

# 6. Mixed Jurisdictions

## Taxonomy in Comparative Law

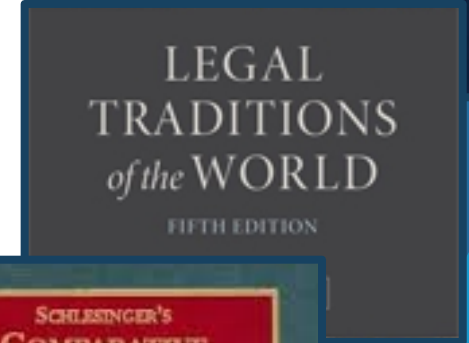
René David, *Les grands systèmes de droit contemporains*, Dalloz, 1964, 1<sup>st</sup> ed.: *common law* | *civil law* | *socialist law* | *other conceptions* | *pluralistic family*

Patrick Glenn, *Legal Traditions of the World*, OUP, 2014, 5<sup>th</sup> 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 Örüçü, *What is a Mixed Legal System*, *EJCL* (2008): *family tree approach* + *wave theory*

**Part II – Comparative Law Across Legal Traditions**



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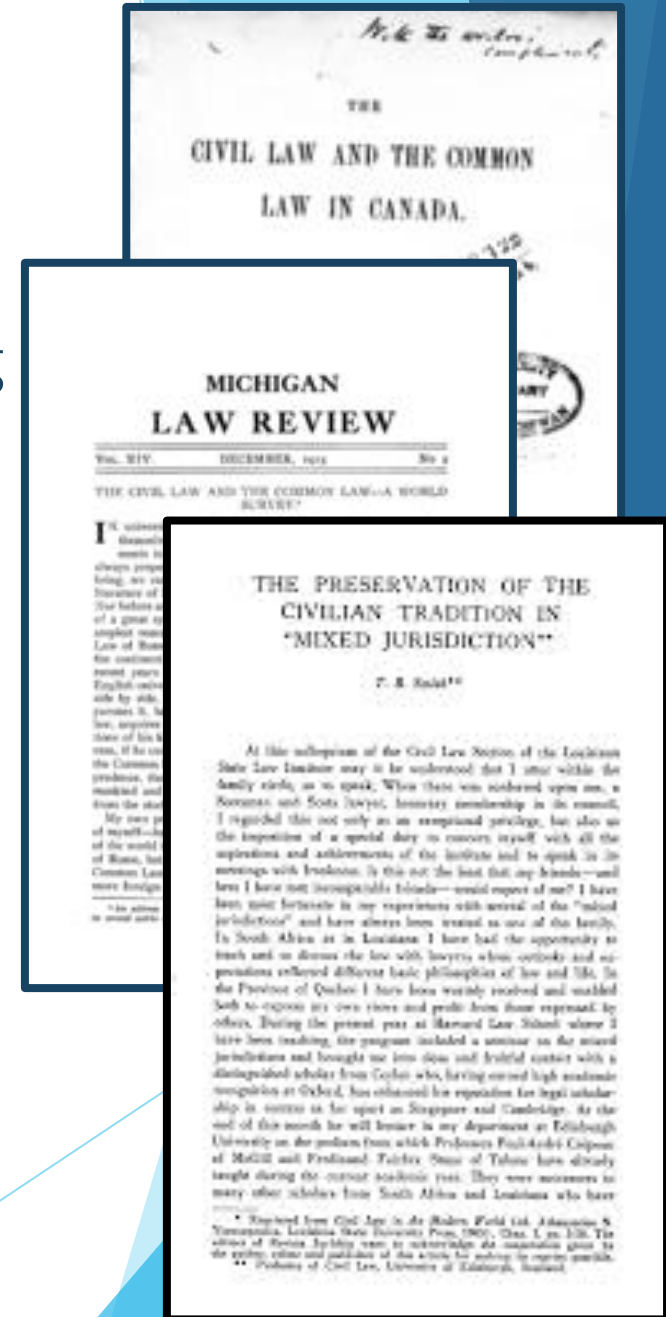
The debate on mixed jurisdictions was born out of the limitations of traditional taxonomy, when English-speaking scholars from some jurisdictions – Scotland, Quebec, and Louisiana – started self-narrating their own system as ‘mixed’.

