Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)

William Tetley[*]

TABLE OF CONTENTS

---

* Professor of Law, McGill University; Distinguished Visiting Professor of Maritime and Commercial Law, Tulane University; Counsel to Langlois Gaudreau O'Connor of Montreal. The author acknowledges with thanks the assistance of Robert C. Wilkins, B.A. B.C.L., in the preparation and correction of the text.

I. INTRODUCTION

Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together

many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland.[1]

The classic definition of a mixed jurisdiction of nearly one hundred years ago was that of F.P. Walton: "Mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law."[2]

This is not too different from the modern definition of a mixed legal system given by Robin Evans-Jones: "What I describe by the use of this term in relation to modern Scotland is a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions."[3]

Both Walton and Evans-Jones are referring to common law/civil law mixed legal systems which stem from two or more legal traditions. Mixed jurisdictions are really political units (countries or their political subdivisions) which have mixed legal systems. Common law/civil law mixed jurisdictions include[4] Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe (formerly Southern Rhodesia),[5] Botswana, Lesotho, Swaziland,[6] Namibia,[7] the Philippines, Sri Lanka (formerly Ceylon),[8] and Scotland.[9] It goes without saying that some mixed jurisdictions are also derived partly from non-occidental legal traditions: the North African countries, Iran, Egypt, Syria, Iraq and Indonesia, for instance.[10]

---

1. *See* The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century, (Basil Markesinis ed., Clarendon Press, 1993).

2. Maurice Tancelin, *Introduction*, *in* F.P. Walton, The Scope and Interpretation of the Civil Code 1 (Wilson & Lafleur Ltée, 1907, *reprinted by* Butterworths, 1980).

3. Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 L.Q.R. 228, 228 (1998).

4. *See* René David & J.E.C. Brierley, Major Legal Systems in the World Today 75-79, paras. 56-58 (3d ed., Stevens & Sons, 1985).

5. *See* Reinhard Zimmermann, *Das römisches-holländisches Recht in Zimbabwe*, 55 Rabels Zeitschrift für ausländisches und internationales Privatrecht 505 (1991).

6. *See* J. H Pain, *The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland*, 11 Comp. & Int'l. L. J. of Southern Africa 137 (1978).

7. Roman-Dutch law, as applied in the province of Cape of Good Hope on January 1, 1920, was made applicable in what is now the Republic of Namibia when that territory was taken over by South Africa after the World War I. Since attaining independence on March 20, 1990, Roman-Dutch law continues to apply there by virtue of art. 1401 of the Constitution of the Republic of Namibia. *See* Reinhard Zimmermann & Daniel Visser, *South African Law as a Mixed Legal System*, *in* Southern Cross: Civil Law and Common Law in South Africa 3 n.16 (Reinhard Zimmermann & Daniel Visser eds., Clarendon Press, Oxford 1996). *See also* David Carey Miller, *South Africa: A Mixed System Subject to Transcending Forces*, *in* Studies in Legal Systems: Mixed and Mixing 165-91 (Esin Örücü et al. eds., Kluwer Law International, 1996).

8. *See* M.H.J. van den Horst, The Roman-Dutch Law in Sri Lanka (1985); Anton Cooray, *Sri Lanka: Oriental and Occidental Laws In Harmony*, *in* Örücü et al., *supra* note 7, 71-88.

9. In the case of Scotland, *see* Evans-Jones, *supra* note 3, at 228.

10. David & Brierley, *supra* note 4, at 77-78, para. 58.

It is interesting that Walton and Evans-Jones are referring to two different *forms* of civil law traditions. Walton is concerned with codified systems, such as Québec and Louisiana, while Evans-Jones is dealing with jurisdictions such as Scotland and South Africa, which received Roman law over a considerable period of time without ever adopting a code. This distinction is important when one analyzes such new branches of the common law as "restitution," which in the United Kingdom is usually compared to Scottish uncodified civil law. When restitution is compared in North America to either the Québec or Louisiana codified civil law of quasi-contract, the effect, if not the result, is different.[11]

It is interesting as well that outside of Europe and such places as Québec, Louisiana and South Africa, there is little discussion of mixed jurisdictions; in fact the subject is usually met with indifference. Facetiously, one might therefore define a mixed jurisdiction as a place where debate over the subject takes place.

It is also useful to remember that different mixtures of legal systems and institutions exist in the world today. Örücü, for example, distinguishes: 1) "mixed jurisdictions" such as Scotland, where the legal system consists of historically distinct elements but the same legal institutions (a kind of "mixing bowl"); 2) jurisdictions such as Algeria, in which both the elements of the legal system and the legal institutions are distinct, reflecting both socio-cultural and legal-cultural differences (assimilated to a "salad bowl"); 3) jurisdictions such as Zimbabwe where legal dualism or pluralism exists, requiring internal conflict rules (akin to a "salad plate"); and 4) jurisdictions where the constituent legal traditions have become blended (like a "purée"), either because of legal-cultural affinity (e.g. Dutch law, blending elements of French, German, Dutch and Roman law) or because of a dominant colonial power or national élite which eliminates local custom and replaces it with a compound legal system drawn from another tradition (e.g. Turkey, blending elements of Swiss, French, German and Italian law).[12] She also notes the existence today of "systems in transition," such as Slovenia, in which only time will determine the character of the composite system now being developed.

II. PLAN AND PURPOSE OF THIS PAPER

This paper will first define legal systems, legal traditions, the civil and the common law, statutory law, mixed legal systems and mixed jurisdictions. It will

---

11. *See* the Québec Civil Code 1994, enacted by S.Q. 1991, c. 64 and in force January 1, 1994, in which the basic law on unjust enrichment, as a quasi-contract, is contained at arts. 1493-1496. The essence of the obligation is stated concisely in general wording, typical of civilian drafting, at art. 1493: "A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for his correlative impoverishment, if there is no justification for the enrichment or impoverishment." By comparison, in uncodified civilian legal systems, such as Scots law, the original civilian principle of unjust enrichment has been somewhat altered and qualified by the influence of the restitution concept of English common law. *See* discussion surrounding note 53, *infra*.

12. *See* Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, *in* Örücü et al., *supra* note 7, at 335-44.

then distinguish the civil law from the common law in their approach, style, interpretation, and substance. Various specific points of comparison as between the two legal traditions will be reviewed, together with a number of resulting differences in their respective substantive rules.

The influence of certain civilian principles on contemporary common law will be examined, as well as the influence of the modern *lex mercatoria* in promoting the beginnings of a transnational, trans-systemic commercial law resembling the historic "Law Merchant."

Finally, some random reflections on my own experience of legal practice, legislation and law teaching in a mixed jurisdiction (Québec) will be presented. These reflections convince me that the long-term survival of a mixed jurisdiction is greatly facilitated by (and perhaps even contingent upon) the presence of at least two official (or at least widely-spoken) languages in that jurisdiction, each mirroring and supporting the legal systems there. Added to this is the need for dual systems of legislation, a federal system and even dual systems of courts. Only with such reinforcement can a mixed jurisdiction truly flourish, especially in the face of the contemporary pressures of "globalization."

The ultimate purpose of my analysis will be to present a general view of mixed legal systems and mixed jurisdictions. The basic tenet of this paper is that both the civil law and the common law traditions make valuable contributions to mixed legal systems and mixed jurisdictions, provided that the two traditions are duly respected and kept in equilibrium, so that one does not overshadow and obliterate the other. Only in that way can the "convergence" of the two traditions, now under way in Europe, truly enrich and strengthen national and international legal culture.

III. RELATED LEGAL ENTITIES AND THEIR DEFINITIONS

It is appropriate to first define various components of mixed jurisdictions or mixed legal systems of which mixed jurisdictions may form part.

A. *Legal Systems*

There are various definitions of the term "legal system":

> A legal system, as that term is here used, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and fifty state legal systems in the United States, separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European Economic Community and the United Nations.[13]

> Legal order: Body of rules and institutions regulating a given society. *Obs.* Some hold to the view that a legal order may be contemplated as

13. J.H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 1 (2d ed., Stanford University Press, 1985).

> forming or striving to form a coherent body of law. *Syn.* juridical system, legal system, system of law.[14]
>
> Each law in fact constitutes a *system*: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of the law in that society.[15]

In my view, the term "legal system" refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.

A legal system may even govern a specific group of persons. Thus a person belonging to various groups could be subject to as many legal systems. For example, a Moslem student attending McGill University in Montreal might be subject to the rules and judicial institutions of Canada, Québec, the University and the Moslem faith. This paper, however, will focus principally on State legal orders, rather than those based on the "personal laws" of specific populations.

B. Legal Traditions or Families

Scholars have advanced divers definitions of "legal traditions," or "legal families":

> There are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law. . . . A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.[16]
>
> This grouping of laws into families, thereby establishing a limited number of types, simplifies the presentation and facilitates an understanding of the world's contemporary laws. There is not, however, agreement as to which element should be considered in setting up these groups and, therefore, what different families should be recognised. Some writers base their classification on the law's conceptual structure or on the theory of sources of the law; others are of the view that these are

---

14. Quebec Research Centre of Private and Comparative Law, Private Law Dictionary and Bilingual Lexicons 243 (2d ed., Revised and Enlarged, Les Éditions Yvon Blais, 1991).

15. David & Brierley, *supra* note 4, at 19, para. 15.

16. Merryman, *supra* note 13, at 1, 2.

> technical differences of secondary importance, and emphasize as a more significant criterion either the social objectives to be achieved with the help of the legal system or the place of law itself within the social order. . . . There would appear to be three at least which occupy an uncontested place of prominence: the Romano-Germanic family, the Common law family and the family of Socialist law.[17]

Other legal traditions include Moslem law, Hindu law, Jewish law, laws of the Far East, and African tribal laws.[18] J.H. Merryman mentions also the Scandinavian tradition.[19]

A legal tradition is thus the general culture underlying a family of similar legal systems. Since most legal systems duplicated the law administered in another jurisdiction (e.g. former British colonies duplicated British law), major legal traditions tend to be associated with the original legal system as it then existed rather than as it exists today.

C. Civil Law

Civil law may be defined as that legal tradition which has its origin in Roman law, as codifed in the *Corpus Juris Civilis* of Justinian,[20] and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators—Continental Europe, Québec and Louisiana being examples); and uncodified Roman law (as seen in Scotland and South Africa). Civil law is highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details.[21]

---

17. David & Brierley, *supra* note 4, at 20, 22, paras. 16, 17.

18. *Id.* at 18, 27-31, paras. 14, 22-25.

19. Merryman, *supra* note 13, at 5.

20. The *Corpus Juris Civilis* is the name given to a four-part compilation of Roman law prepared between 528 and 534 A.D. by a commission appointed by Emperor Justinian and headed by the jurist Tribonian. The *Corpus* includes the *Code* (a compilation of Roman imperial decrees issued prior to Justinian's time and still in force, arranged systematically according to subject-matter); the *Digest* (or *Pandects*) (fragments of classical texts of Roman law by well-known Roman authors such as Ulpian and Paul, composed from the 1st to the 4th centuries A.D., arranged in 50 books subdivided into titles); the *Institutes* (a coherent, explanatory text serving as an introduction to the *Digest*, based on a similar and earlier work by the jurist Gaius); and the *Novellae* (Novels) (a compilation of new imperial decrees issued by Justinian himself). *See* A.N. Yiannopoulos, Louisiana Civil Law System Coursebook, Part I, 9-10 (Claitor's Pub. Div., 1977).

21. The *Private Law Dictionary*, *supra* note 14, at 62, defines "civil law" as follows: "Law whose origin and inspiration are largely drawn from Roman law." The definition proceeds to incorporate the following quotation from Paul-André Crépeau, "Foreword" to the *Report on the Quebec Civil Code*, vol. 1, Draft Civil Code xxvii-xxviii (Éditeur officiel du Québec, 1978): The Civil Law is not simply a collection of rules drawn from Roman, ecclesiastical or customary law, and handed down to us in a solidified form. The Civil Law, as it was so aptly described by Professor René David "consists essentially of a 'style': it is a particular mode of conception, expression and application of the law, and transcends legislative policies that change with the times in the various periods of the history of a people."

D. Common Law

Common law is the legal tradition which evolved in England from the eleventh century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States of the British Commonwealth.[22]

In addition to England and its former colonies, some legal systems were converted to the common law tradition: Guyana, the Panama Canal Zone, Florida, California, New Mexico, Arizona, Texas and other former Spanish possessions.[23]

E. Statutory Law

Statutory law, or law found in legislation other than civil codes, is basic to both the civil and common law. In common law jurisdictions, most rules are found in the jurisprudence and statutes complete them. In civil law jurisdictions, the important principles are stated in the code, while the statutes complete them.

F. Mixed Legal Systems

A mixed legal system is one in which the law in force is derived from more than one legal tradition or legal family. For example, in the Québec legal system, the basic private law is derived partly from the civil law tradition and partly from the common law tradition. Another example is the Egyptian legal system, in which the basic private law is derived partly from the civil law tradition and partly from Moslem or other religiously-based legal traditions.

---

22. The *Private Law Dictionary*, *supra* note 14, at 72, defines "common law" as follows: Legal system of England and of those countries which have received English law, as opposed to other legal systems, especially those evolved from Roman law. "The rule [respecting the transfer of ownership] which the courts of France and Québec have rejected has also managed to survive, albeit in modified form, in the more protective judicial atmosphere of the common law, where it has finally been codified in the Sale of Goods Acts of England and the other provinces of Canada" (Le Dain, 1 McGill L.J. 237, 251 (1952-55)). *Obs.* Canada is a Common law country, except in the case of Quebec which, since the transfer of New France to the British Crown by the Treaty of Paris in 1763, has retained its law of French derivation in matters of "property and civil rights", pursuant to the terms of the "Quebec Act" of 1774.

23. David & Brierley, *supra* note 4, at 76, para. 56.

G. *Mixed Jurisdictions*

A mixed jurisdiction is a country or a political subdivision of a country in which a mixed legal system prevails. For example, Scotland may be said to be a mixed jurisdiction, because it has a mixed legal system, derived in part from the civil law tradition and in part from the common law tradition.

This definition of "mixed jurisdiction" is very similar to those of Walton and Evans-Jones cited above, except that the term as used here describes only the *territory* in which a mixed legal system exists, rather than the mixed legal system itself.

H. *Maritime Law*

Substantive maritime law is in itself a legal system, having its own particular law of sale (of ships); hire (charterparties); bailment and contract (carriage of goods by sea); insurance (marine insurance, undoubtedly the first form of insurance); corporate law (also understood to be the first example of company law); its own particular procedures (the writ *in rem* and the attachment); its own courts (the Admiralty courts); and its own *lex mercatoria* (the *lex maritima* or general maritime law).[24]

Maritime law is a mixed legal system in its own right, found in all jurisdictions, including those belonging to only one major legal tradition. Maritime law is civilian in its origin and has benefited greatly, in the last two centuries at least, from the infusion of certain English common law principles and innovations.[25]

Maritime law also consists of modern international Conventions, including Conventions on collision, salvage, the carriage of goods by sea, maritime liens and mortgages, and shipowners' limitation, for example. Such Conventions have been able to bridge the gap between the two principal Western legal families and are applied similarly by the judicial institutions of different jurisdictions (e.g. France and the United Kingdom). They thereby foster international harmonization of law, by promoting a constructive synthesis of the legal traditions from which they sprang.

I. *Legal Traditions Are Also Mixed*

One could also argue that the distinction between so-called "pure jurisdictions" and "mixed jurisdictions" is not very relevant, because legal traditions are "impure"

---

24. *See* William Tetley, *The General Maritime Law: -The Lex Maritima*, 20 Syracuse J. Int'l. L. & Com. 105 (1996), *reprinted in*, [1996], ETL 469.

25. *Id.* at 115-17, 122-28; [1996] ETL at 478-80, 484-91. *See also* William Tetley, *A Definition of Canadian Maritime Law*, 30 U.B.C. L. Rev. 137, 151-56 (1996); William Tetley, *Maritime Law as a Mixed Legal System*, 23 Tul. Mar. L.J. 1, 4-6, 10-29 (1999).

in any event. Indeed, legal traditions consist largely of rules, some of which have been borrowed from other legal traditions.[26]

The development of the common law illustrates the point. Common law derives in part from the French local customs imported from Normandy into England by William the Conqueror in 1066. Moreover, common law, being more vulnerable than civil law to foreign intrusions because of its less systematic structure and less coherent nature, was "civilised" at various points throughout history, particulary in recent years.[27] In 1832, the Chancellor's permission to take suit was eliminated.[28] In 1852, forms of action were abolished.[29] In 1873, the Courts were unified.[30] In 1875, a Court of Appeal was established.[31] New substantive law of a civilian flavour was introduced (see *infra*) and recently, case management rules have been added.

IV. FORMS OF CIVIL LAW JURISDICTIONS AND HOW THEY DEVELOPED

A. *Introduction*

To understand civil law one must realize that Scotland and South Africa, for example, received Roman law and have retained it without benefit of codification.

