Studies in Legal Systems:

Mixed and Mixing

Editors:
Esin Örücü, Elspeth Attwooll & Sean Coyle

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PREFACE

The editors wish to thank all those who contributed to this book, either by writing the various chapters in it or by assisting in other ways. In particular, we would mention the technical advice given to us by Selma Hoedt and Trevor Hook of Kluwer Law International and the practical expertise, as well as the seemingly limitless patience, of Lorna Brown, Patricia McKeating, Annmarie MacDougall and Susan Webb of Glasgow University Law School. Our gratitude is also due to partners and friends who bore with us during the production process.

In the interests of consistency, we have produced the book, as closely as we could, to a standard format. For this reason, citations may not always appear as they normally would in the jurisdiction concerned.

Esin Örücü
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Glasgow, October, 1995.

INTRODUCTION

Sean Coyle

The purpose of this book is to explore the ways in which various legal systems are mixed or mixing jurisdictions. Its authors are experts in the jurisdiction on which they write, and have direct experience of living within that jurisdiction. Some chapters therefore include, above the explicative account of the system, a personal dimension informative of the related issue: how does this particular mixture work in practice?

In being presented with such material, the duty of the editors is to place the accounts in such an order as to highlight common themes and promote the best "narrative" flow. Among the simplest ways in which this could be achieved would be to arrange the chapters by system-type, grouping those of like structure and mixture together. But in re-reading these chapters closely, it became apparent that the structural issue was not the only thing they had in common: in short, the scope of the book seemed to have reached beyond a mere characterisation of systemic mixité, to include other issues of conceptual importance in fields as diverse as legal education, sociological jurisprudence and so on. We have therefore decided to present the chapters in an order which best reflects this latter category of issues. Another reason for this was the desire to present the collection as a book, as opposed to a mere set of papers with only broad themes in common.

We start with four chapters whose jurisdictions do not coincide with states as such, but with an area (in the cases of Quebec, Scotland and the Basque Country), or a culture within a larger state-entity (Aboriginal law within Australia). In 'Quebec: mixité and monism', H Patrick Glenn presents us with various models for the classification and analysis of mixed jurisdictions. Of these, the two principal ones are "*structured mixité*" and "*unstructured mixité*". In situations of unstructured mixité, the sources of law remain disparate such that there is '. . . both mixité and a lack of formal coordination of it'. In the former case, statist structures work towards a systemic ordering of those disparate elements into a single nationalistic framework; where this programme succeeds, the mixité is extinguished and monism results. In many cases however, the process is never allowed to reach its conclusion, and the result is a "structured mixité", a type of legal order which, Glenn argues, characterises many more systems than was previously thought.

In the case of Quebec, the result may (perhaps) be called a "bi-systemic legal system", in which some areas of the law are more structured, more *monist*, than others. This sets the stage for Glenn's other major distinction, between *conceptual mixité* and *personal mixité*. Of most interest here is the discovery of a new conceptual model for the analysis of mixed jurisdictions: those that we may called "meta-mixed"; where some areas of the system differ from others in that they are structured according to some internal logic, so as to perform monistically, whereas the others remain relatively free of constraint (their conceptual taxonomy is, in currently fashionable terms, "fuzzy").

The temporal dimension urged by Glenn as a prime factor in mixité, is

clearly present in Elspeth Attwooll's chapter 'Scotland: a multi-dimensional jigsaw'. Here, the metaphor is used to stand for that very concept - that is, a structural mixité in which, piece by piece, new bodies of law (or re-interpreted old ones) are added to existing underlying patterns to form the successive temporal layers of the system. As the analysis (presented in terms of past, present and future) shows, it is not only purely common law jurisdictions which adopt a strongly retrospective attitude with regard to internal development. The picture of Scots law that emerges from this retrospective account is a mixed jurisdiction comprised of many foreign elements which have, by force of time and culture, become structured and "indigenified".

In terms of the present, we are told that Scots law counts as mixed in several senses: first in containing mixed legal components (not least the current influence of EC legislation); second regarding the actual techniques of legal practice; and third in virtue of the various dispute resolution mechanisms open to the public, some of which betoken a non-occidental approach to law, notwithstanding the adversarial approach usually favoured. The analysis closes with a tentative projection of future developments, with emphasis on the role of the EC within domestic systems of law.

