The Relevance and Allure of the Mixed Legal Systems

With the publication of these essays, the reader now possesses the entire papers of the Second World Congress on Mixed Jurisdictions which was held in June 2008 in Edinburgh. The papers of the First World Congress were previously published by the Tulane Law Review (Vol 78, 2002). Taken together, these papers make a significant scholarly contribution to mixed-jurisdiction studies, a literature already flowering in its infancy. They are also a visible sign of the expanding interest in this subject around the world. The interest is particularly evident in comparative law circles where these systems, once considered marginal and atypical, are increasingly regarded as the new normality of our times.

With globalization and the increased internationalization of law, the mixed jurisdictions have moved center stage as paradigms for comparative study. Interestingly, this seems to have little to do with the old rationales that once attempted to highlight their importance. Some of these turned out to be weak arguments that were later eclipsed in the course of time.

When the discipline of comparative law was rather new, there was considerable doubt, far more than now, as to whether the common law and civil law could be successfully compared. The mixed jurisdictions were then presented like a bridge across a chasm of misunderstanding, a series of stepping stones or half-way houses across an epistemic gulf. Of course, that attitude, like the alleged gulf it was based upon, was always exaggerated and is now anachronistic, though some introductory works on comparative law may still be based on that premise. We might also recall Lévy-Ullmann’s famous argument in 1925 that Scots law and by extension the mixed systems generally deserved attention because they stood midway between the law of the Continent and the Anglo-Saxon law and could point the way for the future unification of European private law. This argument still carries some appeal, yet we are still awaiting evidence that it will be put to that test. Finally, it may be recalled that Sir TB Smith promoted the concept that greater interchanges and comparative work by scholars within the mixed jurisdictions could strengthen weaker members and help preserve and maintain their civilian traditions. Smith’s approach generated considerable scholarly interest and collaboration within the mixed jurisdictions and produced a renaissance of Scots law and legal literature. Yet as important as his contribution was (intramurally at least) it does not seem to account for the groundswell of interest at large today.
Today, I believe, the mixed systems have new allure and relevance stemming from broad legal movements in European integration that have caused the convergent mixing of civil law and common law elements at all levels—in private law, public law and transnational law. As national specificities are reduced and the legal families converge, the face of Europe may be seen to resemble more closely the profile of the ‘classical’ mixed jurisdictions.

The integration of Europe has been blending and harmonizing the laws of the member states at considerable speed and in noticeable ways for the past forty of fifty years. It is inevitable that their laws should ultimately reflect the mixture of the two principal traditions. Take for example England, the home of the Common law. English law has already absorbed close to twenty EC Directives affecting the area of traditional private law. Even more significant in impact, it has been required to adapt to continental reasoning and interpretation techniques, including the principles of proportionality and legitimate expectations, the distinction between private law and public law, the use of teleological and purposive reasoning and continental drafting style. To satisfy continental concepts of separation of powers, the House of Lords will soon sever its institutional ties to Parliament and the Executive and will simply be called the Supreme Court. The cumulative weight of such changes seems to be breaking down the defense mechanisms of nationalist voices that tend to regard the native law as unalloyed. Increasingly we hear what has rarely been heard or acknowledged before: that not just England but the other member states as well have become mixed legal systems. Even if this characterization is crude and perhaps premature, it is a growing perception, for some say that the European Union will also emerge as a supranational mixed system and that important parts of transnational law are already mixed, as witnessed, for example in the law of contract, by the Vienna Convention on the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, and the Principles of European Contract Law.

Whatever the final verdict on such developments, they have already stimulated interest in the accomplishments and expertise of the classical mixed systems. It is not just that the word ‘mixed’, through spreading application, must inevitably lose its pejorative connotation. There is more importantly the widening appreciation that the paths and processes of mixing are legal universals that all scholars need to study and understand. Whether that process be called harmonization, convergence, transplants, or simple borrowing, there is probably no greater expertise on the subject than can be found among the mixed jurisdiction jurists.

Take for example the question whether a pan-European private law should be created and whether a European civil code will see light of day. What should be clear is that codifiers in the mixed systems have already done much of the advance labor in bridging the common law and civil law traditions in their codes, doctrine and jurisprudence: If one wished to learn how to integrate the trust, or the floating charge, or the principle of detrimental reliance into a modern civil code, one might easily start with the civil codes of Quebec and Louisiana where this has already been done. Certain comparatists even assert (perhaps too optimistically) that the mixed jurisdictions have generally managed to choose the “best” or most “efficient” rules from both traditions. Even if that is not completely true, it is another reason for European codifiers to study the mixed-jurisdiction experience.
Finally there is one other broad development that should be mentioned. The burgeoning interest in legal pluralism, both by anthropology of law scholars and comparative law scholars, has focused attention on the rich variety of mixed systems in the world today. The ‘classical’ mixed systems described by Smith must now be distinguished from the pluralist mixed systems pioneered by Hooker. Using a factual conception of mixtures rather than the historically-derived definition first deployed by Smith, legal pluralism has spurred interest in ‘mixed systems’ throughout the world. This has opened serious discussion and debate within comparative law (indeed it was one of the principal themes of the Second World Congress) about the vital issues of nomenclature and classification.

By any factual test, nearly all the peoples of the world should be regarded as having mixed legal systems. It actually seems impossible to find a contemporary system that could claim to be purely indigenous, viz. endowed entirely of original laws. From the pluralist viewpoint the principal criterion of a mixed system is simply the presence or interaction of two or more kinds of laws or legal traditions within the same ‘social field’. The mixed nature of a legal order can be discovered and confirmed in an objective manner by research and observation. Any interaction of laws stemming from a different tradition or source —indigenous with exogenous or religious with customary or western with non-western—is sufficient to constitute such a system. Interestingly, this extremely inclusive outlook has broad appeal, despite its absence of rigor. Obviously the characterization ‘mixed’ is not a classification tool and does not restrict itself to any specific kind of mixture. It also does not depend upon an analysis of ‘legal styles’ within a mix, nor does it require a subjective weighing of the ‘predominance’ of one tradition over another within the mixture. It does not even depend upon what legal actors understand or perceive or what the tradition itself may say about the nature of the system. A mixture is just a verifiable fact, independent of all other considerations. Of course debates about classification (or the absence thereof) are sometimes demeaned as a good cure for insomnia. But as the late Peter Birks once said, “Darwin would have achieved nothing if he had neglected taxonomy. In the same way, poor classification disfigures the law and delays the progress of legal science.” With Birks’s admonition in mind, perhaps we may consider the Edinburgh papers as a modest start on the long road toward a rational reordering of the genus of mixed laws.

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