

Mixed Legal Systems— The Origin of the Species

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I. INTRODUCTION¹

The concept of mixed legal systems is essentially a modern idea that increasingly shapes discussions about the nature of the world’s legal systems. A mere fifty years ago, such systems were treated as legal aberrations and were rarely discussed. The focus then was upon a coherent ordering of *les grands systèmes* and no space was found in conventional taxonomies for composites and hybrids. Under the influence of “mixed jurisdiction” studies and legal pluralism, however, there is growing awareness that mixed systems, whether restrictively or expansively defined, are a widespread and recurrent reality. They have recurred too often and have endured too long to be regarded as accidents and anomalies. They are here to stay and very numerous, and yet they are regarded as invisible. A recent study by the University of Ottawa² maintains that ninety-one countries should be categorized as ‘civil law’, and forty-two countries as ‘common law’. However, according to the same study, *ninety two countries*—the highest number of all—should be seen as ‘mixed’ systems. The study arranges these “mixed systems” into ten subcategories, under varied rubrics reflecting different combinations, *such as* ‘Common Law and Muslim law’, ‘Civil law and Customary law’,

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1. This Article relies to a considerable extent on V.V. Palmer ed., *Mixed Jurisdictions Worldwide: The Third Legal Family* (2d ed. CUP 2012) at 19-92, and my chapter “Mixed Legal Systems” found in Mauro Bussani & Ugo Mattei eds., *Cambridge Companion to Comparative Law* (Cambridge Univ. Press 2012), at 368-83.

2. N. Mariani & G. Fuentes, *World Legal Systems* (Ottawa: Wilson & Lafleur, 2000).

‘Muslim law and Customary law’, and ‘Common Law and Civil Law’. It is thus apparent that all the legal traditions—the Western, Eastern, Asian, Jewish, Islamic and Sub-Saharan—have provided the basic legal material from which this heterogenous array of hybrids was created.³ The reader will find the categories and combinations of the Ottawa study set out in Appendix A. The so-called ‘Mixed Jurisdictions’ make up roughly sixteen political entities, of which twelve are independent countries. Most are the former colonial possessions of France, the Netherlands or Spain which at some time in history acquired by Great Britain or the United States. Scotland and Israel, however, are exceptions to this pattern.

An important difference of opinion, however, exists over the proper meaning and constituent elements of a mixed system. There are really two camps. Scholars in the classic “mixed jurisdiction” tradition, tend to follow the footsteps of early British comparatists (see Part II below), and they tend to focus upon a single kind of hybrid where most of the comparative research has been done. These scholars have focused their attention upon the systems which straddle Common law and Civil law.⁴ If their perspective is accepted, the number of mixed systems in the world shrinks to fewer than twenty countries.⁵ However, many scholars of legal pluralism (which includes the comparatists who conducted the Ottawa study just mentioned) use a more expansive, factually-oriented approach that absorbs the classical “mixed jurisdictions’ into a larger mass of “mixed legal systems,” which not only exponentially enlarges the field but leaves classifications in disarray.

In this Article I will be concerned with understanding the origins, implications and insights of these two rival theories of mixed systems. Since the classical idea ‘mixed jurisdiction’ had historical priority over that of the “mixed legal system” *tout court*, we may turn to the earlier idea first.

II. THE CLASSICAL MIXED JURISDICTION CONCEPTION—ORIGINS

At the beginning of the twentieth century many western jurists tended to think in bipolar terms: on the one side there was the empire of

3. *Id.*

4. T.B. Smith, *Property and Trust*, vol. 6, *International Encyclopedia of Comparative Law* (Leiden: Brill, 1974); Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1.

5. J. du Plessis, “Comparative Law and the Study of Mixed Legal Systems” in M. Reimann & R. Zimmermann eds., *The Oxford Handbook of Comparative Law* (N.Y.: Oxford Univ. Press, 2006) at 477.

Common Law and on the other side the empire of Civil Law. Indeed this bipolar conception had a geographical structure in the form of the colonial possessions of the mother countries of Europe. It was within this crude dichotomy that the idea of the “classical mixed jurisdictions” first came to life. Previously, places such as South Africa, Quebec and Scotland merely presented strange and puzzling legal phenomena. In a bipolar world their type of private law could be given no particular name and they occupied no particular place. One group of British comparatists, however, took a great interest in studying these systems. They may be regarded as responsible for their “discovery” and for championing them in their research and writings. The leading figures were F.P. Walton, R.W. Lee, M.S. Amos, F.H. Lawson and T.B. Smith.⁶ Their special contribution—novel at the time—was to show that these jurisdictions which straddled or combined the two worlds and did not exactly adhere to either one or the other, were valuable and interesting in their own right. The idea of mixed jurisdictions, Kenneth Reid concludes, was “the product of a failure of classification.”⁷

