

## Louisiana Law Review

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Volume 67 | Number 4

*Symposium: Law Making in a Global World*

Summer 2007

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Vernon Valentine Palmer

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### Repository Citation

Vernon Valentine Palmer, *Mixed Legal Systems... and the Myth of Pure Laws*, 67 La. L. Rev. (2007)

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# Mixed Legal Systems . . . and the Myth of Pure Laws

Vernon Valentine Palmer\*

## I. INTRODUCTION

Perhaps there is no consensus among comparatists as to the meaning we should give to the expressions “mixed legal system” or “mixed jurisdictions” (they are frequently used interchangeably), but the issue is gaining sharper focus as a result of contemporary debate and developments. This article is not an attempt to offer a new or better classification scheme nor to offer a new set of labels. Rather I only intend to discuss some of the problems involved in the use of the terms we have been using. The subject of classification remains significant if we are to understand whether bijural systems like Louisiana, Scotland, Quebec, and South Africa have common characteristics and can be studied comparatively with profit or what can be gleaned from their “mixed jurisdiction” experience. The way we classify systems affects attitudes, perceptions, and sometimes reveals prejudice about those systems. It may even affect the “value” that is placed upon their experience. This article is a series of remarks and reflections on the labels and the values we attach to the mixed systems.

One problem with adopting a current conception of a “mixed system” (wherein the sole requirement is only the presence or interaction of two or more kinds of laws or legal traditions within each system)<sup>1</sup> is that most of Africa, Asia, India, and the “classical” mixed jurisdictions as well will answer to this description. The category is extremely broad since it is as extensive as the notion of legal pluralism. It of course lumps together systems with very little in common, such as Louisiana and Algeria, or Quebec and China.<sup>2</sup> Indeed, rigorous use of this conception, which is factual in its approach, would mean that the

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\* Thomas Pickles Professor of Law, Co-Director of the Eason-Weinmann Center of Comparative Law, and Director of European Legal Studies, Tulane University.

1. See Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 477, 480–86 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

2. Jacques du Plessis has noted this breadth: “When legal pluralism is defined broadly as the ‘situation in which two or more laws interact’ it essentially absorbs the concept of the mixed system.” *Id.* at 483 n.17 (citation omitted). One may go further: It absorbs nearly all the systems of the world.

quasi-totality of the legal systems of the world might be regarded as "mixed legal systems." It would imply that countries such as England, Australia, Canada, France, Germany, and Switzerland, which are generally thought of as though they were either pure common law or civil law systems, would need to be reclassified, for they are certainly mixed systems in a factual sense. Of course no one expects that revolution to happen. Indeed if the choice is between the indiscriminately lumped and the artificially pure, we will probably continue with the artificially pure. But at that point the practical, scientific, and didactic reasons for classifying systems in the first place are significantly reduced.<sup>3</sup>

## II. ANALYSIS

Having posed the problems in these terms, let me now make a number of remarks and observations.

### A. *A Factual Approach to Mixed Systems*

I seriously doubt that there *should* be much debate on the question, "What constitutes a mixed legal system?" We may not know the causes of legal mixtures, but we at least know what a legal mixture is. We can verify its existence factually. If we apply Hooker's definition that "legal pluralism refers to the situation in which two or more laws interact,"<sup>4</sup> then it follows that the presence within a single legal system of laws, methods, techniques, or legal institutions drawn from another tradition or foreign system is sufficient to constitute a mixed legal system. On the other hand, the *absence* of any laws, methods, or institutions drawn from a different legal tradition would suggest that the system is "pure" rather than mixed. A mixed system, then, would be one in which

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3. An alternative approach might try to redraw the world map in terms of a list of "traditions" rather than "systems," but this approach may have little appeal as a classificatory tool. According to H. Patrick Glenn, the traditions are antithetical to exclusivist categorizations and do not provide a basis to classify legal systems. See H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 425 [hereinafter Glenn, *Families & Traditions*]; see also H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 33-34 (2d ed. 2004). Furthermore, since it is society's collective memory that is constitutive of a tradition's identity, then all traditions would seem to be pure from the internal point of view. Traditions may in fact contain mixtures, but this would not necessarily be acknowledged as a fact, nor would it deal easily with mixed systems that are astride two or more traditions.