Continental Europe received civil law from ancient Rome and then retained it by codification, imposed for the most part by victories of Napoleon and later on by the example and great influence of the French Civil Code of 1804.[32] Other jurisdictions, particularly the countries of Latin America, as well as Egypt, imitated the French Code (or other codes based upon it) in enacting their own codifictions.

---

26. Roscoe Pound described the history of a system of law as largely a history of borrowings of legal materials from other legal systems. *See* Alan Watson, Legal Transplants: An Approach to Comparative Law 22 (2d ed., Univ. of Ga. Press, 1993).

27. H.P. Glenn, *La Civilisation de la Common Law, in* Mélanges Germain Brière 596-616 (E. Caparros dir., Collection Bleue, Wilson & Lafleur Ltée, 1993).

28. *Uniformity of Process Act*, 1832, 2 & 3 Will. IV, c. 39. *See generally* J.H. Baker, An Introduction to English Legal History 79-81 (3d ed., Butterworths 1990).

29. *Common Law Procedure Act*, 1852, 15 & 16 Vict., c. 76 (the form of action no longer needed to be stated in the new uniform writ and different causes of action could be joined in the same writ). The forms of action had been largely abolished by the *Uniformity of Process Act*, 1832, *supra* note 28, and by the *Real Property Limitation Act*, 1833, 3 & 4 Will. IV, c. 27, sect. 36.,

30. The *Judicature Act*, 1873, 36 & 37 Vict., c. 66.

31. The *Judicature Act*, 1873, sect. 4, had established the Court of Appeal and the High Court, as divisions of the Supreme Court of Judicature established by sect. 3. This Act came into force at the same time as the *Judicature Act*, 1875, 38 & 39 Vict., c. 77, which made some other modifications as well. *See* Baker, *supra* note 28, at 60 n.60.

32. The French Civil Code of 1804 was enacted on March 21, 1804, as the "*Code civil des Français.*" The title was changed to the "*Code Napoléon*" in 1807 because of the Emperor's personal interest in the drafting of the Code while he was First Consul of the Republic. The original title was revived in 1816 after the fall of the Napoleonic Empire, but the Code was reinstated as the *Code Napolean* in 1852 by decree of Louis Napoleon (Napoleon III), then President of the Republic. Since September 4, 1870, however, it has been referred to as the "*Code civil.*" *See* Yiannopoulos, *supra* note 20, at 21.

Québec and Louisiana, for their part, received civil law and retained it by codifications developed internally, while also incorporating into their codes certain elements of common law origin.

Civil law jurisdictions often have a statute law that is heavily influenced by the common law.

B. France

The French Civil Code of 1804 was no mere consolidation or systematization of existing law, but rather was intended to be a "revolutionary code," reflecting the achievements of the French Revolution. As Yiannopoulos states:[33]

> The Code Napoléon . . . was conceived as a complete legislative statement of principles rather than rules and as a truly revolutionary enactment designed to remake the law in the image of a new and better society. It was founded on the premise that for the first time in history a purely rational law should be created, free from all past prejudices and deriving its content from "sublimated common sense"; its moral justification was not to be found in ancient custom or monarchical paternalism but in its conformity with the dictates of reason. And thus its fundamental precepts are presented with the claim of universality, namely, as an assertion that a legal order is legitimate only when it does not contradict such precepts.

In fact, however, the revolutionary content of the Code (e.g. principles such as freedom and equality of all citizens and the inviolability of property) was balanced with more conservative notions, reflected especially in the pre-existing customary law of France's northern provinces, which earlier scholars such as R.J. Pothier (1699-1772) had striven to harmonize before the Revolution.[34]

C. The Influence of the French Civil Code

Napoleon's victorious armies imposed the French Civil Code on various territories, notably the French-occupied German-speaking areas on the left bank of the Rhine, as well as the Netherlands, Belgium, Italy and the Hanseatic cities. Political suasion led to its introduction into various other German principalities, as well as Danzig, Warsaw and the Swiss cantons. After the downfall of the Emperor, the Code's prestige caused the adoption of similar codifications, in the form of either direct translations of the French Code or national codes based on the French

---

33. Yiannopoulos, *supra* note 20, at 22.

34. *Id.* at 23. Another influence evident in the French Code of 1804 was that of J. Domat (1625-1696), who had undertaken to simplify the Roman law prevalent in France's southern provinces. *See also* Brice Dickson, Introduction to French Law 5 (Pitman Pub. 1994), who notes that, apart from the abolition of feudal tenure, there was no real break with the *ancien droit* in the *Code civil* of 1804, especially because the four-man commission established to carry out the codification consisted of jurists steeped in the old law. Their main concern was "to resolve differences between the various regions of France rather than to create a wholly new and coherent system."

model but with local modifications. These codes include those of Parma (1820), Sardinia (1837), the Netherlands (1838), Modena (1852), unified Italy (1865), Romania (1864), Portugal (1867) and Spain (1889).[35]

In Latin America, the French Code was introduced into Haiti in 1825, while the codes of Bolivia (1830) and Chile (1855) follow the arrangement and copy much of the substance of the Code *Napoléon*. Chile's code served in turn as a model for those of Eduador (1857), Uruguay (1868), Argentina (1869) and Colombia (1873), while Puerto Rico and the Philippines largely copied the Spanish Code of 1889.[36]

The movement towards codification which the French Civil Code set in motion also gave birth to the German Civil Code of 1896 (in force in 1900), although its terminology is more academic and technical and its rules more precise than those of the French Code. The Swiss Civil Code of 1912, by comparison, is simple and non-technical, relying heavily on general principles. The combined French, German and Swiss influence influenced the codifications of Brazil (1916), Mexico (1928), pre-Communist China (1931) and Peru (1936). Japan adopted the German Civil Code in 1898 and Turkey, a translation of the Swiss Code in 1926.[37]

D. Scotland

Not all civilian jurisdictions have, however, codified their private law. One striking example of uncodified civil law is to be found in Scotland.[38] Scots Law has been divided into four periods:[39]

> a) the feudal period, extending from the Battle of Carham establishing Scotland's present boundaries in 1018 to the death of King Robert the Bruce in 1329;
> b) the "dark age" until 1532, when the Court of Session was established;
> c) the Roman period from 1532 until the Napoleonic Wars, when the great reception of Roman Law occurred;
> d) the modern period saw influence of English law which had been given authority by the Union of the Parliaments in 1707 and the establishment of the House of Lords as the final court of appeal of Scotland in civil matters.

The feudal period saw Scotland's establishment as a separate kingdom; the introduction of feudalism from England, which continues even now to be a basic

---

35. Yiannopoulos, *supra* note 20, at 24.
36. *Id.* at 25.
37. *Id.* at 26-27.
38. On Scots law generally, *see* The Stair Society, The Civil Law Tradition in Scotland, Supp. Vol. 2 (Robin Evans-Jones ed.1995); *see also* The Civilian Tradition and Scots Law, Aberdeen Quincentenary Essays (D.L. Carey Miller & Reinhard Zimmermann eds., Dunker & Humblot 1997); Attwooll, "Scotland: A Multi-Dimensional Jigsaw" in Örücü et al., *supra* note 7, at 17-34.
39. Enid A. Marshall, General Principles of Scots Law 1-11 (4th ed., W. Green & Son, Ltd.1982).

element of the law of land ownership, particularly in the Highlands,[40] and the influence of Roman Catholic Canon Law, administered by Church courts, which continues to be at the basis of much modern Scots family law. The establishment of sheriffdoms under King David I (1124-53), where the sheriffs administered civil and criminal justice in the name of the king and heard appeals against rulings of the baronial courts, was also of major importance in this first period. The other main source of law in and after this initial period was custom.

Following the death of King Robert the Bruce in 1329, Scottish law entered a so-called "dark age," resulting from ongoing political strife, economic difficulty and weak government. This period, however, was the golden age of the "Auld Alliance" between Scotland and France, which saw the adoption of French institutions in Scotland and the training of many Scottish lawyers in France. From this period, the Scottish legal system took on its character as a fundamentally civilian system resembling those of Continental Europe, and thus differing from what emerged as the "common law" or "Anglo-American" tradition. In this same period, a Scottish Parliament was created, the Church courts consolidated their hold on marriage and family law, and in 1532, the Court of Session was established.

The third major period, the age of the "reception" of "Roman Law" in Scotland, was really the fruit of the Renaissance and the reawakening of classical learning to which the Renaissance gave birth on the Continent. Scottish lawyers, trained in the great universities such as Paris, Orléans, Utrecht and Leyden, returned home imbued with the terminology, concepts and structured thinking of Roman law and familiar with the Institutes of Gaius and the Digest of Justinian, as well as with the writings of sixteenth and seventeenth century European civilian legal scholars. Civilian rules and principles were thus incorporated into the corpus of Scots law, to supply rules and principles which the old customary law could not provide.[41] It is to this period that the great "institutional writings" on Scots law belong, notably the works of Stair,[42] Erskine,[43] Bell[44] and a few others,[45] the

40. *See* Her Majesty's Stationery Office, the Report of the Land Reform Policy Group of the Scottish Office, "Identifying the Problems," (1998), indicating, at para. 1.1, that approximately 60% of the agricultural land in rural Scotland is managed by landowners or by owner-occupiers; 30% is held by agricultural tenants and 10% by crofters. The abolition of the feudal system in Scotland is now proposed by the Land Reform Policy Group's report "Recommendations for Action," dated January 1999, and will no doubt be among the matters to be addressed by the new Scottish Parliament provided for by the *Scotland Act 1998* (U.K.) 1998, c. 46, following the election of that Parliament on May 6, 1999 and its assumption of legislative powers on July 1, 1999.

41. *See* Evans-Jones, *supra* note 3, at 230-31, who notes that "receptions" of foreign law usually occur when a "weak" legal system confronts a "strong" one. In the case of Scotland, he argues that Roman law was appealing to Scots lawyers because it was written, whereas the customary law was unwritten, because it was systematic and better organized than customary law and because it was the law in which the lawyers, as a social and professional elite, had received their training on the Continent.

42. Sir John Dalrymple, Viscount Stair, Institutions of the Law of Scotland (1681).

43. Professor John Erskine, Institute of the Law of Scotland (1773).

44. Professor George Joseph Bell, Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence (1804) and Principles of the Law of Scotland (1829).

45. Sir Thomas Craig, Jus Feudale (1655); Sir George Mackenzie, Institutions of the Law of Scotland (1684); Andrew McDouall & Lord Bankton, Institute of the Laws of Scotland (1751-1753),

authority of whose statements on any point is even today "generally accepted as equivalent to that of an Inner House decision to the same effect."[46] The immense importance of this "doctrine" as a source of law relied upon by judges as much as, if not more than, precedent, is, of course, in itself evidence of the civilian character of Scots private law.

The period of "reception" also brought momentous political changes affecting law and the legal/judicial system in Scotland. The Scottish Reformation culminated in 1560 in the removal of the Roman Catholic Church courts and their jurisdiction over marriage, annulment and legitimacy. The Union of the Crowns of Scotland and England under James VI in 1603 involved Scotland in the struggle of King and Parliament which raged throughout the seventeenth century in England. The establishment of the General Register of Sasines in 1617 (for the registration of land ownership and encumbrances); and the creation of the High Court of Justiciary in 1672 (still Scotland's highest criminal court), left enduring effects. The Treaty of Union of 1707,[47] which eliminated the Scottish Parliament, while purporting to preserve Scots laws and courts,[48] in fact resulted in English law replacing Roman law as the most influential external influence on the legal system. Finally, the quelling of the Jacobite Rebellion of 1745 culminated in the eradication of the clan system and the abolition of military service as a condition of landholding.

The influence of "Roman law" began to decline towards the end of this period in part because the Court of Session had by then developed its own jurisprudence, and the great institutional authors had commented on Scots law, to the point where reference to Continental jurisprudence and doctrine became less and less necessary. Scottish law students found less reason to study in France or Belgium, where the new codifications (non-existent at home) increasingly formed the basis of the curriculum. Finally, after 1707, the role of the United Kingdom Parliament as the legislature for Scotland and the position of the House of Lords as the final court of appeal in Scottish civil cases resulted in the gradual introduction of more and more elements of common law into the Scottish legal system.

In the modern period, beginning about 1800, Scots law has been increasingly affected by English common law and statutory law, especially in commercial, labour and administrative matters.[49] The doctrine of judicial precedent has been

---

Henry Home, Lord Kames, Principles of Equity (1760); and Baron David Hume, Commentaries on the Law of Scotland Respecting Crimes (1797).

46. David M. Walker, Principles of Scottish Private Law (Vol. I) 26 (4th ed., Clarendon Press 1988) (citing Lord Normand, The Scottish Judicature and Legal Procedure (1941)).

47. The Treaty of Union was brought into force in England by *An Act for an Union of the two Kingdoms of England and Scotland*, 5 & 6 Anne, c. 8 (1706), and the Union, creating the "United Kingdom" came into force on May 1, 1707.

48. Art. XVIII of the Treaty of Union provided that the laws which concerned "public Right, Policy and Civil Government" would be the same throughout the whole United Kingdom, "but that no Alteration be made in Laws which concern private Right, except for evident Utility of the Subjects within Scotland." Art. XIX preserved the Scottish courts.

49. *See* Alan Rodger, *Thinking about Scots Law*, 1 Edinburgh L. Rev. 3 (1996), who notes a tendency from the later years of the nineteenth century for Scottish lawyers to see themselves as part

accepted, and Scottish lawyers have looked to English case law and legal literature. European Union law has also exerted a major influence in Scotland, as it has in other parts of the United Kingdom, since 1973.

Nevertheless, the civilian heritage is still very evident in the structure of Scots private law, as well as in its terminology and content (e.g. obligations, quasi-contract, delict, moveables and immoveables, corporeal and incorporeal moveables, prescription, servitudes, hypothecs, etc.) and in the prevalence of Latin (e.g. *jus quaesitum tertio*, arrestment *ad fundandam jurisdictionem, forum non conveniens, negotiorum gestio, condictio indebiti*), as well as in the deductive method of legal reasoning from general principles to particular applications.

Scottish law is truly a "mixed legal system" because of the diversity of its main sources: feudal law, Roman law, Canon law, English common law (in part) and statutes.[50] In the words of Enid Marshall:[51]

> While, however, Scots law is a distinct legal system, it is far from being an original legal system in the sense of having developed independently of outside influences: there is little in Scots law which is purely native to the country; most of the Scots law has been contributed to Scotland by other legal systems, and the distinctiveness of the Scottish legal system springs from the original way in which the law-makers of Scotland have over past centuries formed a coherent body of law out of these diverse contributions.

A similar conclusion has been reached by Robin Evans-Jones in his more recent study of Scots private law.[52] Evans-Jones points out, however, that the civil law tradition in Scotland is in constant danger of being overwhelmed by English common law, because the process of reception of that law is ongoing, the common law continuing to exercise a strong influence on Scots lawyers and judges.[53] Moreover, Scots legal education has tended to limit the study of civil law to Roman law and to ignore developments in modern civilian legal systems, which because

---

of a large, world-wide family of English-speaking lawyers sharing a unique heritage of law rooted in English principles of freedom and justice. Scots law, with its civilian heritage, became unpopular at this time because it was associated with political dictatorship. *See also* Evans-Jones, *supra* note 3, at 232.

50. Walker adds to this list "the principles of the general mercantile and maritime customs of Western Europe," also known as the *lex mercatoria* and the *lex maritima*, *supra* note 46. *See also* Tetley, *supra* note 24.

51. Marshall, *supra* note 39, at 12.

52. *Cf.* Evans-Jones, *supra* note 3.

53. *See* Evans-Jones' discussion of two major decisions on Scots law which have resulted in a closer assimilation of Scots to English law: Morgan G. Trust Co. of New York v. Lothian Reg' Council, 1995 S.C. 151, 1995 S.L.T. 299 (Ct. of Session) (re: the requirement to prove error in order to recover for unjust enrichment) and Sharp v. Thomson, 1994 S.L.T. 1068 (Outer House); 1995 S.C.L.R. 683 (Inner House), 1997 S.L.T. 636 (H.L. (Sc.)) (re: the divisibility of the right of ownership of immoveables).

usually discussed in legal literature written in languages other than English, is unfortunately inaccessible to many Scots jurists.[54]

E. South Africa

The Republic of South Africa is a mixed jurisdiction whose legal system reflects elements of both civil and common law, as well as African tribal customary law. The civilian heritage is "Roman-Dutch law," brought to the Cape of Good Hope by the first Dutch settlers about 1652 when the colony, then under the administration of the Dutch East India Company, served primarily as a "refreshment station" for Dutch merchants and seafarers on the long journey between the Netherlands and the East Indies.

