

Contemporary Legal Cultures

Hybrid Legal Systems

Classical definitions of mixed jurisdictions

- F.P. Walton: “Mixed jurisdictions are legal systems in which the Romano- Germanic tradition has become suffused to some degree by Anglo-American law”
- Robin EVANS-JONES: “What I describe by the use of this term in relation to modern Scotland is a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions.

Hybridity in law

- broad meaning - example: Poland
- mixed jurisdictions *sensu stricto* : RSA, Scotland, Quebec, Louisiana
- overt and covert hybrids
- meeting points of traditions (case of Malaysia and RSA)
- many possibilities from different ingredients: simples mixes, complex mixes,
- moment of mixture (Louisiana vs Scotland)
- idea of legal transplant (trust in civil code of Czech Republic)

Culinary mixing of Esin Örücü

- (1) “mixed jurisdictions“ such as Scotland, where the legal system consists of historically distinct elements but the same legal institutions (a kind of “mixing bowl“);
- (2) jurisdictions such as Algeria, in which both the elements of the legal system and the legal institutions are distinct, reflecting both socio-cultural and legal-cultural differences (assimilated to a “salad bowl“);
- (3) jurisdictions such as Zimbabwe where legal dualism or pluralism exists, requiring internal conflict rules (akin to a “salad plate“);
- (4) jurisdictions where the constituent legal traditions have become blended (like a “purée“), either because of legal-cultural affinity (e.g. Dutch law, blending elements of French, German, Dutch and Roman law) or because of a dominant colonial power or national élite which eliminates local custom and replaces it with a compound legal system drawn from another tradition (e.g. Turkey, blending elements of Swiss, French, German and Italian law)

Elements of mixture

- Roman law (civilian based systems)
- common law tradition (both common law and quite systems)
- religious law of Hinduism, Buddhism, Confucianism and Islam
- customary law

Reason of mixing legal systems

- colonisation
- re-settlement
- occupation
- expansion
- unification

Methods of mixing

- imposition
- reception
- imposed reception
- co-ordinated parallel development
- inflation of law
- imitation of law

Hope or curse?

- Dangers for mixed jurisdictions
- Model of convergence for future unified system of private law

Mixture of civil law

- Tradition of Roman Law
- Law of Germanic Tribes
- Dutch elegant jurisprudence
- canon law
- customary law (Sachsenspiegel in Holy Roman Empire / Siete Partidas in Castilia)
- written/unwritten (uncodified) - restitution in common law vs quasi-delicts in Louisiana and Quebec

Theory of „family tree”

- The ‘family tree’ model (stammbaum) proposed by Augustus Schleicher in 1862,26 assumed that resemblances arose from common origin (understood in terms of parenthood), and languages closely similar and linked were thought to have separated or diverged from each other, with original divergence and further subsequent divergence.

Interesting hybrids: Thailand

- Thailand - Never a colony, since the end of the nineteenth century it has had in its modern texture a real mixture of sources such as English, German, French, Swiss, Japanese and American laws. These sit alongside historic sources in existence since 1283: rules from indigenous culture and tradition, customary laws and Hindu jurisprudence are still to be found in some modern enactments. In addition, Thai Codes were originally drafted in English and French and subsequently translated into Thai. Thailand's modern texture has been formed from many sources and the legal system of today still grapples with problems of translation and connotation.

Interesting hybrids: Malaysia

- First there was the 'native' law of the aboriginal inhabitants, which is still today regarded as positive law by courts. Then came layers of transplanted law: adat law (a number of Malay customs), Hindu and Buddhist laws, Islamic, Chinese, Thai laws, the English common law tradition coloured by Anglo-Indian Codes and the USA model. There are further influences in South East Asia: French, Dutch, German, Swiss, Portuguese and Spanish Civilian traditions, American, Japanese and Soviet laws

Malta

Here legal history began with the Phoenician settlement and continued with the Roman conquest bringing the Corpus Iuris. Then the Normans invaded and brought feudal law as applied in Spain, Naples and Sicily. The invasion of the Moors had direct influence on the Maltese language. The sovereignty of the Knights of St. John recognised local usage and issued declarations of private law drawing on laws of other countries, mostly Italian. Then came the French with their Napoleonic laws. Finally the British brought the common law. So here in Malta we see a good example of an eclectic Criminal Code drafted under a strong Italian influence but with pervasive English and Scottish impact, and a Commercial Code largely based on the French, with maritime law following English law