4. M.B. Hooker, LEGAL PLURALISM—AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 6 (1975).

two or more legal traditions, or parts thereof, are operating simultaneously within a single system. This factual test, as I have already indicated, is clearly not orthodox among comparative scholars who seem to employ normative and prescriptive criteria, but for purposes of discussion I will adopt the factual test in order to make a number of points clear.

### *B. Pervasiveness of Mixed Systems*

The first implication stemming from the factual approach is that we live in a *predominantly* mixed and plural world. Mixtures are pervasive and they are center stage. There is no reason to regard them as strange and anomalous. It should be acknowledged that mixed systems outnumber “pure” systems of law. They include some of the most populous areas on the globe, such as China, India, and many countries in Africa. In a study by the University of Ottawa, which classified legal systems using six categories (civil law, common law, Muslim law, Talmudic law, customary law, and mixed systems),<sup>5</sup> it was found that ninety-two legal systems are mixed,<sup>6</sup> ninety-six are “civil law,” and forty-two are “common law.” From a factual point of view, however, the number of mixed systems is necessarily far greater than the study suggested. A number of mixed systems were listed as “civil law,” while a number of “civil law” systems could have been listed as mixed if the criteria for the latter had been applied consistently.<sup>7</sup> Moreover, the list of civil law countries covers most of Europe, but according to many observers the European Union itself is becoming a mixed legal system and the Member States, including the United Kingdom, are experiencing not merely the pangs of convergence but are receiving direct doses of non-national law. Upon reflection, all of the so-called civilian legal systems within

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5. Nicola Mariani & Graciela Fuentes, *LES SYSTÈMES JURIDIQUES DANS LE MONDE* (2000). As will be seen, I have reservations about the methods used in this study.

6. The criteria for this category were explained as follows:

The term “mixed,” which we have arbitrarily chosen over other terms such as “hybrid” or “composite,” should not be construed restrictively, as certain authors have done. Thus this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

*Id.* at 17 (Benjamin W. Janke trans., 2007).

7. See *id.* for the criteria. For example, the list of “mixed systems” omits Benin and Central African Republic. They are listed among “civil law” countries, in disregard of the fact that there are African customary law systems operating in these countries alongside of civil law.

the European Union could easily be regarded as mixed legal systems. These systems have been for many centuries an amalgam of indigenous and exogenous sources. Thus Reinhard Zimmermann has commented:

All our national private laws in Europe today can be described as mixed legal systems. None of them has remained "pure" in its development since the Middle Ages. They all constitute a mixture of many different elements: Roman Law, indigenous customary law, canon law, mercantile custom, and Natural Law theory, to name the most important ones in the history of the law of obligations.<sup>8</sup>

Professor Zimmermann's point, however, cannot be confined to Europe. The world's legal systems may all be described as diversified blends of various ingredients: they may include chthonic laws, indigenous customs, exogenous customs, religious laws (Jewish, Hindu, Islamic, or Canon), law merchant, natural law, Roman civil law, common law, and various statutes and codes. I believe it is not at all unusual or surprising to discover five or six layers of exogenous elements in any single private law system one cares to examine.

Thus the factual approach to classification is useful as a contrast to the normative and prescriptive assumptions that underlie our traditional way of classifying systems.

### C. *The Myth of Pure Laws*

If these generalizations are accepted, then it may be asked why comparatists constantly make it sound like there are such things as "pure" systems of common law, civil law, or whatever kind. The reason is not entirely clear. Eurocentrism may play a part, and ingrained outlooks are difficult to change.<sup>9</sup> Whatever the reason, however, we are certainly engaging in oversimplifications that

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8. Reinhard Zimmermann, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW* 159 (2001).

9. H. Patrick Glenn argues for example that the very notion of "legal families" and "legal systems" is Eurocentric in character. In his words, "Western legal traditions are the only ones of the world which have developed the concept of a legal system, and the only ones of the world which purport to describe law, notably in terms of legal families, as opposed to simply living according to it." Glenn, *Families & Traditions*, *supra* note 3, at 435. Yet research would establish that the notion of a "legal system" is one of the West's great exports and has been received almost everywhere in the world. Since non-Western countries make use of it, has it not shed its Eurocentric cast?

conceal reality. First, without openly saying so, we are using private law as the proxy for judging entire legal systems. Obviously when we use signifiers like “common law” or “civil law” or “Muslim law,” these say little or nothing about the constitutional, administrative, or criminal laws in such systems.<sup>10</sup> It would be more accurate to call this a classification of private law systems. Second, these private law signifiers do not even refer to the whole of the private law system. Instead they simply make resort to the oldest taproot of the system as *the* identifying feature. The other roots are ignored. It is a technique of “limited feature classification,”<sup>11</sup> which conveniently leaves out the non-indigenous areas of private law (such as the law merchant, the canon law, and so forth) that have created a legal alloy. Only by dint of this reductionism can anyone claim that these systems are pure and not mixed.