There is a debate among scholars as to whether the Roman-Dutch law received into the Cape colony was purely the civil law of the Province of Holland (one of the seven provinces of the United Netherlands) as it stood in the late seventeenth and eighteen centuries, as expressed by the great Dutch institutional writers of that period,[55] or whether it also included the general Roman (i.e. uncodified civil) law of Europe, which constituted a pan-European *jus commune* in the Middle Ages and early modern period.[56] True to its civilian tradition, South African courts pay marked attention to doctrinal writings, particularly those of classical Dutch authors such as Johannes Voet (1647-1713).[57] South African authors also contributed significantly to the country's legal literature.[58]

Roman-Dutch law continued to develop after the British occupations of 1795 and 1806 and the transfer of the Cape to Britain in 1815, and was taken by the *voortrekkers*, beginning in the 1830's, into the territories later known as the

---

54. Evans-Jones, *supra* note 3, at 241-42.

55. *See* this "narrow view" expounded in Tjollo Ateljees (Eins) Bpk v. Small 1949 (1) SA 856 (App. Div.); Gerber v. Watson 1955 (1) SA 158 (App. Div.); Du Plessis v. Strauss 1988 (2) SA 105 (App. Div.). *See also* Eduard Fagan, *Roman-Dutch Law in its South African Historical Context, in* Southern Cross: Civil Law and Common Law in South Africa 33, 37-41 (R. Zimmermann & D. Visser eds., Clarendon Press, 1996).

56. *See* Fagan, *supra* note 55, at 44-45. *See also* R. Zimmermann, *Roman Law in a Mixed Legal System: The South African Experience, in* The Civil Law Tradition in Scotland 41, 62 (Robin Evans-Jones ed., Stair Society, 1995).

57. *Comentarius ad Pandectas*. Other major Dutch authors relied on include Grotius, *Inleiding tot de Hollandsche Rechts-geleertheyd;* Van der Linden, *Koopmans Handboek* and Van Leeuwen's *Rooms-Hollands-Regt.*

58. Among the best-known works on Roman-Dutch law published in South Africa are C.H. van Zyl, The Theory of the Judicial Practice of the Colony of the Cape of Good Hope and of South Africa Generally (1893); Sir Andries Maasdorp, Institutes of Cape Law, Vol. I (The Law of Persons, 1903), Vol. II (The Law of Things, 1903), Vol. III (The Law of Obligations, 1907), Vol. IV (The Law of Actionable Wrongs, 1909); Manfred Nathan, The Common Law of South Africa, Vol. 2 (1904); Johannes Wessels, History of the Roman-Dutch Law (1908); R.W. Lee, An Introduction to Roman-Dutch Law in South Africa (1915); George Wille, The Principles of South African Law (1937). More contemporary scholars include H.R. Hahlo & Ellison Kahn, The Union of South Africa: The Development of its Laws and Constitution (1960), as well as Reinhard Zimmermann, *supra* note 56.

Transvaal and the Orange Free State.[59] As the nineteenth century progressed, however, English law began to be imported by statute into the Cape Colony, including the principle of freedom of testation, as well as in commercial and corporate fields, insurance, insolvency, constitutional, administrative and criminal matters.

Following the Boer War (1899-1902) and the establishment of the Union of South Africa (1910), English and Roman-Dutch law were largely fused into a single system, thanks in good part to the influence of Lord de Villiers, Chief Justice of Cape Colony and later of the Union for forty-one years, whose work was continued by Chief Justice J.R. Innes, who served from 1914 to 1927. Subsequently, the Appellate Division experienced a period of "purism," associated with the tenure of L.C. Steyn as Chief Justice from 1959 to 1971, in which an effort was made to purify Roman-Dutch law from English accretions.[60] Purism was associated with the ascendancy of apartheid.

In the new Republic of South Africa, where South African legislation and precedents are lacking, Roman-Dutch and English sources are given approximately equal weight, in a kind of pragmatism. There is a considerable respect for both the institutional writers and more recent authors on Roman-Dutch law (a civilian trait), mixed with a view of judicial precedent as of very great importance (a common law characteristic).[61] There is also a recognition of African customary law ("indigenous law") which under the present Constitution must be applied where applicable, subject to the Constitution and any relevant legislation.[62]

F. Québec

Before the Treaty of Paris of 1763 by which New France was ceded to Great Britain, the territory now forming the Canadian province of Québec, as part of New France (generally called "*le Canada*" by its inhabitants), had a private law primarily governed by the *Coutume de Paris* (Custom of Paris). This customary law, first reduced to writing in France in 1580, applied in the City of Paris and the surrounding province of Ile-de-France and was administered judicially by the *Parlement de Paris*. The *Coutume* was imposed on New France by King Louis XIV's Edicts of April 1663[63] and May 1664.[64] Because it was directed primarily at rights in immoveable property (particularly the feudal rights of seigneurial ownership), rather than at the law of persons, however, the *Coutume de Paris* was supplemented in the latter regard by Roman law, as systematized and formulated

---

59. Fagan, *supra* note 55, at 46-57.

60. *See id.* at 60-64.

61. Zimmermann & Visser, *supra* note 7, at 9-12.

62. *See* the Constitution of the Republic of South Africa sect. 169(3); Zimmermann & Visser, *supra* note 7, at 12-15.

63. *Édit d'avril 1663, published in Édits, Ordonnances royaux, Déclarations et Arrêts du Conseil d'état du roy concernant le Canada*, De la presse à vapeur de E.R. Fréchette, Québec, 1854, vol. I, at 37.

64. *Édit de mai 1664*, *supra* note 63 at 40.

in the doctrinal writings of eminent French legal scholars, especially Pothier (1669-1772) and Domat (1625-1696), as well as by the Canon Law of the (established) Roman Catholic Church. The third principal source of private law in New France was the royal ordinances, including the *Ordonnance sur la procédure civile* (1667), the *Ordonnance sur le commerce* (1673) and the *Ordonnance de la marine* (1681). In last place came the *arrêts de règlements*, promulgated by the local *Conseil souverain* (a local governing council composed of the Governor, the Bishop and the Intendant) on diverse subjects such as agriculture, public health and fire prevention.[65]

Following the Treaty of Paris (1763), there was an initial period of confusion as to the applicable law, during which the French population generally boycotted the newly-established English courts and settled private law disputes according to the old law (*ancien droit*).[66] Some clarification came with the enactment at Westminster of the *Quebec Act 1774*,[67] which preserved the "laws of Canada" (i.e. the *ancien droit*, civil law) in respect of "Property and Civil Rights," while imposing English criminal law and also decreeing the English principle of freedom of testation. The *Act* also permitted the free exercise of the Roman Catholic faith "subject to the King's supremacy," and left existing seigneurial tenure intact, while providing that English tenure in free and common soccage would apply in respect of new land grants. In 1791, the *Constitutional Act*[68] divided the old Province of Quebec into Lower Canada (the present Province of Québec) and Upper Canada (the present Province of Ontario), and established English common law and free and common soccage in Upper Canada, without, however, disturbing the primacy of the civil law in Lower Canada. Nevertheless, the foundation had been laid for Québec to become a mixed jurisdiction.[69]

Under the *Act of Union* of 1840,[70] reuniting Upper and Lower Canada as the "Province of Canada," a land registration system was established (1841), seigneurial tenure was abolished (1854)[71] and legislation was adopted confirming that the civil law, rather than the common law, applied in territories where land had

---

65. *See* John E.C. Brierley & Roderick A. Macdonald, Quebec Civil Law: An Introduction to Quebec Private Law 6-14 (Emond Montgomery Publications Limited, 1993).

66. *Id.* at 15.

67. *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, U.K. 14 Geo. III, c. 83, in force May 1, 1775. *See generally*, H.M Neatby, The Administration of Justice under the Quebec Act (Univ. of Minn. Press, 1937).

68. *An Act to Repeal Certain Parts of An Act Passed in the Fourteenth Year of His Majesty's Reign, intituled, An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America, and to make Further Provision for the Government of the said Province*, U.K., 31 Geo. III, c. 31.

69. *See* Brierley & Macdonald, *supra* note 65, at 17: "The result, in private law matters, was the alteration over the next years of Québec Civil law into the law of a bijural jurisdiction: portions of English law coexisted with the body of old French law reinstituted under the [Quebec] Act."

70. *An Act to Re-unite the provinces of Upper and Lower Canada, and for the Government of Canada*, U.K. 3 & 4 Vict., c. 35.

71. After 1854, all land was granted *en franc aleu roturier*, which was generally the French equivalent of English free and common soccage. Moreover, the creation by contract of obligations in the nature of feudal servitudes was prohibited.

been granted in free and common soccage since 1774.[72] New ideas began to circulate. The diversity of the sources of the civil law, the diversity of languages in which it was expressed, the absence of contemporary commentaries on that law and the reputed "advantages" of the French and Louisiana codes, resulted in pressure for codification, which led to the formation of a commission in 1857.[73] The commission produced the Civil Code of Lower Canada of 1866[74] and the Code of Civil Procedure of 1867,[75] both of which were in force when the Province of Québec became part of the Dominion of Canada on July 1, 1867.[76]

Unlike the French Civil Code of 1804, with its revolutionary ideals, and the Italian or German codes, aimed at consolidating a newly-achieved national unity, the Civil Code of Lower Canada reflected the conservative, family-oriented values of the largely rural (and mostly francophone) society of nineteenth-century Québec, as well as the economic liberalism of the burgeoning commercial and industrial (and primarily anglophone) elites concentrated in Montreal. In structure and style, the Code reflected the French Civil Code of 1804 very closely. Nevertheless, it rejected major elements of the French Code which were new law (since 1763 or 1789) and socially unacceptable to most Quebecers (notably divorce), while maintaining elements of the pre-revolutionary French law (e.g. the fideicommissary substitution). It also added certain local elements.

The Code, it has been said,

> [S]uperimposed elements of English and commercial law, as well as local variation on received Civil law, all woven together into a synthetic whole. Substantively, it reflects a blending of institutions and values of the *ancien droit* (particularly in marriage, filiation, and inheritance) with the rationalistic and liberal values of the enlightenment (particularly in contract, civil liability, and property).[77]

A distinctive feature of the Code of 1866 was that it was drafted in both French and English, with both versions official. The original Article 2615

---

72. *See* Brierley & Macdonald, *supra* note 65, at 20-22 and statutes cited there.

73. *Id.* at 25, citing the preamble of the *Act respecting the codification of the Laws of Lower Canada relative to civil matters and procedure*, S. Prov. C., 1857, c. 43, being the statute under which a commission was constituted to prepare the Civil Code of Lower Canada and the Code of Civil Procedure.

74. The Civil Code of Lower Canada was enacted by *An Act respecting the Civil Code of Lower Canada*, Stat. Prov. Can. 1865, c. 41, and came into force on August 1, 1866.

75. The Code of Civil Procedure was enacted by *An Act respecting the Code of Civil Procedure of Lower Canada*, S. Prov. C. 1866, c. 25.

76. July 1, 1867 was the date of coming into force of the *British North America Act*, U.K. 30 & 31 Vict. c. 3 (1867), renamed the *Constitution Act, 1867* by the *Canada Act*, U.K. 1982, c. 11 and now cited in Canada as R.S.C. 1985, Appendix II, No. 5. Under the *Act*, the Dominion of Canada, comprising the Provinces of Nova Scotia, New Brunswick, Québec and Ontario, officially came into being as a federal State. Canada now consists of ten provinces and three territories, the most recent territory created being Nunavut, which became a territory separate from the Northwest Territories as of April 1, 1999.

77. Brierley & Macdonald, *supra* note 65, at 35.

(renumbered as Article 2714 in 1974) directed the interpreter to the language version most in accord with the existing law on which the article concerned was founded.[78]

Various particular amendments were made to the Code after 1866, including a most important reform removing various incapacities of married women in 1964,[79] but no major overhaul got under way until the Civil Code Revision Office (the C.C.R.O., first established in 1955) was reorganized under Professor Paul-André Crépeau in 1966, at the height of the "Quiet Revolution" and on the centennial of the old Code. The Quiet Revolution was a process of intellectual ferment and social transformation, beginning after World War II, which saw Québec reject many of the conservative and traditional attitudes reflected in the old Code, and which gave rise to a demand for a wholesale revision, rather than a mere reform, of Québec's basic law.[80] The C.C.R.O., in twelve years of intensive labour by forty-three committees, produced sixty-four reports on specific topics.[81] These were assembled in a single Report,[82] comprised of a draft Code and a codifiers' report (*Commentaries*), both of which were presented to the Minister of Justice of Québec in 1977 and published in separate French and English versions in early 1978. The draft was never examined by any National Assembly committee, however, and further work on a new Civil Code was taken over by the Ministry of Justice.[83]

In 1980, a portion of the new Civil Code of Québec dealing with family law (marriage, divorce, filiation, adoption, support obligations and parental authority) was enacted[84] based on the recommendations of the C.C.R.O.'s Report. Québec in fact therefore had two civil codes at the same time. From 1983 to 1991, eight measures were adopted on a variety of matters, including the law of persons, successions and property, which were eventually incorporated into the new Code.[85] Finally, the whole of the present Civil Code of Québec was enacted in December 1991 and came into force on January 1, 1994, replacing the Civil Code of Lower Canada.[86]

The new Civil Code gives full recognition to the human person and human rights as the central focus of all private law, while also consolidating the position

---

78. *Id.* at 30-31, 147-49. Both language versions continued to be consulted even after the repeal of art. 2714 by the *Charter of the French Language*, S.Q. 1977, c. 5, sect. 219. The two language versions of all enactments of the Québec National Assembly have equal authority under Canada's *Constitution Act, 1867*, sect. 133, as reaffirmed in A.G. Quebec v. Blaikie [1979] 2 S.C.R. 1016 (Supr. Ct. of Can.).

79. *An Act respecting the legal capacity of married women*, S.Q. 1964, c. 66.

80. Brierley & Macdonald, *supra* note 65, at 83.

81. *Id.* at 88.

82. Civil Code Revision Office, *Report on the Québec Civil Code*, Éditeur officiel du Québec, Québec, 1978.

83. Brierly & Macdonald, *supra* note 65, at 93.

84. *Act to establish a new Civil Code of Québec and to reform family law*, S.Q. 1980, c. 39.

85. *See* Brierley & Macdonald, *supra* note 65, at 96-97.

86. S.Q. 1991, c. 64, in force January 1, 1994.

of the Code as the *ius commune* of Québec.[87] Its specific rules give expression, in more contemporary language, to the social changes in Québec society since the "Quiet Revolution." The new Code continues to reflect the impact of certain English principles and institutions (e.g. freedom of testation, trusts (now called "foundations"—and "moveable hypothecs"—an adaptation of the English chattel mortgage), while still respecting the basic structure and terminology of civilian codification. It takes account of contemporary technological developments (e.g. computerization of registers of civil status and registers of personal and moveable real rights). It also includes a very important Book X on private international law, which is marked by recent developments in the conflict of laws in Europe (e.g. the Rome Convention 1980[88] and the Swiss Statute on Private International Law 1987[89]), and which also incorporates a number of common law concepts, such as *forum non conveniens*, into what is essentially a civilian codal regime. The French and English versions of the new Code are official, and may be used to assist in interpreting ambiguous provisions.

G. Louisiana

Louisiana was first subjected to French Edicts, Ordinances and the Custom of Paris by charters issued to companies of merchant adventurers in 1712 and 1717, which laws remained in force when the territory became a royal colony in 1731. After Louisiana's cession to Spain in 1763, French laws remained in force until 1769, when they were officially replaced by Spanish laws and institutions,[90] including the *Nueva Recopilación de Castilla* (1567) and the *Recopilación de Leyes de los Reinos de las Indias* (a rearrangement of major legal texts up to 1680), and, in default of a specific rule in a later enactment, the *Siete Partidas* (a compilation of laws, based on the Justinian compilation and the doctrine of the Glossators, made under King Alfonso X in 1265 and formally enacted under King Alfonso XI in 1348). Following the territory's retrocession to France in 1800, Spanish law continued in force, because France assumed sovereignty for only twenty days in 1803 before the United States took possession of Louisiana on December 20 of that year.[91]

After the transfer to the U.S., pressure came from the incoming Americans to impose the common law in Louisiana, particularly because six different

87. *See* the Preliminary Disposition of the Civil Code of Québec 1994.

88. Convention on the Law Applicable to Contractual Obligations, adopted at Rome on June 18, 1980, and in force on April 1, 1991.

89. *Loi fédérale sur le droit international privé du 18 décembre 1987*, 1988 Feuille Fédérale (FF) I 5.

90. Modern scholarship, however, indicates that French private law was still applied extrajudicially by the French population of Louisiana after the cession to Spain, without resort to the official Spanish judicial system. *See* Yiannopoulos, *supra* note 20, at 29; H. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 Tul. L. Rev. 3, 87-88 (1978).

91. Yiannopoulos, *supra* note 20, at 28-29. *See also* H. Baade, *The Formalities of Private Real Estate Transactions in Spanish North America*, 38 La. L. Rev. 656 (1978).

compilations of Spanish laws existed and it was unclear which of over 20,000 individual laws of Spain applied in the territory. Thanks, however, to the leadership of Edward Livingston, a New York common lawyer who had become a convert to the superiority of the civil law after moving to New Orleans, and following a political crisis surrounding the matter, a two-man committee was mandated by the Louisiana legislature to prepare a compilation of the civil law applicable in the "Territory of Orleans."[92] The product was a digest,[93] known as the Louisiana Civil Code of 1808, which was approved even by Governor Claiborne, who had formerly been a major advocate of the common law.