As early as around 1900, Frederick Parker Walton, the Oxford-trained Scotsman who was then Dean of the law faculty at McGill in Quebec, began writing about these hybrids in some detail. In his earliest article, Walton undertook a comparison of Quebec, Louisiana and Scotland and he observed that these jurisdictions “occupy a position midway between the Common law and the Civil law.”⁸ He argued that Scotland could no longer be considered a civil law country, though it may have once been, for (he argued) it had accepted (or had been forced to accept) English mercantile law, the doctrine of *stare decisis*, and a mass of English legislation made applicable to Scotland. Quebec seemed to be in much the same position. Its civil code was French law, but it displayed a strong tendency to accept the doctrine of *stare decisis*; its mercantile law and rules of procedure were generally English, and the Quebec courts embodied all the institutional powers of a common law court. These English counterweights to the codified Civil Law in Quebec made for “a peculiar and separate system.”⁹

Robert Warden Lee expanded the investigation well beyond the parameters treated by Walton and to my knowledge he was the first to

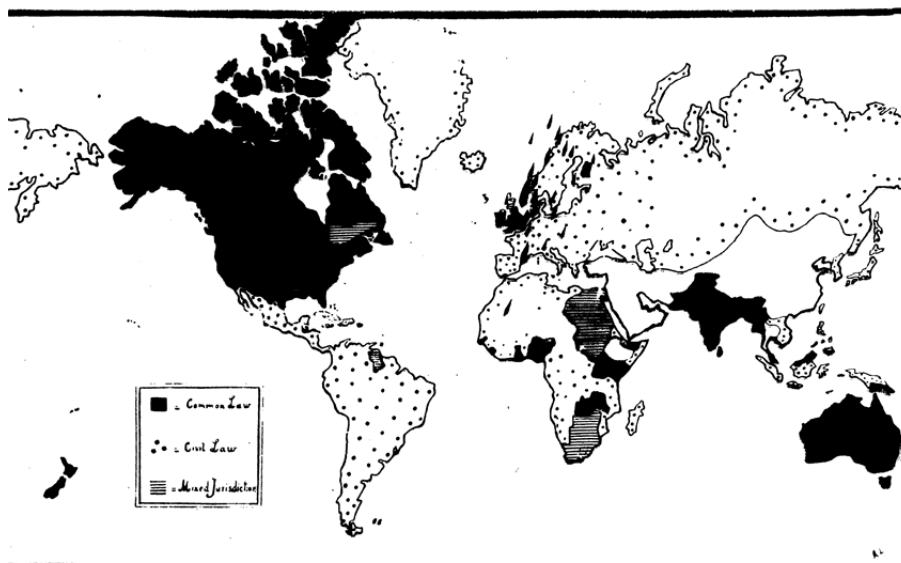
6. K. Reid, “The Idea of Mixed Legal Systems” (2003) 78 TUL. L. REV. 5; V.V. Palmer, “Two Rival Theories of Mixed Legal Systems” (2008) 3 J. COMP. L. 7.

7. Reid, *supra* note 6.

8. F.P. Walton, “The Civil Law and the Common Law in Canada” (1899) 11 JURIDICAL REV. 282.

9. F.P. Walton, “The Legal System of Quebec” (1913) 13 COLO. L. REV. 223-25.

launch the expression “mixed jurisdictions.” Previously a magistrate in Ceylon where he acquired a life-long interest in Roman-Dutch law, Lee succeeded Walton in the deanship at McGill. He published in 1915 an article entitled “The Civil Law and the Common Law—A World Survey”.¹⁰ Here Lee attached a primitive hand-drawn map of the world which is of the greatest historical interest to this subject.¹¹



THE CIVIL LAW AND THE COMMON LAW—A WORLD SURVEY

Lee’s purpose in this *mappa mundi* was to give the reader a survey of the points of interaction between the civil and the common law worlds. His map was the first graphic to capture the *dispersed fields* of this interaction. The legend one sees in the left corner of the map indicated that the eight countries marked with horizontal stripes were “mixed jurisdictions.” These were Quebec, Louisiana, British Guiana, Scotland, South Africa, Egypt-Sudan, Ceylon and the Philippines.¹² The common-law countries like the United States and Australia were marked with dark shading, while the civil-law countries like Germany and Russia were shown by dotted marks. The professed aim of the article itself was to

10. R. Warden Lee, “The Civil Law and the Common Law—A World Survey” (1915) 14 MICH. L. REV. 89.

11. Reid, *supra* note 6.

12. The treatment of some of these countries, for example Scotland and Ceylon, can barely be seen, but they receive the horizontal stripes as well.

assess how the Civil Law forces inside these mixed systems were holding up against what he called the “ceaseless intrusions” of the Common Law.

