"A THING WITHOUT COHESION OF PARTS"? THE PROFESSIONAL AND PEDAGOGICAL CONTRIBUTION OF MIXED JURISDICTIONS


"[H]owever I admit the superiority of the Civil Law over the Common law ... yet an incorporation of the two would be like Nebuchadnezzar's image of metal and clay, a thing without cohesion of parts."


A "mixed jurisdiction" might refer to any legal system that joins disparate legal families or traditions. This would exclude very little, however, as even the common law is not immune from influence or borrowings. A "mixed jurisdiction" thus normally refers to those legal systems that combine civil law and common law elements. These mixités undermine the neat dichotomies normally presented in comparative law texts. As Vernon Valentine Palmer notes in *Mixed Jurisdictions Worldwide: The Third Legal Family*, these jurisdictions "will always appear anomalous and uncatalogable when compared to parents who are themselves domiciled in different families."¹ Palmer’s conviction is that many of these mixed jurisdictions have "profound generalizable resemblances" and he "argue[s] strongly for the proposition that legal history can be highly autonomous and path dependent."² *The Contribution of Mixed Legal Systems to European Private Law*, to which Palmer also contributes, stresses more clearly the value of the "mixed" experience to European law and, I hope to suggest, any legal system. Together, both books show the often-ignored value of comparative law to legal practice and legal choice, while suggesting that the study of mixed jurisdictions may provide particularly useful insights even to

jurisdictions that fall more neatly into either civil law or common law categories.

**Mixed Jurisdictions Worldwide** is very much in the style of recent comparative studies of statutory interpretation and precedent by D. Neil MacCormick and Robert S. Summers. Both of those works, each excellent in its own right, combined national reports based on extensive questionnaires with elaborate editorial comment summarising their findings. On the basis of reports from seven mixed jurisdictions (South Africa, Scotland, Louisiana, Quebec, Puerto Rico, the Philippines, and Israel) with a combined population of 150 million people, Professor Palmer’s theme is that these systems collectively make up a “new” or “third” legal family sharing many common features. Instead of the categories of comparative law which pre-determine that these jurisdictions will fit awkwardly, it is better, he suggests, to “adopt ... a horizontal ‘cross-comparative’” approach between them.

Palmer explains his method in Part I of *Mixed Jurisdictions Worldwide*. In preparing the questionnaire (included as an appendix) to be given to national reporters, he concentrated on 11 topics used to structure their analyses and simplify the task of summarising their findings. These are: (1) the founding of the system; (2) the magistrates and the courts; (3) judicial methodology; (4) statutory interpretation; (5) mercantile law; (6) procedure and evidence; (7) the judicial reception of common law; (8) the emergence of new legal creations; (9) purists, pollutionists, and pragmatists; (10) the linguistic factor; and (11) a report bibliography. Part II of the work presents the evidence in a series of detailed national reports. These reports are each rich in detail, though there are curiously two or more reporters for several jurisdictions.

Insofar as it has a method, comparative law has traditionally focused on private law. This reflects, in part, the fact that the inclusion of public law, never a major part of the Roman influence even in the civilian tradition, complicates considerably the classification of legal families. Significantly, Palmer includes an analysis of both private and public law. This has the


4. Another large mixed jurisdiction is Sri Lanka, with some 19 million people. Smaller mixed jurisdictions not included are Saint Lucia, Mauritius, the Seychelles, Zimbabwe, Botswana, Lesotho, Swaziland and Namibia.


6. The reporters are: Paul Farlam and Reinhard Zimmermann (South Africa, Report one); C.G. Van der Merwe, J.E. Du Plessis, and M.J. De Waal (South Africa, Report two); Elspeth Reid (Scotland, Report one); Robert Leslie (Scotland, Report two); Vernon Valentine Palmer in collaboration with Matthew Sheynes (Louisiana); John E.C. Brierley (Quebec, Report one); The Honourable Jean-Louis Baudouin (Quebec, Report two); Ennio Colón and associates (Puerto Rico); Pacffico Agabin (The Philippines); Stephen Goldstein (Israel).
surprising effect of showing the mixed jurisdictions discussed to be more alike. Palmer dates the founding of the jurisdictions at the point:

"when (1) the law in question was specifically a civil-/common-law mixture; (2) this mixture reached sufficient proportions as to strike a neutral observer as obvious; and (3) a structural division existed between private civil law and public Anglo-American law."? 