Scotland

- Scots customary law (different regulations of Norse, Celtic and Germanic tribes)
- Influence of Anglo-Norman Law (imitation and inspiration)
- Age of institutional writings (voluntary reception)
- Influence of English Law after Act of Union (1707) - gradual reception with signs of imposed reception (ex. law of treason) and unification

- Scots Law has been divided into four periods:
- (a) the feudal period, extending from the Battle of Carham establishing Scotland's present boundaries in 1018 to the death of King Robert the Bruce in 1329;
- (b) the "dark age" until 1532, when the Court of Session was established;
- (c) the Roman period from 1532 until the Napoleonic Wars, when the great reception of Roman Law occurred;
- (d) the modern period saw the influence of English law which had been given authority by the Union of the Parliaments in 1707 and the establishment of the House of Lords as the final court of appeal of Scotland in civil matters.

Republic of South Africa

- The Republic of South Africa is a mixed jurisdiction whose legal system reflects elements of both civil and common law, as well as African tribal customary law. The civilian heritage is “Roman-Dutch law”, brought to the Cape of Good Hope by the first Dutch settlers about 1652 when the colony, then under the administration of the Dutch East India Company, served primarily as a “refreshment station” for Dutch merchants and seafarers on the long journey between the Netherlands and the East Indies.

- Roman-Dutch law continued to develop after the British occupations of 1795 and 1806 and the transfer of the Cape to Britain in 1815, and was taken by the voortrekkers, beginning in the 1830s, into the territories later known as the Transvaal and the Orange Free State. As the nineteenth century progressed, however, English law began to be imported by statute into the Cape Colony, including the principle of freedom of testation, as well as in commercial and corporate fields, insurance, insolvency, constitutional, administrative and criminal matters.

- Following the Boer War (1899-1902) and the establishment of the Union of South Africa (1910), English and Roman-Dutch law were largely fused into a single system, thanks in good part to the influence of Lord DE VILLIERS, Chief Justice of Cape Colony and later of the Union for forty-one years, whose work was continued by Chief Justice J.R. INNES, who served from 1914 to 1927. Subsequently, the Appellate Division experienced a period of “purism“, associated with the tenure of L.C. STEYN as Chief Justice from 1959 to 1971, in which an effort was made to purify Roman-Dutch law from English accretions. Purism was associated with the ascendancy of apartheid.

- In the new Republic of South Africa, where South African legislation and precedents are lacking, Roman-Dutch and English sources are given approximately equal weight, in a kind of pragmatism. There is a considerable respect for both the institutional writers and more recent authors on Roman-Dutch law (a civilian trait), mixed with a view of judicial precedent as of very great importance (a common law characteristic). There is also a recognition of African customary law (“indigenous law”) which under the present Constitution must be applied where applicable, subject to the Constitution and any relevant legislation

Quebec

- Before the Treaty of Paris of 1763 by which New France was ceded to Great Britain, the territory now forming the Canadian province of Québec, as part of New France (generally called “le Canada“ by its inhabitants), had a private law primarily governed by the Coutume de Paris (Custom of Paris). This customary law, first reduced to writing in France in 1580, applied in the City of Paris and the surrounding province of Ile-de-France and was administered judicially by the Parlement de Paris. The Coutume was imposed on New France by King Louis XIV’s Edicts of April 1663 and May 1664.

- Because it was directed primarily at rights in immovable property (particularly the feudal rights of seigneurial ownership), rather than at the law of persons, however, the Coutume de Paris was supplemented in the latter regard by Roman law, as systematised and formulated in the doctrinal writings of eminent French legal scholars, especially POTHIER (1669-1772) and DOMAT (1625-1696), as well as by the Canon Law of the (established) Roman Catholic Church. The third principal source of private law in New France was the royal ordinances, including the Ordonnance sur la procédure civile (1667), the Ordonnance sur le commerce (1673) and the Ordonnance de la marine (1681). In last place came the arrêts de règlements, promulgated by the local Conseil souverain (a local governing council composed of the Governor, the Bishop and the Intendant) on diverse subjects such as agriculture, public health and fire prevention.

