PART I

Introduction and comparative overview

Introduction to the mixed jurisdictions

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I A glimpse at the extended family

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 cross-breeding. 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. A geographer might well note they show an affinity for remote islands, trading outposts and shipping lanes. These emplacements, however, were not random choices but in many cases were commercially or strategically important to the parents. Probably geography conceals the collective importance of the group. Combined, they rule the lives of over 150 million people and occupy an area the size of a subcontinent. Dispersed as they in fact are, they become again a series of disconnected dots and dashes on the globe with few apparent common denominators, except perhaps one: the systems are mutually intelligible. Their jurists enjoy the possibility of great complicity and close understanding, stemming from their knowledge of civil law, common law, and the English language. They speak similar bijural dialects, understand one another, and do not feel alien in the other's legal culture.[1]

[1] The notion of legal culture, to quote Lawrence Friedman, refers to "the attitudes, values and opinions held in society, with regard to the law, the legal system and its various parts." *Law and Society: An Introduction* (Prentice Hall 1977), p. 76. The term may also characterize the "underlying traits of whole legal systems – its ruling ideas, its flavour, its style." *The Legal System: A Social Science Perspective* (Russell Sage 1975), p. 15. See also John Bell, "English Law and French Law – Not So Different?" 69 *Camb. L. J.* (1995) ("A specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts."). For various other definitions, see David Nelken, *Comparing Legal Cultures* (Dartmouth 1997), pp. 15–17; Mark Van Hoecke and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" 47 *ICLQ* 495 (1998).

The unity of their experience, however, exists amidst a great diversity of peoples, cultures, languages, climates, religions, economies, and indigenous laws. Indeed, it is the background presence of these highly diverse settings which makes legal unity all the more remarkable and impressive. For some this may seem even counterintuitive. The contrast between peoples and cultures may be as great as that between the Tamil (Sri Lanka) and Cajuns (Louisiana), spoken languages as different as Afrikaans (South Africa) and Tagalog (Philippines). Buddhism may be the predominant religion in one, Judaism in a second, Christianity in a third. In important instances, as in South Africa and the Philippines, religious law, indigenous law and custom, and other personal laws are simultaneously operating alongside the civil law/common law mix and may be, by any real measure, a far more important source of legal control for the majority of the people than the Western law.[2] Our focus upon common law/civil law mixtures by no means suggests the unimportance of these personal laws. Rather, to second Daniel Visser and Reinhard Zimmermann's felicitous phrase, they are one of the "three graces" of the legal order.[3] In South Africa the Constitution itself places the indigenous custom on a plane of equality, and according to Justice Langa this law must be "accommodated, not merely tolerated, as part of South African law."[4] Nor does the present study ignore the legal effects of interactions between personal and private laws, for mixing of this kind constitutes the pulse of legal integration.[5] Indeed, our study gathers such information wherever available so that the broader picture may emerge.[6]

[2] See Joan Church, "The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience" [2005] *ANZLH E-Journal* 94; Chuma Himonga, "State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law" 25 *Tul. Eur. & C.L. Forum* 23 (2010).

[3] *Southern Cross*: *Civil and Common Law in South Africa* (Oxford University Press 1996), pp. 12–15.

[4] Quoted in Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" 88 *J. Religion* 466, 481 (2008), papers.ssrn.com/abstract=1278056. See also Church, "The Place of Indigenous Law", pp. 94–95. In the case of *Bhe* v. *Magistrate*, [2005] 1 BCLR 1 (CC), the Constitutional Court of South Africa stated that "while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law." In *Alexor Ltd* v. *Richtersveld Community*, [2003] 12 BCLR 130 (CC), the Court added that "indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."

[5] See, for example, I. E. Sagay "The Dawn of Legal Acculturation in Nigeria – A Significant Development in Law and National Integration: Olowu v. Olowu", [1986] *J.A.L.* 179.

[6] See Questionnaire concerning personal and religious laws, §I-6 and Questions I-c and VIII-e in Appendix A.