Louisiana, Palmer's own jurisdiction, shows how difficult such a birth may be. Originally governed as a French colony (1699–1769), whose legal system included the Coutume de Paris as well as French edicts and ordinances, Louisiana was subsequently ceded from France to Spain (1762). The best-known Spanish Governor was the Irishman "Alejandro" O'Reilly, whose "O'Reilly's Code" (1769) formally integrated Louisiana law with that of Spain. A brief retrocession to France followed in 1800. Spanish law continued in force, however, and France only resumed control of the colony for one month before the US took possession in 1803 as a result of the Louisiana Purchase. A nation with a common law tradition of private law and an already unique public law confronted a territory, the Territory of Orleans, that had known only continental law and whose Creole population was overwhelmingly French-speaking.

Most other mixed jurisdictions were created by means of a similar "intercolonial transfer" from continental European powers to either Britain or the US, with a corresponding metamorphosis from a civil law tradition to the Anglo-American common law. Where there were large non-Anglo populations already established, continental institutions and culture could be defended. "The decision in favor of retaining the existing civil law," Palmer notes, "was usually strongest in circumstances where there was a large, non-anglophonic population of continental European extraction already ensconced upon the land and already in a position of numerical superiority and socio-economic dominance." As Louisiana history shows, while this population might defend itself and its laws with considerable élan, it could also be quickly swamped by Anglo settlement.

Such transfers are not, of course, the only manner in which jurisdictions might become mixed. With the Act of Union in 1707, Scotland was formally merged with England and Wales, but it retained its own unique mix of Roman and civil law, feudal and canon law, as well as the influence of English law, both public and private. Far more atypical is Israel. The influx of European Jewish jurists at mid-century "civilised" (so to speak) its original common law system. Its public law, on the other hand, has looked increasingly to American, rather than English or continental, institutions.

Israeli judges and jurists remain comfortable with Anglophone scholarship and practice.

As the foregoing suggests, particularly in the case of an intercolonial transfer, law and culture are intimately, or perhaps only more obviously, related in a mixed jurisdiction. The language in which the law operates is thus very important. The Louisiana Digest of 1808, largely drawing from the projet or draft of the *Code Civil des Français* (1804) was written in French, though its substance remained in large part Spanish. Louisianans did not object to the whole of the new American regime. The addition of Anglo-American criminal law, American public law, or later, large measures of American commercial law permitted integration, rather than dissolution, into the new nation. This experience was not unique to the Territory and Palmer observes that:

"the new sovereign established common law in sectorial fashion (primarily in the fields of public law, judicial institutions, and perhaps criminal law) and permitted retention of civil law in the private-law sector. This initial decision to compartmentalize two alien laws within respective zones was a deliberate political choice."\(^\text{10}\)

Changes in private law are more difficult to accept, dealing as they do not simply with the events of everyday life, but arguably with the way of life of a people themselves. The Louisiana Constitution of 1812, drawn largely from that of Kentucky but translated into French, added additional precautions to protect its private law from Anglo-American penetration. Article IV, §11 prohibited incorporation of a legal system by "general reference"; in effect the provision was directed against the common law and English Equity. "Additionally, Article IV, §12 (1812), required judges to refer to the particular law (*loi*) in virtue of which the judgment was rendered and to adduced the reasons on which that judgment was founded."\(^\text{11}\)

This was an attempt, with some limited success, to prevent the legal order from developing on the basis of jurisprudence (*i.e.* case law) rather than legislation.

This history, interesting perhaps in its own right, can easily serve pedagogical purposes. For example, *Mixed Jurisdictions Worldwide* provides many useful reminders of the complexities of codification. Neither Scotland nor South Africa has modern civilian codes, arguably making common law penetration easier in those jurisdictions. Codification was, in important respects, a nineteenth-century, post-revolutionary phenomenon. Louisianans first drafted a Digest of the laws (1808), redacting valid law from the many pre-codification Spanish sources. Later they drafted the Code of 1825, a "proper" civilian code, that is one whose "goal ... is to achieve a material and systematic structure of the law, whereas formal codification

\(^{10}\) Palmer, p.20.