Whereas the legal systems of Quebec and Scotland furnish examples of the "classical" definition of mixed jurisdictions (i.e. along common law - civil law lines), those of the Basque Country and Australia present to us more complex, less categorical models for analysis. In the case of the Basque Country, the mixture is one of civil law and "custom", in which the latter is not exactly what one usually intends by that term, i.e. a certain body of law with a certain tradition that makes up one source of the system, but rather a subset of legal activity which pertains only to one area of the jurisdiction, without full autonomy. In 'The Basque Country: Basque law in Spain', Alejandro Saiz Arnaiz and Joxerramon Bengoetxea Caballero discuss this concept, *forality*, both in terms of its legal relation to Spanish constitutional law, and in its role as a constituent of cultural expression. We are presented with a model of law that is, in a great many respects, unique: there are no specifically Basque legal institutions, no autonomous body of law as such, and no statutes written in the Basque language. There are, rather, what the authors describe as legal "singularities" and "peculiarities" in regard to certain areas of the law which nevertheless constitute significant deviations from mainstream Spanish law.

There can be no doubt, though, that talk of "Basque law" is conceptually justified. Aside from purely aesthetic concerns, Basque law remains an important object of study in virtue of its individuality: it is a model that evades clear categorisation within the existing broad concepts of comparative law. In many ways, the same is true of Australia.

The interesting circumstances of Australia's mixture - the extent of which is only now coming fully to be realised - are reflected by Charles Edwards through two recent developments, the *Mabo* judgment and the 1986 Australian Law Reform Commission Report. In 'Australia: accommodating multi-culturalism in law', he suggests that these developments may be taken as instances of a new approach in Australian law to the recognition of the

rights and, (of greater conceptual significance), the separate normative arrangements, of its indigenous peoples. The basic effects, he argues, have been to raise the status of Aboriginals in Australia, and to establish the legal significance of a developed indigenous culture, with its own body of norms, which was already in place prior to European colonisation, and which has weathered the (at best) indifferent attitude of the dominant legal culture. The task now facing both cultures is to find some way of giving effect, in "western" legal terms, to principles of aboriginal "law" which are in many ways divorced from received conceptual paradigms. The centrepiece example (in *Mabo*) is the dominant position of land in aboriginal cultural consciousness - a relationship whose essence "ownership" concepts simply fail to capture.

Most central, perhaps, to our purposes, is that the picture of legal pluralism presented in this chapter suggests a new type of mixed jurisdiction, which does not sit comfortably within existing models; *viz.* a pluralist jurisdiction wherein one of the elements of the mixture is not, strictly, "legal" (at least, not within the western paradigm), but something else.

Whilst in Australia recognition of indigenous law is on the increase, and with it a growing acceptance of that jurisdiction as *pluralistic*, in Sri Lanka we see the opposite: a popular decision to move toward legal *unity*, a "common law of Sri Lanka", and to ignore the pluralism that previously existed. The important issue here is the nature of the decision to alter received perceptions of the legal status quo, which in this case proceeds on an ascending model, from the population upwards, in contradistinction to the following collection of chapters in which that decision is grounded in a descending model, the organs of state having assumed responsibility for change.

In 'Sri Lanka: Oriental and Occidental laws in harmony', Anton Cooray describes the systemic blend of Roman-Dutch- and English law influences that together make up the common law, the *residual* law, of Sri Lanka. Also of importance however are the various indigenous bodies of law, such as Muslim and Kandyan law, which govern various classes of legal transaction. Sri Lanka is presented as a system not only of parallel development, as between common law and indigenous law, but also as intermixed: the Roman-Dutch elements in particular reacting dynamically to preserve consistency with the growing complexity of the system.

The role of education and the virtues of a 'deep-rooted participatory democracy' are also stressed as factors in the subsistence of various bodies of law that would otherwise fall into neglect.[1] Sri Lanka's current mixture may therefore be viewed as a blend of historic affiliations and 'deliberate constitution-making'.