#### D. A Glance at England and the European Union

Digressing for a moment, it is increasingly argued that the English common law is already a mixed system, and nowadays English lawyers seem more inclined to acknowledge the intermixture than in the past.<sup>12</sup> Hector MacQueen argues that English law has been transformed in the past two centuries. He cites the decline of the doctrine of consideration in contract, the Continental origins of *Hadley v. Baxendale*, and recent legislation that abolished the privity principle in order to bring English law into line with other jurisdictions of the European Union. The field of obligations, he continues, has been restructured as a system once based upon the forms of action into one “founded on the division of contract, tort, and unjust enrichment.”<sup>13</sup> David Ibbetson similarly notes that “The Common law of obligations grew out of the intermingling of native ideas and sophisticated Roman

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10. I have argued elsewhere that a wider public law focus is essential to an understanding of the mixed jurisdictions: “The common-law and civil-law families are really ‘private-law’ families carved from private-law comparisons. Normally this private-law focus is thrown into disarray when the public law is included and compared.” Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 6 n.8 (Vernon Valentine Palmer ed., 2001).

11. Glenn, *Families & Traditions*, *supra* note 3, at 438.

12. See, e.g., T.H. Bingham, “There is a World Elsewhere:” *The Changing Perspectives of English Law*, 41 INT’L & COMP. L.Q. 513 (1992).

13. Hector MacQueen, *Looking Forward to a Mixed Future: A Response to Professor Yiannopoulos*, 78 TUL. L. REV. 411, 412 (2003).

learning.”<sup>14</sup> Entry into the European Union has of course hastened a *rapprochement* with the Continent.<sup>15</sup> English law has absorbed close to twenty European Community (“EC”) Directives affecting the area of traditional private law and has been receiving a variety of Continental ideas, including the principles of proportionality and legitimate expectation, the distinction between private law and public law, teleological and purposive reasoning, and Continental drafting style.<sup>16</sup>

The European Union may soon be recognized as a supranational mixed system. That seems to be an outcome that some Europeanists desire,<sup>17</sup> and there are various signs that this is happening. There is noticeable convergence in the field of contract, for example, as witnessed by the Vienna Convention on the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, and the Principles of European Contract Law.<sup>18</sup> The single civil code of private law, if this European project ever materializes, would necessarily rely on these models and would produce a mixed private law system based upon common law and civil law elements.<sup>19</sup>

### *E. Mixed Systems as Models and Paradigms*

Recognizing that hybridity is a universal fact will no doubt require us to revise some of the received attitudes and prejudices about mixed systems, particularly attitudes about “classical” mixed

14. D.J. Ibbetson, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 1 (1999).

15. In Lord Denning’s famous allusion, “[T]he Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.” *H.P. Bulmer, Ltd. v. J. Bollinger S.A.*, [1974] Ch. 401, 418 (U.K.). For an appraisal of the effects as of the 1990s, see B.S. Markesinis, *THE GRADUAL CONVERGENCE* 30–32 (1994).

16. See Mark Atew, *Teleological Interpretation and Land Law*, 58 *MOD. L. REV.* 696 (1995); Bingham, *supra* note 12, at 522–24; Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 *AM. J. COMP. L.* 347 (1994); Diana Nestorovska, *Influences of Roman Law and Civil Law on the Common Law*, 1 *HANSE L. REV.* 79 (2005).

17. See Hein Kötz, *The Value of Mixed Jurisdictions*, 78 *TUL. L. REV.* 435, 439 (2003) (“It may sound a bit premature and starry-eyed, but I will say it nonetheless: let us hope that the gradual establishment of a European law as a mixed jurisdiction will allow us to combine the best of both worlds.”).

18. For example, a comprehensive concept of breach of contract has now been achieved across Europe, though this required a break with a long tradition to the contrary in certain civil law countries. See Jürgen Basedow, *Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG*, 25 *INT’L REV. L. & ECON.* 487 (2005).

