# ARTICLES

## SYMPOSIUM INTRODUCTION: METHODOLOGY AND INNOVATION IN MIXED LEGAL SYSTEMS, PAPERS FROM THE THIRD CONGRESS OF THE WORLD SOCIETY OF MIXED JURISDICTION JURISTS

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The concept of a "mixed jurisdiction" is not new to comparative law. As early as the turn of the twentieth century, some comparative law scholars began to recognize that certain jurisdictions did not fit neatly on the map of what was seen as the world's two dominant legal systems.[1] Half a century later, from the middle 1950s to the middle 1960s, the trailblazing Scottish jurist T.B. Smith worked and travelled diligently to popularize the idea that mixed jurisdictions not only had something of value to contribute to comparative law but could also strengthen their own distinctive legal cultures by appreciating the distinctiveness of their kindred systems.[2]

At the turn of the twenty-first century, Vernon Palmer led a new generation of comparative law scholars in an effort to identify the most salient historical and institutional characteristics of what has come to be known as the seven classically mixed jurisdictions: the four codified mixed systems of Louisiana, Quebec, Puerto Rico, and the Philippines; and the

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1. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 8-9 (2002).

2. *Id.* at 11-16.

three uncodified mixed systems of Scotland, Israel, and South Africa.[3]

In 2002, Professor Palmer organized the first Worldwide Congress of the World Society of Mixed Jurisdiction Jurists (WSMJJ).[4] Scholars from many countries, but especially from the seven classically mixed jurisdictions, came to New Orleans and presented papers that reflected on the significance of this newly self-conscious "third legal family" and on other sites and forms of legal mixing.[5] Four years later, at the second Worldwide Congress of the WSMJJ, scholars from an even broader array of legal systems descended on Edinburgh, Scotland, where they continued to engage in bilateral and often trilateral comparisons of legal concepts and institutions within the classic mixed family. They also argued with increasing intensity that the concept of a mixed jurisdiction should be broadened to recognize systems outside of the classic mixed family and that mixtures and mixing within legal systems identified with either of the two traditionally dominant legal families deserved new scrutiny.[6]

By the time the WSMJJ hosted its third Congress in the summer of 2011, focusing on the topic of "Methodology and Innovation in the Mixed Jurisdictions" at Hebrew University in Jerusalem,[7] the concept of a mixed jurisdiction was being used to describe systems as diverse as Nepal, Macao, and Hong Kong. Meanwhile scholars continued to question the descriptive value and essential elements of the concept of a mixed jurisdiction. Although comparative law scholars will no doubt continue to question the utility, accuracy, and normative value of the mixed jurisdiction idea for many years to come, the basic insight of the mixed jurisdiction movement—namely that a legal system's hybridity is not a defect or disease that must be eradicated for the

3. *See generally* VERNON VALENTINE PALMER, ED. MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (2001). As Reid notes, Palmer's "pioneering study" was far from the only work of comparative law scholarship that was published during this period. Reid, *supra* note 1, at 16-17 (citing numerous other examples).

4. *See* WSMJJ, http://www.mixedjurisdiction.org/ (last visited May 29, 2012).

5. *See generally First Worldwide Congress on Mixed Jurisdictions: Salience and Unite in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities*, 78 TUL. L. REV. 1 (2003).

6. *See* Papers of the Second World Congress on Mixed Jurisdictions, *The Boundaries of Unity: Mixed Jurisdictions in Action*, *available at* http://www.mixedjurisdiction.org/?page_id=251 (last visited May 29, 2012).

7. *See* WSMJJ, http://www.mixedjurisdiction.org/?page_id=166 (last visited May 29, 2012).

system to function effectively but rather a source of juristic nourishment that is worthy of study and often of emulation—is here to stay.

The five articles that are published here in this symposium issue of the *Loyola Law Review* were all presented initially as papers at the Third Congress of the WSMJJ. The articles illustrate some of the recurrent themes of the mixed jurisdiction movement since its inception and also illustrate the new directions the movement is likely to take in years to come. Three of the articles focus primarily on a single legal system but examine a particular source of hybridity in that system.

In our first article, T.W. Bennett introduces us to the traditional African concept of *ubuntu* and shows us how the post-apartheid legal system of South Africa has incorporated this plastic but powerful communitarian concept into the fabric of public and private law in that famously complex mixed legal system.[8] Bennett's article examines how *ubuntu* was directly incorporated into the post-aparthied constitutional order in South Africa beginning in 1993 and how the courts there have subsequently learned to use the concept in the resolution of complex cases. He also speculates on future roles for *ubunu*, drawing rich comparisons to the role that equity played in the development of English common law. In short, Bennett's article shows how legal *mixite* is never a static phenomenon and how even a highly developed legal system like South Africa can suddenly undergo a new and deeper process of mixing when history demands.