It is, in fact, the issue of what we may call "constitutionalism" in law that forms the core subject of the next six chapters. As we shall see,

[1] The importance of education to the preservation of, or in some cases, progression from, certain cultural elements in mixed jurisdictions is a theme touched upon in most of the chapters in this book. For more detailed statements, see especially those on Germany, Malta and Mauritius.The chapter on Israel is also of interest in discussing the role of the personnel of the law in respect of these matters.

constitutionalism is capable of being both an instrument of legal-cultural change and a block to such change. In the first three cases, those of Turkey, the Russian Federation and the Tyumen Region, the constitution is used as *the* instrument of social change, to construct a new type of society by reinventing the constitution and the state infrastructure. In this respect we may look upon constitutionalism as an exercise in legal positivism - the notion that the law can change the people, not by historical accident but by deliberate legal means.

In 'Turkey: change under pressure', Esin Örücü describes the Turkish legal system as the product of extensive movements of law across frontiers. Normally, this would result in a mixed jurisdiction, but in fact the end-product was a civilian system of law; not an association of diverse elements, but a proper compound, a *purée*. Part of the reason for this, Örücü argues, was the desire of the élite to modernise and westernise Turkish society through the use of large-scale receptions of various codes, which were then blended successfully by means of judicial application and interpretation. An extensive examination of the case law demonstrates the way in which this was both handled and achieved. Another factor, we are told, may have been efforts to streamline and adapt existing legal institutions for eventual participation in the economic and legal orders of the European Community.

Turkey, then, may be seen as a result of internal and external pressure for change. Such a massive change, Örücü states, 'must be a transitional one', especially in view of the definite direction that change has taken.[2] Similarly, Yury Tikhomirov and Albert Piglokin's chapter 'Russian Federation: the state and prospects for legislative development' concentrates on the extent to which the new breed of Russian legislation continues to serve in the reconstruction of Russian society as it moves from previous socio-legal forms and theories towards a broadly western model. Here too we see "transition properly so-called": definite movement away from one systemic ideology and towards a new one. They argue that not only is a codified body of law necessary to effect the changes political will demands but, also, that law is pivotal in deciding the direction of that change. The remainder of the chapter deals with the law's promotion of new civic values that facilitate the newly-emergent ways of life.

In 'The Tyumen Region: regional aspects of the dynamics of development of state law in modern Russia' Klara Barbakova *et al* discuss further the "determining role of State Law" in regional socio-legal forms within the Russian Federation. They see the legal picture across the Federation as being at present highly unsettled, partly as a result of the magnitude of state intervention in the historic and social underpinnings of various legal systems. This process is, however, necessary if a stable basis for the newly-democratic states is to be found.

If the foregoing provide evidence of the role of law in socio-cultural change, the opposite position - that of the role of law in socio-cultural preservation - is the case in the following contributions, on Hong Kong, Israel and South Africa respectively.

[2] We shall see, in the context of the Algerian system, that lack of definite direction during paradigm-change results in a question mark being placed over the use of "transition" concepts to describe that change.

Yash Ghai's account of the issues surrounding the Hong Kong Special Administrative Region in the run-up to the transfer of sovereignty to China, concentrates on anomalies and contradictions set to arise out of the Basic Law. In 'Hong Kong: interpretation of the Basic Law of the Special Administrative Region' he argues that part of the problem comes from the fact that the Basic Law and the systems it represents lie between various legal traditions as well as at their conjuncture. The mechanism for the Basic Law's interpretation, therefore, is at best vague, and at worst - such as where those systems may be pulling in opposite directions - may be contradictory.

In this climate of uncertainty, Ghai wonders how much of Hong Kong's existing legal infrastructure will remain intact. He also ponders the wider cultural effects the changes may bring, especially regarding investment patterns and the future direction of the economy. Finally, he suggests an alternative model for interpretation of the Basic Law.

