Salience and Unity in the Mixed Jurisdictions: The Papers of the World Congress

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The Tulane Law Review has graciously permitted me to write a few words of introduction about the articles of the First Worldwide Congress on Mixed Jurisdictions. Before beginning that pleasant task, however, I must thank the Review, not merely for extending this privilege but more importantly for undertaking the monumental task of editing and publishing the entire set of articles. The number and international breadth of the articles has undoubtedly taxed the Review’s resources, but in the end these efforts have produced a lasting contribution to the study of mixed jurisdictions. This is in keeping with the finest traditions of the Review and its continuing devotion to comparative law.

By way of introduction to the articles, I begin with the occasion which brought these authors together. The World Congress was in many ways an historic and experimental event. It was, I believe, the first time jurists from these far-flung places had ever gathered for the purpose of studying and celebrating their own individuality. Their aspirations were summed up in the title given to the Congress: *Salience and Unity in the Mixed Jurisdiction Experience*. In four days of meetings and discussions in New Orleans, the Congress served as an international pedestal to advance and promote a long-neglected

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subject. Held under the auspices of the Tulane Law School and the Eason-Weinmann Center of Comparative Law, the Congress was sponsored by twenty-one law faculties from the mixed jurisdictions (seven from South Africa alone). In addition to scholars and delegates sent from these faculties, it was widely attended by comparative lawyers from Europe, North America, Africa, Latin America, and Asia, thanks to the joint sponsorship of three international organizations—the International Academy of Comparative Law, the American Society of Comparative Law, and the International Association of Legal Science. The result was a large, diverse gathering of jurists of different cultures, traditions, and backgrounds who had not previously crossed paths and, generally speaking, had not viewed their own law in relation to other mixed jurisdictions. Given the eclecticism of the group, one might have been forgiven for wondering—would they understand one another? Would they have much of anything in common? Such questions or doubts were quickly answered. The Congress was a resounding success for the participants, both socially and intellectually. Any fears of incomprehension—of mentalités glancing off one another—were immediately dissipated. Mixed jurisdiction jurists are separated by oceans, by history, and by many cultural and linguistic differences, yet they tend to understand one another very easily and do not feel alien in each other’s legal culture. They are brought together, it seems, by their knowledge of both common law and civil law and how these traditions interact within the same system, and the English language serves as their channel of international communications. Their desire for closer, more permanent relations led to the founding of a new organization, *The World Society of Mixed Jurisdiction Jurists,* and steps are already underway to convene a second World Congress in Scotland in 2006.

Coming to the articles themselves, I only wish to make three very general remarks. The first is to observe that the issues and themes in these articles are not those discussed in general comparative law venues. Indeed the articles center upon themes which are distinctively “mixed jurisdiction” and typically receive no attention in other forums. Perhaps never before has such a concentration of research been published in any other journal. To illustrate, I will single out, somewhat unfairly to the others, just a few titles. The first article by Professor Kenneth Reid is entitled *The Idea of Mixed Legal Systems,* and here we learn where the concept originated and how it evolved.

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Little more than a century old, this invented term is the product of a failure of classification among legal families which, for all its shortcomings, has become a fixture in the language of comparativists. Professor Reid's magisterial treatment gives us a frontispiece for the contributions which then follow on the particularized aspects of the mixed jurisdiction experience. Dean Efrén Rivera Ramos's article, *The Impact of Public Anglo-American Institutions and Values on the Substantive Civil Law*, explores a very basic institutional tension found in all mixed jurisdictions: courts and constitutions conceived in the Anglo-American mold not only introduce common law method and style but revise the content of the civil law as well. New constitutional values such as equality, privacy, and dignity enter the private civil law and literally rewrite those rules. Daniel Visser's *Cultural Forces in the Making of Mixed Legal Systems* exposes the clash of cultural forces within the mixed-law environment. He discusses the cultural champions who have sought to establish or preserve the hegemony of one legal tradition over the other, sometimes waging *bellum juridicum*, other times leading or opposing renaissance movements, but at all times taking part in a highly interesting mixed jurisdiction phenomenon. The other articles deal with equally pointed questions: how autonomous law develops that is neither civil nor common, the acute linguistic problems caused by mixed sources of law, the clash of two methodologies and its outcome, the costs and benefits of having dual laws, and the future direction and life cycle of such systems. These treatments have a certain freshness from a comparative point of view and the articles establish a provisional framework for further work in the emerging field of mixed jurisdiction studies.

My second general remark is to point out that mixed jurisdictions are clearly becoming of greater interest in the wider world and the audience for these articles is presumably growing as well. As harmonization efforts and globalization trends continue, there is a greater need for accommodation between common law and civil law ideas and institutions. European harmonization, for example, necessarily means accommodating and mixing common law and civil law. A blend of the two laws is already emerging in the national systems and also at the European level. It seems increasingly probable, as Professor Hein Kötz predicts in *The Value of Mixed Jurisdictions*, that ultimately Europe will become some sort of mixed jurisdiction herself and therefore "the experience of the existing mixed jurisdictions will be most germane to Europe's efforts to make headway in that process of gradual rapprochement." This could mean
that the classic mixed jurisdictions, rather than Europe’s stepchildren, are actually the forerunners of her future. What can be learned from the mixed jurisdiction experience, however, depends largely upon what the mixed jurisdictions can teach about themselves. Much will depend upon the quality of research and what it can reveal.

This leads me to a final remark concerning the methodological outlook of the authors. In one sense the high quality of comparative law in these articles is simply what one expects to occur when a group of illustrious writers is asked to address interesting themes. In fact, however, a contributing cause lies in their methodology. Comparative law written by mixed jurisdiction jurists has many interesting advantages and here we have an example. The mixed systems are living incubators of comparative law. The fact that civil and common law are intimately associated and embedded within each framework of laws prompts these writers to make explicit comparisons, as opposed to mere parallel descriptions which leave the intellectual work to others. Furthermore their experience inside the two traditions is immediate and day-to-day. Their double immersion in both traditions, though perhaps only waist deep, gives rise to a surer comparative touch than a so-called pure civilian would normally acquire through study of the common law or a common lawyer would acquire through study of the civil law. But more importantly, a good number of these articles follow a cross-comparative method which the Congress organizers strongly encouraged the authors to adopt. Long advocated by the late Sir Thomas Smith and Justice José Trias Monge, this more cosmopolitan approach seeks international comparisons between the mixed jurisdictions themselves as a means of eliciting insights into their unity and differences. Rather than the usual mother-country comparisons or an internal comparison restricted to common law and civil law sources within a given system, this approach accepts the experience of sister jurisdictions as potentially relevant to the solution of legal problems and as a vital means of understanding legal phenomena occurring throughout the mixed systems. It is a method which opens windows in the closed laboratories of comparative law. It is one of the reasons why these articles may be a turning point in the study of mixed jurisdictions.

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2. It must be sadly noted that in 2003 Justice Trias Monge passed away in San Juan. His article Legal Methodology in Some Mixed Jurisdictions may be the final work penned by this remarkable jurist and scholar.