For more than a century past the Civil Law has been on the defensive. It is the Common Law that has been the active aggressor. I shall speak principally of the struggle between the two systems in some of the British Colonies. But the same tendencies, I believe, may be detected in other Civil Law jurisdictions, such as the State of Louisiana and the Philippines.¹³

Thus Lee saw the mixed jurisdictions as legal battlegrounds within the far-flung British Empire, which was literally at war with civil law countries at the time. Every example he used seemed to show the effects of assimilation, capitulation or resistance by the Civil Law in regard to the offensives launched by the Common Law within mixed jurisdictions. To that end he took the reader through a long list of examples.¹⁴ The words “mixed jurisdiction”, however, appeared merely once in the article and this was not even in the text. It was found only in the legend of his map. To this day it is unclear where Lee obtained this peculiar expression and why he was reluctant to use it systematically. It has been speculated¹⁵ that his most likely inspiration was the international mixed tribunals of Egypt which were sometimes described as “the mixed jurisdictions.” Whatever the case the concept gained a foothold, at least among the British comparatists, and has been kept to this day.

Interestingly, though Egypt figured in Lee’s map as a mixed jurisdiction, this was temporary. It is no longer regarded as a member of this group, at least not in the classical sense of the term.¹⁶ Nevertheless, the country was a *rendez-vous* point for the personalities involved in promoting the mixed jurisdictions. Walton left Quebec for Cairo and joined a third English comparatist already there, Sir Maurice Sheldon Amos. Amos was deeply involved in Egypt’s complicated French/Islamic/British legal system. Fluent in Arabic and French, he served on the Egyptian Court of Appeal, later became Director of the Khedival School of Law (Walton was his successor), and later became judicial adviser (essentially minister of justice) to the Egyptian government. A close association with Walton bore fruit in a notable book—Amos and Walton *Introduction to French Law*. In 1936 Amos

13. Lee, *supra* note 10, at 94.

14. Lee employed a wealth of examples from each jurisdiction in a systematic review of five areas of private law. *Id.* (Persons, Property, Obligations (Contract and Delict), Successions, and Procedure). Egypt is only mentioned once in passing, and no example is taken from its law.

15. Palmer, *supra* note 6.

16. Due to subsequent legal and political changes. See V.V. Palmer, “Quebec and Her Sisters in the Third Legal Family” (2009) 54 MCGILL L.J. 321.

published an article in the *Harvard Law Review* that surveyed all British possessions in which Common law and the Civil law were combined. It was again a panoramic account of the mixed jurisdictions, though the term was not used.¹⁷

These cosmopolitan figures, their feet at times diversely planted in Montreal, Edinburgh, Cairo and Colombo, led the *præ*-campaign for wider recognition of these interesting systems. Another influential figure in the campaign was F.H. Lawson at Oxford. Lawson was T.B. Smith's mentor at Oxford during the latter's legal studies and he had a surprisingly deep knowledge of Scots law. He saw educational value in the comparative study of Scots law and mixed systems generally. In his inaugural address in the chair of comparative law at Oxford, he called attention to "a most interesting group of laws which, because they display the influence of English law on a body of doctrine already profoundly Romanized, stand between the common and the civil law systems."¹⁸ He remarked in conclusion, "I have spoken at length about these hybrid laws because I regard them as peculiarly favourable fields for comparative work in an English university."¹⁹

Beginning in the 1960s T.B. Smith began to write extensively on the subject of mixed jurisdictions,²⁰ and mounted a kind of international campaign on their behalf. He made extended visits to Louisiana, South Africa and Quebec, and invited foreign colleagues from those places back to Edinburgh on teaching visits. Smith embraced the term "mixed jurisdictions" as no predecessor had done, and he employed it in the restricted sense of systems in which common law and civil law elements in the private law interacted and vied for supremacy. At first he carefully placed the term in quotation marks, and for literary variation he occasionally substituted the words "mixed system", but this did not change the countries to which he was referring. In 1963 he introduced the term into the title of an article essay for the first time and in the essay he ventured a fairly weak definition. He deemed a mixed jurisdiction to be 'basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence'²¹

17. M.S. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1936-1937) 50 *HARV. L. REV.* 1249.

18. F.H. Lawson, "The Field of Comparative Law" (1949) 61 *JURIDICAL REV.* 16, 26.

19. *Id.* at 29.

