SYMPOSIUM INTRODUCTION: THE SCHOLAR, TEACHER, JUDGE AND JURIST IN A MIXED JURISDICTION: PAPERS FROM THE FOURTH CONGRESS OF THE WORLD SOCIETY OF MIXED JURISDICTION JURISTS

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The peripatetic journey of the World Society of Mixed Jurisdiction Jurists (WSMJJ) through the classic mixed-jurisdiction capitals of the world began in 2002 at Tulane University in New Orleans, Louisiana. Four years later, the WSMJJ met for its second worldwide congress at Edinburgh University in Scotland. In 2011, it landed at Hebrew University in Jerusalem.[1] In 2015, the WSMJJ returned to North America and hosted its fourth worldwide congress at McGill University in Montreal, Canada.

At each stop along the way, jurists have explored, debated, questioned, expanded, and sometimes even rejected the notion of a mixed jurisdiction as WSMJJ founder Vernon Palmer defined it in his now-classic study that helped launch the comparative law project on mixed jurisdictions.[2] Indeed, by the time that the

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1. For a brief sketch of the scholarship produced by the WSMJJ leading up and through its third congress, see John A. Lovett, *Symposium Introduction: Methodology and Innovation in Mixed Legal Systems, Papers from the Third Congress of the World Society of Mixed Jurisdiction Jurists*, 57 LOY. L. REV. 703 (2011).

2. In the second edition of his classic comparative law study, Palmer himself hesitates to give a single definition of a mixed jurisdiction, but does suggest that a "classic mixed jurisdiction" will tend to be distinguished by three characteristics: (1) the system will be "built upon the dual foundations of common and civil law materials"; (2) actors and observers of such a system will be psychologically "cognizant of and will acknowledge the dual character of the law" because of the quantitative weight of the distinctive bijurality; and (3) civil law will generally be "cordoned off within the field of private law," leaving Anglo-American common law to

WSMJJ concluded its fourth congress in 2015, most observers would have agreed that the notion of legal *mixité* has become a pervasive, though admittedly contested, concept in comparative law. Even though the use of metaphors, such as the "legal transplant," has perhaps flagged in recent years, scholars continue to explore the notion of *mixité*.[3] Plainly, the notion of *mixité* has tremendous appeal—as evident in the breadth of papers presented at the fourth congress.

Authors from a wide range of jurisdictions, both classic exemplars and new candidates, assert that *mixité* cannot be confined to the dual foundations of source materials from the common and civil law. For instance, on one hand, the coexistence of customary or other indigenous law with one of the legal traditions of Western Europe amounts to a *mixité* worth acknowledging. On the other hand, as in Ivan Sammut's article in this Symposium, the lens of *mixité* may be applied to a supranational entity, namely the European Union. In addition, the more one digs into the richness of legal sources, the less it seems plausible to think that there is any genuinely "pure" tradition to serve as a foil for the "mixed" ones. The term and its referents may not, then, be wholly stable, but *mixité* will unquestionably continue to inspire fruitful debate and comparative inquiry.

The theme of the fourth congress was intentionally broad: *The Scholar, Teacher, Judge and Jurist in a Mixed Jurisdiction*. It sought to engage participants in an examination of the people who create and constitute a mixed jurisdiction, however defined, rather than just abstract claims about the nature of such systems. The articles collected in this Symposium in part reflect that ambition. They also demonstrate that *mixité* can emerge from a variety of sources, both individual and structural. As readers will discover, the *mixité* of a mixed jurisdiction can surface in the work of a single scholar who shapes an important field of private law through treatise writing. It can surface in the work of a distinguished scholar, law reformer, and judge, one whose writing and judicial decisions have profoundly affected the entire legal system's orientation and values. It can appear in the

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dominate the public-law arena. Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 8–9 (Vernon Valentine Palmer ed., 2d ed., 2012).

3. For an example of such discussion, see Robert Leckey, *Review of Comparative Law*, *in* SOCIAL & LEGAL STUDIES (forthcoming 2017).

collaborative efforts of an entire legal system to create a new model for procedural law. And it can be detected in the mysterious act of an anonymous government official who uses his authority to rename a legislative document in a manner that would lead to more than two centuries of historical and juristic debate.