19. See MacQueen, *supra* note 13, at 417.

jurisdictions such as Louisiana, Scotland, South Africa, Quebec, Puerto Rico, and so forth. For example, does it any longer serve a useful purpose to speak of these systems as historical accidents,<sup>20</sup> or as marginal cases, or as “odd men out” in a binary civil law/common law world? In my opinion, mixed systems have been too much at the center of legal evolution to be regarded as something unusual or strange. They cannot be both paradigms and pariahs at the same time. A useful classification scheme ought to begin with their centrality as a point of departure.<sup>21</sup> That would force us to abandon the conceit that “pure” legal systems are somehow privileged or preferred, that some mixtures are superior to other mixtures, or that the utility of mixed systems lies in the incidental lessons or insights they may have for their parents.<sup>22</sup> It is frequently remarked that the mixed jurisdictions like Scotland and Louisiana are “laboratories of comparative law” and that others may benefit from studying their experiences or their practices. In reality, however, all systems are laboratories of comparative law, and any system’s experience could be of some value for others.

Hector MacQueen has made the point (in words that can be endorsed as an elevated approach to the study of plural systems generally) that:

It is contrary to the spirit of mixed legal systems [to analyze their past] on the basis that one part of the mix is good and the other bad. Instead the mixed systems need to be evaluated on their own terms—that is as neither civil law nor common law—and analysts must accept that a mixed past means a mixed future.<sup>23</sup>

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20. Glenn compares them to anomalies in the world of science where complex structures may represent “frozen accidents.” H. Patrick Glenn, *Quebec: Mixité and Monism*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 1, 14 (Esin Örüçü et al. eds., 1996).

21. Esin Örüçü shares this view that all legal systems are overlaps and mixes to varying degrees and thus their mixed nature should be the starting point of comparative classification. See Esin Örüçü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 359, 363 (Mark Van Hoecke ed., 2004).

22. For example, it has been asserted that Israeli drafting successes may reassure England of the feasibility of changing its drafting style; that Scots law or the McGregor code may serve as a template for the single European code; and that Louisiana law may show how common law/civil law ideas can be conciliated in a civil code. See Giuseppe Gandolfi, *CONTRACT CODE DRAWN UP ON BEHALF OF THE ENGLISH LAW COMMISSION v–xi* (1993); Kötz, *supra* note 17, at 438–39.

23. MacQueen, *supra* note 13, at 412.

Thus if it were necessary to find some "value" in their makeup or their nature it is surely not in the form of their incidental value for others but rather in what they can reveal about the formation and evolution of private law systems everywhere. Their value is best understood in terms of why they were originally formed, why they are recurrently preferred, and what they have done for the peoples they have served.

#### *F. An Ancient Pedigree*

This brings me to an historical point. The mixed legal systems have been with us since antiquity and have been continually generated in conditions of increased social contact, commerce, and communication between peoples. The incubation of these systems within empires, for example, suggests that mixing is unavoidable (and maintaining original purity unattainable) once there is sufficient social and intellectual connection with foreign people. In this section of my article I will turn briefly to discuss the Roman Empire, the Ottoman Empire, and the colonial empires of the sixteenth to nineteenth centuries. These supranational enterprises of the past suggest that the mixed systems of today are part of a larger historical pattern.

#### *G. The Roman Empire*

Empire transformed the law of the Roman people into a mixed system, and at the same time it created a series of such systems within Rome's provinces. One reason for this development appears to have been the sheer number of foreign tribes brought together under Roman rule,<sup>24</sup> and a second reason would be the value the Romans attached to personal laws. From early antiquity (third century A.D.) the Romans followed the view that the law applicable to a person was determined not by the territory in which he lived but by the national group from which he came.<sup>25</sup> Partly

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24. On the large number of foreigners flowing in and out of Rome, their tribal networks and the cosmopolitan nature of its population, see Callie Williamson, *THE LAWS OF THE ROMAN PEOPLE: PUBLIC LAW IN THE EXPANSION AND DECLINE OF THE ROMAN REPUBLIC* 240–43, 262–67, 270–71 (2005).