The Digest of 1808 was largely inspired by the revolutionary ideas of France, gleaned from the French Civil Code of 1804 and its preparatory works, approximately 70% of its 2,156 articles being based on those sources. The remainder of the text was derived from Spanish law and institutions, which rules were retained in the event of conflict with French-inspired provisions.[94]

Despite the Digest, confusion persisted as to which specific laws applied in Louisiana.[95] Another committee was therefore instructed by the legislature to revise the civil code and add to it any missing laws still found to be in force. The result was the Louisiana Civil Code of 1825,[96] which was modelled very closely on the French Civil Code, most of its 3,522 articles having an exact equivalent in that Code.[97] It was designed to replace all pre-existing law, although the courts refused to give it quite the sweeping effect that had been intended.[98]

The 1808 and 1825 Codes were both drafted in French and translated into English, after which they were published in both languages, both versions being official. The enabling statute of the 1808 Code[99] required consultation of both language versions in the event of ambiguity of any provision. The 1825 Code, on the other hand, was merely published in both French and English, without any provision in its enabling statute for resolving conflicts. Because the French text

---

92. The Territory of Orleans had approximately the same boundaries as the present State of Louisiana. *See* Yiannopoulos, *supra* note 20, at 30.

93. *A Digest of the Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government* (1808).

94. *See* Yiannopoulos, *supra* note 20, at 31; Tate, *The Splendid Mystery of the Civil Code of Louisiana*, 3 La. L. Rev. 1 (1974); Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1976).

95. Much of the confusion resulted from the Louisiana Supreme Court's decision in *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (La. 1817), holding in effect that the Digest of 1808 was really incomplete. *See* Yiannopoulos, *supra* note 20, at 32.

96. In force June 20, 1825. Together with the Civil Code, the committee also drafted a Code of Practice and a Commercial Code. The latter Code was rejected, however, on the ground that commercial law in the United States should be uniform.

97. About 60% of the 423 amendments and 1746 new provisions included in the 1825 Code were taken from French treatises (by Pothier, Domat and Toullier, for example), and an additional 15% from the French Civil Code. *See* Yiannopoulos, *supra* note 20, at 33 n.15.

98. *See, e.g.*, Flower v. Griffith, 6 Mart. (n.s.) 89 (La. 1827); Reynolds v. Swain, 13 La. 193 (1839) (cited by Yiannopoulos, *supra* note 20, at 34-35 nn.17 & 20).

99. 1808 La. Acts No. 29.

was the original, however, and because the translation was known to have errors, the French version came to be regarded as controlling.[100]

A third Civil Code was promulgated in 1870,[101] which changed the numbering of articles, but otherwise essentially re-enacted the 1825 Code, except for inserting amendments required to take account of the abolition of slavery after the American Civil War, as well as amendments and new laws enacted since 1825 which affected codal provisions. Although the 1870 Code was published only in English, it was the general vew that the French texts of the articles of the 1825 Code which were unamended continued to be determinative in the event of ambiguity.[102] A Compiled Edition of the three Codes was published in 1938.[103]

Beginning in 1976, the Louisiana State Law Institute, now responsible for the Code, has secured the adoption by the Louisiana Legislature of various partial revisions.[104] Among the most important of these is the new Book IV on Conflict of Laws (Articles 3514-3549 c.c.) adopted in 1991.[105]

H. Egypt

Prior to the arrival of Islam in 641 A.D., Roman law prevailed in Egypt. The Islamic conquest led, however, to the imposition of Islamic *Sharia* law, consisting of a compilation of Islamic jurisprudence, rooted in the *Koran* (the Islamic Holy Book), the *Sunna* (the Prophet's traditions),the *Ijma* (the consensus of opinion of Moslem jurists) and other sources. This law was administered by *Sharia* courts, empowered to hear civil, criminal and family matters within their assigned territories.[106] *Sharia* law prevailed for approximately eleven hundred years, but, interestingly, permitted non-Moslems to apply their own religiously-based family law systems, so that, in that domain, Egypt may be said to have been a mixed legal system for centuries.

The accession to power of Mohammed Ali as ruler of Egypt in 1805 resulted in the increasing influence of European law, and particularly of French law, in the country. Beginning in 1856, a system of fourteen judicial councils was created to administer non-Moslem family law in Egypt (especially for the benefit of foreign residents). In 1875, a system of "mixed courts" was established, to administer the

---

100. Yiannopoulos, *supra* note 20, at 34.

101. The 1870 Code was called the "Revised Civil Code of the State of Louisiana."

102. Yiannopoulos, *supra* note 20, at 35.

103. For a new Compiled Edition of the Civil Codes of Louisiana, *see* Vols. 16-17 La. Rev. Stat. (Civil Code) (1972 & Supp. 2000).

104. Among the parts of the Louisiana Civil Code revised piecemeal since 1976 are the provisions dealing with ownership, servitudes, building restrictions, boundaries, legitimate children, successions, obligations in general, contracts, matrimonial regimes, partnership, occupancy and possession, as well as prescription. *See* La. Civ. Code (1986) pp. xxvii-xxviii, and the different Louisiana statutes cited there.

105. 1991 La. Acts No. 923.2, in force Jan. 1, 1992.

106. Dr. Adel Omar Sherif, *The Origins and Development of the Egyptian Judicial System, in* Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt 13-15 (Kevin Boyle & Adel Omar Sherif eds., 1996).

so-called "mixed codes," being different civil, commercial, penal and procedural codes governing the relations between foreigners or between foreigners and Egyptians. These codes, notably the Civil Code of 1875, were modelled on the corresponding codes in force in France. In fact, the Egyptian government would only adopt them after their approval by those foreign countries (principally Britain and France) which enjoyed a privileged status in Egypt.[107] In 1883, a system of "national courts" was set up to adminster French-inspired national codes on the same subjects applicable to Egyptian citizens. Meanwhile, the *Sharia* courts continued to enforce Islamic *Sharia* law in respect of family matters among Moslems and Moslems married to non-Moslems. And different religious judicial councils applied their respective religious rules of family law among the non-Moslem Egyptian minorities, such as the Coptic Christians.

Not surprisingly, considerable confusion and jurisdictional conflict arose out of this complex legal and judicial structure, leading to demands for simplification and rationalization. The mixed courts were abolished in 1949 and the *Sharia* courts and religious judicial councils in 1955, their jurisdiction being transferred to the national courts, which came to be known as "ordinary courts."[108] The old "mixed codes" were replaced by national codes of universal application to Egyptians and foreigners alike, notably the new Egyptian Civil Code of 1948 and the Egyptian Code of Civil Procedure of 1968, which continued to reflect French influence. Significantly, however, family law, although now administered in a unified judiciary, continued to be subject to the "personal law" of each of the principal religious groupings within the population, in accordance with the "Personal Status Law" of 1929.[109]

Today, under Article 2 of the Egyptian Constitution of 1971, as amended in 1980, Islamic *Sharia* law is the principal source of legislation in Egypt. Both Moslem and civilian legal systems coexist, however, as illustrated in a decision of the Supreme Constitutional Court in 1985,[110] holding that Article 226 of the Civil Code, permitting interest to be charged on overdue debts, was not, as alleged, unconstitutional under Article 2 of the Constitution, because that provision was not retroactive, and because its implementation in specific fields of private law was not automatic, but required express amending legislation.

Modern Egyptian law is therefore an intriguing mixed legal system, blending civilian rules fashioned, in style, structure and content, on the model of the French Civil Code of 1804, with the law of Islam and, in family law areas (such as marriage, divorce, filiation and alimentary obligations), with a variety of religiously-founded personal laws.

---

107. *See id.* at 16-17.

108. *Id.* at 17-18.

109. Law No. 1925 (1929), as amended by Law No. 100 (1985).

110. Supreme Constitutional Court of Egypt, May 4, 1985, *published in* the *Official Gazette of the Arab Republic of Egypt* on May 16, 1985.

V. CIVIL LAW AND COMMON LAW: DIFFERENCES IN SOURCES, CONCEPTS, AND STYLE

Common law and civil law legal traditions share similar social objectives (individualism, liberalism and personal rights) and they have in fact been joined in one single family, the *Western* law family, because of this functional similarity.[111] My analysis will therefore explore the sources, concepts and style of the two Western sources of law.[112]

A. *Order of Priority: Jurisprudence and Doctrine*

A major difference between the civil law and common law is that priority in civil law is given to doctrine (including the codifiers' reports) over jurisprudence, while the opposite is true in the common law.

This difference in priority can be explained by the role of the legislator in both traditions. French civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law.

B. *Doctrine: Functions*

The civil law doctrine's function is "to draw from this disorganised mass [cases, books and legal dictionaries] the rules and the principles which will clarify and purge the subject of impure elements, and thus provide both the practice and the courts with a guide for the solution of particular cases in the future."[113] The common law doctrine's function is more modest: authors are encouraged to distinguish cases that would appear incompatible to a civilist, and to extract from these specific rules. (Of course, there is a point where the common law author will refuse to draw specific rules that have no policy basis and will criticize openly absurd judgments.)

C. *Doctrine: Style*

The common law author focuses on fact patterns. He or she analyzes cases presenting similar but not identical facts, extracting from the specific rules, and then, through deduction, determines the often very narrow scope of each rule, and sometimes proposes new rules to cover facts that have not yet presented themselves.

---

111. David & Brierley, *supra* note 4, at 25-26. *See also* R. David, *Existe-t-il un droit occidental?*, *in* Mélanges Hessel E. Yntema (Twentieth Century Comparative and Conflicts Law) 56-64 (A.W. Sijthoff 1961).

112. David & Brierley, *supra* note 4, at 20: "The law's conceptual structure. . . ."

113. David & Brierley, *supra* note 4, at 94.

The civilist focuses rather on legal principles. He or she traces their history, identifies their function, determines their domain of application, and explains their effects in terms of rights and obligations. At this stage, general and exceptional effects are deduced. Apart from requiring some statutory analysis, determining the area of application of a principle involves some induction from the existing case law, while delimiting exceptions involves some deduction.

D. Jurisprudence: Function

Common law jurisprudence sets out a new specific rule to a new specific set of facts and provides the principal source of law, while civil law jurisprudence applies general principles, and that is only a secondary source of law of explanation.

E. Stare Decisis

The English doctrine of *stare decisis* compels lower courts to follow decisions rendered in higher courts, hence establishing an order of priority of sources by "reason of authority."[114] *Stare decisis* is unknown to civil law, where judgments rendered by judges only enjoy the "authority of reason."[115]

This distinction makes sense. Confusion would result in the common law world if the core of the law was to differ from one court to the other. This is not true in the civil law world, where the general principles are embodied in national codes and statutes, and where doctrine provides guidance in their interpretation, leaving to judges the task of applying the law.

F. Jurisprudence: Style

Civil law judgments are written in a more formalistic style than common law judgments. Civil law decisions are indeed shorter than common law decisions, and are separated into two parts—the *motifs* (reasons) and the *dispositif* (order). This is because civil law judges are specially trained in special schools created for the purpose, while common law judges are appointed from amongst practising lawyers, without special training.

The method of writing judgments is also different. Common law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, and decide (if not create) the specific legal rule relevant to the present facts. Civil law decisions first identify the legal principles that might be relevant, then verify if the facts support their application (only the facts relevant to

---

114. The House of Lords in a "Practice Statement" (Judicial Precedent), [1966] 1 W.L.R. 1234, [1966] 3 All E.R. 77 (H.L. 1966), proposed "while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

115. In practice, however, the *Cour de cassation* is feared by judges of lower courts.

the advanced principle thus need be stated). (In Québec, the common law methodology is followed.)

G. *Statutes: Functions*

Although statutes have the same paramountcy in both legal traditions, they differ in their functions. Civil law codes provide the core of the law—general principles are systematically and exhaustively exposed in codes[116] and particular statutes complete them. Finally follows the jurisprudence.

Common law statutes, on the other hand, complete the case law, which latter contains the core of the law expressed through specific rules applying to specific facts. (It is not surprising that the English word "law" means all legal rules whatever their sources, while the French word "*loi*" refers only to written statutory rules. The word "*droit*" in the French civil law is the equivalent of "law" in English common law.)

H. *Style of Drafting of Laws*[117]

Civil law codes and statutes are concise (*le style français*), while common law statutes are precise (*le style anglais*).[118] Indeed, civil law statutes provide no definitions, and state principles in broad, general phrases.[119]

Common law statutes, on the other hand, provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions, preceded by a catch-all phrase and followed by a demurrer such as "notwithstanding the generality of the foregoing."[120]

---

116. Art. 5 C. Civ. (France) states that Judges are forbidden to enunciate general principles in the cases which come before them (*"Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises."*). Such a provision does not appear in the Québec Civil Codes of 1866 or 1994 or the Louisiana Civil Codes, but it epitomizes the civil law as it was said to be.

117. *See* William Tetley, Marine Cargo Claims 45-47 (3d ed., 1988).

118. *See* L.-P. Pigeon, Rédaction et interprétation des lois 19 (Québec, 3d ed., Gouvernement du Québec 1986). Montesquieu, in his celebrated *De L'Esprit des Lois* (Book XXIX, Ch.16), gives as his first and foremost admonishment on composing laws that: "The style ought to be concise." (*The Spirit of Laws*, A Compendium of the First English Edition with an Introduction by David Wallace Carrithers, 376 (1997)).

119. Portalis, one of the drafters of the Code Napoléon, declared: *"L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière."* *See* A Source-book on French Law 233 (Sir O. Khan-Freund et al. eds., 3d ed. rev., 1990). *See also* Brice Dickson, Introduction to French Law 10-11 (1994): "The generally worded provisions of the *Code civil* and the consequent freedom given to judges to interpret and apply those provisions have made possible the development of new rules and have without doubt been responsible for the Code's ability to come to terms with the social, technical and economic developments since Napoleon's day."

120. *See generally*, G. C. Thornton, Legislative Drafting 53 (2d ed., 1979); Bulmer v. Bollinger, [1974] 2 All E.R. 1226, 1237 (C.A. per Lord Denning M.R.).

This difference in style is linked to the function of statutes. Civilian statutory general principles need not be explained, precisely because they are not read restrictively (not being exceptions), but need to be stated concisely if the code is to be exhaustive. Common law statutory provisions need not be concise, because they cover only the specific part of the law to be reformed, but must be precise, because the common law courts restrict rules to the specific facts they are intended to cover.

Those styles can be found in international conventions. The Hamburg Rules[121] were drafted in a civilian style with the rule of responsibility in one sweeping article.[122] The Hague Rules,[123] by comparison, were drafted in a common law fashion, with responsibility in three very long and detailed articles, being Article 3(1) on seaworthiness, Article 3(2) on care of cargo and Article 4(2)(a) to (q) on seventeen exculpatory exceptions.[124]

I. Interpretations of Laws[125]

In civil law jurisdictions, the first step in interpreting an ambiguous law, according to Mazeaud,[126] is to discover the intention of the legislator by examining the legislation as a whole, including the "*travaux préparatoires*," as well as the provisions more immediately surrounding the obscure text.[127] In common law jurisdictions, by comparison, statutes are to be objectively construed according to certain rules standing by themselves,[128] such as that an enactment must be read as

---

121. United Nations Convention on the Carriage of Goods by Sea, adopted at Hamburg, March 31, 1978, and in force November 1, 1992, commonly known as the "Hamburg Rules." For the official English text of the Hamburg Rules, *see* Tetley, *supra* note 117, Appendix "A" at 1143-65; *see also* Unif. L. Rev. 1978-I, 134.

122. Art. 5(1) of the Hamburg Rules reads "[t]he carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Art. 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

123. International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted at Brussels, August 25, 1924, commonly known as the "Hague Rules." For the official French text of the Hague Rules, *see* Tetley, *supra* note 117, Appendix "A" at 1111-20, with an English translation, at 1120-29; *see also* Unification du droit/Unification of Law 488 (1948).

124. Art. 4(2) reads "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (q). Any other cause arising without the actual fault. . . ."

125. *See* Tetley, *supra* note 117, at 47-50.

126. H. Mazeaud, Leçons de Droit Civil 172 (François Chabas ed., 11th ed., Paris, Montchrestien 1996).

127. *See*, e.g., the Código Civil de Panama, art. 9, which provides:

> When the sense of a rule of law is clear its literal text cannot be disregarded with the pretext to consult its spirit. However, for the interpretation of an obscure expression of Law, the interpreter may refer to the intent or spirit that can be consulted through the Law or its history clearly manifested within the Law or in the genuine history of its creation.

This provision was cited in *Phoenix Marine Inc. v. China Ocean Shipping Co.*, 1 Lloyd's Rep. 682, 686 (per Moore-Bick J.) (1999).

