BOOK REVIEW

MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY. By Vernon Valentine Palmer (ed.). Cambridge University Press 2001. 470 pp. plus Appendices.

Reviewed by Alain Levasseur[*] & Jackie M. McCreary[†]

The very notion of mixed jurisdiction and its agreed upon confinement or restriction to a greater or lesser mingling of two of the most widely spread legal traditions, the civil and the common law, have for the most part garnered the approval of comparatists. F.P. Walton referred to mixed jurisdictions as "legal systems in which the Romano-Germanic tradition has become suffused."[1] Suffusion is the concept often used to describe mixed jurisdictions in that a mixed jurisdiction is an overspreading of two legal systems into a culmination of one. Walton's view contrasts with that of Palmer who writes that "Israel and Scotland are the only states of this kind [mixed] which one might say freely chose to become hybrid and did so as independent countries. The others acted under compulsion."[2] Palmer also writes that

> [a]n under-emphasized but vital fact is the difference between British- and American-influenced mixed jurisdictions. Although both influences are common law, . . . [c]ivil law in South Africa, Quebec, and Israel has *cohabited* exclusively with the English common law, . . . [o]n the other hand, civil law in Louisiana, Puerto Rico and the Philippines has lived in *turbulent monogamy* with American[3] law.[4]

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1. F.P. WALTON, THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA 1 (1907) (M. Tancelin ed., Butterworths 1980).

2. VERNON V. PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 5 (Cambridge Univ. Press, United Kingdom 2001). Professor Palmer is the Thomas Pickles Professor of Law at Tulane University School of Law.

3. To some degree by Anglo-American law.

4. PALMER, *supra* note 2, at 6 (emphasis added).

R. Evans-Jones wrote that a mixed legal system is "a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions."[5]

If, in these definitions, the accent is on the identification of a mixed jurisdiction as living under a legal system mixing the civil law and the common law, it should be acknowledged that other types of "mixités" or mixtures or minglings of legal systems can exist. There is, indeed, no reason why a country would not qualify as a "mixed jurisdiction" if its legal system were a mixture of written law and customary law, or religious law and secular law. As long as a national or state legal system is a vivid example of a mixture of legal systems or traditions, whatever their nature and whatever the degree of inter-penetration, absorption, cohabitation or suffusion of these legal systems, that mixed legal system is in use in a mixed jurisdiction.[6] Yet, the expression "mixed jurisdiction" has become identified[7] with the legal system in force in a country (South Africa), a state (Louisiana) or a province (Quebec) where the civil law and the common law traditions have mixed, and still mix, to a greater or lesser extent. That identification has been usurped by the civil law and the common law pushing and shoving aside other mixed legal traditions in the making of a new legal family—their offspring—which Professor Palmer has named "The Third Legal Family."[8]

Talking about offspring, only a child of this family could write so eloquently, so vividly, and so emotionally about the "Third Family." Raised and educated in the state of Louisiana and, for the last thirty years, a pillar of the Tulane Comparative Law Faculty, Professor V.V. Palmer is one of only a handful of legal scholars who could paint before our eyes such a lucid, methodical, insightful, and heart-felt presentation of the nature and features of a "mixed jurisdiction" as he describes it. His feel for the subject matter, his mastership of comparative law, his breadth of knowledge and experience of a wide variety of existing legal orders, and his humanist perspective on law entitle him to take the

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5. THE CIVIL LAW TRADITION IN SCOTLAND (R. Evans-Jones ed., 1995).

6. It could be said, however, that every legal system is a "mixture," to a greater or lesser degree, of a variety of absorbed, digested legal systems: natural law mixing with positive law; positive law with jurisprudence; public with private . . . so, in a sense every system in the world would fit under "mixed jurisdiction." Hardly a classification tool!

7. By the words of the *oracles of the law* as in the civil law tradition or by the force of *precedent* as in the common law tradition.

8. Was there some hesitation or uncertainty on Palmer's part where, on the cover page of the book, the different print and characters of the title *The Third Family* appear to make it a sub-title? Is Palmer launching a "trial balloon" in the hope that the legal community will legitimize his "offspring?" Was it the publisher's decision to emphasize *Mixed Jurisdictions* over *The Third Family?*

leadership, and the well deserved credit, in making the assertion that a new legal family has emerged and that this "Third Legal Family" of Mixed Jurisdictions has now reached maturity with its own personal identity. The whole purpose of the book[9] is to prove, through common experience, that there exists a commonality of features—three all together—making some jurisdictions the component members of this new legal family and that the methodology used to penetrate the originality of this new family is that of "a horizontal 'cross-comparative' focus."

The core of the book, Part II: The Comparative Evidence, is built on seven reports written in response to a questionnaire drafted by Vernon Palmer.[10] The questionnaire reflects the preselection of subjective assumptions, which Palmer does not hide,[11] meant to demonstrate that, given some historical factors, the civil law and the common law interact in a certain general way, a Mixed Way, built around three common features. Palmer identifies these as (1) the specificity of the mixture, (2) a quantitative and psychological characteristic, and (3) a structural allocation of content.