In the case of Israel, change has been characterised by movement away from the earlier common law forms and towards a civilian law system, such that now it is a mixture of the two. But in 'Israel: creating a new legal system from different sources by jurists of different backgrounds', Stephen Goldstein questions the level at which this mixture has occurred. Though the law contains many civilian elements, it is not marked by the existence of any truly mixed *institutions*: rather, the system consists of separate, compartmentalised elements belonging to one or other tradition. Goldstein suggests that by looking behind the positive law, to the structures and processes and the judiciary's perceptions of its own role and so on, one will discover that there are few civilian elements and that the culture is one of common law. Though some "continental" influences are present, the penetration of civilian forms occurs only at certain levels and no further. One may therefore detect resistance at the legal-cultural level, to change.

In a loosely related way, the South African system is comprised of a civilian-based common law and a broadly "English" structure. Most of that country's legal history, David Carey-Miller argues, consists in English-style methods towards the application of Roman-Dutch material. But in his 'South Africa: a mixed system subject to transcending forces' Carey-Miller stresses that the mixed nature of the system was and is secondary to its social role, first as an instrument of oppression, and now as a means of social change. In the event, he says, the overthrow of the former regime came not from law, but from political, economic and social pressure. Even now, Carey-Miller states, as the neglected dimension of public law achieves importance in the new state, in the form of a new constitution and bill of rights, it is still political and social pressure, and not the law, that is the engine of social change.

In various ways, then, the foregoing six chapters all provide powerful examples of the way in which law can be used to push, pull, shape, maintain or radically change, aspects of society or indeed whole cultural orders. In the following case, that of Algeria, the direction of change is much less certain.

In 'Algeria: reconciling faith and modernity', Ahmed Aoued presents a system which is both historically complex and presently at a crossroads. For some, he says, the system '. . . is in transformation, for others it is in

transition'. This statement reflects well the internal uncertainty surrounding the current direction of that system. Viewed from outside, the situation is even more ambivalent. The idea of transition, traditionally construed, depicts a situation in which a system moves from point *a* to point *b* either gradually or by a number of steps. The same, by and large, is required of transformation-concepts. In this case however, though movement is certainly evident, the direction of change is not obvious. This may partly result from the complexity mentioned above: when many different elements of a system begin to change at once, results cannot be predicted with any certainty. In that case, perhaps the correct characterisation of the Algerian system is that it is, for the moment, experiencing nothing short of upheaval.

Next in order are two chapters which are illustrative of the historical dimension of mixed jurisdictions. They are also excellent examples of small jurisdictions that have achieved a good measure of internal harmony among the mixture of elements, and succeed in showing how such historical mixtures often provide the best *working* models of mixed jurisdictions. In L Neville Brown's 'Mauritius: mixed laws in a mini jurisdiction', we return to a common law - civil law mixture, this time the result of French and English influences. In addition however, Brown underlines the importance of legal education and training in the further development of a growing body of indigenous law, "Mauritian law", which differs in significant respects from its parents. The quality of the mixture, and the strength of the Mauritian economy, argues Brown, ensure that Mauritius is well-placed with respect to international affairs in a way that belies its territorial size.

A great many more influences are evident in Malta's legal history. In 'Malta: a microcosm of international influences', Joseph Ganado traces these various elements from the first body of laws, enacted by the Knights of Malta, to the present day. Though the British had altered the administrative and judicial structures of the Maltese system, Ganado points out that the most fruitful period of legal development coincided with the period of codification in the 19th century, during which, to various degrees, Scottish, French and Italian influences made their presence felt. Though this period of codification is attributed to the contemporary upsurge in European legal theory, Ganado warns against doctrinal or theoretical approaches to Malta's mixture, both because the elements of the mixture are too numerous to support a single theoretical pattern, and because he sees the historical development of the system as proceeding along pragmatic rather than teleological lines.

The next two chapters are to a high degree concerned with the cultural dimension in pluralism. Both are manifestations of an intention to promote the highest quality mixture based upon the very best each cultural element has on offer, but in radically different ways. Japan, Aritsune Katsuta tells us, has a hybrid legal culture, made up of fundamentally different influences. The central metaphor in 'Japan: a grey legal culture' is partly to do with this mixture of "black" and "white" elements which do not ordinarily sit together. Yet if Japanese legal culture is ambiguous, it is certainly not amorphous: by tracing the historical influences on Japanese legal consciousness at the hands, first, of the *bushi* Shogunate, and later, the West, Katsuta shows Japanese culture to be a curious, though quantifiable meeting of old, new, eastern and western ideas. The extent to

which Japan has succeeded - in being both an eastern and a western legal culture - is testimony to the skillfulness of the balancing act performed with respect to the various cultural elements.