Of course, *mixité* does not emerge solely from the hands of a single individual, or even from the concentrated efforts of one group of engaged advocates for law reform working at a particular moment. It can also result from systemic forces affecting how lawyers and judges are trained, and it can emerge in specific legal institutions that embody respect for tolerance and mixed backgrounds.

The first article in the Symposium comes from **Jacques du Plessis**.[4] Du Plessis explores the development of the structure of South African contract law by studying the contribution of J.C. de Wet (1912–1990), a distinguished professor at the University of Stellenbosch who wrote a treatise on South African contract law, *Kontraktereg*, first published in 1947 and reissued in many subsequent editions. Du Plessis sets the stage for De Wet by showing how South African contract law had been initially received from uncodified Roman–Dutch law. He also reveals how earlier jurists, influenced by civil law sources, took important steps in the direction of creating a unitary, more systematic structure for contract law. Examples include the Dutch scholar Joannes van der Linden (1756–1835), who worked in the Roman–Dutch tradition and borrowed from Pothier, and the South African Sir John Wessels, who borrowed from nineteenth-century English writers on contract law such as Pollock and Anson, themselves influenced by Pothier. But it was De Wet, according to Du Plessis, who created the decisive model that dominated late-twentieth-century South African contract law. Even after De Wet's passing, South African contract law remains marked by his presence as two camps of contract scholars have emerged: those who basically adopt De Wet's model and those who essentially ignore it. Although De Wet is a striking example of how much influence one scholar can have on a legal system's development, Du Plessis does not claim that De Wet was a radical innovator. Rather, in his view, De Wet, like most private-law jurists, did not write on a clean slate. Instead, he built on the foundations laid

4. Jacques du Plessis, *Jurists, Structures, and the Development of the South African Law of Contract*, 62 LOY. L. REV. 621 (2016).

by his predecessors. When private-law scholars do change the development of law, Du Plessis concludes, their changes "are generally modest in scope and introduced incrementally." Interestingly, Du Plessis also observes that, even though De Wet has a reputation for being a "purist" in heated battles over the nature of the South African legal system, his work more often reflects a pragmatic approach, concerned less with the provenance of any particular legal norm or structure than with its utility to the system as a whole.

Moving to another of the classic—but still uncodified—mixed jurisdictions, **Nir Kedar** assesses the contribution of Aharon Barak, a seminal figure in the development of Israeli law.[5] Like Du Plessis, Kedar begins his legal biography by setting the stage with a short introduction to the historical forces that led to the emergence of Israel's distinctive legal order in the years preceding and following the founding of the State of Israel. Here, Kedar points out the three factors that make Israel a unique system within the mixed-jurisdiction family: (1) the absence of a subordination of continental civil law by a common-law jurisdiction, and the presence of its opposite—the gradual incorporation of private civil-law norms and ideas into a common-law superstructure; (2) the multiplicity of Israel's private-law sources; and (3) the absence of a "linguistic–cultural tension" between two distinct groups. Next, Kedar identifies the building blocks of Barak's conception of Israel's mixed legal identity: his comparative awareness of the variety of legal systems in Western law, the heterogeneity of individual sources of law and institutions within Israel, and—perhaps most important—Barak's life-long goal of constructing an "enlightened and progressive legal system," one that would embrace the rule of law and would also be "original" and reflect Israel's distinctive religious and cultural identity. In the final part of his essay, Kedar turns to Barak's life. He shows how, in each phase of Barak's remarkable legal career, he embodied Israel's identity as a mixed system. The phases include Barak's time: (1) as a student who absorbed continental civil law, English common law, and positivist, analytical legal thinking; (2) as a professor and dean at Hebrew University, where he played a major role in the "Americanization" of Israeli legal education and the "Europeanization" of Israeli private law; and finally (3) as

5. Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, 62 LOY. L. REV. 659 (2016).

Attorney General and Supreme Court Justice, initiating and leading the effort to constitutionalize Israeli public law and to codify its private law. In Kedar's view, Barak should be given credit for two "quiet revolutions" in Israeli law—a "constitutional revolution" and a "codification revolution," both of which have been largely—but not completely—realized.

