Taxonomy in Comparative Law

René David, Les grands systèmes de droit contemporains, Dalloz, 1964, 1st ed.: common law | civil law | socialist law | other conceptions | pluralistic family

Patrick Glenn, Legal Traditions of the World, OUP, 2014, 5th ed.: common law | civil law | Chthonic law | Talmudic law | Islamic law | Hindu law | Asian law

Ugo Mattei, Three Patterns of the Law, 45 AJCL 5 (1997): professional law | political law | religious law

Esin Örücü, What is a Mixed Legal System, EJCL (2008): family tree approach + wave theory

PRÉCIS 0601178151 Les grands systèmes de droit contemporains Anthropologie juridique LEGAL TRADITIONS of the WORLD SCHLESINGER'S COMPARATIVE Mixed Legal Systems at New Frontiers

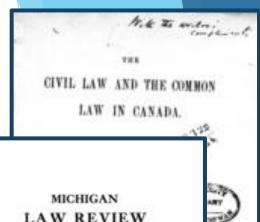
The debate on mixed jurisdictions was born out of the limitations of traditional taxonomy, when English-speaking scholars from some jurisdictions – Scotland, Quebec, and Louisiana – started self-narrating their own system as 'mixed'.

Frederick P. Walton, The Civil Law and the Common Law in Canada, (1899) 11 Juridical Review 282

Robert W. Lee, The Civil Law and the Common Law – A World Survey, 14 Michigan Law Review 89 (1915)

T.B. Smith, The Preservation of the Civilian Tradition in "Mixed Jurisdictions, 35 Rev. Jur. U.P.R. (1966)

Part II – Comparative Law Across Legal Traditions



LAW REVIEW

At this suffergrow of the Gird Law Section of the Lockinson State Law Escatuse every in he understood that I same within the heally sirrle as to speak. When there was scalared upon me, a Sommen and Sons lawyer, bearing sensimilary in the research, regarded this not only as an exemptional privilege, has also us the imposition of a special skey to concern toyalf with all the explorations and arbitroments of the landon and to simply in inmeetings with brokenin. Is this not the best that my brands—and here I have not incomparable bloods—asset report of me? I have ben more forteners in my experiences with several of the "mixed prindiction" and have always less, would us use of the battle. In South Africa or in Louisiana I have had the appearantly as tech and so discour the low with Investor whose outpoke and eaproteins referred different basic philosphies of law and life, in the Province of Qualitic I have been worsely received and madded Self to expect its own rions and profe from from represell by there. Butting the present year at Marrard Law Sidned where I title bets teaching the yearpuse included a uniting on the setund principalisms and brought me iron done and drainful contain with a thetagraphed arbeits from Corbos who, having current high analouse troopsiries at Orderd, has obtained for reposition for legal saludar ably in corres on her upon as Singapore and Cambridge. As the

many other nebelies from South Althra and Legislam who have no el Recion Syrbity cam to misterridge de mantalisa ga-pribe, crimo and patridos el des actuals he malore la marcia a

end of this seems for will becare in my department or Edinburgh University on the profess from which Professors Foul André Ceignes of Moliti and Fredmand Fulctive Steam of Talana have already targle during the current academic rasi. They were moreover in

THE PRESERVATION OF THE CIVILIAN TRADITION IN "MEXED JURISDICTION" T. A. Smith!

This scholarship thus defined mixed jurisdictions as those legal systems in which civil law and common law doctrines had been received and contend for supremacy.

The birth of the category can be seen as a claim of autonomous identity by the periphery against the dominant English, Canadian or US culture ...

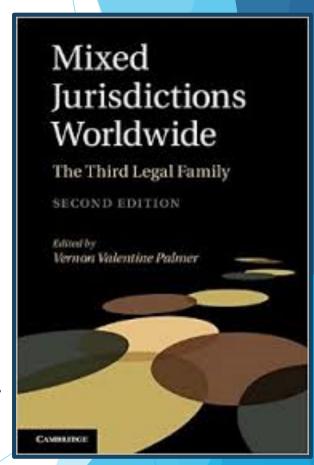
... and as a by-product of the English-speaking, Western legal scholarship, which put the emphasis only on mixtures of the traditional 'major' legal traditions of the world, i.e. the civil law and the common law ones.

Two opposite visions of mixed jurisdictions

(1) Mixed jurisdictions as a 'third legal family' displaying an "impressive unity despite the indisputable diversity of people, cultures, languages, climates, religions, economies, and indigenous laws existing among them".

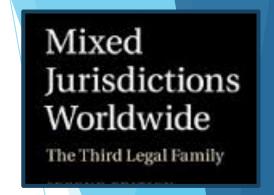
Features:

- civil law precedes the common law;
- judicial decisions are given strong precedential value;
- civil procedure is adversarial and Anglo-American;
- ▶ private law is mostly dictated by civil law principles, but with some incursion of the common law (esp. in the law of delict and in commercial law).