Louisiana

- Louisiana was first subjected to French Edicts, Ordinances and the Custom of Paris by charters issued to companies of merchant adventurers in 1712 and 1717, which laws remained in force when the territory became a royal colony in 1731. After Louisiana's cession to Spain in 1763, French laws remained in force until 1769, when they were officially replaced by Spanish laws and institutions,⁹⁰ including the Nueva Recopilación de Castilla (1567) and the Recopilación de Leyes de los Reinos de las Indias (a rearrangement of major legal texts up to 1680), and, in default of a specific rule in a later enactment, the Siete Partidas (a compilation of laws, based on the Justinian compilation and the doctrine of the Glossators, made under King Alfonso X in 1265 and formally enacted under King Alfonso XI in 1348). Following the territory's retrocession to France in 1800, Spanish law continued in force, because France assumed sovereignty for only twenty days in 1803 before the United States took possession of Louisiana on 20 December of that year.

- The Digest of 1808 was largely inspired by the revolutionary ideas of France, gleaned from the French Civil Code of 1804 and its preparatory works, approximately 70% of its 2,156 articles being based on those sources. The remainder of the text was derived from Spanish law and institutions, which rules were retained in the event of conflict with French-inspired provisions.
- Despite the Digest, confusion persisted as to which specific laws applied in Louisiana. Another committee was therefore instructed by the legislature to revise the civil code and add to it any missing laws still found to be in force. The result was the Louisiana Civil Code of 1825, which was modelled very closely on the French Civil Code, most of its 3,522 articles having an exact equivalent in that Code. It was designed to replace all pre-existing law, although the courts refused to give it quite the sweeping effect that had been intended.
- The 1808 and 1825 Codes were both drafted in French and translated into English, after which they were published in both languages, both versions being official. The enabling statute of the 1808 Code required consultation of both language versions in the event of ambiguity of any provision. The 1825 Code, on the other hand, was merely published in both French and English, without any provision in its enabling statute for resolving conflicts. Because the French text was the original, however, and because the translation was known to have errors, the French version came to be regarded as controlling.

Jurisprudence and doctrine

- This difference in priority can be explained by the role of the legislator in both traditions. French civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law.

Function of doctrine

- The civil law doctrine's function is "to draw from this disorganised mass [cases, books and legal dictionaries] the rules and the principles which will clarify and purge the subject of impure elements, and thus provide both the practice and the courts with a guide for the solution of particular cases in the future." The common law doctrine's function is more modest: authors are encouraged to distinguish cases that would appear incompatible to a civilist, and to extract from these specific rules.

Function of jurisprudence

- Common law jurisprudence sets out a new specific rule to a new specific set of facts and provides the principal source of law, while civil law jurisprudence applies general principles, and is only a secondary source of law of explanation.

Style of judgements

- Civil law judgments are written in a more formalistic style than common law judgments. Civil law decisions are indeed shorter than common law decisions, and are separated into two parts – the motifs (reasons) and the dispositif (order). This is because civil law judges are especially trained in special schools created for the purpose, while common law judges are appointed from amongst practising lawyers, without special training.
- The method of writing judgments is also different. Common law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, and decide (if not create) the specific legal rule relevant to the present facts. Civil law decisions first identify the legal principles that might be relevant, then verify if the facts support their application (only the facts relevant to the advanced principle thus need be stated). (In Québec, the common law methodology is followed.)

Survival of mixed jurisdictions?

- 1. Language
- The long-term vitality of two legal systems in a mixed jurisdiction is greatly assisted, and may in fact be dependent upon, the official recognition of two languages, one of which is particularly associated with each legal system in question. The examples of Québec, South Africa, Louisiana and Scotland are very telling in this regard.

- 2. Separate legislatures
- Where a mixed jurisdiction has its own legislature separate from the legislature of the federation (if any) of which it forms part, and separate from the legislature of any other country, it is easier to secure the future of the divergent legal traditions of the jurisdiction than it is where only one assembly exercises legislative power