In her contribution, **Rosalie Jukier** reveals how contemporary procedural law in Quebec has become a "microcosm of mixity," by incorporating important elements of continental civil procedure into what had been a traditional common-law-style adversarial procedural system.[6] Jukier begins by identifying the structural origins of the mixity of Quebec law in eighteenth-century legislation, Canada's nineteenth-century federal constitution, and the status and judicial decision-making practices of Quebec judges. She then shows how Quebec procedural law developed out of a complex mixture of civil and common-law sources, even though by the middle of the twentieth century it had come to resemble "quite closely that of a common law adversarial system." Jukier explains the forces that have led to significant change in Quebec procedural law in the past twenty-five years. Those forces include calls for civil-justice reform emanating from the United Kingdom and Canada more broadly and the emergence of new legal scholarship in North America that began to draw attention to the important normative role that procedural law plays in any legal system. Jukier also points out how the evolution of Quebec procedural law has required a new pedagogy for teaching procedural law in that mixed jurisdiction. Here, she details the thematic, critical, and comparative approach that the Faculty of Law at McGill University has created for teaching procedure in its course *Judicial Institutions and Civil Procedure*. Jukier also examines how new thinking about procedure has begun to affect procedural jurisprudence emanating from the Supreme Court of Canada and has led to a "unique judicial methodology" for resolving questions of Quebec procedural law. Finally, she discusses how the awakening of procedural law in Quebec has influenced the development of the province's new Code of Civil Procedure (adopted in February 2014, in force since January 2016). She details how legal transplantation had led to the establishment of a new role for judges as active case managers charged with

6. Rosalie Jukier, *Quebec Procedural Law as a Microcosm of Mixity: Implications for Legal Pedagogy, Judicial Decision-Making, and Law Reform*, 62 LOY. L. REV. 691 (2016).

making litigation less expensive and more equitable for all parties. In the end, Jukier proves her claim that "Quebec's procedural system is more mixed than ever before" and shows how this *mixité* is a potential source of strength.

Asya Ostroukh's article focuses on the historical origins of a classic mixed jurisdiction, Louisiana, and in particular how the first civil code in that jurisdiction came to be called a "digest" rather than a code.[7] Ostroukh examines a contradiction that has long been apparent to historians of Louisiana's mixed legal system. On one hand, the document entitled "The Digest of the Laws in Force in the Territory of Orleans with alterations and amendments adapted to its present system of government" was the first comprehensive reception of the Code Napoleon of 1804 anywhere in the world. Its adoption by the Territorial Legislature in 1808, and its approval by Territorial Governor William Claiborne, was the decisive event that launched Louisiana's evolution as a mixed legal system. On the other hand, the document was called a "digest." As Ostroukh explains, generations of Louisiana legal historians have seized on this fact, on an 1808 letter from Claiborne to President James Madison, and on Louisiana judicial decisions in the years between 1808 and 1825 to insist that the Digest was nothing more than a restatement of the Castilian laws in force in the Territory of Orleans at the time of the 1803 cession to France and then to the United States. For followers of the Tucker–Pascal–Dargo school of Louisiana legal history, the Digest was really just a Digest. Yet, as Ostroukh also shows, there is ample evidence to support the claims made by another group of historians and jurists, the Batiza–Palmer–Cairns school, that the Digest was a true Civil Code in the Romanist tradition, at least from the perspective of the drafters who wrote it and the legislature that passed it. Ostroukh's unique contribution to this long and often passionate debate is her laser-like focus on the historical and linguistic context of the creation of the Digest's title itself. Because Ostroukh's story is told like any good historical mystery, we do not want to give away the ending. But anyone interested in understanding how Louisiana became a mixed legal system will want to study her article carefully.

