' (30) *Annual Review of Anthropology* 227. Others attribute it to restrictive land acquisition policies adopted by planter-controlled island governments after emancipation in an effort to tie the former slaves to the plantations; in response, extended families pooled their resources to be able to afford the land, and the land thus acquired was regarded as belonging to the family, both present and future: Barrow, C (1962) *Family Land and Development in St Lucia* University of the West Indies at 14-16. Still others explain it, at least in part, by the difference in inheritance patterns under French (shared succession) and English (single succession) law: id at 14-16; Vargas, A and Stanfield, D (2003) 'St Lucia Country Study of Land Administration and Management Issues' in Williams (ed) supra n 7, 281 at 283-284.

[109] Cenac supra n 71 at 13-18.

[110] In practice in Saint Lucia, some co-owners live on and farm the land; but those who do not do so nevertheless have a right to come back and farm if they wish, and this is readily accepted in time of need. In this way, family land is a social and economic safety net. See eg Besson, J (1987) 'A Paradox in Caribbean Attitudes to Land' in Besson, J and Momsen, J (eds) *Land and Development in the Caribbean* Macmillan at 27-30.

[111] Cenac n 71 at 88-93; see also Dujon, V (1997) 'Communal Property and Land Markets: Agricultural Development Policy in St Lucia' (25) *World Development* 1529.

[112] Eg Barnes, G and Griffith-Charles, C (2007) 'Assessing the Informal Market and Deformalization of Property in St Lucia' (24) *Land Use Policy* 494.

[113] See eg de Sousa Santos, B (1977) 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargarda' (12) *Law and Society* 5; Edésio, F and Varley, A (eds) (1998) *Illegal Cities: Law and*

CONCLUSIONS

The three Commonwealth Caribbean jurisdictions of Guyana, Trinidad and Saint Lucia are thus examples of mixed jurisdictions in both their traditional and non traditional forms. In the three, traditional mixity between civil and common law resulted from British military successes in the imperial clashes of the 17th to 19th centuries. The Roman-Dutch, Spanish and French civilian heritages survived with mixed success in the three jurisdictions. All three were subjected to similar legal pressures to assimilate: substantive changes to large areas of the law; largely inaccessible civil law sources, written in languages which few were able to read; adoption of English as the language of the laws, the government, and the courts; administration of justice following common law procedures by common-law trained lawyers and judges who were by-and-large unfamiliar with and unsympathetic to the civil law traditions they were administering; and so on. But the extent to which each of the three colonies succumbed to assimilation pressures is probably due more to extra-legal factors than to legal ones.

The chances of survival of a minority legal tradition are much stronger where there is a degree of affinity between the population and its legal system, where the majority of the population regards it as part of their heritage and a reflection of their own identity. It is admittedly difficult, even artificial, to look for widespread affinity in the population of the three colonies to any legal system, as the vast majority were slaves, indentured labourers or otherwise disenfranchised.[115] The choice of legal system was largely a matter for the elite. That said, the concordance was strongest in Saint Lucia, which was an established, settled colony at the time of the conquest. The colony had been French for some 150 years prior to conquest; the population remained relatively stable after conquest, without a sudden influx of new English planters and merchants, new slaves or indentured labourers. The population remains largely Roman Catholic, and the French language (creole) has not only survived but is increasingly treated with pride.[116] This bodes well for a continued survival of the French legal system on the island. The concordance between population and legal system was weakest in Trinidad, where Spanish settlement never really caught hold and the population was largely French even prior conquest. Moreover, both Trinidad and Guyana were the 'wild west' of the Caribbean, with much vacant land available for newcomers.[117] The composition of the elite of two colonies thus changed rapidly, becoming more English, and this happened more quickly in Trinidad than in Guyana. By the end of the 19th century, there were few or no

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Urban Change in Developing Countries Zed Books; and Matthews Glenn, J and Bélanger, V (2003) 'Informal Law in Informal Settlements' in Holder, J and Harrison, C (eds) *Law and Geography* (Current Legal Issues Volume 5) Oxford University Press 281.

[114] Eg Reisman, M (1985-1986) 'Lining Up: The Microlegal System of Queues' (54) *University of Cincinnati Law Review* 417.

[115] Early statistics show that around the time of the emancipation of the slaves in the 1830s, inhabitants of European origin constituted around 3% of the population in Guyana, 8% in Trinidad and 12% in Saint Lucia: Dupont supra n 11 at 208 and 295; 'Saint Lucia' *Encyclopaedia Britannica*, available at <http://www.search.eb.com/>.

[116] See eg Lieberman, D (1975) 'Language Attitudes in St Lucia' (6) *Journal of Cross-Cultural Psychology* 471; and Frank, DB (1993) 'Political, Religious and Economic Factors Affecting Languages Choice in St Lucia' (102) *International Journal of the Sociology of Language* 39; Nwenmely, H (1999) 'Language Policy and Planning in St Lucia: Stagnation or Change?' (13) *Language and Education* 269. The 2000 Throne Speech, by the Governor General at the opening of the legislative session of the Saint Lucia Parliament, was delivered partly in Creole: see supra n 83.

[117] Abolition of the slave trade in 1809 thus created difficulties for the two colonies, Trinidad in particular; and in 1812 a registration system for slaves was put in place – not without difficulty – to control the smuggling of slaves: see John supra n 20.

descendents of the original continental Spanish settlers in Trinidad, and only about 1% of the population of Guyana was Dutch.[118] It is not surprising, therefore, that assimilation in Trinidad was virtually complete by the mid 19th century, and took about 60 years more in Guyana to be almost complete.

As for possible forms of non traditional mixed jurisdictions suggested by the three jurisdictions, mixity between European and aboriginal law, as with the Guyana example, seems closest to traditional mixity. Both ask the same questions about on-going application of pre-existing law, and both invoke similar principles of continuity in response. The two principles differ, however, in that the aboriginal principle of continuity envisages aboriginal rights applying only to the original inhabitants, with the newcomers being subject to their own laws,[119] whereas in traditional mixed jurisdictions, continuity results in an on-going generalised application of the old law, until changed, to newcomers and old residents alike. However, both principles were developed at about the same time and form part of the same imperial constitutional law. Extending the notion of mixed jurisdictions to include aboriginal law would share the logic of historical layering that is inherent in most traditional examples of mixed jurisdictions.

The other two examples – formal mixity between secular and religious law, as in Trinidad, and informal mixity between formal and informal law, as in Saint Lucia – are both possible extensions of the notion of mixed jurisdictions, although these are less compelling than the previous example. Formal mixity between secular and religious law does not always have the same historical dimension as traditional mixity, not does it result in a generalised layering of laws but rather in the creation of pockets, or enclaves, of personal law; nevertheless, the formality of the mixing helps ensure a certain 'crispness' in the analysis of the relationship between the two sets of laws, similar to that applying to traditional mixity. Mixity between formal and informal law is the furthest removed from traditional mixed jurisdictions. It raises interesting questions, and there is mixing. But to include it within the notion of 'mixed jurisdictions' runs the risk of extending the notion beyond recognition.

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[118] Dupont supra n 11 at 210.

[119] The extent to which aboriginal law can have a territorial as well as a personal dimension is still being worked out in Canada. See eg Matthews Glenn, J (1999) 'Aboriginal Rights and Sustainable Development in Canada' (48) *International and Comparative Law Quarterly* 176.