20. T.B. Smith, *Studies Critical and Comparative* (Edinburgh: W Green & Son, 1962).

21. T.B. Smith, "The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'" in A.N. Yiannopoulos ed., *Civil Law in the Modern World* (Baton Rouge: La. State Univ. Press, 1965) at 4.

Within a few years scholars from Quebec, Louisiana and Scotland followed his lead and adopted this definition. It became part of the basic grammar of comparative law when Smith published his entry “Mixed Jurisdictions” in the *International Encyclopedia of Comparative Law*.²² Here he declared,

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

Smith had a number of practical aims in mind. He conducted cross-comparative studies of the mixed jurisdictions in order to strengthen and preserve their civilian character. He noted that “lawyers in these systems have hitherto tended to work in isolation, and to forget that ‘neighbors in law’ are not necessarily those closest geographically.” His notion of legal ‘neighborhoods’ was a rather boundless one, based on shared characteristics, common problems, methods, sources and similar histories.

Later research has confirmed his view that there is an inner relationship to this cluster of ‘common law/civil law’ systems. I have referred to them as a “third legal family,”²³ which one writer at least regards as a “novel epistemic move.”²⁴ The word family of course is not used in the biological sense nor does the claim of a ‘third’ family imply there are no other families in existence. Indeed I believe there undoubtedly are other families awaiting investigation and discovery once we free ourselves from the shackles of binary thinking. Rather the word ‘family’ simply invites attention to the fact that the classical mixed systems have an impressive unity despite the indisputable diversity of peoples, cultures, languages, climates, religions, economies and indigenous laws existing among them. Indeed it is the background presence of these highly diverse settings which makes legal unity all the more remarkable and impressive.²⁵ The foundation for these tendencies lies in history. Generally, in most cases, a civil law shaped by the reception of Roman and Canon laws was initially implanted. A tide of

22. Smith, *supra* note 4.

23. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1.

24. J. Husa, “Legal Families” in J. Smits ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) at 382.

25. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1.

common-law influence later ensued, and a neo-civilian reaction to that influence occurred in the 20th century.²⁶

History bequeathed to these systems three abstract characteristics that set them apart from other mixes and other families of mixes. The *first characteristic* is the specificity of the mixture in question. Their private law is built upon dual foundations of common-law and civil-law materials. The words “mixed jurisdiction” singles out a mixture which is exclusively western: the Romano-Germanic and Anglo-American elements. A *second characteristic* is quantitative and psychological. The presence of these dual elements in a classical mixed jurisdiction will be obvious to an ordinary observer. There seems to be a quantitative threshold to be reached before a given system is deemed a mixed jurisdiction. This factor explains why the states of Texas and California, which indeed have some civil law in their bloodstream are generally regarded as “common-law” states, but the state of Louisiana is regarded as a mixed jurisdiction and the others are not. A *third characteristic* is structural. In every case the civil law will be cordoned off within the field of private law, thus creating the distinction between *private* continental law and *public* Anglo-American law. This structural allocation of content is invariably present in this subset.

Some may regard these characteristics as too abstract to be more than a formal means of differentiating, say, South Africa, Quebec, and Scotland from the wide variety of hybrid and pluralist systems that can be found in the world today. Yet as we go deeper and study the infrastructure of the classical systems more closely, we begin to see that, as Smith pointed out fifty years ago, they display common problems, common traits and similar patterns of behavior.²⁷ This may be illustrated here in six points.

26. This particular sequence is not invariable. Scotland and Israel’s distinctive bijurality came about differently. So too did the so-called ‘second wave’ mixed jurisdictions like Botswana, Lesotho and Namibia.

27. Of course we must not overlook that they have separate personalities, styles and legal sources. The sources of law in the mixed jurisdictions are not uniform. The French group (e.g., Quebec, Louisiana, Mauritius) is characterized by the influence of the Code Napoléon and thus possess civil law in a hardened form which is thought to be more highly resistant to common law penetration. The Dutch group (e.g., South Africa, Botswana, Sri Lanka) consists of uncodified Roman-Dutch law that stems from institutional writers such as Grotius and Voet and relies upon a stronger system of *stare decisis*. The Spanish group (Puerto Rico, the Philippines) is somewhat like the French group because the 1889 civil code of Spain was crafted in the mould of the French Code civil. On the opposite side of the coin, whether the jurisdiction’s common law stems from Great Britain or the United States of America makes a palpable difference to the character of the system.