128. Sir Courtney Ilbert, Legislative Methods and Forms 250-51 (1901).

a whole, and that special provisions will control general provisions, so as to meet the subjects' reasonable understandings and expectations.[129]

Two reasons can be advanced to explain this difference in interpretation. Firstly, common law statutes have to be read against a case law background, while civil law codes and statutes are the primary source of law under Montesquieu's theory. Secondly, civil law judges are influenced by Rousseau's theory that the State is the source of all rights under the social contract, while English judges favour Hobbes' theory that the individual agreed to forfeit to the State only certain rights.[130]

J. The Appointment of Judges

Common law judges, who are called to play an important role in deciding what the law is, are appointed from among experienced practising lawyers. Civil law judges, whose main function is adjudicating, are appointed fresh from specialized schools. (Québec judges, in the common law tradition, however, are all appointed from practising lawyers, this being another example of the common law tradition in Québec.)

K. Consequences—Evolution of the Law

While the civil law principles, frozen into codes and often rigid doctrine, are imposed on courts, most common law rules can be changed from time to time, subject to the doctrine of *stare decisis*. On one hand, the realities of modern life can be addressed in a more timely fashion through the common law, e.g. the salvage lien and repairer's lien. On the other hand, common law judges are sometimes hesitant to change a rule, where the consequences of doing so in relation to the whole of the law are not clear.[131] Less timid to reform, civil law jurisdictions have sometimes hired learned authors to assist in effecting major legal changes. An example is the engagement by the French Government of the late Dean René Rodière, then regarded as the premier maritime law author and professor in France, to draft five statutes by which French maritime law was reformed in the 1960's.[132]

---

129. However, Ilbert sets some presumptions that the legislature did not intend to alter the rules or principles of the common law beyond what is expressly declared, or to oust or limit the jurisdiction of the superior courts. *Id.* at 250.

130. Rousseau and Hobbes' theories are compared in Y. Guchet, La pensée politique 56-60 (1992).

131. David & Brierley, *supra* note 4, at 101, para. 74.

132. Law No. 66-420 of June 18, 1966 concerning contracts of charterparty and of carriage by sea (June 24, 1966, J.O. 5206); Law No. 67-5 of Jan. 3, 1967 concerning the status of ships and other seagoing vessels (Jan. 4, 1967, J.O.106); Law No. 67-522 of July 3, 1967 concerning marine insurance (July 4, 1967, J.O.6648), later codified as Book 1, Title VII of the *Code des assurances* by Decree No. 76-666 of July 16, 1976 (July 21, 1976, J.O. 4341); Law No. 67-545 of July 7, 1967 concerning events at sea (July 9, 1967, J.O. 6867); and Law No. 69-8 of January 3, 1969 concerning shipowning and maritime sales (Jan. 5, 1969, J.O. 200).

L. *Concept of the Legal Rule*

> In countries of the Romano-Germanic family, . . . in which doctrinal writing is held in high esteem, the legal rule is not considered as merely a rule appropriate to the solution of a concrete case. Through the systematising efforts of the doctrinal authors, the legal rule has risen to a higher level of abstraction: it is viewed as a rule of conduct, endowed with a certain generality, and situated above the specific application which courts or practitioners may make of it in any concrete case. . . . In the eyes of an Englishman, the French *règle de droit* is situated at the level of a *legal principle* (*principe juridique*); to him it appears to be more a moral precept than a truly "legal rule."[133]
>
> The English *legal rule* is situated at the level of the case for which—and for which alone—it has in fact been found and enunciated in order to ground a decision. The English legal rule [. . .], in the eyes of a French jurist, is situated at the level of a particular *judicial application* made of the rule; it is easy enough for him to understand but to him such a concept gives English law a case-by-case and therefore an organisationally unsatisfactory character.[134]

Consequentially, civil law systems are "closed," in the sense that every possible situation is governed by a limited number of general principles,[135] while common law system are "open," in the sense that new rules may be created or imported for new facts.[136]

Civil law allows for wider rules than does the common law in private law matters (those rules that can be avoided by contract), in that civil law rules are suppletive (the parties are deemed to know the law and hence to be aware of those rules), while common law rules are presumptive of the intention of the parties when relevant facts are present.[137]

M. *Categories of Laws*

Civil law categories are based on the rules themselves, e.g. private law and public law,[138] while common law categories were founded on the law that was administered by different courts, e.g. common law courts and the court of Equity.[139]

---

133. David & Brierly, *supra* note 4, *id.* at 94, para. 69, 359 para. 320. In the latter passage, they refer to A.P. Sereni, *The Code and the Case Law*, *in* The Code Napoléon and the Common Law World 61 (B. Schwarz ed., 1956): "The civil law *règle juridique* may appear at times to an Anglo-American lawyer to be nothing more than an abstract precept or at most a general directive rather than an actual legal provision."

134. David & Brierley, *supra* note 4, at 358, 359, para. 320.

135. *Id.* at 360-61, para. 322.

136. *Id.*

137. *Id.* at 364-65, para. 325.

138. *Id.* at 81, para. 60.

139. The Judicature Acts, 1873, 36 & 37 Vict., ch. 66; 1875, 38 & 39 Vict., ch. 77 enabled Common Law and Equity to be administered by the same Courts.

It is not surprising that adjectival law (which includes the rules of procedure and evidence) was traditionally given considerable attention in common law jurisdictions, while substantive law habitually received more attention in civil law jurisdictions.

N. Rights Versus Remedies

Civil law focuses on rights and obligations, while common law is oriented toward the jurisdiction of particular courts to grant the sought-after remedy ("remedies precede rights").[140]

It follows that the civil law does not have a clearly defined system of remedies, but relies rather on the courts to choose or even create the appropriate remedy.[141] Conversely, the common law does not have a unitary system of rights and obligations. Courts having jurisdiction to hear a matter falling within a cause of action set the rights and obligations *au fur et à mesure* that they are called to rule on them; it is only through precedents that specific rights (always in relation to a cause of action) can be found.

Maritime liens, for example, have been restricted in their scope by jurisdictional confrontations between the courts of common law and of Admiralty (*The Halcyon Isle*),[142] while Canada and the United States consider maritime liens to be substantive rights in the civilian tradition (*The Ioannis Daskelelis*).[143]

VI. CIVIL LAW AND COMMON LAW: RESULTING DIFFERENCES IN LAW

A study of several differences in substantive law as between the civil law and the common law is very instructive in illustrating the diversity of basic juridical concepts underlying the two legal systems.

A. Economic Loss

Civil law's unitary system of obligations provides for the same means of enforcement (*moyens de mise en oeuvre*) whatever the obligation (patrimonial or not, contractual or not), including performance by equivalence (*exécution par équivalent*), i.e. damages (*dommages-intérêts*), which include losses of profits (*pertes de profit* or *lucrum cessans* in Latin).[144] Common law, while allowing consequential damages in contract, used to be unwilling to award pure economic

---

140. *See* W. W. Buckland and A.D. McNair, Roman Law and Common Law: A Comparison in Outline 399 (F.H. Lawson, ed., 2 ed. rev., 1952).

141. Art. 20 of the Code of Civil Procedure (Québec), S.Q. 1965, ch. 80, reads "[w]henever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provision of law."

142. [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C. 1980).

143. S.C.R. 1248 (1974), 1 Lloyd's Rep. 174 (1973); AMC 176 (Supr. Ct. of Can.).

144. C. Civ. art. 1149 (France); *Civil Code of Québec*, S.Q. 1991, ch. 64, art. 1611 [hereinafter Civil Code of Québec (C.C.Q.)]; La. Civ. Code art. 1995.

loss (i.e. damages in tort when there is no physical damage).[145] This attitude has been softened recently, however.[146]

B. *Pre-Judgment Interests*

Pre-judgment interests are recoverable as of right in civil law,[147] because they are understood as part of the *lucrum cessans*. On the contrary, pre-judgment interest has been awarded only in relatively recent times in common law systems, except in maritime law.

C. Lex Mercatoria

The modern *lex mercatoria* finds its strength in civilian jurisdictions, as was pointed out by Thomas Carbonneau:

> It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the legal system. Nor is it astonishing that the most virulent critics of *lex mercatoria* and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles.[148]

D. *Conflict of Laws*[149]

Terminology—In common law, "conflict of laws" includes choice of law, choice of jurisdiction and recognition of foreign judgments. In civil law, the appropriate translation is "private international law" (as opposed to internal law) because conflict of laws (read literally) merely governs choice of law rules.

History—While private international law dates back to the Roman times, common law conflict of laws rules are relatively new, because the procedural requirement of service used to be sufficient to limit the jurisdiction of the court to domestic conflicts.

Emphasis—Civil law, being essentially substantive instead of adjectival, puts more emphasis on its choice of law rules, while common law, being essentially procedural, focuses on the rules of jurisdiction (for example, service *ex juris*).

---

145. Robins Drydock Co. v. Flint, 275 U.S. 303, (1927).

146. The Jervis Crown, (CNR v. Norsk Pacific), [1992] 1 S.C.R. 1021, (1992) 91 D.L.R. (4th) 289, (1992); 1992 AMC 1910 (Supr. Ct. of Can.) (1992).

147. C. Civ. art. 1153 (France); C.C.Q art. 1617 (Québec); La. Civ. Code art. 2000.

148. Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny, in* Lex Mercatoria and Arbitration 37 (Carbonneau, ed., rev. ed., Transnat'l Juris Publications, 1998).

149. *See* William Tetley, International Conflict of Laws. Common, Civil and Maritime (Les Éditions Yvon Blais 1994) [hereinafter *International Conflict of Laws*].

Traditional method—The civil law traditional method (imported into many common law systems) consists in characterizing the dispute as belonging a defined category, and then identifying the applicable internal law in relation to points of attachment of the category concerned. Even with similar categories (e.g. procedural versus substantive issues), the characterization of issues is always influenced (if not mandatorily governed) by the *lex fori*; hence a delay to sue issue would be characterized as substantive in civil law (relating to prescription)[150] and procedural in common law (relating to limitation periods).[151] The same is true of maritime liens, which are procedures in England,[152] and substantive rights in civil law,[153] as in certain common law jurisdictions.[154]

Special methods—Civil law and common law developed similar rules to limit the scope of the traditional method when its strict application led to undesirable results. The civil law notions of *fraude à la loi* and *fraude au jugement*[155] are similar to the common law rule of "no evasion of the law";[156] the same is true of civil law's international public order[157] and common law's public policy.[158] The civil law concept of *loi d'application immédiate* (mandatory rules) is also making

150. *See, e.g.*, C.C.Q. art. 3131 (Québec 1994): "Prescription is governed by the law applicable to the merits of the dispute."; La. Civ. Code art. 3549. In the case of European Union countries, the Rome Convention 1980, at art. 10(1)(d), now subjects prescription to the law applicable to the contact.

151. In recent years, however, common law jurisdictions have begun to treat foreign limitation periods as substantive, rather than procedural, matters, subject to only a few exceptions. *See, e.g.*, the *U.K. Foreign Limitation Periods Act 1984*, U.K. 1984, ch. 16. For Scotland, *see* the *Prescription and Limitation (Scotland) Act 1984*, U.K. 1984, ch. 45. *See generally*, William Tetley, *supra* note 149, at 694-98. In Canadian common law conflict of laws, limitation periods are now also treated as substantive, thanks to the decision of the Supreme Court of Canada in *Tolofson* v. *Jensen and Lucas* v. *Gagnon* [1994] 3 S.C.R. 1022. *See also* William Tetley, *New Development in Private International Law: Tolofson v. Jensen and Lucas v. Gagnon* 44 Am. J. Comp. L. 647 (1996).

152. The Halcyon Isle, [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C). *See generally* Tetley, *supra* note 149, at 569-75. Many other countries which received English common law also treat maritime liens as procedural for conflict of laws purposes, and thus subject to the *lex fori* (e.g., South Africa, Cyprus, New Zealand and Australia). See, Tetley *supra* note 149, at 574-79.

153. The substantive character of "maritime privileges" (i.e., maritime liens) in traditional civil law was recognized long ago by eminent jurists such as Story in *The Nestor* 18 F. Cas. 9 (C.C. D. Me. 1831) (Case No. 10,126) and by Sir John Jervis in *The Bold Buccleugh* (1851) 7 Moo. P.C. 267, 284, 13 Eng. Rep. 884, 890 (P.C.1851). *See generally* William Tetley, Maritime Liens and Claims 56-60 (2 ed., Les Éditions Yvon Blais 1998).

154. The Ioannis Daskelelis [1974] S.C.R. 1248, [1974] 1 Lloyd's Rep. 174, 1973, AMC 176 (Supr. Ct. of Can.). *See generally* Tetley, *supra* note 149, at 565-69 and other Canadian decisions cited there. The United States, with its largely civilian maritime law heritage, also treats foreign maritime liens and claims as substantive. *See id.* at 552-65 and American decisions cited there. *See also* Tetley, *supra* note 153, at 39-41.

155. *See* Tetley, *supra* note 149, at 141-44.

156. *See id.* at 144-54.

157. *See id.* at 103-06. *See also* C.C.Q. arts. 3081, 3155(5) (Québec 1994); La. Civ. Code arts. 3538, 3540, requiring consideration of the public order of the otherwise applicable law in respect of marriage, forms of contract and party autonomy in contract respectively.

158. *See generally* Tetley, *supra* note 149, at 107-16.

its way outside the civil law jurisdictions—see the reservation at Article 7(1) of the 1980 Rome Convention.[159]

E. Forum Non Conveniens[160]

Forum non conveniens is the common law principle whereby a court, which has jurisdiction to hear a claim, refuses to do so, because it believes another court of another state also has jurisdiction to hear the claim and can better render justice in the circumstances.[161] This principle was unknown to civil law courts, which are often required by the constitutions of their respective countries to hear an action, although they may suspend it. Scotland was first to develop the concept of *forum non conveniens*[162] and now Québec[163] and Louisiana[164] have adopted the principle. Lord Goff of Chievely of the House of Lords suggests that:

> [t]he principle [*forum non conveniens*] is now so widespread that it may come to be accepted throughout the common law world; indeed since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilized of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen.[165]

---

159. *See generally id.* at 128-32.

160. *See* Tetley, *supra* note 149, at 799-803.

161. Spiliada Maritime Corp. v. Cansulex Ltd. (The Spiliada), [1987] A.C. 460, 476, [1987] 1 Lloyd's Rep. 1, 10 (H.L. 1987).

162. *Forum non conveniens* was developed by Scottish courts in the nineteenth century in decisions such as *Clements v. Macaulay*, 4 Macpherson 583, 592 (Sess. Cas., 3d ser 1866). *See also* Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français" 1925 S.C. 332 (Session), upheld 1926 S.C. 13, (1925) 23 Lloyd's List L. Rep. 209 (H.L. 1925). The Scottish origin of *forum non conveniens* was acknowledged by the House of Lords in *Airbus Industrie GIE* v. *Patel*, [1998] 1 Lloyd's Rep. 631, 636 (H.L. per Lord Goff 1998).

163. Art. 3135 of the Civil Code of Québec 1994 codified the rule in the following terms: "[e]ven though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."

164. In fact, *forum non conveniens* applies generally in U.S. federal conflict of laws. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 S. Ct. (1947); Piper Aircraft v. Reyno, 454 U.S. 235, (1981).

165. Airbus Industrie GIE v. Patel, [1998]1 Lloyd's Rep. 631, 642 (H.L. 1998). Lord Goff points out, *id.* at 636, that *forum non conveniens* has been approved in Australia (*see* Voth v. Manildra Flour Mills Pty. Ltd. (1990) 65 A.L.J.R. 83); Canada (*see* Amchem Products Inc. v. British Columbia Workers' Compensation Board [1993] 1 S.C.R. 897, [1993] 102 D.L.R. (4th) 96) and in New Zealand (*see* Club Mediterranée N.Z. v. Wendell (1989) 1 N.Z.L.R. 216). He also notes that the principle has no application as between States party to the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters.

Forum non conveniens was accepted by English courts[166] in order to palliate the absence of rules of international jurisdiction (the only procedural rule limiting jurisdiction then being service).

F. Forum Conveniens[167]

Forum conveniens is the common law principle whereby a court, which does not have jurisdiction over a claim, nevertheless accepts jurisdiction, because there is no other appropriate jurisdiction to hear the claim and justice would not otherwise be done.

The principle is not known in civil law, although it has been placed in the new Québec Civil Code 1994 at Article 3136.[168]

G. *Arbitration*[169]

A common law equity clause in an arbitration agreement "purports expressly to dispense the arbitrator from applying the law either wholly or in part."[170] In civil law, these are called *amiable compositeur* clauses. While strict equity clauses (also known as *ex aequo et bono* clauses) are suspect in England,[171] *amiable compositeur* clauses are generally permitted in civil law jurisdictions and are found in civilian codes.[172]

---

166. *See* decisions such as The Atlantic Star [1974] A.C. 436, [1974] 2 Lloyd's Rep. 197 (H.L. 1973); MacShannon v. Rockware Glass Ltd. [1978] A.C. 795 (H.L. 1978); The Abidin Daver [1984] 1 A.C. 398 [1984], 1 Lloyd's Rep. 339 (H.L. 1984); and Spiliada Maritime Corp. v. Cansulex Ltd. (The Spiliada) [1987] A.C. 460 [1987], 1 Lloyd's Rep. 1 (H.L. 1987). By virtue of § 49 of the *Civil Jurisdiction and Judgments Act 1982*, 1982, ch. 27, as amended in 1991 by the *Civil Jurisdiction and Judgments Act 1991*, 1991, ch. 12, sch. 2, para. 24, any court in the United Kingdom may stay any proceeding on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Brussels Convention on Jurisidiction and the Recognition of Judgments in Civil and Commercial Matters or the very similar 1988 Lugano Convention.