25. See Michael Lambris, *THE HISTORICAL CONTEXT OF ROMAN LAW* 48 (1997); George Mousourakis, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* 418 (2003); Barry Nicholas, *AN INTRODUCTION TO ROMAN LAW* 57 (1969) ("Ancient law was in principle 'personal' . . . Roman law applied to Roman citizens, Athenian law to Athenian citizens."). There may have been instances in which a people were admitted to the Empire but did not retain their tribal custom, perhaps because they had already been sufficiently

out of pragmatism and partly out of respect, the Romans did not impose their private law on others. The mosaic of a mixed system was therefore already in the making in the form of the duality between Roman rule and the personal law of different peoples brought into proximity. Thus we find that *peregrini* at Rome were not governed by Roman law. The law applied to them was their own native or personal law, but since disputes could involve various non-Romans with conflicting personal laws, the *peregrine praetor* built up a composite legal system, the *ius gentium*, which in turn exercised influence over the *ius civile*.<sup>26</sup> Eventually parts of this body of law applied not only to transactions involving *peregrines* but to transactions between citizens. The *ius gentium* was partly “received” by the *urban praetor*, while the *ius civile* was in turn partly “received” by the *peregrine praetor*.<sup>27</sup> The two legal orders represented a mixed system in Rome.

The collapse of the Empire in the West (by 476 A.D.) reversed the political position of Rome, but it did not arrest the interaction between Roman law and other personal laws. The ascendant German tribes continued living according to their own laws and customs, while Romans in the population and the clergy continued to be governed by Roman law. In many cases their German overlords did not impose the personal law of the conqueror upon their Roman subjects. Within a single kingdom there could be pluralism of the personal laws and ease of interaction.<sup>28</sup> Saint Agobard, archbishop of Lyon from 816 A.D., pointed to the kind of social relations this produced: “It constantly happens that of five persons who are walking or sitting together, not one is subject to the same laws as another.”<sup>29</sup> Thus some rulers ordered the compilation of codes to reflect the Roman law, which their Roman

Romanized by living in close contact with the Roman society for several generations. See P.S. Barnwell, *Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West*, 168 PAST & PRESENT 6, 9–10 (2000).

26. See Simeon L. Guterman, THE PRINCIPLE OF THE PERSONALITY OF LAW IN THE GERMANIC KINGDOMS OF WESTERN EUROPE FROM THE FIFTH TO THE ELEVENTH CENTURY 39 (1990).

27. See Nicholas, *supra* note 25, at 58. One example cited by Nicholas was that an old institution of the *ius civile*, the contract of stipulation, was made applicable to *peregrines*. *Id.*

28. The Frankish capitulary of 768, for instance, stated: “All shall follow their own law, both Romans and Salians; and those who come from other regions shall live according to the law of their own country.” Maurizio Lupoi, THE ORIGINS OF THE EUROPEAN LEGAL ORDER 394–95 (Adrian Belton trans., 2000) (1994).

29. Mousourakis, *supra* note 25, at 419.

subjects would follow.<sup>30</sup> The law applicable to the Romans in Gaul was contained in the *Lex Romana Visigothorum* issued by King Alaric II in 506 A.D. At first this was exclusively for Roman subjects and did not apply to the entire population, but by 654 A.D. it applied to Romans and Visigoths alike.<sup>31</sup> Likewise Roman subjects in Burgundy were governed by the *Lex Romana Burgondionum* pursuant to a policy under which the two peoples, Burgundians and Romans, were deemed equal but distinct under the law.<sup>32</sup> On the Italian peninsula the Lombards permitted Roman subjects to be governed by the law of Justinian.<sup>33</sup> Thus Mousourakis points out:

As in Italy, so in Gaul and Spain Roman law was preserved, even though in a vulgarised form, through the application of the principle of the personality of the laws, but also through the medium of the church whose law was imbued with the principles and detailed rules of Roman law.<sup>34</sup>

The laws, like the populations to which they applied, were interactive and could not be hermetically separated. Directly or indirectly the Roman law exercised influence over the Germanic law and vice-versa.<sup>35</sup> As Roman and German elements in the population fused progressively, Germanic customs tended to become Romanized, while Roman laws tended to be barbarized. "In this way," Mousourakis states, "the diversity of laws persisted no longer as an intermixture of personal laws, but as a variety of local customs." The customary law could thus become "a combination of elements of Roman law and Germanic customary law."<sup>36</sup>

The point is that the Roman Empire in the West, as much in its construction as in its disintegration, effectively generated mixed systems of private law at an early date. These early Romano-Germanic systems served as a means of preserving vulgarized

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30. See *id.* at 418.