The extended family of mixed jurisdictions is rather large. It consists of roughly sixteen political entities,[7] of which twelve are independent countries. The most populous of these are South Africa (c. 42.5 million), the Philippines (c. 74.5 million), and Sri Lanka (c. 19 million).[8] Quebec, Louisiana, Puerto Rico, and Scotland are not independent states but are distinct legal systems within a larger political structure and enjoy considerable autonomy in directing their legal affairs.[9]

If we date the creation of a mixed jurisdiction (as we should) not by the original founding of the country, colony, or polity in question, but by later events which introduced bijurality or made it an inevitable consequence, then we may obtain a rough idea of the ages of these systems. By all reckoning Scotland is the oldest since its system acquired its distinctive mixed identity not later than 1707 and, in the view of many historians, considerably sooner,[10] followed next by Quebec (in the period 1763–1774), Malta (1801–1812), Louisiana (between 1803 and 1812), and South Africa (c. 1809). Botswana (then Bechuanaland) began receiving mixed laws in 1891, and the Philippines and Puerto Rico entered the circle in 1898 upon termination of the Spanish–American war and the installation of American rule. Israel is the youngest in the family. Her system became mixed in the second half of the twentieth century, not due to foreign imposition but by reason of internal demographic and cultural changes within the new Jewish State. Indeed, one might say Israel and Scotland freely *chose* to become hybrid and did so as independent countries. The others usually acted under varying degrees of compulsion.

Excluding Scotland and Israel for just a moment, we find that most of the extended family consists of the former colonial possessions that were transferred to Great Britain or the United States. Seen from their civil law side, these systems are French-, Spanish-, Dutch-, or Italian[11]-influenced and their personalities and styles are quite distinctive as a result. The

[7] For a short description and bibliography of eight mixed jurisdictions not covered by Country Reports, see Appendix B. A special Report on the Cameroon is contained in Appendix C.

[8] The least populous are the islands of Saint Lucia, Mauritius, and the Seychelles.

[9] Scotland acquired a separate Parliament in 1999 with control over most matters except foreign affairs and national defense. Thus the new degree of home rule enjoyed there now approaches the type of autonomy found in Louisiana, Puerto Rico, and Quebec.

[10] By the Act of Union the English and Scottish sovereignties merged to form Great Britain. There is some debate as to the date or period of the birth of the Scottish mixed system, since it can be maintained that the system was "mixed" well before union with England. See pp. 37–38.

[11] Italian legal and linguistic influence on Malta pre-dated colonization by Great Britain.

French group, for instance (Quebec, Louisiana,[12] Mauritius, the Seychelles, and Saint Lucia) reflects cultural, linguistic, and religious ties that set it apart from the Dutch and Spanish legal systems. The type of civil law which each mother country left germinating is considerably different. The hallmark of the French group is the law's modernity and codified form. The Napoleonic Code Civil with its emphasis upon bourgeois individualism and liberty was chosen to replace the outdated, relatively unromanized Custom of Paris that had been exported to the French colonies.[13] Codified civil law is widely thought to be "tough law" which is more resistant to common law incursion than uncodified civil law in such systems as Scotland and South Africa.[14] The Dutch group (Sri Lanka, South Africa, Botswana, and several other nations in the region) is characterized by uncodified Roman–Dutch law whose original sources are authoritative writers like Grotius and Voet from the province of Holland. The open-textured, historical cast of this law engenders a rather special *esprit* and style.

There is, of course, a second side to these personalities. It must be remembered that the family of mixed jurisdictions is a family of double nationalities and one would not understand its unity or its diversity so well without some attention to its Anglo-American side. An under-emphasized but vital fact is the difference between British- and American-influenced mixed jurisdictions. Although both influences are common law, these countries embodied and then disseminated quite different legal cultures.[15] Civil law in South Africa and Quebec, for example, has cohabited exclusively with the English common law, and thus has been influenced by

[12] Louisiana is placed in the French group even though it was ruled by Spain for the thirty years prior to its cession to the United States. Most historians would agree that, in terms of lasting effects, French culture, language, and ultimately French law greatly overshadowed the effects of Spanish rule. Louisiana remained a French civilization during Spanish rule. See Vernon Valentine Palmer, "Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803–1812" in Palmer, *Louisiana: Microcosm of a Mixed Jurisdiction* (Carolina Academic Press 1999), pp. 28–30.