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)

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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.

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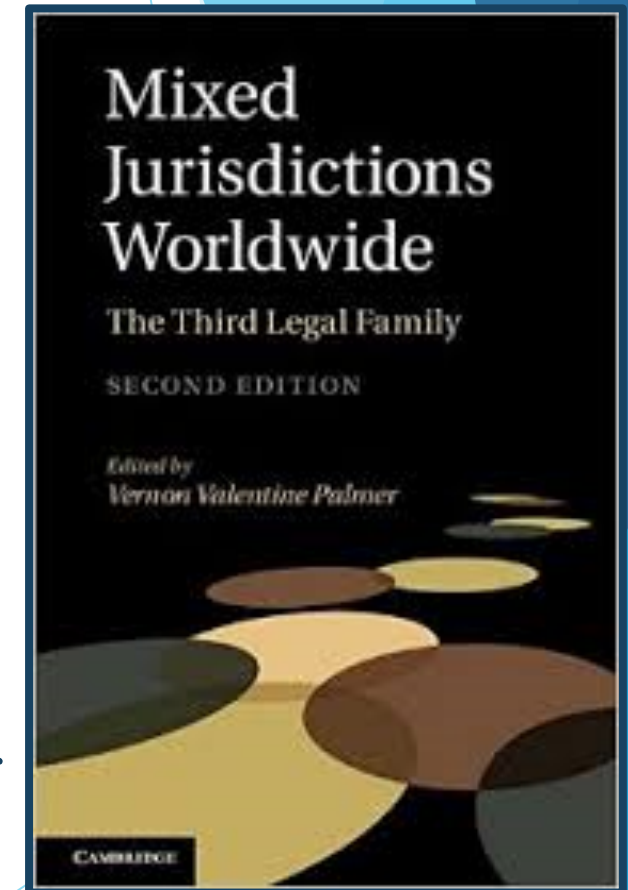
## Two opposite visions of mixed jurisdictions

(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).

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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.