31. See Lupoi, *supra* note 28, at 77-78.

32. See *id.* at 82.

33. See Mousourakis, *supra* note 25, at 419.

34. *Id.* at 420. Lupoi says this alleged "principle" was not spelled out in any source and did not exist as a principle. See Lupoi, *supra* note 28, at 388, 393.

35. According to Lupoi, "Visigothic legislation was invariably modeled on Roman legal sources and the various sources of vulgar Roman law, which were influenced by it in their turn." Lupoi, *supra* note 28, at 75. He notes, for example, that King Euric was assisted in compiling his code by the Roman jurist, Leon of Narbonne. See *id.* at 75 n.209.

36. Mousourakis, *supra* note 25, at 421.

Roman law, and at the same time they were the legal groundwork that made the later Bolognese revival possible. Of course the mixed elements in these systems made it impossible to build any sort of "pure" edifice with materials taken from their layered foundation. The revival was a later chapter in the interaction between Roman law and local laws and took place on the basis of territoriality, but popular attachment to personal local laws would continue the mixing process.

#### H. *The Ottoman Empire*

The Ottoman Empire, founded in 1299, was from its inception a plural legal system, which, according to Professor Örüçü, would evolve by the nineteenth century into a mixed system and would finally emerge in the twentieth century as a civilian system.<sup>37</sup> The first Ottoman rulers, like the Romans, dealt with foreign peoples in their midst on the basis of something similar to the principle of personality.<sup>38</sup> Islamic law was the basic law applicable to Moslems in the Empire, but non-Moslems were subject to their own laws (criminal law excepted). Thus "the laws, faiths and customs of other subject peoples were in fact respected and allowed to continue to be practiced alongside Islamic Law."<sup>39</sup> Professor Örüçü asserts, however, that up to the year 1839 this system was not "mixed" because, while these different laws existed side by side, there is no evidence of any interaction between them. In her opinion the system turned into a mixed system during a transitional period, 1839 through 1923, prior to the massive reception of Western laws. "By the late 1880s the hybrid character of the Ottoman legal system was well established. The system itself was no longer solely Islamic but a mixed jurisdiction, the Islamic and the civilian cultures operating side by side. At this time it was plural, mixed, and in transition." It had "the appearance of a 'salad bowl' with components from the civilian

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37. See Esin Örüçü, *Turkey: Change Under Pressure*, in STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 89, *supra* note 20, at 89, 90-92.

38. Chibli Mallat sees a "powerful contrast" between "the overarching system of Islamic law as a 'personal model' versus the dominant system of Western law described as a 'territorial model.'" Chibli Mallat, *Comparative Law and the Islamic Legal Culture*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 624.

39. Örüçü, *supra* note 37, at 90. Thus Jews, Armenians, and Greeks living in and near Istanbul followed their own laws and had separate courts. Non-Moslems living on European lands also had their own courts and their own laws. French residents, under the "Capitulations," had special status, extensive privileges, their own Consular Courts, and their own laws.

tradition, mostly French, the laws of the Christian minorities, Islamic Law, and tradition all coexisting and intermingling.”<sup>40</sup> In the next period, 1923 to the present, she argues, Turkey became a civil law state, “a full member of the civilian family of laws.”<sup>41</sup> It introduced a blend of foreign codes from Switzerland, Italy, and Germany. In this process it could not of course achieve civil law purity. Turkey became a mixed legal system because it was composed of laws of different provenances. The systems from which it borrowed were diverse and distinct strands of European law, each with a heritage of non-indigenous elements.

### *I. European Colonialism*

Mixed systems and legal pluralism are closely associated with European colonial rule. The empires of the Dutch, the British, the French, the Germans, the Belgians, the Portuguese, and the Italians projected European law into territories of Africa and Asia where the indigenous peoples already had their own laws. Whether the local laws would be suppressed entirely and replaced by that of the metropole, or would they be retained to the extent it did not interfere with political rule was a recurrent question. It is remarkable, however, that each metropole generally recognized and retained the personal statute of the indigenous peoples they encountered, even though these emerging or emerged nation states were general adherents of the principle of territoriality. Retention of the personal law system was a technique of governance that was justified on pragmatic grounds.<sup>42</sup> Thus colonialism generally produced a host of hyphenated legal systems. The British Empire produced Anglo-customary law systems in Africa,<sup>43</sup> hybrid Anglo-Hindu law systems in India, Anglo-Buddhist law in Burma, and Anglo-Muhammadan law in Pakistan.<sup>44</sup> French colonial policy in Africa, for example, made no attempt to suppress customary law even though French policy was often thought to be based on notions of assimilation and association with African peoples. As a result, “the greater part of the received metropolitan law [of France] remained inapplicable to the bulk of the population.”<sup>45</sup> Under the approach of both the English and the French, when a population or religious law was encountered radically different

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40. *Id.* at 92.