- (1) In all these systems civil law rules and principles are filtered through Anglo-American institutions. The civilian substance is therefore often openly or insensibly modified by courts and judges in the common law mould who are something more than neutral conduits.
- (2) Judicial decisions are given strong precedential value even though the civil law comes in hardened codifications in which case law is claimed to have low value. Yet the primordial value of case law in Louisiana and Quebec, however, is well known, despite official denials to the contrary. In three systems (Scotland, South Africa and The Philippines) court decisions are accepted as an official source of law second only to legislation.
- (3) Civil procedure is adversarial and Anglo-American. The common law origins of this procedure, where substantive law is interstitially inseparable from the remedies, leaves a visible imprint on the substantive civil law.
- (4) Common-law rules and principles have, historically, made deep incursions into the civil law sphere of each country, but it has followed predictable paths, by penetrating the most porous points of entry, such as the law of delict, while leaving resistant institutions like property law relatively unaffected.
- (5) Commercial law in all these countries was transformed and replaced by Anglo-American commercial law, because of pressure to conform to the norms of the dominant Anglo-American economy.
- (6) Historically, these systems have been shaped by jurists who have been called purists, pragmatists and pollutionists. These distinctions reflect a divisive split among the jurists and the literature, and it has been a characteristic (and formative) feature of legal evolution.²⁸

28. The purists are partisans of the civil law, who wish to keep the private law pure and deplore common law encroachment. Purists normally have civilian legal training and speak a continental language. Pollutionists are usually of Anglo-American ancestry (or English-speaking nationals) who may believe in the superiority of the common law. They may have common law training and favor reception of common law rules or even the overthrow of civil law. Pragmatists normally have bijural legal training and take a more detached view of the law. For them the interaction of common and civil law allows the judge or legislator to mix the rules of each tradition and create superior rules than either system could produce on its own. The three groups seem to be different than ordinary schools of legal thought. They are indigenous to the mixed jurisdiction environment and have no identity in other kinds of systems. Today, however, their differences may be more historical than topical.

Today mixed jurisdiction studies are flourishing. The past ten years have seen three large-scale historical and comparative works under the editorship of Reid, Visser and Zimmermann which explore the connections between South Africa and Scotland.²⁹ A comparative survey and analysis of seven systems appeared in 2001,³⁰ and in a later 2012 edition this survey was expanded to nine countries.³¹ A new international organization to support further research was founded in 2002.³² The papers of three Worldwide Congresses (New Orleans 2002, Edinburgh 2007, Jerusalem 2011) have added to the growing literature.³³ The first comparison of Louisiana and Scots private law appeared in 2009.³⁴ As Jacques du Plessis has well said, the movement that was once a one-man band led by T.B. Smith has now become an entire orchestra.

The label “mixed jurisdictions” thus refers to a circumscribed subset of countries with a specific history and a rather large comparative literature. The label resonates with modern comparative lawyers (certainly those in the Anglo-American wing) but it has not been well understood by a wider community. Indeed it has been readily confused with, even partly absorbed by, a wider theory advanced by multidisciplinary comparatists, legal anthropologists and pluralists. To the broader pluralist conception we now turn.

III. THE PLURALIST CONCEPTION

Perhaps a more liberal conception of the mixed legal system necessarily follows from pluralism’s broader pursuit of legal phenomena, as when attention is focused not only to customary law, tribal law, and religious law recognized by the state, but also on the unrecognized and unofficial laws which escape state control and constitute the living law.³⁵

29. See R. Zimmermann & P. Visser, *Southern Cross* (Oxford: Clarendon Press, 1996); R. Zimmermann, *History of Private Law in Scotland*, 2 vols. (Oxford: Oxford Univ. Press, 2000); R. Zimmermann, P. Visser & K. Reid eds., *Mixed Legal Systems in Comparative Perspective* (Oxford Univ. Press: Oxford, 2004).

30. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1.

31. *Id.*

32. The World Society of Mixed Jurisdiction Jurists, www.mixedjurisdiction.org.

33. See “First Worldwide Congress” (2002) 78 TUL. L. REV. 1-501. The papers of the Second Worldwide Congress are found online in the *Electronic Journal of Comparative Law* (2008), www.ejcl.org, and also published in three journals: (2008) 23 TUL. EUR. & CIV. L.F. 37-173; (2007) 18 and (2008) 19 STELLENBOSCH L. REV. and (2008) 3 J. COMP. L. The papers of the Third Worldwide Congress have been distributed into four journals: (2011) 6 J. COMP. L.; (2012) LOYOLA L. REV., (2012) 57 MCGILL L. REV., and (2012) POCHEFSTROOM ELEC. L.J.