[13] When Spain recodified and modernized its private law in 1889, it too was under the influence of the French Code Civil. This law was extended to Puerto Rico and the Philippines, replacing the Castilian private law which had been principally based upon *Las Leyes de Toro* and *Las Siete Partidas*.

[14] This point was underlined in a comparison of the codified law of Louisiana with the uncodified law of Scotland. See Vernon Valentine Palmer and Elspeth Reid (eds.), *Mixed Jurisdictions Compared: The Private Law of Louisiana and Scotland* (Edinburgh University Press 2009).

[15] See, e.g., P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (Clarendon 1991).

English tribunals, judges, and literature. In the course of the relationship many statutes have been patterned on Westminster models; many jurists have looked to England for training or inspiration. On the other hand, civil law in Louisiana, Puerto Rico, and the Philippines has lived in turbulent monogamy with American law. To name but a few side effects, they received infusions of American statutory law, constitutional law, *emigré* interpretations of the civil law, and the American model of legal education.[16] It is important to differentiate the work of the two role models because we know that the common law counterpoint they have provided has varied in its strength and characteristics. When one compares the position of the judge, the effect of *stare decisis*, the pace of common law adaptation to social change, or even the economic and political dominance of these countries over their *protégés*, the American and English subfamilies should be carefully distinguished.[17]

II The mixed jurisdiction in profile: three characteristics

There has never been an accepted definition of a mixed jurisdiction, and it would be premature to try to offer one here. It is conventionally agreed (though with scant analysis) that all the systems within this study are indeed of that type, but it is natural to want to know why this is so. Comparative law writings continually use the term without explaining its significance or considering reasons for its contested meaning.[18] The eminent Scottish comparatist Sir Thomas Smith described these systems in the broadest terms, as being "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."[19] Even this generalization, though not

[16] American influence in the areas of legal education and constitutional law has been quite important in Israel, though in other respects the Israeli system has felt the direct effects of British influence.

[17] This factor may prove useful as a classification tool for the mixed jurisdictions. The common law and civil law families are really "private law" families; this classification pays no regard to the public law side of the legal system. Normally this private law focus is thrown into disarray when the public law is included and compared. Yet this wider focus, I submit, is essential to an understanding of the mixed jurisdictions.

[18] Clearly there is a rival theory which uses a factual test that produces an all-encompassing category. See Vernon Valentine Palmer, "Two Rival Theories of Mixed Legal Systems" 12 *Electronic Journal of Comparative Law* 1 (2008), www.ejcl.org/121/art121-16.pdf.

[19] "The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'" in Athanassios N. Yiannopoulos (ed.), *Civil Law in the Modern World* (Louisiana State University Press 1965), pp. 2–3.

inaccurate, is somewhat vague and misleading.[20] Perhaps it is vagueness and uncertainty, not fondness for the picturesque, which explains our frequent resort to metaphors, such as to call Puerto Rico "a civil law isle in a common law sea" or to say with H. R. Hahlo and E. Kahn, "Like a jewel in a brooch, the Roman–Dutch law in South Africa today glitters in a setting that was made in England."[21] A general theme of this book is that it is better to describe before we try to define, yet at this stage the reader is entitled to some clearer idea of the mixed jurisdiction. In Chapter 1 I will attempt to give a "descriptive and comparative overview" which discusses how the idea developed and what the leading characteristics of such jurisdictions are. At this point, however, I will only outline three *abstract* features that set them apart not only from so-called "pure" legal systems, assuming such systems exist,[22] but from the remaining mass of pluralistic systems found around the globe.

The first characteristic feature is the specificity of the mixture to which we refer. These systems are built upon dual foundations of common law and civil law materials. Systems around the world certainly present diverse mixes – of religious law, indigenous custom, merchant law, canonical law, Roman law, and judge-made law – and there is certainly no shortage of legal pluralism, but only in "mixed jurisdictions" do we find, notwithstanding the presence of other legal elements as well, that common law and civil law constitute the basic building blocks of the legal edifice. This unwieldy expression really singles out that mixture which is exclusively Western, drawn as it is from Romano-Germanic and Anglo-American legal materials.