\(^{11}\) Palmer, p.269.
[i.e. a digest] strives only to succeed in regrouping and classifying existing texts.” The Digest and Code were drafted in French and translated into English. Both published versions were official, though the English forms were so obviously translations, and indeed poor translations, that the French prevailed. By the time of the third Civil Code of 1870, essentially re-enacting and updating the 1825 Code after the American Civil War, the tide had turned and the French language—not to mention its culture—was increasingly under threat. While even now Louisiana has a French-speaking population, there is only a tenuous connection to continental legal scholarship. Given the importance of this scholarship (“the doctrine”) to the civilian tradition, the inability of accessing it is significant. One of the curious benefits of Louisiana scholarship is the translation or creation of a large amount of comparative and civilian materials into English, the lingua franca of the mixités Palmer studies.

Disagreements between what Palmer calls “purists” and “pollutionists”, those more and less sympathetic to the Civil law tradition, are anything but academic in a mixed jurisdiction. Debates on the binding sources and persuasive authorities of law, especially the nature of precedent, are of particular importance. Indeed, “[t]o many scholars”, they:

“raise ... a defining issue in the quest to locate the 'soul' of the system, inevitably leading to the question whether the ruling method of the judges is common law, civil law, or mixed, as if the doctrine of precedent is a litmus test of family allegiance or a sharp tool of classification.”

As Palmer notes, most jurists and practitioners can be classified as “pragmatists” who look to results rather than the niceties of legal theory. These observations usefully highlight both legal divergence and convergence in the common law and civil law. Stare decisis is rarely pure and, civilian ideology to the contrary, jurisprudence constante (a consistent pattern of legal interpretation by the courts) works in practice in much the same manner. Palmer notes that the “adoption of the common-law style of writing opinions and techniques of judgment” in mixed jurisdictions “ensured that the complexities of ratio decidendi and obiter dictum and the art of distinguishing cases would be introduced as well.” Although the “legal rule” typically exists at the level of legislation in the Civil law, rather than the case as in the common law, these elements are never entirely absent from continental jurisprudence.

15. Palmer, p.49.
16. Louisiana also indicates the complex relationship of the philosophical sources of law in early nineteenth-century civilian thought. Its formal sources included (and
On the other hand, statutory interpretation by the courts of a mixed jurisdiction may differ from civil code article to common law–inspired statute. In codal interpretation, the broadly-phrased articles suggest a liberal, teleological approach. In Louisiana, this can involve the “Comments” to the code. In good “mixed” style these comments operate in effect as an attached travaux préparatoires complete with citations to the jurisprudence (as evidence of the law), an approach that is anathema to the pure civilian. Where there are lacunae in the code, the judge can deductively analogise through its implicit principles in much the same way that a common lawyer might analogise inductively between cases. With detailed “special” statutes or common law-style legislation, judges will adopt a narrower, more literal approach, though the American judiciary has long been more sympathetic to purposive interpretation than has its counterparts in Britain and Ireland.

The influence of common law court structures and models of judicial decision-making are, as Palmer illustrates, profound. In these mixed jurisdictions, continental-investigative procedures were quickly replaced by rules of evidence and procedure of common law origin, with its more clearly defined adversarial and oral proceedings and, to different degrees, use of a wholly lay jury. This is of great practical importance as:

“Even though the substantive civil law may seem to remain relatively ‘pure,’ particularly where it exists in codified form, nevertheless when Anglo-American procedural mechanisms dominate the enforcement of substantive rights, they leave a visible imprint upon the civil law. By this is meant that substantive law may be subtly modified, without further judicial or legislative will, at the practical stage of law realization.”

“Mixed” tribunals exclude the Equity courts of the common law world but are more centralised than those of civilian jurisdictions. They are typically general in substance and unitary in structure. Judges in mixed jurisdictions tend to be drawn from senior practitioners, rather than following the continental division, both educationally and professionally, between magistrate and lawyer. In accordance with the Anglo-American tradition, these judges also see themselves as possessing inherent, rather than delegated, powers. Their opinions, too, typically resemble the discursive pattern of the common law, and not the more abbreviated form associated with the Franco-Romano (rather than Germanic) civilian tradition. Separate concurring and dissenting opinions are common. In mixed jurisdictions, still include) not only legislation and custom but, in the absence of a legal rule, equité or justice. See Palmer, “The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana” (1994) 69 Tul. L. Rev. 7.