167. *See* W. Tetley, *International Conflict of Laws* at 803-04. *See also The Rosalie* (1853) 1 Sp. 188 at 192, 164 E.R. 109 at 112, where the great English (civilian) Admiralty judge, Dr. Stephen Lushington, took jurisdiction in an Admiralty case where no other court would do so, in order to prevent a denial of justice, although technically he lacked any statutory basis for doing so.

168. C.C.Q. Art. 3136 provides: "Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

169. Tetley, *supra* note 149, at 385-419.

170. Mustill & Boyd, Commercial Arbitration 74, (2 ed., Butterworths 1989). A typical equity clause may read: "The arbitrator shall be entitled to decide according to equity and good conscience and shall not be obliged to follow the strict rules of law." *See* Tetley, *supra* note 149, at 413.

171. *See* Mutill & Boyd, *supra* note 170, at 75-77; Tetley, *supra* note 149, at 413-14. *See also* Czarnikow v. Roth, Schmidt & Co. [1922] 2 K.B. 478, 491 (1922), 12 Lloyd's List L. Rep. 195, 198 (C.A. 1922 per Atkin L.J.).

172. *See* the New Code of Civil Procedure (France) art. 1474 (re domestic arbitration) and art. 1497 (re international arbitration) and the Code of Civil Procedure (Québec) at art. 944.10. Besides, they are specifically permitted under art. 28(3) of the 1985 UNCITRAL Model Law on International

H. *Arbitration and Interpretation/Construction of Contracts*[173]

The common law objective contract theory dictates that contractual promises be interpreted according to the reasonable expectation of the promisee (an objective standard).[174] Civil law, which is based on the autonomy of free will, requires actual consent (a subjective standard),[175] but presumptions of fact are available to the trial judge.

VII. SOME CIVILIAN PRINCIPLES NOW IN THE COMMON LAW

A. *Restitution*

Restitution is the new common law science which in recent years has spawned textbooks, law journals and law articles, lectures and conferences where none had existed before. Restitution is proof that the common law is not dead.

Much of the modern law of restitution resembles the civil law principles of quasi-contract found for centuries in Scottish civil law. The revival or creation of restitution in England intrigues civilians, particularly in codal countries.

Terminology—While the principle of unjust enrichment now unites restitutionary claims at common law,[176] unjust enrichment at civil law is but one of the quasi-contracts (others being *negotiorum gestio* and the reception of what is not due) which triggers restitution.

The common law used to be restricted to specific forms of action which did not include a general restitutionary claim for unjust enrichment. The law of restitution therefore developed mainly through the action *indebitatus assumpsit* under the implied contract theory.[177] The latter concept was abandoned with the abolishment of the forms of actions, and has recently been replaced by a substantive principle of unjust enrichment which underlies, according to Goff & Jones,[178] not only quasi-contractual claims (as in the civil law) but also the other related causes of action which trigger a restitutionary claim.

Commercial Arbitration, as well as under art. VII(2) of the European Convention on International Commercial Arbitration (Geneva 1961) and art. 42(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington 1965).

173. *See* Tetley, *supra* note 117, at 226-27.

174. The leading statement is by Blackburn J. in *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597, 607: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

175. C. Civ. Art. 1108 (France); C.C.Q. arts. 1385, 1386. (Québec 1994); La. Civ. Code art. 1927.

176. Lord Goff of Chieveley & G. Jones, The Law of Restitution 12 (4th ed., Sweet & Maxwell 1993).

177. *Id.* at 5-12.

178. *Id.* at 11.

It is interesting that today the three basic requirements of unjustified enrichment under both civil law and common law are: 1) an enrichment by the receipt of a benefit, 2) that this benefit be gained at the plaintiff's expense, and 3) a lack of legal cause.

B. Negligence: Delict—The General Tort of Negligence

Before *Donohue v. Stevenson*,[179] there was no general duty of care at common law. There were many tort causes of action, and the tort of negligence covered only certain special duties. Civil law, on the contrary, always recognized the general obligation not to act unreasonably in situations not governed by contract.

Donohue v. Stevenson created, amongst the special duties of care already sanctioned by the action in negligence, a general duty of care similar to that of civil law: "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour,"[180] neighbours being "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[181] Since then, "obligations" are now taught in common law schools and books are written on the subject (e.g. Tettenborn).

C. Foreseeable Contractual Damages[182]

In civil law, it is not sufficient that contractual damages be the immediate and direct consequence of the non-performance; they must have been foreseen or foreseeable at the time that the obligation was contracted unless there is intentional or gross fault.[183]

In 1854, *Hadley v. Baxendale*,[184] citing Pothier, the French authority,[185] the court adopted the rule that, besides those damages arising naturally from the breach, consequential damages include such damage as "may reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it";[186] if there are special circumstances, they must be communicated and thus known to both parties.

---

179. [1932] A.C. 562 (H.L. 1932).
180. *Id.* at 580 (per Lord Atkin).
181. *Id.*
182. *See* Tetley, *supra* note 117, at 319-23.
183. C. Civ. Art. 1150 (France); C.C.Q art. 1613. (Québec 1994); La. Civ. Code art. 1996.
184. [1854] 9 Ex. 341; 156 E.R. 145.
185. [1854] 9 Ex. 341, 345-46; 156 E.R. 145, 147.
186. [1854] 9 Ex. 341, 354-55; 156 E.R. 145, 151.

D. *Pre-Judgment Interests*[187]

In civil law, the general principle of *restitutio in integrum* entails that pre-judgment interests be granted as a loss of profit.[188] Interest is even payable as of right when the debtor has delayed in performing an obligation to pay a sum of money, and are calculated from the date the obligation was due.[189] It is not surprising that "damages" is translated into "*dommages-intérêts*" in French.

Pre-judgment interests were gradually awarded in common law. *Lord Tenterden's Act*[190] opened the door slightly in 1833—the Court was granted discretion to award interest for debts of sums of money. The *Law Reform (Miscellaneous Provisions) Act, 1937*,[191] at Section 3, and later Section 35A of the *Supreme Court Act 1981*,[192] finally confirmed the discretionary powers of the courts to award interest "at such rate as it thinks fit or as rules may provide." (The Admiralty Court had already adopted the civil law rule that interest was always due to the obligee when payment was not made in time.)[193]

E. *Proof of Foreign Law*[194]

Common law is more adversarial, while civil law is more inquisitorial, when it comes to proving the substance of a foreign law, a question of fact arising in a choice of law or recognition of foreign law situation. At common law, foreign law was proven by the testimony of qualified expert witnesses, who were summoned to court, and subject to examination as to both their qualifications as experts and their knowledge and interpretation of the foreign law in question. In civil law jurisdictions, on the other hand, foreign laws needed usually be proven only by the production of a certificate, prepared by a diplomat of the relevant state or an expert in the foreign law concerned, who, however, was not called to testify as a witness at trial. Moreover, judicial notice was possible and is now compulsory.[195]

Today, the United Kingdom has softened its rules of proof of foreign law. Pursuant to Section 4(1) of the *Civil Evidence Act 1972*,[196] any person suitably

---

187. *See* Tetley, *supra* note 149, at 747-56.

188. C.C.Q Art. 1618. (Québec 1994).

189. C. Civ. Art. 1153 (France); C.C.Q art. 1617. (Québec 1994); La. Civ. Code art. 2000.

190. *An Act for the further Amendment of the Law, and the better Advancement of Justice, known as the Civil Procedure Act*, (1833) 3 & 4 Will. 4, ch. 42, § 28.

191. U.K., 24 & 25 Geo. 5, ch. 41.

192. Inserted by the *Administration of Justice Act, 1982*, 1982, ch. 53, § 15(1) and sch. 1, part. I.

193. *See* The Northumbria (1869) L.R. 3 Adm. & Eccl. 6, 10 (High Ct. of Admiralty 1869).

194. *See* Tetley, *supra* note 149, at 763-86.

195. The *Rebouh* and *Schule* decisions, *Cour de Cassation*, October 11 and 18, 1988, (1989) 78 Rev. cr. dr. int. pr. 368, Clunet 1989, 349, note Alexandre, which imposed on French judges the duty of inquiring into the foreign law applicable according to French conflict rules, even where the parties do not invoke that law. *Lloyd* v. *Guibert*, (1865) L.R. 1 Q.B. 115, 129 (Exch. 1865) stands for the common law position that judicial notice of a foreign law cannot be taken.

196. U.K. 1972, ch. 30.

qualified by virtue of his knowledge or experience is a competent expert, "irrespective of whether he has acted or is entitled to act as a legal practitioner" in the country concerned (what was required before), and uncontradicted evidence of the expert witness as to the effect of the sources he has referred to is usually accepted. Moreover, the *Contracts (Applicable Law) Act 1990*[197] implementing the 1980 Rome Convention[198] now permits judicial notice in ascertaining contractual obligations. Other common law jurisdictions such as Canada and the United States of America have taken an even more civilian route in adopting less formalistic means of proof and permitting judicial notice as a general rule.

F. Contributory Negligence[199]

While at common law contributory negligence has always been a complete bar to an action in tort, civil law has always dealt with this issue as a mere question of causation, thereby apportioning liability according to the gravity of the concurrent faults. Moreover, the common law developed the "last opportunity rule" (known as the "the last clear chance rule" in the U.S.) in order to avoid triggering the contributory negligence rule against an otherwise faulty claimant.

By way of statute, most common law jurisdictions have now limited, if not abolished, the contributory negligence rule, and adopted the more equitable "proportionate fault" (comparative fault) rule.[200] The Supreme Court of Canada even took the matter of reform in its own hands and eliminated the contributory negligence bar in respect of torts aboard a single ship under Canadian maritime law.[201] As to the "last opportunity rule," it was held to be incompatible with the new proportionate fault system and hence fell obsolete.[202]

G. Marine Insurance[203]

Common law and civil law define marine insurance in different terms. Common law speaks of an undertaking to indemnify "marine losses, that is to say, the losses incident to marine adventure."[204] Civil law is concerned instead with the guarantee of "risks in respect of a maritime operation."[205] Despite this different

---

197. U.K. 1990, ch. 36.

198. Adopted at Rome, June 19, 1980.

199. *See* Tetley, *supra* note 149, at 476-78.

200. The most noteworthy statute is the United Kingdom's *Law Reform (Contributory Negligence) Act 1945*, 8 & 9 Geo. VI, ch. 28.

201. Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. [1997] 3 S.C.R. 1210, (1997) 153 D.L.R. (4th) 385, (1997) 221 N.R. 1, (1997) 158 Nfld. & P.E.I.R. 269, (1997) 48 C.C.L.I. (2d) 1 (Supr. Ct. of Can.).

202. Henry v. Brandon, *Apportionment of Liability in British Courts under the Maritime Conventions Act of 1911*, 51 Tul. L. Rev. 1025, 1030 (1977).

203. *See* Tetley, *supra* note 149, at 331-83.

204. *Marine Insurance Act 1906*, U.K. 6 Edward VII, ch. 41, § 1.

205. Translation of art. 1 of the French *Code des assurances*, Law No. 67-522 of July 3, 1967, codified as arts. L.171-1 to L.173-26 inclusive of the *Code des assurances* by Decree No. 76-666 of

wording, however, common law marine policies cover risk interests as well as property rights.

VIII. THE *LEX MERCATORIA*

A. *The Influence of the* Lex Mercatoria

In medieval Europe, beginning as early as the ninth century and continuing up until the sixteenth century, there existed a remarkably uniform body of customary mercantile law which was applied by merchant courts in commercial disputes. This transnational custom was known as the *lex mercatoria*, or in English, the "Law Merchant."[206] The *lex mercatoria* incorporated a body of customary private maritime law, the *lex maritima*, or "*Ley Maryne*" as it was called in French. The two were interrelated because of the importance of seafaring commerce in medieval Europe. The relationship was colourfully described as follows by Malynes writing in 1622:[207]

> And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the Lex Mercatoria is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth.

Over time, various principles of the *lex maritima* were committed to writing in primitive codifications, of which the three most important were the Rôles of Oléron (c. 1190),[208] which applied in northern and western Europe from the Atlantic coast

---

July 16, 1976 (July 21, 1976, J.O. 4341).

206. On the Law Merchant of the Middle Ages, *see generally* Leon Trakman, The Law Merchant: The Evolution of Commercial Law (F.B. Rothman 1983); Leon Trakman, *The Evolution of the Law Merchant: Our Common Heritage*, 12 J. Mar. L. & Comm. 1, 3 (1980): "Merchants began to transact business across local boundaries, transporting innovative practices in trade to foreign markets. The mobility of the merchant carried with it a mobility of local custom from region to region. The laws of particular towns, usually trade centers, inevitably grew into dominant codes of custom of transterritorial proportions."

207. Malynes, Consuetudo vel Lex Mercatoria (1622), cited by W.S. Holdsworth, *The Development of the Law Merchant and its Courts, in* Holdsworth, *Select Essays in Anglo-American Legal History*, 292-93 (vol. 1, Little, Brown & Co., 1907).

208. The *Rôles of Oléron* were probably composed on the Island of Oléron off Bordeaux (France) in the late twelfth century. They are compilations of both principles and reported judgements relating to legal matters arising in the then burgeoning wine trade between Aquitaine (Guienne) and England and Flanders. Thirty known manuscripts of the *Rôles* are in existence, most of them written in Old French. For one English translation of a later version, consisting of forty-seven articles, see 30 Fed. Cas. 1171. Earlier versions, consisting of thirty-five and twenty-four articles were published by Sir Travers Twiss, in *The Black Book of the Admiralty*, in vol. 1 (1871) and vol. 2 (1873) respectively. The best modern scolarly treatment of the *Rôles*, althrough regrettably unpublished, is that of James Shephard, *Les Origines des Rôles d'Oléron* (unpublished Master's thesis, Univ. of Poitiers, 1983) and *Les Rôles d'Oléron: Étude des Manuscrits et Édition du Texte* (unpublished D.E.A. thesis, Université de Poitiers 1985). *See generally* Tetley, *supra* note 153, at 13-17.

of Spain to Scandinavia; the *Consolato del Mare*,[209] which governed Mediterranean maritime affairs from about the late 1300s; and later the Laws of Wisbuy (or Visby),[210] based on the Rôles of Oléron, which regulated trade on the Baltic.[211]

The *lex mercatoria* and its maritime component, the *lex maritima*, were administered by local courts, often by the "piepowder" (*piedpoudre*) courts at medieval fairs, which typically heard the disputes between the merchants concerned and rendered judgments between tides, so as not to delay the merchants unduly on their voyages.[212] The Law Merchant, including maritime law, thus constituted a legal system, with rules and institutions of its own, which relied upon codified principles in the civilian manner, and which was burdened with little conflict of laws because of its Europe-wide character. Even in England, it was this transnational, essentially civilian *ius commune* which governed commercial and maritime litigation conducted before the High Court of Admiralty sitting at Doctors' Commons in London.[213] Scotland too accepted the *lex maritima*. In *Nicolsoun v. Watsoun*, a decision of Scotland's Admiralty Court, it is reported that there was pleaded "the law of the buik of Olouris safer as thai ar ressavit in this realme" (the law of the book of Oléron so fair as they are received in this realm).[214]

A surprising amount of this historic, civilian maritime *ius commune* continues to exist in the admiralty law of modern nations, including common law countries, and particularly in the United States. Many principles, such as abandonment in shipowners' limitation of liability, proportionate fault in marine collisions, wrongful death remedies for the survivors of deceased seafarers, maintenance and cure rights of sick and injured seamen, the awarding of prejudgment interest as an integral part of damages from the date of the casualty, the civilian *assistance*

---

209. The *Consolato del Mare* is a compilation of decisions rendered by "consuls" who dispensed maritime justice in various Mediterranean ports (notably, Barcelona, Valencia and Marseilles). The earliest text available of the *Consolato* is a version in Catalan, dating from 1494, although the compilation is thought to date from towards the end of the fourteenth century. *See also* Tetley, *supra* note 153, at 21.

210. The Laws of Wisbuy, first published in Copenhagen in 1505, were possibly brought from Flanders, a meeting place for merchants who plied the North Sea and the Baltic, to the Hanseatic cities (notably Hamburg, Lübeck and Bremen) and thence to Baltic towns (notably Rostock, Stralsund and Danzig). They may in fact be a Low German translation of the *Judgments of Damme*, a compilation of Flemish sea laws based on the *Rôles of Oléron*. For an English translation, *see* 30 F. Cas 1189. *See also* Tetley, *supra* note 153, at 20-21.