In the contributions of Santiago Legarre and Mary Algero, we are treated to meditations on one of the classic subjects of mixed jurisdiction analysis: the binding (and sometimes unbinding) nature of precedent. Legarre shows us how in Argentina, a legal system that has traditionally been firmly associated with the civil law family, precedent plays a more nuanced role in judicial decision making than civil law folklore might suggest.[9] As Legarre explains, the complexity of precedent in Argentina stems from the fact that although Argentina was profoundly influenced by its Spanish and French common law

8. T.W. Bennett, *An African Doctrine of Equity in South African Public Law*, 57 LOY. L. REV. 709 (2012).

9. Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 727 (2012).

roots (the "derecho comun" as Legarre calls it), the country's constitutional framework was basically borrowed from the United States. Thus, Argentina's courts, at least in their public and constitutional decision making, engage in practices of soft "vertical" and "horizontal" stare decisis that will be quite familiar to many North American readers, especially those from mixed jurisdictions like Louisiana, Quebec, and Puerto Rico.

Algero's contribution will bring many of *Loyola Law Review*'s most frequent readers home to a very familiar subject—how Louisiana courts and judges navigate between our legal system's facial adherence to the doctrine of jurisprudence constante (and its official rejection of stare decisis) at least for matters of private law and its actual practice of promoting stability and certainty by showing respect for prior judicial decisions.[10] Algero draws on her previous empirical research into the views of Louisiana judges to show us how Louisiana manages to avoid the potential inflexibility of a strict stare decisis regime and the potential uncertainty of a system that does not give any deference to prior judicial decisions. In her view, Louisiana achieves a happy compromise between two dichotomous approaches to the potentially problematic role of precedent in a mixed legal system.

The final two contributions to our symposium illustrate the kind of cross-border, comparative analysis that has become the hallmark of much mixed jurisdiction scholarship. First, Max Loubser and Tamar Gidron focus on two prominent members of the original mixed jurisdiction family (Israel and South Africa) and show how the law governing the liability of state authorities in both jurisdictions has evolved.[11] As Loubser and Gidron explain, although each jurisdiction began from a different starting point (the English common law of torts in the case of Israel and the Roman-Dutch law of delict in South Africa), the two systems approach to state liability for wrongs has tended to converge toward a widening and more "consumerist" vision of public liability. They identify several causes of this convergence—emerging constitutional values, judicial recognition of the need to protect human rights, strongly multicultural

10. Mary Garvey Algero, *Considering Precedent in Louisiana: Striking the Right Balance Between Predictability and Certainty of Interpretation on the One Hand, and Flexibility and Re-Interpretation on the Other*, 57 LOY. L. REV. (forthcoming July 2012).

11. Max Loubser & Tamar Gidron, *Liability of the State and Public Authorities in Israel and South Africa*, 57 LOY. L. REV. 727 (2012).

societies, concerns about crime and security, and the needs to preserve scarce state resources—but also point out reasons why South African courts have been somewhat more conservative in their approach to certain issues, among them state liability for pure economic loss.

Finally, Adam Hofri-Winogradow tells a fascinating story of both internal methodological innovation and cross-border legal transplantation originating in a classically mixed jurisdiction (Israel).[12] Hofri-Winogradow examines the emergence of the so-called "shapeless trust" (and its close cousin "the settlor title retention trust"). He explains how this institutional hybrid, a trust in which the trustee is not necessarily endowed with legal title to the trust assets, emerged in the first decades of the Israeli state as practitioners familiar with the Anglo-American trust model clashed with government officials and civil law jurists from Continental Europe who were suspicious of the trust. He ably describes some Israeli academics' criticism of this trust innovation, judicial reaction to the shapeless trust, and its potential demise in the face of the recently published, but not yet enacted, Israeli Civil Code. Hofri-Winogradow also shows us how the Chinese Trust Act has borrowed the Israeli shapeless trust model and explains why, in other legal systems, that might be hostile to reception of the Anglo-American trust model, the shapeless trust might be a valuable mechanism for the introduction of trust culture and practice.

These five articles will not be the last that *Loyola Law Review*'s readers will hear from the Worldwide Congress of Mixed Jurisdiction Jurists. In our fall issue, we will publish yet another article originating from the recent Jerusalem Congress, Shael Herman's *Civil Recodification in an Anglophone Mixed Jurisdiction: A Bricoleur's Playbook*, which addresses, among other topics, the work of the late Saul Litvinoff as a Louisiana Civil Code Revision draftsman. Finally, as the Fourth Congress of the WSMJJ is already scheduled to take place in the summer of 2015 at McGill University Law School in Montreal, Quebec, we can look forward to still more work from this vibrant and growing branch of comparative law scholarship.

12. Adam Hofri-Winogradow, *Shapeless Trusts and Settlor Title Retention: An Asian Morality Play*, 58 LOY. L. REV. (forthcoming July 2012).