17. Palmer, p.63. “The old maxim that civil law subordinates the remedy to the right is thus turned on its head in jurisdictions where common-law procedure controls the right.” Palmer, p.66.
appellate courts are courts of “revision” rather than “cassation” and the highest courts are composed of a small number of judges sitting en banc in every decision. In Louisiana, judges are even elected. However much this may seem consistent with a strict separation of powers, it owes more to an American vision of democracy than European bureaucracy.

Other examples of common law penetration are less attractive, reflecting the cultural biases and legal ignorance of Anglo-American lawyers in a mixed setting. By no means a “purist”, Palmer argues that the justifications for the reception of common law are “typecast and patterned ... [and] indicia of the unity of the mixed-jurisdiction experience.”18 The “fantasies” of judges in mixed jurisdictions “are more than idle dreams. The uses and abuses of comparative law that they engage in are ... a significant part of legal development.”19 He argues convincingly that a general pattern of “penetration and resistance” can be established:

“According to the various reports, the field of obligations (encompassing tort, contract, and quasi-contract) has been the most affected area of the civil law, and with obligations, tort (delict) absorbed the greatest amount of common-law influence, contract a lesser but substantial amount, while quasi-contract would be the least influenced of the three. On the other hand, property has been ‘the most unassailable stronghold of civilian jurisprudence.’ Succession law, too, has been largely resistant to judicial activism, although the question of free testation has sometimes been a battleground.”20

As Palmer argued in more detail in his contribution to The Contribution of Mixed Legal Systems to European Private Law, areas like tort reveal how the brevity and economy of civilian principles can act as gateways for the introduction of the specifics of the common law.

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Beyond the argument that these mixités make up a third legal family, Palmer’s observations are more descriptive than prescriptive. The Contribution of Mixed Legal Systems to European Private Law (Jan Smits (ed.)) is somewhat more didactic. Smits writes of the failure to take account of mixed jurisdictions and the utility of their experience:

“Firstly, in trying to reconcile English law with the law of the

18. Palmer, p.54.
European mainland, it is useful to benefit from those systems where there is already a mix of the civil law and the common law. Secondly, in predicting to what extent uniformity will actually come about in Europe, it may be useful to look at how legal systems or rules develop in general.\textsuperscript{21}

These jurisdictions (Scotland, South Africa, and Louisiana) may provide clues, he suggests, to the relevance of the \textit{ius commune} of the European past and “the feasibility of a uniform private law for Europe” in the future.\textsuperscript{22} This feasibility is not obvious. The contributors to the work propose very different responses to the question whether lawyers in mixed jurisdictions are uniquely free to choose the “best” or most efficient legal rules.

Alan Watson’s “Legal Transplants and European Private Law” is a particularly strong reaffirmation of his belief in the routine nature of legal borrowing and transplants. Watson, the author of numerous books on law, legal history, and legal change, takes issue with the critique of comparativist Pierre Legrand. Legrand, who is opposed to the notion of a European code, has insisted that European systems are \textit{not} converging and indeed (as Smits paraphrases) that “the \textit{mentalités} are even irreconcilable in the case of continental and English law.”\textsuperscript{23} Watson is deeply critical both of the abstract nature of Legrand’s analysis and his neglect of comparative legal history which shows that “massive successful borrowing is commonplace ... [and] is usually the major factor in legal change.”\textsuperscript{24}

Anthony Ogus explores the question of whether “hybrid jurisdictions” are “more efficient, and adapt more readily to changing external variables, than those with a single dominant legal culture ...”.\textsuperscript{25} Given the increased “competition” in legal choice in a mixed jurisdiction, he cautiously suggests that this is true. Robin Evans-Jones is less certain. Not only does he question the extent to which Scottish law is meaningfully mixed, but challenges whether the “choice” of mixing is rational at all. “One does not find ... a clever synthesis between the Civil and the Common law [in Scots law], as deliberation on the merits of each alternative solution as a form of legal development suggests would happen.”\textsuperscript{26} Instead, the receptions of, first,