211. *See* William Tetley, *The General Maritime Law - The Lex Maritima*, 20 Syracuse J. Int'l. L. & Com. 105 (1994), *reprinted in* 1994 ETL 469.

212. *See, e.g.*, the charter of Newcastle-upon-Tyne, which during the reign of Henry I (1100-1135) gave the City court the authority to judge cases between merchants and seamen before the third tide. Certain Scottish cities also had charters permitting courts to sit and adjudge maritime matters before the third tide. *See* May Bateson, Borough Customs 184 (Selden Society, vol. 2, 1906); Tetley, *supra* note 153, 12-13.

213. *See* Graveson, Conflict of Laws 33-34 (7th ed., Sweet & Maxwell 1974): "But even in Admiralty there was no conflict of laws because, in cases to which the law merchant applied, there was only one law. And when, in the sixteenth century, the law merchant was taken over and administered in the courts of common law, it was applied on the theory that it was part of the common law, and not a law foreign to the court."

214. *See* Stair Society, Acta Curiae Admirallatus Scotiae (1557-1561), vol. 2, 164 (1937).

principle in modern salvage law, marine insurance and the application of equity, are among the examples in substantive law. Procedural law also reflects the same heritage in the maritime attachment, an admiralty application of the *saisie conservatoire* of traditional civil law.

But in addition there is what has been called the "new" Law Merchant, the modern *lex mercatoria*, which many scholars believe is gradually beginning to take shape in international commerce. The 1993 Uniform Customs and Practice for Documentary Credits (UCP 500)[215] published by the International Chamber of Commerce is one example, being a compilation of modern banking practices which enjoy near universal acceptance and "will readily be treated by the court as impliedly incorporated into the various documentary credit contracts as established usage."[216] The 1990 Incoterms of the International Chamber of Commerce also provide a transnational set of conditions on price and delivery applied uniformly in international sale of goods contracts.

Another significant devlopment is the 1980 Vienna Sales Convention 1980[217] which "seeks to maintain a delicate balance between the contrasting attitudes and concepts of the civil law and of the common law. . ."[218] in harmonizing law on the sale of goods between States party to the Convention. It is noteworthy that the Convention has been applied as part of the modern *lex mercatoria* by the Iran-United States Claims Tribunal.[219]

In shipping, the influence of the contemporary Law Merchant may be seen in the use by shippers and shipowners and their respective agents of a multitude of standard-form contracts, particularly standard-form bills of lading[220] and charterparties,[221] as well as in certain normative documents frequently incorporated by reference into carriage of goods by sea contracts.[222]

---

215. ICC Publications No. 500. *See* E.P. Ellinger, *The Uniform Customs and Practice for Documentary Credits—the 1993 Revision* [1994] LMCLQ 377.

216. Roy Goode, Commercial Law 985 (2d ed., Penguin Books, 1995).

217. The United Nations Convention on Contracts for the International Sale of Goods (sometimes called the "CISG"), adopted at Vienna, April 11, 1980 and in force January 1, 1988.

218. *See* Goode, *supra* note 216, at 927. The general requirement of good faith enshrined at art. 7(1) of the CISG is absent from English law, for example, but very present in civil law. *Id.* at 931-32 (stressing that the Convention's rules on offer and acceptance follow the civil law rather than the common law). Art. 79 relieving a party from liability in damages for a failure to perform caused by an impediment beyond his control is also characterized by Goode (*id.* at 937) as "more akin to the French law of *force majeure* than to the English law of frustration."

219. Watkins-Johnson Co. and Watkins-Johnson Ltd. v. Islamic Republic of Iran, 1990 XV Y.B. of Com. Arb. 220, cited by Goode, *supra* note 216, at 929.

220. *See*, for example, the "Congenbill" bill of lading of the Baltic and International Maritime Council (BIMCO); the "Liner Bill of Lading" ("Conlinebill") (BIMCO) and the Combined Transport Bill of Lading ("Combiconbill") (BIMCO).

221. *See*, for example, the BIMCO Uniform Time-Charter (Baltime), the New York Produce Exchange (NYPE) forms of time charterparty and the BIMCO Uniform General Charter (Gencon) form of voyage charterparty, among many others.

222. *See*, for example, the 1990 Uniform Rules for Sea Waybills of the Comité maritime international (CMI); the 1993 Voyage Charterparty Laytime Interpretation Rules, issued jointly by BIMCO, the CMI, the Federation of National Associations of Ship Brokers and Agents (FONASBA)

One of the areas in which growth of a modern *lex mercatoria* is most visible is in international commercial arbitration. With each passing year, there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the United States), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus gradually developing a system of arbitral precedent.[223] International commercial arbitration is also greatly aided by major international conventions such as the New York Convention 1958[224] and the 1985 UNCITRAL Model Law on International Commercial Arbitration.[225] The latter instrument offers a complete legislative cadre for international commercial arbitration, including both substantive and procedural rules.[226] Legislation based on the Model Law is now in force in such widely divergent jurisdictions as Australia, Bulgaria, Canada (at the federal level and in all provinces and territories), Cyprus, Hong Kong, Nigeria, Peru, Scotland [227] and Tunisia, as well as in several U.S. states.[228] As the American arbitration scholar, T. Carbonneau, has noted:[229]

> There is a body of legal rules that represents a world law on arbitration. States basically agree directly and indirectly on those legal principles that should attend the operation and define the legitimacy of the arbitral process. These rules of law surround arbitration and regulate its activity on a world-wide basis. They have arisen as a result of the arbitral process and represent its acceptance within most national legal systems. They constitute, in effect, a body of world law on the procedure and regulation of arbitration that is highly consistent in both principle and policy.

The existence of a modern *lex mercatoria* remains a controversial one, especially in common law countries, where some critics deny that there can be any

---

and the General Council of British Shipping (GCBS); and the 1994 York/Antwerp Rules on general average, adopted by the CMI.

223. *See* Tetley, *supra* note 211, at 134-42, especially at 140-41, and authorities cited there. *See also* T. Carbonneau, Cases and Materials on Commercial Arbitration 565-68 (Juris Publishing Inc., 1997).

224. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted at New York, June 10, 1958, and now in force in over ninety States, including the United Kingdom.

225. Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on June 21, 1985.

226. *See* J.E.C. Brierley, *Canadian Acceptance of International Commercial Arbitration* 40 Me. L. Rev. 287 (1988).

227. The UNCITRAL Model Law on International Commercial Arbitration 1985 applies in Scotland by virtue of the *Law Reform (Miscellaneous Provisions (Scotland) Act 1990*, U.K. 1990, ch. 40, § 66, and Sch. 7. It is interesting that Scotland is party to the UNCITRAL Model Law, while England is not. England, however, has incorporated elements of the Model Law into its *Arbitration Act 1996*, 1996, c. 23.

228. *See* Tetley, *supra* note 149, at 393-94.

229. Carbonneau, *supra* note 223, at 567. "Despite the private character of their jurisdictional authority, international arbitrators occupy a unique vantage point for articulating international commercial law principles. Their practical mission allows them to craft functional predicates of substantive decision." *Id.* at 23.

such thing as transnational norms having legal force independent of contractual incorporation, national statutes or international conventions. The debate in itself says much about the difference between common law and civil law thinking.[230]

B. *The 1994 UNIDROIT Principles of International Commercial Contracts*

A major step forward in the development of a modern *lex mercatoria* was taken in 1994 when the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) in Rome, Italy adopted the "Principles of International Commercial Contracts."[231] This document was the fruit of some fourteen years of labour by a working group comprising some of the most respected specialists in contract law and international trade law from the civil law, common law and Socialist legal systems in different countries of the world. Its drafters took account of both common law and civilian compilations and codifications.[232] Together with the Comments, the UNIDROIT Principles set forth some of the fundamental concepts underlying international commercial contracts in the modern world. The purpose of the Principles is clearly set forth at the outset of the text:

> These Principles set forth general rules of international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement international uniform law instruments. They may serve as a model for national and international legislators.

Accordingly, the Principles constitute more than just a checklist or guide to negotiators in concluding transborder trade agreements. They are autonomous in

---

230. *See* Carbonneau, *supra* note 148 and accompanying text. As Carbonneau has phrased it: It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the legal system. Nor is it astonishing that the most virulent critics of lex mercatoria and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles. *Id.* at 37.

231. *Principles of International Commercial Contracts*, UNIDROIT, 1994. *See also* the English version of the Principles *reproduced in* J.M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281 (1994).

232. Among the principal sources of the UNIDROIT Principles, one may cite the U.S. Uniform Commercial Code and the Restatement (Second) of the Law of Contracts, the Algerian Civil Code of 1975, the Foreign Economic Contract Law of the People's Republic of China, and the drafts of the Netherlands and Québec Civil Codes which came into force in 1992 and 1994 respectively, as well as the 1980 Vienna Convention on the International Sale of Goods and several Model Laws adopted by UNCITRAL. *See* M.J. Bonnell, *The UNIDROIT Priniples of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, 1996 Uni. L. Rev. 229, 231.

character, in that they permit issues which are not addressed specifically to be resolved in harmony with their basic tenets.[233] Certain of their rules are mandatory and may not be contracted out of, notably the standards of good faith and fair dealing prescribed by Article 1.7.2. Most importantly, the Principles may be applied as constituting the *lex mercatoria* when the parties to the contract have agreed that it should be applicable, thus giving added credibility to the existence of the new Law Merchant itself. [234] Finally, it is immensely signifcant that the Principles can be, and are being, applied as models for national and international lawmakers in drafting new legislation on commercial contracts.[235]

Among the reasons for the rapid acceptance of the UNIDROIT Principles is their accessibility in many languages.[236] They have also found a place in the curricula and teaching materials of literally dozens of law faculties in Europe, North America, South America, Africa and Asia.[237] Another is the fact that they

---

233. K. Boele-Woelki, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts*, 1994 Uni. L. Rev. 652, 658. *See also* the decision of the *Cour d'appel de Grenoble*, Jan. 24, 1996, 1997 Uni. L. Rev. 180, where the Principles were used to determine the rate of interest to which a creditor of a debt due under an international sale of goods contract was entitled where the debtor delayed in making payment, in the absence of a specific rule on the point in the 1980 Vienna Convention on the International Sale of Goods.

234. The Principles were soon adopted by international commercial arbitrators, particularly of the International Chamber of Commerce. They were regarded as the most genuine expression of general rules and principles enjoying a wide international consensus, in a 1995 partial award on a contractual dispute between an English company and a governmental agency of a Middle East State, where the contract referred merely to "principles of natural justice." The same year, they were accepted, in respect of their rules of interpretation, as a proper source of "Anglo-Saxon principles of law" in a dispute between a U.S. company and a governmental agency of a Middle Eastern country. In a third dispute, between an Italian company and a governmental agency of a Middle East country, on a contract without a choice of law clause, the arbitral tribunal, in a partial award on the applicable law, decided to base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*." In its subsequent award on the merits, the same tribunal referred to various articles of the UNIDROIT Principles, thereby implicitly holding them to be a source of the *lex mercatoria*. *See* M.J. Bonnell, *The UNIDROIT Principles in Practice: The Experience of the First Two Years*, 1997 Uni. L. Rev. 34, 42-3.

235. *Id.* at 37-38, reports that the UNIDROIT Principles have been a source of inspiration in the Netherlands Civil Code 1992, the Québec Civil Code 1994, and the new Civil Code of the Russian Federation. Individual provisions of the Principles have been referred to in the final Report of the Commission for the Revision of the German Law of Obligations 1992, and in the drafts of the Civil Codes of Lithuania and the Czech Republic, the draft Commercial Code of Tunisia and in the draft Uniform Law on General Commercial Law being prepared by the Organization for the Harmonization of Business Law in Africa. The Scottish Law Commission, in its Discussion Paper No. 101, *Interpretation in Private Law*, Aug. 1996, also expressly referred in its proposals for the reform of the rules on interpretation of legal acts to arts. 4.1, 4.2, 4.4, 4.5, 4.6 and 4.7 of the UNIDROIT Principles.

236. Bonnell, *supra* note 234, at 38, writing in late 1996 or early 1997, reported that the complete version (the articles and the comments) were available in Chinese, English, French, Italian, Portuguese, Russian, Slovak and Spanish, with a German version then in preparation, and that the "black letter rules" (i.e., the articles without the comments) had been translated into Arabic, Bulgarian, Czech, Flemish, Hungarian, Korean and Serbian, with a Japanese translation then in preparation.

237. *Id.* at 36-7 lists over sixty law faculties in which the UNIDROIT Principles figure in the courses and/or teaching materials at the time of his article. Both the University of Edinburgh and the

represent a consensus of over seventy specialists from all major legal systems. Finally, as one experienced American lawyer has commented:[238] "The great importance of the [UNIDROIT] Principles is that the volume exists. It can be taken to court, it can be referred to page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution towards making *lex mercatoria* definitive and provable."

The UNIDROIT Principles, in the few years since their approval, have achieved an impressive synthesis of the law of international trade, reconciling different legal traditions in a creative and beneficial fashion, to the benefit of the international business community.

IX. STATUTES TO UNIFY OR RECONCILE THE TWO SYSTEMS

A unique initiative in the reconciliation of the common law with the civil law by statute is underway in Canada. In June 1998, the federal Minister of Justice introduced in the Canadian House of Commons, Bill C-50, entitled *Federal Law—Civil Law Harmonization Act, No. 1*.[239]

In Canada, where nine provinces and three territories are common law jurisdictions, and only one province (Québec) is a civil law jurisdiction, there has been a regrettable tendency in the past for federal statutes to be drafted using the vocabulary and style of the common law alone. This was understandable, especially because many of the federal legislative drafters and law officers were trained exclusively in that legal system. The tendency was exacerbated by the fact that until recent years, federal legislation in Canada was usually drafted first in English and then translated into French before its introduction in the federal Parliament.[240] As a result, there is a constant risk that the civil law terms and ideas may be either forgotten or distorted in federal enactments, resulting in difficulties of interpretation and application of those laws in Québec.

Bill C-50 seeks to correct such distortions in present federal law and to prevent their repetition in the future. The major purpose of the Bill is to "ensure that all existing federal legislation that deals with private law integrates the terminology, concepts and institutions of Québec civil law."[241] It is hoped that this harmonization of federal legislation with the civil law as codified in the Civil Code of Québec 1994,[242] will improve the application of federal laws in that province,

---

University of Glasgow appear in the list.

238. B.S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, *in* Golden Gate University School of Law, 2 Annual Survey of Int'l & Comp. L. 111, 122 (1995) (cited by Bonnell, *supra* note 234, at 44).

239. The full title of Bill C-50 is "A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law." The Bill was introduced in first reading in the House of Commons on June 12, 1998.

240. Today, however, both official language versions of new federal statutes are drafted in original English and French texts.

241. *See* the News Release: Re Bill C-50, released June 12, 1998.

242. S.Q. 1991, ch. 64, in force Jan.1, 1994.

increase the efficiency of courts administering federal laws[243] and better respect what is referred to as the "bijural" character of Canadian federalism (i.e. the coexistence of the common law and the civil law systems of private law within the Canadian federation). The specific purposes of the Bill are:[244]

> To repeal the pre-Confederation provisions of the 1866 Civil Code of Lower Canada that fall within federal jurisdiction and replace certain provisions with appropriate provisions on marriage applicable only in the Province of Quebec;
>
> To add rules of construction that recognize the Canadian bijural tradition and that clarify the application of provincial law to federal law on a suppletive basis, as well as bijural provisions in federal statutes;
>
> To harmonize Acts of Parliament, including the Federal Real Property Act,[245] the Bankruptcy and Insolvency Act,[246] the Crown Liability and Proceedings Act[247] and other statutes of a lower degree of complexity which relate to security and property law, with the civil law of the Province of Quebec.

Of particular interest are the proposed new Sections 8.1 and 8.2 of the Canadian *Interpretation Act*[248] which would be enacted by sect. 8 of the Bill:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> 8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Since 1993, the Department of Justice of Canada has reviewed approximately 700 federal laws to identify those whose content or format would be most affected

---

243. In Canada, both provincial superior courts (whose judges are appointed by the federal government) and provincial inferior courts (whose judges are appointed by the provincial governments) administer federal, as well as provincial, laws. The only major exception to the rule is the Federal Court of Canada, a statutory court whose jurisdiction is limited to certain domains of federal law specified by statute.

244. *See* the Progress Table to Bill C-50.

245. R.S.C. 1991, ch. 50.

246. R.S.C. 1985, ch. B-3.

247. R.S.C. 1985, ch. C-50.

248. R.S.C. 1985, ch. I-21.

by changes in the Québec Civil Code, and has identified approximately 300 such statutes which will require further review *over the next nine years*. The challenge of effective harmonization is therefore one of considerable magnitude. It remains to be seen to what extent the high hopes underlying Bill C-50 will be realized. Nevertheless, harmonizing two legal systems by *statute*, in a manner designed to respect the essence and genius of each system, is a creative undertaking, and a development which, if successful in the Canadian/Québec context, might well be of interest to other mixed jurisdictions around the world.