41. *Id.*

42. See Werner Menski, *COMPARATIVE LAW IN A GLOBAL CONTEXT* 116 (2d ed. 2006).

43. See Hooker, *supra* note 4, at 58–62.

44. See *id.* at 86–101.

45. *Id.* at 220.

from its own, the decision was taken to compartmentalize the personal laws and apply them in a non-unitary plural way.

*J. The Rise of "Classical" Mixed Jurisdictions*

The classical mixed jurisdictions, as stated earlier, are systems in which the private law is essentially a structured blend of civil law and common law. The majority of these systems were created during the colonial era.<sup>46</sup> They too reflect that the claims of the personality principle never entirely vanished; the cultural *acquis* of a personal law could prevail even in an era of emerging nation states ostensibly committed to the "territorial" conception of law.<sup>47</sup> Their *raison d'être* is not so dissimilar from the grounds that inspired the earlier systems at Rome and Constantinople. Their formation seems to entail a twofold process: on the one hand, an assertion of personal law entitlement by the subjects; on the other hand, a cost-benefit calculation by the colonial sovereign. The issue must conciliate these two points of view:

At the genesis of the mixed jurisdictions are the claims of a culture to preserve its own language, religion, historical experience and, not least, its laws and customs. Hopes may indeed be pinned upon the native legal system to serve as a proxy for preserving the culture in all its manifestations. On the other side is a political superior who considers the costs and benefits of allowing such a result. These claims therefore may have to be asserted openly and strenuously in a test of political strength, or they may quietly gain recognition because of statesmanship or negotiation.

From a review of five intercolonial transfers, it can be suggested that demographics on the ground, language issues, local remonstrances, cultural identifications, land holdings, military and economic considerations, as well as questions of basic fairness were some of the factors influencing colonial authorities.<sup>48</sup>

The decision in favor of retaining the existing civil law was usually strongest in circumstances where there was a large,

46. Common-law/civil-law hybrids from the colonial period would include Quebec, South Africa, Louisiana, Sri Lanka, Puerto Rico, The Philippines, Mauritius, Seychelles, Namibia, Lesotho, Zimbabwe, Swaziland, Botswana, and Cameroon. Exceptions arising for reasons unrelated to colonialism would include Scotland, Israel, and possibly Cyprus.

47. By this is meant that within a country's boundaries, there is one legal system that is by definition exclusive.

48. See Palmer, *supra* note 10, at 21–22.

non-anglophonic population of continental European extraction already ensconced upon the land and already in a position of numerical superiority and socio-economic dominance. If this original population, however, was politically overshadowed by a large American or English population, the preexisting civil law could be abrogated entirely. The jurisdiction [in that case] could make a complete and immediate somersault from civil law to common law.

An instructive lesson we can learn from the mixed jurisdictions of the colonial era is that the fact of conquest, cession, or purchase of a territory has never automatically led to a decision to impose a new law or to keep the preexisting law of the people. It places this question on the table, nothing more. The variables affecting its resolution are essentially the same variables that sovereigns and subjects have weighed before in many cases at various times and places, including the Roman and Ottoman Empires.

### III. CONCLUSION

The process behind mixed systems is a living one and is constantly taking place around us. We are forced to recognize this when we approach the subject in a more factual way. A factual approach forces us to consider them as the norm rather than the exception, as the general pattern of legal development rather than historical accidents. For example, the extent to which the private law systems of the European Union are converging through the directive process and the quest for uniform laws, and the extent to which a single civil code will Europeanize the private laws of all Member States are questions that will determine whether Europe is or soon becomes a mixed system. As we watch these developments, we should anticipate that personal attachment to private law will be asserted in all its humanistic and cultural dimensions and this claim will be weighed against the interests of a more perfect union. The system that emerges will be following an age-old blueprint for accommodating the claims of personal law in a federated world.