\begin{itemize}
\item \textsuperscript{21} Jan Smits (ed.), \textit{The Contribution of Mixed Legal Systems to European Private Law}, (Intersentia, Antwerp, 2001), p.5. The essays in the collection were originally presented at the conference on the same theme held at Maastricht University, May 18, 2000.
\item \textsuperscript{22} Smits, p.7.
\item \textsuperscript{24} Watson in Smits, p.23.
\item \textsuperscript{25} Ogus, “The Contribution of Economic Analysis of Law to Legal Transplants” in Smits, p.36.
\item \textsuperscript{26} Evans-Jones, “Mixed Legal Systems, Scotland and the Unification of Private Law in Europe” in Smits, pp.44–45.
\end{itemize}
civil law and later common law in Scotland had little to do with rationality or efficiency, but culture and politics.\(^{27}\)

The remaining essays explore the capacity of mixed systems to change. Gerhard Lubbe and Johann Neethling contribute essays on, respectively, “contract” and “tort” in South Africa.\(^{28}\) These are followed by Palmer’s article on “The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana”. Consistent with the argument of *Mixed Jurisdictions Worldwide*, he writes that “Tort is the area *par excellence* of common law penetration.”\(^{29}\) Indeed, perhaps as befits these frequently colonial jurisdictions, his:

“thesis is that the mixed-jurisdiction mind instinctively seeks to narrow and reduce broad civilian tort principle into smaller focused liability categories. It will seek and find these limitations in doctrines like the ‘fellow servant rule’, the doctrine of contributory negligence, the ‘duty situation’; and the relational ‘duties of care’, the nominate English torts, or perhaps it will seek shelter in the use of pre-codification ‘understandings’ as a measure of a codified provision’s ‘intended’ reach. This *mentalité* resists the logic of open-ended syllogistic development, preferring a cautious, pragmatic case by case expansion of liability. A general clause in these surroundings was not destined to be an exercise in detached reason but in large measure the self-portrait of a dominant culture.”\(^{30}\)

In summary, “[i]t might be said that the original French acorn which took root in Louisiana soil 200 years ago now flourishes as a mighty English oak.”\(^{31}\) Whether this is a *better* choice is not clear. Palmer’s final comments are written in a manner and mood more like that of Evans-Jones than the editor of *Mixed Jurisdictions Worldwide*. He suggests that, rather than simply choosing to move towards common law solutions on the basis of their efficiency or value, the “Louisiana legal mind has become culturally conditioned by Anglo-American thought.”\(^{32}\)

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Both *Mixed Jurisdictions Worldwide* and *The Contribution of Mixed Legal*

27. He adds, indeed, that “Scotland is rightly perceived by the vast majority of lawyers as a common law system which, for complex reasons, has been influenced by the Civil law.” Evans-Jones in Smits, p.45.


Systems to European Private Law achieve their stated goals. In the first work, Professor Palmer makes a strong case for viewing mixed jurisdictions as a third legal family sharing numerous common features. In the second, the essays collected by Professor Smits show the experience of these mixitées provide particularly useful insights to Europe’s varied and mixing jurisdictions. Together, they suggest that it is navigating the shoals of comparative law at the level of practice that makes the study of mixed jurisdictions so valuable. For these reasons, the works, or selections from them, might also provide useful pedagogical resources. It is certainly my intention to make use of them.

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33. Professor Palmer’s contribution to comparative law and jurisprudence is already secure. He was recently elected President of the unfortunately named “World Society of Mixed Jurisdiction Jurists”. He also participating in organising the first “World Congress on Mixed Jurisdictions” (New Orleans, November 6–9, 2002) hosted last year by the Tulane School of Law and the Eason Weinmann Center for Comparative Law. There were approximately 150 delegates from 21 co-sponsoring law faculties and organisations such as the International Association of Legal Science, the International Academy of Comparative Law at the Hague and the American Society of Comparative Law. The theme was “Salience and Unity in the Mixed Jurisdiction Experience” and the papers presented are scheduled for publication in the Tulane Law Review. The site of the next “Congress” will be Scotland in 2004, under the joint auspices of the law faculties of Aberdeen, Edinburgh and Glasgow Universities. Information on the Society and conference is available from jsayas@law.tulane.edu.

34. See also Jan Smits, The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System (Intersentia, Antwerp, 2002), translated by Nicole Kornet.