A second characteristic is quantitative and psychological. The presence of these dual elements will be obvious to an ordinary observer. There is probably a quantitative threshold to be reached before this will occur. This threshold explains why the states of Texas and California, which indeed have *some* civil law in their legal systems, are generally regarded as "common law" states, while the state of Louisiana is

[20] Aside from being ill adapted to the evolutionary circumstances of the Israeli mixed system, Smith's statement may mislead one into thinking that the whole legal system is "basically civilian," when in truth its civilian part would not extend beyond the private law sphere (see p. 9, third characteristic). He thereby leaves Anglo-American public law and public institutions out of the picture when in truth these are important dimensions of the system's mixed character.

[21] *The South African Legal System* (Juta 1968), p. 585. On the misleading aspects of metaphorical expressions, see Vernon Valentine Palmer, "Introduction" in Palmer, *Louisiana: Microcosm of a Mixed Jurisdication* (Carolina Academic Press 1999).

[22] Discussed in Vernon Valentine Palmer, "Mixed Legal Systems … and the Myth of Pure Laws" 67 *La. L. Rev.* 1205 (2007).

regarded as a mixed jurisdiction. The civil law elements in the former are not nearly as obvious as in the latter. It seems that an occasional transplant or even a series of them from one tradition to the other will not necessarily create this distinctive bijurality. In the mixed-jurisdiction family one expects a large number of principles and rules to be of distinguishable pedigree, even including non-substantive aspects of the law, such as the nature of institutions and the style of legal thinking. One consequence of distinctive bijurality is to experience relatively clear metes and bounds so that the internal passage from common law to civil law substance or reasoning is a well-defined transition. Psychologically speaking, actors and observers within such a system will be cognizant of and will acknowledge the dual character of the law. As Joseph McKnight well observes, "To characterize a system as mixed is to recognize a prevailing state of the legal mind. However mixed his system is in fact, the English lawyer does not think of it as such. Its Roman elements … are perfectly plain and obvious to me. But to English lawyers and even English historians … the Roman elements are scarcely recognized."[23]

The 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 is invariable in the family.[24] Of course the content of

[23] Knight's portrait of English attitudes may no longer be accurate. The influx of European law into English law as a result of joining the European Union has inevitably affected juristic outlooks. English private law has absorbed close to twenty EC Directives in the area of traditional private law and Britain has been required to adopt continental reasoning, including the principles of proportionality and legitimate expectation, the distinction between private law and public law, the use of teleological and purposive reasoning, the concept of good faith, and continental drafting style. See Palmer, "Two Rival Theories," p. 21. Esin Örücü has suggested that in a hybrid system a "knowledgeable cook" can see the distinctive bits and pieces of the law surfacing and sinking in the mixing bowl. Esin Örücü, "A Theoretical Framework for Transfrontier Mobility of Law" in R. Jagtenbery, E. Örücü, and A. J. de Roo, *Transfrontier Mobility of Law* (Kluwer 1995), p. 10. By the same token the contemporary English cook must find it increasingly difficult to deny the presence of many new legal elements in the common law mix.

[24] So far we have no example of a "reverse" allocation of these respective spheres. One vainly searches for a system where continental law predominates in the public sphere while Anglo-American law dominates in the private. Of course this is by no means impossible; its non-existence is perhaps only a caprice of history. Interestingly, the Anglophone region of Cameroon comes close to being a reverse allocation, but this does not hold true for the larger Francophone area of the country. See Cameroon Report, §I-1, Appendix C.

these respective spheres is never *purely* civil nor *purely* common, but it will be *predominantly* of one kind rather than the other.[25] How the basic terms of the allocation arose will usually be found in treaties, articles of capitulation, organic laws, and constitutional provisions. It is mainly the historical and cultural clash in this arrangement which gives rise to an appreciation of the system's mixed character. Perhaps one should indicate, very briefly, what lies within these somewhat disconnected worlds.