Sara Gwendolyn Ross addresses a different kind of *mixité* in her article on the capacity for private law to legislate

7. Asya Ostroukh, *The Mystery of the* Mixité *Around the Title of the Louisiana Digest of the Civil Laws of 1808*, 62 LOY. L. REV. 725 (2016).

tolerance.[8] Ross is concerned with the social tensions that can arise from new forms of urban redevelopment and affordable-housing policies in both the United States and Canada. Ross begins by recounting how developers across North America increasingly favor what is called a "mixed community model" of development. This can mean a mixture of uses (e.g., residential, commercial, office space), a mixture of income levels among residents, or a mixture of tenure models (e.g., home ownership, condominiums, and rental tenancies). These mixed-use, mixed-income, and mixed-tenure redevelopment projects are restructuring urban neighborhoods and bringing individuals and households with often-different cultural, social, ethnic, economic, and language backgrounds into close proximity with one another. This "social mix" can in turn lead to tension and conflict, diluting some voices while privileging others. Although communities are likely to use some public-law tools to address these inevitable conflicts, Ross suggests that article 976 of the Civil Code of Québec, with its statement of the value of social toleration and "give and take" accommodation as well as its implicit requirement that neighbors must not inflict real harm on one another, might also provide a model of productive "engagement with difference" in Quebec.[9] *Mixité* then, in Ross's account, can emerge in a single legal principle. It can also assume a healing, problem-solving role in a heterogeneous society.

Ivan Sammut examines two seemingly different legal systems, that of Malta and the European Union.[10] He shows how they both have qualities that might justify placing them in the family of mixed jurisdictions. Sammut first takes the case study of Malta and demonstrates convincingly how the evolution of its substantive and procedural law, the development and practices of its judiciary, and the role of legal academics in the system fit the norms of mixed jurisdictions. More surprisingly, though, he takes a macro-view of the supranational legal order of the European Union. He particularly focuses on the function of some of its

8. Sara Ross, *Legislating Tolerance: Article 976 of the Civil Code of Quebec and its Application to Mixed-Income and Mixed-Use City Redevelopment Projects*, 62 LOY. L. REV. 749 (2016).

9. As Ross notes, article 976 of the Civil Code of Québec has an analogue in articles 667 through 669 of the Louisiana Civil Code. Ross reads these provisions, just like article 544 of the French Civil Code, as only stating "limitations on ownership and the use and control of property," rather than as potentially transformative statements of social toleration. *Id*. at 767–70.

10. Ivan Sammut, *Interpreting the Law in a Mixed Jurisdiction: The Professor vs. the Judge—Peers or Rivals*, 62 LOY. L. REV. 777 (2016).

courts and the training of its judges, the forces shaping legal education, and the impact of the free movement of lawyers across Europe, arguing that the European Union itself is taking on the characteristics of a mixed system. Whether or not one agrees with him that it is appropriate to characterize the European Union in terms of a mixed legal system, his contribution to the Symposium models the use of comparative inquiries honed in the context of more-classically-recognized mixed jurisdictions.

Matthieu Juneau returns the Symposium to the mixed jurisdiction of Quebec, where the fourth congress took place.[11] His point of departure is the recodification of Quebec civil law in the second half of the twentieth century, culminating in the adoption of the Civil Code of Québec in 1991 (entry into force in January 1994). While its aims were multiple, that recodification on some views aimed to "re-civilize" Quebec civil law, re-orienting the Civil Code as the authoritative announcement of the province's general private law or *droit commun*. Juneau's intervention explores the degree to which, post-recodification, the mixed characterization remains pertinent for Quebec. He argues that it is important to focus not only on the sources of law, including their formal and authoritative presentation in legal texts, but also on processes. Relying on the concept of legal acculturation, he argues that Quebec's *mixité* is appropriately detected in processes, such as civil procedure, and in legal methods and legal culture. By highlighting the importance of procedure, Juneau's article echoes Rosalie Jukier's account. Together, the two invite a focus on the actions of the law in a mixed jurisdiction.

We trust the readers of this Symposium issue will find all of these contributions stimulating. Individually, each contribution provides a probing exploration of the emergence, or re-emergence, of legal *mixité*. Taken together, these articles demonstrate that the idea of a mixed jurisdiction is still a vital source of scholarly inspiration. We hope that you will agree with us that, whether viewed through the history of a classic mixed jurisdiction such as South Africa, Israel, Malta, or Louisiana, through the internal development or potential application of legal institutions within one of those jurisdictions, or in the context of understanding supranational legal structures, *mixité* remains a powerful heuristic frame.

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11. Matthieu Juneau, *The* Mixité *of Quebec's Recodified Civil Law: A Reflection of Quebec's Legal Culture*, 62 LOY. L. REV. 809 (2016).