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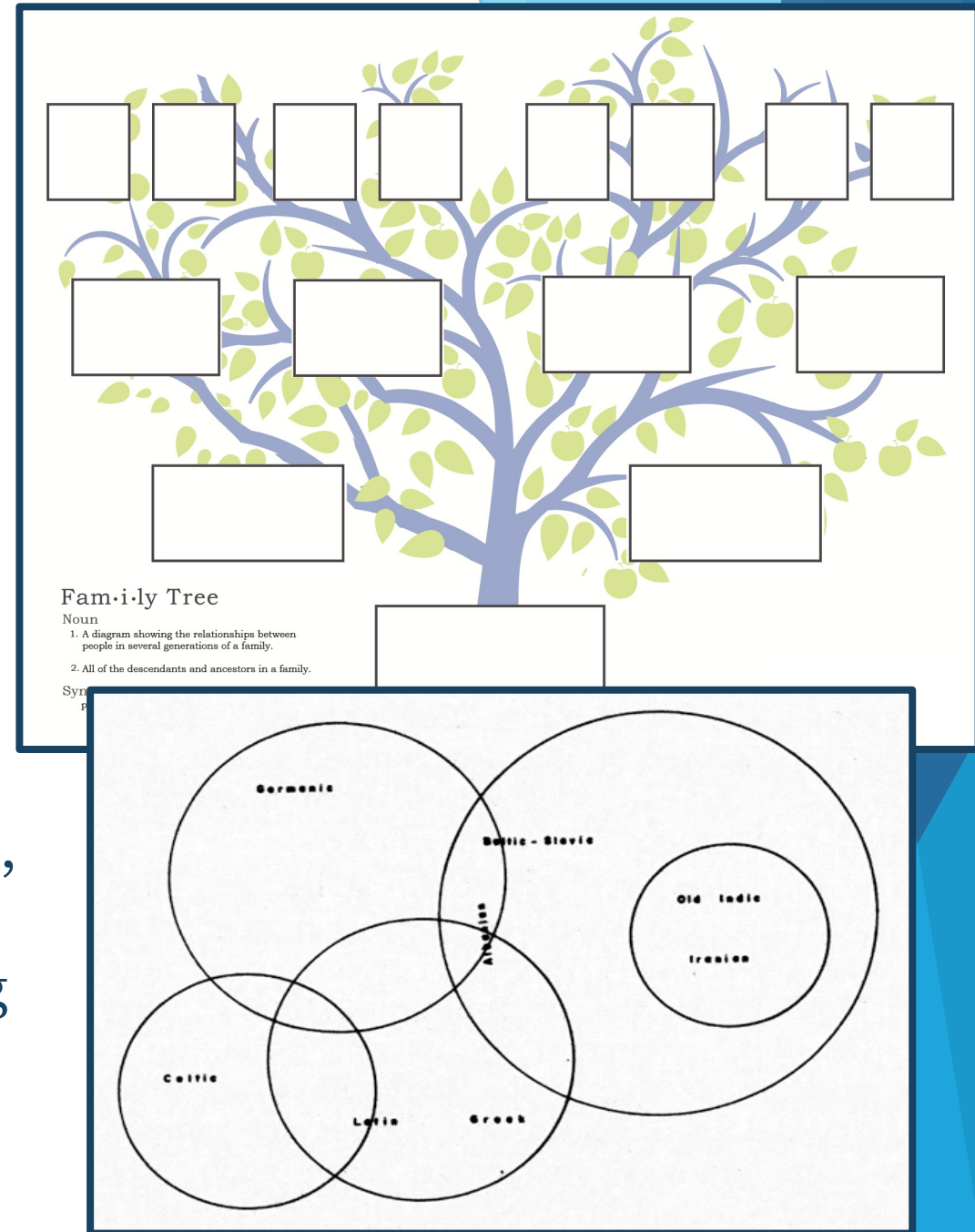
## Two opposite visions of mixed jurisdictions

(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.

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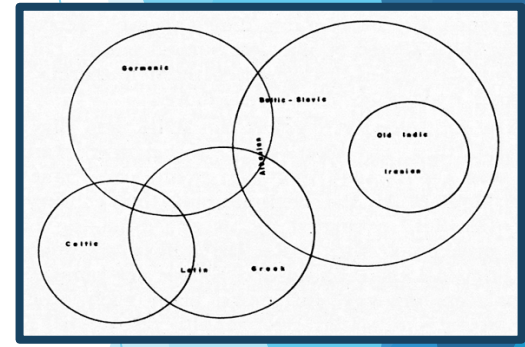
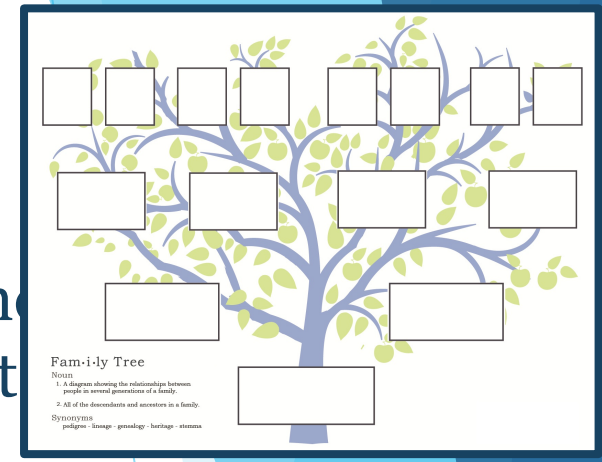
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Special attention must be paid to legal-cultural convergence and non-convergence that may come about as result of legal import and to any ensuing socio-cultural non-convergence. In this context, cultural pluralism, clash of diverse cultures, and the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

## Taxonomy of possible encounters [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.

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Yet, what do ‘social’, ‘legal’, ‘similarity’, and ‘difference’ mean ?