To the casual observer, the private law sphere may, in many mixed jurisdictions, have the outward appearance of a "pure" civil law. It contains the law of persons, family law, property, succession law, and obligations which the civilians conceive to embrace all of contract, quasi-contract, and delict. By the law of persons and personal status, children born in marriage are presumed to be legitimate (*pater est quem nuptiae demonstrant*) and the interests of the unborn are protected from conception. Mutual obligations of fidelity and support are imposed upon parents and children. Property rules stress the distinction between ownership and possession, between real rights and personal rights, and there is a *numerus clausus* of real rights. The principle *solo consensus obligat* is the basis for enforcing promises, onerous as well as gratuitous, and delictual responsibility generally rests upon the principle of *culpa*.

In contrast to the civilian sphere, the public law in a mixed jurisdiction will appear to be typically Anglo-American. British and American traditions differ of course in many respects as to constitutional form, but this law will broadly agree upon the principles of separation of powers, the independence of the judge, judicial review of governmental acts, due

[25] The assertion is deliberately qualified because there may be some penetration by one into the other (occurring sometimes before, sometimes after, the founding of the system). One reason for intermixing across the public/private divide may be the common law's lack of a clear private law/public law distinction. This permits continuing interaction between the two domains (e.g. the liability of the state may be governed by principles drawn from the private civil law). See Francois du Bois, "State Liability in South Africa: A Constitutional Remix" 25 *Tul. Eur. & C. L. Forum* 139 (2010); H. Patrick Glenn, "Quebec: Mixité and Monism" in E. Örücü, E. Atwooll, and S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996), p. 6. Additional interaction may stem from the process of conforming or harmonizing the private law to constitutional norms or supranational directives.

For the effect that French constitutional ideas have had on Sri Lanka's post-independence Constitution (replacing judicial review with France's system of pre-enactment review and introducing an Executive President based on the French model), see Anton Cooray, "Sri Lanka: Oriental and Occidental Laws in Harmony" in E. Örücü, E. Attwooll, and S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996), pp. 71–72.

process of law, free speech, and freedom from arbitrary search and arrest. The criminal law will embody the presumption of innocence, the principle *nulla poena sine lege*, and trial by a jury of one's peers. There will normally be no separate Constitutional Court,[26] nor separate administrative hierarchy. The great public writs of *quo warranto* and *habeas corpus* may be used to ensure the rule of law.

These three characteristics in my view are the lowest common denominators of a mixed jurisdiction. Admittedly they are somewhat abstract and require further elaboration. If they are accepted as reliable criteria, however, they afford a means of differentiating "classical" mixed jurisdictions from a wide variety of hybrid and pluralist systems. Understanding these traits permits us to anticipate the events necessary to found such systems, to gauge when evolutionary developments are reshaping their nature, or to predict their disintegration and demise.[27] These criteria will also enable me to discuss more clearly, in §III, the distinctive place of the classical mixed jurisdictions among the world's legal families.

III The question of a third legal family

There is a truism that might be called the beginning of all wisdom in comparative law research. It is that, as Arminjon, Nolde, and Wolff have said, "there doesn't exist in the modern world a pure judicial system formed without exterior influence."[28] According to this axiom, all systems are alloys and no nation's laws can claim to be purely indigenous. The difficulty the truism poses for our subject, however, is why and indeed *how* can we meaningfully discuss and isolate a distinct class of systems that is mixed in some deeper or "truer" sense, as opposed to the truistic sense. As stated earlier, for many years conventional usage held that the "mixed jurisdictions" referred to those particular hybrids which combined common law and civil law.[29] As such they were never viewed as a family, but they occupied a small niche that was conceptually linked to the common law and civil law families. Not all comparative lawyers may agree. For example when French or Russian jurists refer to *droit*

[26] South Africa and Malta are exceptions. Both have specialized Constitutional Courts. See the South Africa and Malta Reports, §II-3.
[27] See, for example, M. C. Dalton, "The Passing of Roman–Dutch Law in British Guiana" 36 *SALJ* 4 (1919).
[28] *Traité de droit comparé* 49, No. 49 (LGDJ 1950).
[29] Smith, "The Preservation of the Civilian Tradition," pp. 2–3.