Yet if Japan's success comes from an ability to combine various cultural elements whilst maintaining their relative separation, Slovenia's favoured method is to blend its mixed traditions into a "best-case" whole. Dragan Petrovec's analysis in 'Slovenia: some questions concerning the new criminal legislation' uses the development of criminal law as a point of departure for examination of that jurisdiction's rich legal-cultural mixture. What that model shows is a careful development of Slovenian legislation according to existing bodies of law, selective borrowings from other European traditions, as well as International Humanitarian Law, and the construction of hybrid principles based upon a mixture of these traditions. An example of the latter category is seen in the unique Slovenian attitude to criminal procedure in the courts, which proceeds on a mixture of adversarial and inquisitorial techniques. This systematic rejection of outside influences which do not work, in favour of reception or retention of ones that do, has achieved not a loose association of principles, but rather a harmonised body of law based on a manipulation of the sources of law into a newly-structured statutory framework.

The final substantive chapter is Eckart Klein and Frank Kimms's 'Germany: reunification and the restoration of legal unity'. Here we have a situation which is not historically, or even now, a mixed jurisdiction, but increasingly a *blending* one. It is a system *in transition*. Klein traces the contemporary situation from 19th century movements toward unification of the separate German states into a "common citizenship", through post-war parallel existence of the two Germanys in which their respective legal systems diverged under political pressures, to the reunification treaties of 1989. The problems of harmonisation of laws between the two systems is governed by the treaties, and the authors examine critically the relevant issues. They also describe the considerable influence of the EC in preparing the way for reunification of the two states. But for the EC, they argue, it is unlikely that a reunification of two peoples with "different mentalities" would have been realised, or at least realised so quickly. It was this EC influence that the authors suggest is responsible for the fostering of social and legal conditions favourable to reunification.

Noreen Burrows's chapter 'European Community: the mega mix' generalises the case of Germany to all legal systems within the European Union. She examines the ways in which the legal systems within the Union contact each other, and how, at various levels, they influence and develop together. These processes occur both within and without the immediate sphere of European *law*, but are common also to economic and social dimensions of the Union's activity.

Burrows does not claim for European law the status of a legal system, nor yet that of a mixed jurisdiction; rather, she follows the European Court of Justice in characterising it as a 'new order of international law', a composite built up out of a mixture of ideas, institutions and concepts of the various member states - and these two aspects, perhaps, may be treated as corresponding to external- and internal (EC) perspectives on what European law is. The internal dimension is characterised as a symbiotic

relationship, with EC law, on the one hand, penetrating the national legal systems, changing their style and content (sometimes dramatically - as with the effective overthrow of the UK doctrine of parliamentary sovereignty), and the national legal systems on the other hand providing the raw materials out of which EC law is constructed and developed.

Thus, within the European legal sphere, it is legal borrowing that has become the norm in the quest for an homogeneous legal order. Burrows examines the methods by which the organs of community law transform domestic legal concepts for wider European consumption: some borrowings are fairly straightforward; others, such as the French *acte clair*, have little more than homonymy linking them with their original domestic counterparts. The result of such borrowings has been to alter the national legal systems into composites in their turn. The chapter finishes by questioning the impact of EC law outwith the European Community, arguing that its influence is not always benign.

The penultimate chapter in this book, David Goldberg and Elspeth Attwooll's 'Legal orders, systemic relationships and cultural characteristics: towards spectral jurisprudence', re-examines the whole issue of the ways in which not only legal, but other normative, orders can be related and mixed. The notion of "mixture", they argue, is a matter for external- as well as internal (systemic) inquiry, so that conceptions of mixité extend beyond mere source-constructions to the much wider realm of relationships between the systems or orders themselves. In recognition of this, they present new theoretic constructions for the analysis of legal orders, which are part like and part unlike the existing models for mixed systems used by comparatists.