34. V.V. Palmer & E. Reid eds., *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh: Edinburgh Univ. Press, 2009).

35. The distinction, for G.J. van Niekerk, “Legal Pluralism” in J.C. Bekker, C. Rautenbach & N.M.I. Goolam eds., *Introduction to Legal Pluralism in South Africa*, 2d ed

Pluralism's focus is often upon colonial, neo-colonial and post-colonial societies in Africa and Asia where various personal laws coexist and interact with western law as continuing effects of legal history.³⁶ It may be the Hindu, the Muslim, Jewish or African customary laws which govern different communities within the same territory and necessitate the use of interpersonal conflict rules to determine which personal law applies to whom. There are of course certain differences between the notion of 'personal law' and 'private law'.³⁷ For purposes of this discussion personal law may be regarded as a subset of private law, a restricted list of topics (perhaps the most culturally significant legal areas) within the larger area of private law.³⁸ In this sense, personal law may signify an ethnic enclave or niche in the midst of official law.³⁹ Personal law and private law are therefore intertwined, and it is necessary to grasp the cultural connection in order to understand the characteristic structure of the mixed systems.

According to the pluralist conception any interaction of laws of a different type or source—indigenous with exogenous, religious with customary, western with non-western—is sufficient to constitute a mixed legal system.⁴⁰ This not only transcends the conventional taxonomies of comparative law, but suggests the logical starting point for the reform of those classifications.⁴¹ At bottom all systems may be described as diversified blends with unlimited possible recombinations: chthonic laws, religious laws (Jewish, Hindu, Islamic or Canon Law), law merchant, Natural Law, Roman Civil Law, Common Law and so forth. It is not difficult to discover five or six layers of exogenous elements in any single private law system one cares to examine. Zimmermann has pointed out that

(Durban: LexisNexis South Africa, 2007) at 5-14, lies in the difference between "state" pluralism and "deep" pluralism.

36. M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford Univ. Press, 1975).

37. In some systems the term 'personal law' may not be recognized as such. For example, it was unknown to classical Islamic jurists and did not gain currency until near the turn of the 20th century. J. Nasir, *The Islamic Law of Personal Status*, 2d ed. (Leiden: Brill, 1990).

38. For example, the topics of Jewish personal law recognized in India only relate to successions and marriage/divorce, whereas though Hindu personal laws in India have a somewhat broader coverage (successions, marriage and divorce, guardianship, adoption; joint family and partition, and religious institutions) they by no means fill the field of private law. The topics of Muslim personal law in India have similar scope. See C. Rautenbach, "Phenomenon of Personal Laws in India: Some Lessons for South Africa" (2006) 39 COMP. & INT'L L.J. S. AFRICA 244.

39. See W. Menski, *Comparative Law in a Global Context*, 2d ed. (Cambridge: Cambridge Univ. Press, 2006), 243.

40. Hooker, *supra* note 36.

41. Palmer, *supra* note 6.

All our national private laws in Europe today can be described as mixed legal systems. None of them has remained 'pure' in its development since the Middle Ages. They all constitute a mixture of many different elements: Roman Law, indigenous customary law, canon law, mercantile custom and Natural Law theory, to name the most important ones in the history of the law of obligations.⁴²

Of course ancient systems could hardly have been 'pure' either. Both in its construction and collapse, the Roman empire absorbed the personal laws of foreign peoples under its domination, and the Roman law was transformed in the process.⁴³

Today mention of 'mixed systems' is increasingly in vogue in European discussions. It is now not uncommon to hear that English Common Law has become a 'mixed' system,⁴⁴ and for that matter the European Union has been discussed as a mixed supranational system.⁴⁵ These characterizations suggest that *mixité* is becoming an alternative way of describing the effects of legal harmonization on member states and Europe itself. English law has absorbed close to twenty EC Directives affecting the area of traditional private law and English judges have at times used continental reasoning, including the principles of proportionality and legitimate expectation, the distinction between private law and public law, the use of teleological and purposive reasoning, and the concept of good faith.⁴⁶ In that light the Common Law's *mixité* may refer to transformations at a deeper level and by a different process than the language of transplants can convincingly describe.

42. R. Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford: Oxford Univ. Press, 2001) at 159.

43. V.V. Palmer, "Mixed Systems . . . and the Myth of Pure Laws" (2007) 67 *LA. L. REV.* 1205.

44. See T.H. Bingham, *There Is a World Elsewhere: The Changing Perspectives of English Law*, (1992) 41 *INT'L & COMP. L.Q.* 513; J.E. Levitsky, *The Europeanisation of British Legal Style*, (1994) 42 *AM. J. COMP. L.* 347; X. Lewis, *A Common Law Fortress Under Attack: Is English Law Being Europeanized?*, (1995) 2 *COLUMBIA J. EUR. L.* 1.