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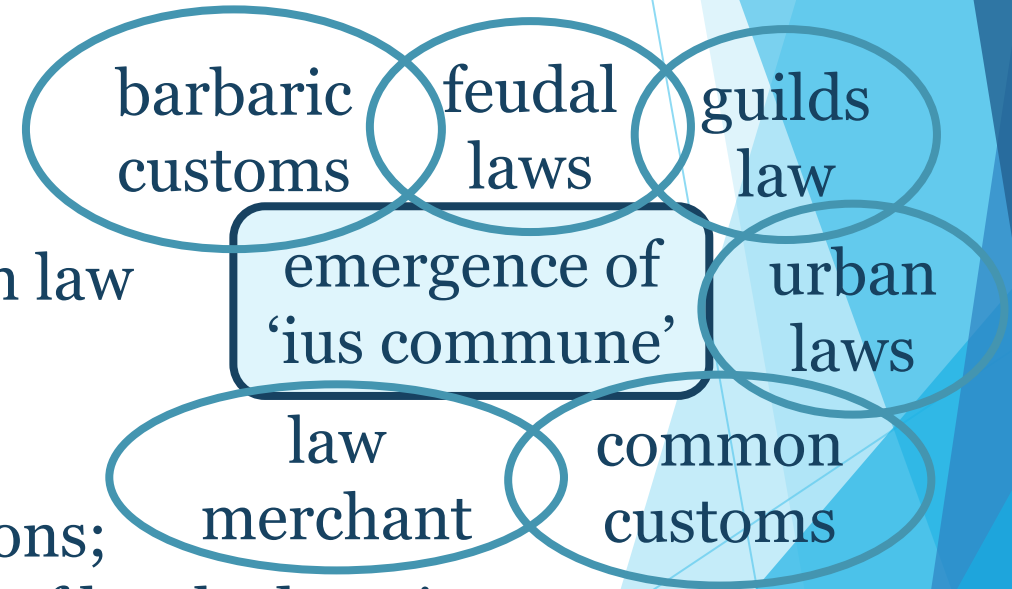
“All legal systems are mixed”: the case of Italy

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 5<sup>th</sup> century: Roman law
- ▶ 5<sup>th</sup> to 11<sup>th</sup> century: barbaric law
- ▶ 11<sup>th</sup> to 18<sup>th</sup> 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.





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“All legal systems are mixed”: the case of Italy

The variety of local laws was still visible in the 19<sup>th</sup> century.

- ▶ the Kingdom of the two Sicilies and the Kingdom of Piedmont-Sardinia adopted the **French Civil Code** in 1819 and 1837 respectively;
- ▶ Tuscany (under Austrian Grand Dukes) and the regions of Rome and Bologna (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**.

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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]

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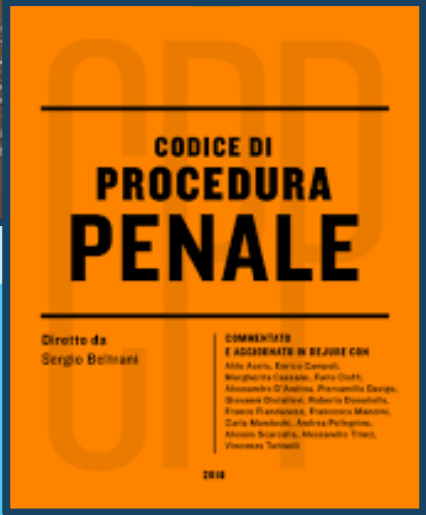
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“All legal systems are mixed”: the case of Italy

- ▶ 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



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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.