These "spectra" are designated according to both their systemic relationships with other orders *and* their own cultural characteristics (which may well also be mixed). In promoting "spectra", rather than simple system-types, as the correct units of analysis, Goldberg and Attwooll are stating in effect that each "model" of a mixed legal order is less static, more *fluid,* than was previously supposed by comparatists. The use of spectra thus gets round the problem of conceptual narrowness, discussed by Patrick Glenn in the first chapter in this book, by presenting a much freer set of boundary criteria for identifying the kind(s) of system which may fall under a given spectrum. This also allows for a more acceptable balance, first as between the need for intellectual categorisation of systems and their individual circumstances, that is, those parts of the various systems which before lay outside the scope of taxonomic ordering, to be treated as anomalies; and, second, as between the need for objective agreement over which concepts obtain within a given situation and the need to interpret events through various different, and often clashing, cultural perspectives. As illustrated by the authors: '. . . from one point of view, what may be described as "a willing reception" may, from another, be perceived as imposition'.

This point is echoed in the closing chapter of this book, Esin Örücü's 'Mixed and mixing systems: a conceptual search'. She too argues for a rethinking of traditional comparative models in the light of the growing number of counter-examples to the conceptual partitions such models demand. The classical frame of reference for the analysis of mixed

jurisdictions has used the notion of "legal families" as its ground. Örücü is concerned to find a wider reference frame by taking not legal families as such, but *movements of law* as the primary explanans of the formation of mixed jurisdictions.

The problem with the "legal families" approach is its reliance on a notion of mixed jurisdictions which sees them as arising at the points of contact of various legal traditions. But as Örücü shows, the notion of what a legal tradition is is no less problematic than Goldberg and Attwooll have shown rigid conceptions of mixed jurisdictions to be. The various combinations of legal-cultural diversity, socio-cultural pluralism, legal-cultural affinity and so on demonstrate this point. But, as it is the notions of mixed jurisdiction and tradition that provide the grounds of comparative analysis, the traditional constructs, within the legal families model, begin to look decidedly unsafe.

The dilemma as Örücü sees it is this: we need fairly rigid definitions in order to talk about or classify legal types at all. But for any given rule, exceptions will exist, mostly due to the variety of historical circumstances that give to certain systems their peculiar characteristics. In comparative law, for every rule formulated, the exceptions will tend to smother it through force of numbers. We therefore have a choice: either we can insist on strict rules necessary to a tidy conceptual framework, and force recalcitrant legal systems into somewhat contrived pre-set boundaries, or else we can relax the rules, thus allowing for greater leeway in assigning systems to a given set of criteria, but at the price of achieving less conceptual rigour.

This need for a more "fuzzy" approach to the theory of mixed jurisdictions is perhaps the most overwhelming message of this book. In their various ways, the chapters on Quebec, Australia, the Basque Country, Algeria, the European Community and others make it increasingly obvious that even the "classical examples" of mixed jurisdictions no longer seem quite to fit the mould. The final chapter offers its own ideas on what an alternative framework might include (in this case, a new perspective on internal logic, from both a vertical and a horizontal viewpoint); but as Örücü notes, the need for further research into this area is obvious. It is hoped that the material in this book can provide a useful starting point for such a project.

CONTENTS

QUEBEC : MIXITÉ AND MONISM

H Patrick Glenn

The concept of a mixed legal system appears to have been a creation of 19th and 20th century doctrine, which was largely transfixed by the idea of law as a pure and national product, capable of construction in the form of autonomous systems. Where this intellectual construction became too obviously strained, in its application to a particular country or jurisdiction, resort was had to the scientific tradition of the anomaly - the unexplainable though marginal case, which remained for the time being outside the explanatory power of general scientific theory. The mixed legal system thus would not presently conform to pure and national concepts of law, nor to established criteria for inclusion in established definitions of legal families. It was, however, a system, and one which could eventually acquire the characteristics necessary for taxonomic ordering.