45. Thus H. Kötz, "The Value of Mixed Jurisdictions" (2003) 78 *TUL. L. REV.* 435, 439 ("It may sound a bit premature and starry-eyed, but I will say it nonetheless: let us hope that the gradual establishment of a European law as a mixed jurisdiction will allow us to combine the best of both worlds.").

46. Bingham, *supra* note 44, at 522-24; J.E. Levitsky, "The Europeanisation of the British Legal Style" (1994) 42 *AM. J. COMP. L.* 347; D. Nestorovska, "Influences of Roman Law and Civil Law on the Common Law" (2005) 1 *HANSE L. REV.* 79; M. Attew, "Teleological Interpretation and Land Law" (1995) 58 *MODERN L. REV.* 696. The incorporation in the year 2000 of the European Convention on Human Rights, thus effectively providing a written bill of rights for Britain, is another continental influence of major importance. See A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford Univ. Press, 2001).

IV. THE INTERSECTIONS AND ENHANCEMENTS OF TWO CONCEPTIONS

The overall effects of the pluralist conception on mixed jurisdiction studies are not entirely clear at this time, but there are important intersecting points.

Firstly, the pluralist approach to hybrids provides an important corrective against selective, perhaps Eurocentric, accounts of comparative law. Although pluralism generally lacks a comparative dimension, it tends to bring forward all the legal elements found in a social field, especially elements that might be omitted or downplayed in investigations conducted strictly in terms of common law and civil law interaction. Quebec for example has eleven distinct nations of aboriginal peoples within its borders. These laws have been called Canada's and Quebec's "third legal tradition".⁴⁷ The vast territory of Nunavik, the homeland of the Inuit, comprises about one-third of Quebec's territory. Yet research and reference to these laws, though they undoubtedly constitute part of the Quebec legal system, are exceedingly rare in the legal literature.⁴⁸ The same research gap exists in the other mixed jurisdictions and it may be preventing us from obtaining a holistic understanding of them. Can we understand South African law properly if we think only in terms of the Roman-Dutch and Common Law rules and ignore the rich array of customary laws and personal laws in that country? In Daniel Visser and Reinhard Zimmermann's felicitous phrase, those laws are one of the "three graces" of the legal order. Demographically and culturally speaking, they have enormous importance. The greatest part of the population, by far, is governed by them. The post-apartheid Constitution of South Africa places the indigenous custom on a plane of legal equality, and in Justice Langa's words, this law must be "accommodated, not merely tolerated, as part of South African law." Thus a pluralist outlook would at least suggest that scholars might expand their research interest and should embrace the interaction in a multicultural country, for the mixing process is inevitably the pulse of legal integration.⁴⁹

47. A. Grenon & L. Bélanger-Hardy eds. *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Carswell, 2008) at 13-14 n.29.

48. The exceptions again prove the rule: See A. Lajoie, J.M. Brisson, S. Normand & A. Bissonnette, *Le statut juridique des peuples autochtones au Québec et le pluralisme* (Cowansville: Yvon Blais 1996); H.P. Glenn, *Legal Traditions of the World* (N.Y.: Oxford Univ. Press, 2000); Law Commission of Canada ed., *Indigenous Legal Traditions* (Vancouver: Univ. of British Columbia Press, 2007).

49. See Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1, at 4.

Secondly, pluralism's focus upon personal laws touches upon the *raison d'être* of these hybrids—viz. the internal cultural struggle to preserve or maintain personal law. The creation of a mixed system, historically speaking, has often taken place when a people lost its political sovereignty, yet refused to give up the right to keep living in accordance with its own personal or private laws. Whether this was originally the *Coutume de Paris* implanted in Quebec, or the Roman-Dutch law brought with the settlers to South Africa or the African tribal or customary law of the indigenous population is only a difference in detail, for in each case the same cultural imperative was in play. The 'struggle' may be better documented in the case of the European settlers, but it lay behind complex pluralism in other parts of the world as well. Rarely has any people willingly given up its own personal law or voluntarily accepted someone else's. In South Africa, when the Cape fell into British hands, the Roman-Dutch law was the personal/private law of the Dutch settlers, and retention was allowed. At the same time and in the same territory African custom was retained as the personal law of various South African peoples. This pattern has replayed many times in history and not, it seems, because an international law norm so required (as has often been supposed),⁵⁰ but rather on account of cultural tenacity, on the one hand, and political calculation on the other. Esmein correctly observed many years ago that the policy of allowing a subjugated people to retain their personal law is often not a matter of choice but a kind of necessity imposed upon the conqueror.