Two opposite visions of mixed jurisdictions

(1) Mixed jurisdictions as a 'third legal family'



Louisiana	South Africa	Quebec	Swaziland	Seychelles
Israel	Philippines	Botswana	Sri Lanka	Saint Lucia
Scotland	Puerto Rico	Lesotho	Mauritius	Zimbabwe

This understanding of mixed jurisdictions has been criticized, as it would be:

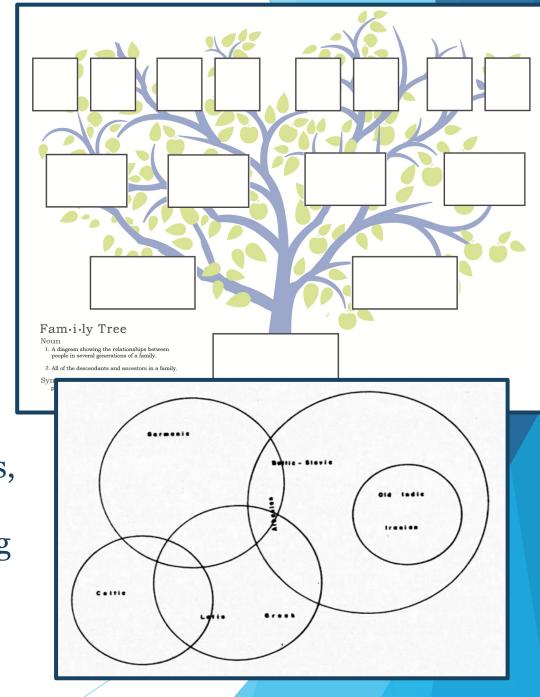
- Anglo- and Euro-centric;
- incomplete;
- not helpful.

Two opposite visions of mixed jurisdictions

(2) All legal systems are mixed, whether covertly or overtly.

family tree approach & wave theory

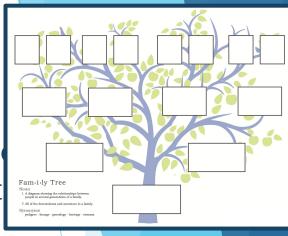
The goal is to deconstruct the conventionally labelled pattern of legal systems and reconstruct them with regard to origins, relationships, overlaps and interrelationships, and diverse fertilizers such as the social and cultural context, and the grafting and pruning used in their development.

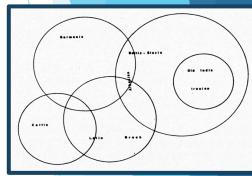


Special attention must be paid to legal-cultural convergence and non-convergence that may come about as result of legal import and to any ensuing socio-cultural non-convergence. In this context, cultural pluralism, clash of diverse cultures, and the consequences for the importing legal systems are of particular contemporary interest.

<u>Taxonomy of possible encounters</u> [Örücü]:

- (1) systems of social and legal similarity;
- (2) systems of social similarity but legal difference;
- (3) systems of social difference but legal similarity;
- (4) systems of both social and legal cultural difference.





Yet, what do 'social', 'legal', 'similarity', and 'difference' mean?

"All legal systems are mixed": the case of Italy

Italy is an affiliate to the civil law family – if not the most representative civil law system [J.H. Merryman, The Italian Style, 18 Stanford L.

Rev. (1964-1965), III parts]

> 753 BCE to 5th century: Roman law

▶ 5th to 11th century: barbaric law

▶ 11th to 18th century: re-discovery of Roman law through the universities; canon law

Basic ingredients of the civilian recipe:

Roman law and Canon law at its foundations;

universities and a scholarly-based system of legal education;

scholarly mission to draw from local norms general rules and principles.

feudal barbaric guilds customs laws law

> emergence of 'ius commune'

law

common merchant customs

urban

laws

"All legal systems are mixed": the case of Italy
The variety of local laws was still visible in the 19th
century.

- the <u>Kingdom of the two Sicilies</u> and the <u>Kingdom of Piedmont-Sardinia</u> adopted the **French Civil** Code in 1819 and 1837 respectively;
- ► <u>Tuscany</u> (under Austrian Grand Dukes) and the <u>regions of Rome and Bologna</u> (under papal administration) were ruled by the **ius commune**;
- Trieste (1382-1918), Milan (1706-1799; 1815-1859) and Venice (1797-1866) were under the Habsburg empire and ruled by the **Austrian Civil Code**.



In 1861, the Kingdom of Piedmont-Sardinia unify the whole peninsula.

«With a single blow, the whole edifice of the ius commune of continental Europe, which had been in place and functioning for sever hundred years, fell – and along with it fell the teachings of the doctors, the authority of the courts, and the plurality of normative levels.»

[A. Padoa Schioppa, "A Sketch of Legal History", in J.S. Lena and U. Mattei (eds.), Introduction to Italian Law, Kluwer, 2002, 7]



"All legal systems are mixed": the case of Italy

- ▶ 1865 to 1890: French influence > Civil Code of 1865
- ▶ 1890 to 1950s: French + German influence > Civil Code of 1942
- ▶ 1950s to present: U.S. influence > Code of Criminal Procedure

NOT EFFECTIVE:

decentralized judicial review adversary criminal procedure class actions contingency fees EFFECTIVE:

finance and commercial law new methodologies new paradigms of teaching law of trust



What does the debate on mixed jurisdictions teach us?

- no legal system is pure;
- we should look behind the veil of official receptions to carefully review the contribution that different legal formants made to the process of molding foreign-inspired rules, methods and procedures;
- we should analyze the historical, cultural and technical factors underlying patterns of vulnerability to, and resistance against foreign models;
- we should pay high attention to the often unintended consequences of legal borrowing, and to the combinations, mutations, and hybridizations which may result from coexistence of local models and imported ones.