There is therefore a hidden, temporal dimension in the idea of a mixed legal system. The sources of its law are disparate, and hence mixed,[1] and at the present time statist structures have been unable to complete the task of transfiguring[2] disparate law into systemic, national law. So long as this process is incomplete, the jurisdiction will remain mixed and the mixité will remain evident in ongoing, continuing use of disparate sources. The task of transfiguration may be completed, however, and this will signal the end of the mixité. The law will have become pure and monist in character. Professor Rouland has thus correctly stated that mixed jurisdictions may function (*s'actualiser*) as monist jurisdictions. The original sources of law may be disparate in character, yet monist, state institutions may already have largely completed the task of transfiguration into a single, national, systemic structure of law.[3]

Some so-called mixed jurisdictions have endured as such for so long, however, that their mixité may become an object of scientific interest, as opposed to marginalization.This is also said to occur in the case of anomalies in science. Mixité in law is evidently today a major subject of enquiry, as this book demonstrates, and if a jurisdiction has continued to exist as a mixed jurisdiction through the entire period of nationalization of law it is necessarily one which has strenuously, though often quietly, resisted the pressures of nationalization and systematization. There are probably far more such jurisdictions in the world than taxonomic

[1] This by itself is clearly inadequate for designation as a mixed system, since the historical origins of law of all jurisdictions are disparate. For the absence of any "pure" legal systems in the world, see P Arminjon, B Nolde & M Wolff, *Traité de droit comparé* vol. 1 Paris (1950) 49.

[2] Professor Carbonnier has spoken of the process by which Roman law became "transvasé" or decanted into modern French law. J Carbonnier, 'Usus hodiernus pandectarum' in R Graveson *et al* (eds), *Festschrift für Imre Zajtay* Tübingen (1982) 107-116 at 110.

[3] N Rouland, 'Les droits mixtes et les théories du pluralisme juridique' in *La formation du droit national dans les pays de droit mixte* Aix-en-Provence (1989) 41-55 at 42.

comparative law was previously willing to recognize.[4] Quebec is certainly one of them. It has dealt with disparate sources of law at least since the arrival of European settlers (first French, then English). It may be more appropriate to say that it has always dealt with disparate sources of law.

It is perilous to try to impose order on any discussion of mixité. Since the temporal dimension of the phenomenon appears to be so important, however, an effort will be made to capture the dynamic of Quebec's mixité by examining first the phenomenon of unstructured mixité, then the influence of statist structures in attempting to freeze or structure a particular mix of sources, and finally the resistance of mixed sources to formalization, as demonstrated in ongoing resort to a broad and varied range of sources of law.

I. Unstructured Mixité

French explorers did not find an uninhabited territory on their arrival in North America in the 16th century. The question of whether European law was applicable to aboriginal peoples was one which had to be addressed. It is not yet fully resolved and may well never be. Moreover, the question of the application of European law or aboriginal law was one which masked a more refined question, that of the particular aboriginal law applicable to aboriginal peoples.

The work of anthropologists and historians is now uncovering the richness of native American life and custom in the time prior to European settlement.[5] Different bands lived in different ways and, in a population spread over the entire North American continent, there was room for great variation, within a general tradition which taught respect for the natural environment and sharing amongst generations - past, present and future. Public law clearly existed, and now has been rendered even into codified form.[6] Private law was less important, since land was the object of a communal form of usufruct and private property extended to a relatively small range of objects of personal use. Family law was most developed. Crime was dealt with according to general rules which did extend in some instances to theft. The relations between customs appear generally unstructured, and neither territoriality nor personality of laws could be seen to be of clear and evident application. Much depended on the mobility of the band.

[4] See, for the contemporary phenomenon of reception, to which must now be added the experience of East European countries and Russia, H P Glenn, 'Reception and Reconciliation of Laws' *Rechtstheorie* Beiheft 12, *Monistic or Pluralistic Legal Culture?* Berlin (1991) 209-214.

[5] See generally O P Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* Toronto (1992), notably ch. 4; D Jenness, *The Indians of Canada* Ottawa, 6th edn. (1963), notably chs IX and X ; B Trigger, *The Children of Aataentsic [:] A History of the Huron People to 1660* Kingston/Montreal (1976).

[6] *The Great Law of Peace of the Longhouse People (Iroquois League of Six Nations)* Rooseveltown, N.Y., 5th printing (1977).