There is in effect a necessity which is imposed on the conqueror, *of allowing their laws to be conquered*, every time that a conquest brings together two races too different in the degree and form of the civilization. This is what is done in our time in great measure by the French in Algeria, by the English and the French in India and in Indo-China.⁵¹

For similar reasons British policy in southern Africa was "no more than a frank acceptance of the fact that colonial administrations were in no position to force their subjects to comply with Roman-Dutch law."⁵²

Thirdly, pluralism's message that we live in a predominantly mixed and plural world may change some of the pejorative views and prejudices about mixed jurisdictions. It is now clearly a solecism to speak of them

50. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, *supra* note 1.

51. A. Esmein, *Cours élémentaire d'histoire du droit français* (Sirey: Paris, 1950) at 50-51.

52. T.W. Bennett, "The Conflict of Laws" in Bekker, Rautenbach & Goolam, *supra* note 35, at 17.

as historical accidents⁵³ or marginal cases, as “odd-men-out” in a binary civil law/common law world. They can hardly be pariahs and paradigms at the same time. Some future classification scheme should accept their centrality as its point of departure.⁵⁴ The thought that ‘pure’ legal systems are somehow privileged, that some mixtures are superior to others, or that the ‘utility’ of mixed systems may be judged by the incidental lessons or insights they may have for their parents are also some ideas we may need to discard. It is frequently remarked that mixed jurisdictions like Scotland and Louisiana are ‘laboratories of comparative law’ and that others might benefit from studying their experiences or their practices. In reality all systems are laboratories of comparative law and any system’s experience could be of some value for others.

53. Glenn compares them to anomalies in the world of science where complex structures may represent “frozen accidents”. H.P. Glenn, “Quebec: Mixité and Monism” in E. Öricü, E. Atwooll & A.S. Coyle eds., *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer, 1996) at 2, 14.

54. Palmer, *supra* note 43. Esin Öricü shares the view that all legal systems are overlaps and mixes to varying degrees and thus their mixed nature should be the starting point of comparative classification. E. Öricü, “Family Trees for Legal Systems: Towards a Contemporary Approach” in M. van Hoecke ed., *Epistemology and Methodology of Comparative Law* (Oxford-Portland: Hart, 2004) at 363.

APPENDIX

From: N. Mariani & G. Fuentes (2000) *World Legal Systems* 16-17
W&L. Mixed Legal Systems

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

1. MIXED SYSTEMS OF CIVIL LAW AND COMMON LAW

Botswana
Cyprus
Guyana
Louisiana (USA)
Malta
Mauritius
Namibia
Philippines
Puerto Rico (associated to USA)
Quebec (CD)
Saint Lucia
Scotland (UK)
Seychelles
South Africa
Thailand

2. MIXED SYSTEMS OF CIVIL LAW AND CUSTOMARY LAW

Burundi Burkina Faso Chad China
Congo, Democratic
Republic of the Congo,
Republic of the Côte D'Ivoire
Equatorial Guinea
Ethiopia
Gabon
Guinea
Guinea Bissau
Japan
Korea, North Korea, South

Madagascar
Mongolia
Mozambique
Niger
Rwanda
Sao Tome and Principe
Senegal
Swaziland
Taiwan
Togo

3. MIXED SYSTEMS OF CIVIL LAW AND MUSLIM LAW

Algeria
Comoros
Egypt
Iraq
Kuwait
Lebanon
Libya
Morocco
Mauritania
Syria
Tunisia

4. MIXED SYSTEMS OF CIVIL LAW, COMMON LAW AND CUSTOMARY LAW

Djibouti
Eritrea
Indonesia

5. MIXED SYSTEMS OF CIVIL LAW, COMMON LAW AND CUSTOMARY LAW

Cameroun
Lesotho
Sri Lanka
Vanuatu
Zimbabwe

6. MIXED SYSTEMS OF COMMON LAW AND MUSLIM LAW

Bahrain
Bangladesh

Oman
Pakistan
Qatar
Singapore
Sudan
United Arab Emirates

7. MIXED SYSTEMS OF COMMON LAW AND CUSTOMARY LAW

Bhutan
Hong Kong (CN)
Malawi
Micronesia, Federated States
Myanmar
Nepal
Sierra Leone
Solomon Islands
Tanzania
Uganda
Western Samoa
Zambia

8. MIXED SYSTEMS OF COMMON LAW, MUSLIM LAW AND CUSTOMARY LAW

Brunei
Gambia
Kenya
India
Malaysia
Nigeria

9. MIXED SYSTEMS OF COMMON LAW, MUSLIM LAW AND CIVIL LAW

Iran
Jordan
Saudi Arabia
Somalia
Yemen

10. MIXED SYSTEMS OF TALMUDIC LAW, CIVIL LAW AND COMMON LAW

Israel