These common features are extracted from reports whose authors are well-known and highly regarded comparatists writing about their own mixed jurisdiction. The roster is most impressive, and therefore credible, with names like Agabin, Baudouin, Brierley, Colón, De Waal, Du Plessiss, Farlam, Goldstein, Leslie, Reid, Van Der Merwe, Zimmermann, and Palmer, of course. Each one of these reports is worth reading and we encourage the reader to ride on the seas of comparative law as one moves from South Africa to Scotland, the Philippines to Puerto Rico, Quebec to Louisiana, to rest on the shores of Israel. One notices that all these jurisdictions have at least one other thing in common: they border on waters that carried the waves of "cultures, languages, religions, peoples."[12] For those very reasons, these jurisdictions have presented fertile territories "where common law and civil law coexist and commingle and constitute the basic materials of the legal order."[13]

Palmer played the dexterous role of the maestro conducting the Première of a symphony and a Première it is indeed. His touch is subtle and fresh, his creativity is cogent and, yet, sensitive; his feelings inspire

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9. Palmer states in the preface that "the aim of this book is to understand the mixed-jurisdiction experience." PALMER, *supra* note 2, at ix.

10. *See id.* app. A, at 471.

11. "I was led to consider a simplified format, rather than an encyclopedic list, which held down the number of questions and also revealed my purposes more clearly." *Id.*

12. *Id.* at x.

13. *Id.* at ix.

his language and touch the reader. Ponder the following: "The mixed jurisdictions have lived in physical and intellectual isolation, cut off from family members around the world. In a sense, each was born one of a kind, an only child who was destined to develop introspectively, conscious of its "otherness" and crossbreeding."[14] And: "Situated at the four corners of the earth, the mixed jurisdictions now seem to be great solitaries, separated by cultural gulfs and vast ocean stretches."[15]

If we were pressed or merely asked to find some flaws in this otherwise excellent book, it would be on the methodology resorted to, and the substantive materials relied upon, by Professor Palmer. We were a little puzzled by the "uneven" treatment given to the selected jurisdictions in the extent of the reports they were to submit on the basis of the questionnaire prepared by Palmer. Why did some "mixed jurisdictions" submit two reports while others turned in one only?[16] It is not so much the actual number of reports that bothers us. After all, Palmer's report on Louisiana—and the only one on Louisiana—is longer than the two Scotland or Quebec reports, but there are obvious risks, not to say dangers, that one runs in being faced with the possibility of either conflicts, inconsistencies, or major differences in the treatment of the same subject matter by the two reporters of the same jurisdiction. Ambiguity, confusion, or uncertainty might occupy the reader's mind. A look at the reports from Scotland might be used as an example. For example, Report Number 1 gives us answers to Questions I-a, I-b, and I-c[17] which, although very short, and may for that very reason, appear to be inconsistent with the single answer given to the same questions by Report Number 2.[18] Or is it only a question of disagreement between the two reporters? In the same two reports, we find that "in medieval times the law of the independent Kingdom of Scotland . . . was basically Germanic law. The land law at the time was feudal . . . ."[19] To the extent we could ascertain, Report Number 1 made no reference to what, we believe, were fundamental sources of the law of Scotland. On the flip side of the coin, Report Number 1 makes an important reference to the

14. *Id.* at 3.

15. *Id.*

16. For example, South Africa, 2 reports; Scotland, 2 reports; but Puerto Rico, Louisiana, and Israel, one report. Most certainly, Professor Palmer must have had reasons that should remain personal to anyone who has had the experience of working with an array of "contributors!"

17. PALMER, *supra* note 2, at 208.

18. *Id.* at 242.

19. *Id.* at 240-41.

jus commune[20] whereas, it appears to us, no such important reference to the law of the European continent is made in the second report. One will also wonder why the two reports cover the "judicial reception of common law" in so drastically different manners and depth.[21] Isn't that topic on the role of the judges at the heart of the distinctive features of the common law and the civil law?[22]

Another obvious danger when dealing with different jurisdictions (should we say particularly with "mixed jurisdictions" since one legal system may, surreptitiously and mischievously, carry more weight in one mixed jurisdiction than in another) is a misunderstanding on the fundamental meaning of a legal institution brought about by the use of the same single terminology. The concept of "quasi-contract" illustrates very well the problem. Palmer, in the questionnaire sent to the reporters, uses the legal expression "quasi-contract"[23] under Generalization VII-1, in a civil law sense, thereby creating the risk of confusion with the very different common law notion of quasi-contract. This may have been the reason why South African Report Number 2 suggested, very diplomatically and wisely, that the preferred expression to be used should have been "unjustified enrichment," and he is followed in this respect by Report Number 1 from Scotland.[24] We wish, in this respect, that Professor Palmer had followed the structure and terminology of the Louisiana Civil Code of today, Palmer's own code, which has a Title V of Book III entitled "Obligations Arising Without Agreement" and a Chapter 2 with the title "Enrichment Without Cause."[25] Such terminology would avoid the confusion with the common law concept of quasi-contract which has so plagued the Louisiana jurisprudence in the past.

Our most grateful thanks to Professor Palmer for having given identity to the Louisiana legal system brought to the shores of this state on the swords of soldiers, the writings of scholars, the ambitions of kings, and the eloquence of jurists of, at least, three different legal systems. The "third family" has become alive under the highly sensitive and precise

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20. *Id.* at 202-03.

21. *Compare id.* at 226-32, *with id.* at 249-52.

22. There is a difference also in the terminology. For example, see *id.* at 227, wherein the first report refers to "unjustified enrichment." But see *id.* at 249, wherein Report Number 2 uses the term "unjust enrichment." A lawyer trained in the civil law will readily seize the depth in the difference between the terms "unjustified" and "unjust."

23. *Id.* at 475.

24. *Id.* at 227; *see also* Report Number 1 for Quebec, *id.* at 341.

25. Because we are talking about "mixed jurisdictions" we cannot but call the reader's attention to the civil law concept of "cause" in the title of this legal institution.

pen of our colleague whose "Introduction" to the book should become required reading for all concerned with the "human" face of the law. Is the "mixed jurisdiction" the jurisdiction of tomorrow?[26]

26. One could think about the law of the European Union.