X. PRACTISING IN A MIXED JURISDICTION

My first contact with a mixed jurisdiction was in law school in Québec (1948-1951) and then during nineteen years in the practice of law. As lawyers, we understood we had been trained as civilians, but in corporate, tax, criminal and administrative matters, the law was common law in both its nature and its drafting. The judges and lawyers had no difficulty in adapting to both systems, so that imperceptibly one legal tradition impinged on the other.

In consequence, in our day-to-day work, we found no major problem in practising civil law in Québec and then moving over to the common law of another province or of the Federal courts. In other words, lawyers and judges are not concerned with practising and adjudging law in the mixed jurisdiction of Québec. Rather, if they aware of the dual legal systems, they rejoice in them.

XI. LEGISLATING IN A MIXED JURISDICTION

My second experience with a mixed jurisdiction was in the Québec National Assembly where I was a back-bencher in the Opposition from 1968 to 1970 and then a cabinet Minister from 1970 to 1976.

At first, I was quite unaware of any role I had to protect and advance the civilian tradition and was quite willing to have the new Insurance Act adopted as a statute and extract it from the Civil Code of 1866. This caused no hue and cry at all, except from one McGill Professor, Paul-André Crépeau, whom I had not met but who convinced me that insurance principles should remain in a code, with the administrative principles consigned to a statute.

This we did. We also systematically drew up all the statutes with which the Ministry of Financial Institutions was concerned—concerning real estate, corporations, trusts, consumer protection, co-operatives, etc.—in the *civilian* style.

This was one of the major revelations of my time in politics.

Today, one of the purposes of the nationalist movement and of separatist politicians in Québec is the protection of the civil law of Québec, along with the French language and culture. It is my view that they can be protected as well, or perhaps better, in a federal system.

XII. TEACHING IN A MIXED JURISDICTION

Professors in mixed jurisdictions are much more concerned with the distinction between the civil law and the common law than are practitioners. The latter consider the other tradition merely as a different law, or a foreign law, with which they must contend.

In Québec, the civil law is very important as a major part of Québec's distinctive nature. The civil law, like the French language, must be protected from the intrusions of the common law. Professors lead the charge in this regard, whether or not they are separatists politically.

At McGill Law Faculty, two law degrees are presently given, being a bachelor of civil law (B.C.L.) after three years of study and a bachelor of common law (LL.B.) also after three years. Both degrees are granted in the National Programme after four years. There is much intentional transsystemic teaching at McGill, and the two legal traditions are now being taught *concurrently* from the very first year of law school, so that all future McGill law graduates will complete their legal education with a thorough grounding in both legal traditions, assimilated in a comparative law perspective.

Teaching both civil law and common law in a mixed jurisdiction is exceedingly demanding, as my own experience at McGill (1976 to the present) has convinced me. It is also challenging, exciting and very satisfying.

XIII. CREATION OF MIXED JURISDICTIONS

It is my view that mixed jurisdictions are created when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest.[249] The imposition on Québec of the English common law, together with England's administrative, judicial and legislative system, leaving the French civil law to continue unchanged, is an example. The intrusions of other cultures by armies and treaties, as seen in Belgium and much of the rest of Europe at the time of Napoleon, as well as in the cases of South Africa and Louisiana, provide further examples.

---

249. *See also* Örücü, *Mixed and Mixing Systems: A Conceptual Search*, *in* Örücü et al., *supra* note 7, at 348-49:

> They [mixed jurisdictions] can be said to be the direct outcome of the British colonial policy in ceded colonies of leaving intact most of the existing legal institutions and the law already in force, only imposing Common Law for convenience, as opposed to the civilian colonists who introduced codes and therefore, a way of life. When the forces behind the formation of mixes are looked at historically, it is impositions or partial impositions that are responsible for the coming into being of most mixed systems of the past.

Mixed jurisdictions may also be created by the voluntary "reception" of foreign law.[250] The classic example of this process may be found in Scotland. Robin Evans-Jones[251] describes how Scottish lawyers in the sixteenth and seventeenth centuries, having been trained in Roman law in European universities, developed a preference for that law, which they brought home with them at the end of their studies. Roman law had the advantage of being written, as opposed to customary; it was systematic and was also more certain and often more just than the indigenous Celtic law which had prevailed previously in Scotland. Gradually, the Roman law familiar to the foreign-trained jurists supplanted the indigenous law, and was "received" into the country, becoming Scots law. Significantly, Evans-Jones notes:[252]

> The fundamental factor explaining why receptions occur is that a strong system of law comes up against as weak system which it then overwhelms to a greater or lesser extent. In other words, the reception of Roman law happened because it was stronger than the indigenous laws it came up against.

A second "reception" occurred in Scotland in the nineteenth century (and continues today), as more and more English common law began to be introduced into Scots law, once again because of the comparative weakness of that law.[253]

XIV. SURVIVAL OF MIXED JURISDICTIONS

It is my very strong view that it is very difficult for a mixed jurisdiction to survive if it has only one language, one legislature and one court system. The two legal systems in such a mixed jurisdiction are soon melded together as one.

A. Language

The long-term vitality of two legal systems in a mixed jurisdiction is greatly assisted, and may in fact be dependent upon, the official recognition of two languages, one of which is particularly associated with each legal system in question. The examples of Québec, South Africa, Louisiana and Scotland are very telling in this regard.

---

250. *Id.* at 341, referring to movements of migration of laws and people as catalysts in the formation of mixed jurisdictions, and identifying the forces behind these movements as including "expansion, occupation, colonisation and efforts of modernisation, and the ensuing impositions, imposed receptions, voluntary receptions, infiltrations, inspirations and imitations and concerted—or co-ordinated parallel developments."

251. *See* Evans-Jones, *supra* note 3, at 231. *See also* our remarks on Scotland, Louisiana, South Africa and Egypt, *supra*.

252. *Id.* at 230-31.

253. *Id.* at 231-32.

1. Québec

Under Canada's *Constitution Act, 1867*,[254] all provincial laws and regulations of Québec, as well as all federal laws and regulations, must be adopted in both French and English, so that Canada and Québec have, in fact, two languages of legislation. Both languages may be used in the debates and must be used in the records of both the federal Parliament and the Québec National Assembly. Either of those languages may be used in any court of Canada (i.e. the Supreme Court of Canada and the Federal Court of Canada), as well as in the courts of Québec. French, of course, is a major language of the civil law, Québec's system of private law. English, on the other hand, is traditionally the language of the common law, which forms the basis of Québec's public law, as well as of many spheres of federal law (e.g. criminal law, maritime law, etc.).

Linguistic duality is not purely a matter of constitutional law in Québec, however, but is also a living reality. Both the historic languages of the civil law and the common law *in fact* continue to be read, understood, spoken and written by Québec's legislators, judges, lawyers and scholars. Law students must have a solid command of *both* French and English in order to pursue legal studies in Québec in *either* of those tongues and in order to practise effectively at the Bar and on the Bench in the province. Their resulting professional bilingualism enables Québec jurists to have ready access *in the original* to both civil law jurisprudence and doctrine emanating from France and other francophone countries, as well as to common law decisions and legal writings from the United Kingdom, the United States, the other provinces of Canada and other wholly or predominantly anglophone jurisdictions. The decisions of Québec judges frequently contain quotations from both civil law sources (generally in French) and from common law sources (generally in English). The concepts, terminology and method of reasoning of the two legal systems are familiar to an increasingly wide circle of Québec jurists, many of whom qualify to practise their profession in both Québec and one or more other Canadian provinces and/or abroad. Legal publishing too is done in

254. *See* § 133 of the *Constitution Act, 1867* (formerly the *British North America Act* (1867) 30 & 31 Vict. ch. 3) and renamed by the *Canada Act, 1982*, 1982, ch. 11. The present Canadian citation is R.S.C. 1985, Appendix II, No. 5. § 133 provides:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the legislature of Quebec shall be printed and published in both those Languages.

See also the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act 1982*, which itself is Schedule "B" to the *Canada Act, 1982*, at §§. 16(1), 17(1), 18(1) and 19(1), reiterating the provisions of § 133 of the *Constitution Act, 1867* concerning the official status of the English and French languages in respect of the federal Parliament and government and courts established by Parliament.

both French and English in Québec.[255] All these factors make Quebeckers particularly conscious of both the traditions from which their legal rights and obligations spring and ever more committed to preserving and enhancing those traditions, without permitting either to obliterate or overshadow the other. A clear commitment to the preservation of the civilian legal tradition of Québec law, even in the context of Canadian *federal* legislation, is seen in the draft *Federal Law—Civil Law Harmonization Act, No. 1*[256] discussed above.

This "bijuralism" and bilingualism also cause Québec lawyers (especially graduates of the "National Programme" offered by the Faculty of Law of McGill University) to be in great demand in international law firms and international organizations, as well as in the Canadian federal civil service, where both their language skills and their knowledge of the two principal legal systems of the Western world are highly prized.

2. *South Africa*

South Africa's mixed legal system also thrives largely because both Afrikaans and English are recognized as official languages of the Republic, together with a number of indigenous languages.[257] Historically, the fact that Dutch and German were languages accessible to so many Afrikaners also contributed, particularly in the later nineteenth and early twentieth centuries, to the survival of Roman-Dutch law, at a time when it risked being totally undermined by the common law and the English language. Daniel Visser notes the assistance which the "purist" defenders of Roman-Dutch law at that period of South African history derived from the institutional writings of modern European civilian authors, especially those who published in Dutch and German:[258]

> This practice brought much modern civilian learning into South African law, a process greatly facilitated by virtue of the fact that the Afrikaans-speaking academics enjoyed a linguistic affinity to at least two of the most influential European countries.

---

255. As an example, my three major books, Marine Cargo Claims, (3d ed.,1988); International Conflict of Laws (1994); and Maritime Liens and Claims (2d ed.,1998), were all published in English by Les Éditions Yvon Blais, Inc., Montreal, a firm most of whose law books, are published in French.

256. Bill C-50 of 1998 (Canada); *see* text accompanying *supra* notes 239-48.

257. *See* the Constitution of the Republic of South Africa (Act 108 of 1996), signed into law on December 10, 1996, at ch.1, § 6, recognizing eleven languages, including Afrikaans and English, as well as nine indigenous languages, as official languages of the Republic. By § 6(3)(a), the national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

258. D. Visser, *Placing the Civilian Influence in Scotland: A Roman-Dutch Perspective*, *in* David L. Carey Miller & Reinhold Zimmermann, The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays 239-49 (Duncker & Humblot 1997).

As in Québec, South African bijuralism today is strengthened by the bilingualism of members of the Bar and the Bench, as well as by that of legislators, scholars and students. The laws of the Republic are enacted in both Afrikaans and English, which languages are also official in the courts. Law students require a knowledge of both those tongues to pursue their studies and to practise effectively afterwards. Judgments are written in both languages, and both civil law and common law authorities are cited in them. Legal publishing is also done in both Afrikaans and English, with much of the writing on Roman-Dutch law appearing in Afrikaans.

There is also a recognition of customary law in the new Constitution of 1996. The Bill of Rights, enacted by Chapter 2 of the Constitution, provides at Section 39(2) that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights. Section 39(3) further provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

3. Louisiana

By comparison, the difficulty which the civilian tradition experiences in surviving and developing in Louisiana is directly proportional to the constantly declining use of the French language in that state. The state's first Constitution in 1812 was actually drafted in French, and only a duly authenticated English translation was sent to Washington, to comply with the requirements of the Enabling Act of the U.S. Congress,[259] which permitted Louisiana to accede to statehood.[260] Nevertheless, even that early Constitution provided that the laws, public records and judicial and legislative written proceedings of the State would be promulgated, preserved and conducted "in the language in which the Constitution of the United States is written" (Article VI, Section 15). Under Louisiana's 1845 Constitution, the Constitution and laws of Louisiana were required to be promulgated in the English and French languages (Article 132), although Article 103, confusingly, reiterated the earlier English-only rule for laws, public records and judicial and legislative written proceedings, and the 1852 Constitution (Article 100) repeated that latter rule. The Constitutions of 1845 (Article 104) and 1852 (Article 101) also obliged the Secretary of the State Senate and the Clerk of the House of Representatives to be "conversant" with both French and English, and permitted members to address either House in French or in English. The State Constitutions of 1879 (Article 154), 1898 (Article 165) and 1913 (Article 165), however, all contained provisions requiring the laws, public records and judicial and legislative written proceedings to be promulgated,

259. Act of Feb. 20, 1811, ch. 21, 2 U.S. Stat. 641, § 4.

260. *See* Lee Hargrave, The Louisiana State Constitution: A Reference Guide 2 (Greenwood Press 1991).

preserved and conducted in English, but also empowered the General Assembly to provide for the publication of the laws in the French language, while also permitting judicial advertisements to be made in French in certain designated cities and parishes. Eventually, however, under the 1921 Constitution, the English language alone came to prevail in the legislature and the courts of Louisiana, as it did also in public education.[261]

Under Louisiana's present Constitution of 1974, there is no provision on the official language or the language of the legislature or the courts, but in fact English alone is the official tongue.[262] There is no need for legislators, judges, lawyers, law professors or students to possess even a reading knowledge of French in order to complete their training and to practise their professions. Even some of the great French civil law treatises have been translated into English[263] and are consulted only in translation by most Louisiana jurists, because they cannot read the original versions. Legal publishing in the state is in English only. These factors contribute to the weakness of the civil law tradition in Louisiana, which coupled with the strength of federal law, has resulted, for example, in the replacement of the provisions on securities in the new Louisiana Civil Code,[264] by the Uniform Commercial Code chapter.

4. Scotland

A similar situation prevails in Scotland, where language, and culture generally, played a role in the "reception" of Roman law into Scots law in the sixteenth and seventeenth centuries, and more recently, in the reception of much English common law, thus making Scotland a "mixed jurisdiction." Robin Evans-Jones attributes the first reception largely to the influence of Scottish lawyers who received their legal education in continental European universities and then went home with "an intellectual and cultural preference for the Civil law in which they

---

261. The Constitutions of 1898 and 1913, at art. 251 in each case, required the "general exercises" in the public schools to be conducted in the English language; but permitted the French language to be taught in those parishes or localities where French predominated, provided that no additional expenses were thereby incurred. Under the 1921 Constitution (Art. 12, § 12), however: "[t]he general exercises in the public schools shall be conducted in English."

262. Art. XI, § 4 of the 1974 Constitution, however, does provide: "[t]he right of the people to preserve, foster, and promote their respective historic linguistic and cultural origins is recognized." This complements Art. I, § 3, which prohibits unreasonable discrimination based on culture, and reflects a reawakening of cultural consciousness in Acadian Louisiana, but has no impact on the status of English as the sole *de facto* official language of the State. *See* Lee Hargrave, *supra* note 260, at 187.

263. *See*, for example, M. Planiol & G. Ripert, *Treatise on the Civil Law* in 3 tomes and 6 vols. (trans. La. State Law Institute, 1959), from the original *Traité élémentaire de droit civil*. A multi-volume treatise of Louisiana civil law (in English) by various authors also exists.

264. The Louisiana Civil Code has been so extensively and repeatedly amended since its last great revision in 1870, and particularly in the period 1976-84, that it may for all practical purposes be regarded as a "new" Civil Code. These frequent and major amendments demonstrate the unfortunate (and common law-inspired) tendency of the Louisiana legislators to treat the Code as just another statute.

had been trained."[265] At that time, such studies were undertaken in Latin, French and/or Dutch. In the nineteenth century, however, as a result of a "cultural shift in Scotland from continental Europe towards England,"[266] Scottish lawyers ceased being trained on the Continent and began to see themselves as part of a worldwide community of *English*-speaking lawyers sharing with English and American jurists a legal heritage associated with justice and freedom. The result of this cultural transformation has been a slow erosion of the civilian heritage of Scots law, in favour of its English common law component. Evans-Jones cites the example of the concept of *condictio indebiti*, or unjustifed enrichment, which Scottish judges have increasingly refined and interpreted in accordance with English, rather than modern civil law. He observes that the general principle of unjustified enrichment, as a source of obligations, is really the creation of the later civilian tradition (not generally taught in Scottish law schools), rather than of Roman law, and notes:[267]

> The substance of this law has since been developed in a Civilian legal culture from which Scots lawyers were remote and *expressed in languages which most Scots could not read.* It is through academic work that the law of modern Civilian systems needs to be made accessible in Scotland. If this is lacking *it is not surprising that English law, because of its* proximity, *accessibility* and powerful *culture* should provide such an attractive model to Scots. (Italics added for emphasis).

The fact that English is the only official language in Scotland obviously makes it much harder to secure the kind of widespread knowledge of the modern European civil law among Scots lawyers which Evans-Jones sees as vital to shoring up the foundation of Scots law. Nor does it appear likely that any traditional civil law language (e.g. Latin or French) will be made official by Scotland's new Parliament, which assumed its legislative powers on July 1, 1999. It is to be hoped, however, that the knowledge of modern European civil law in Scotland will be enhanced by courses in Scottish universities offered by professors familiar with the major European codes and the languages in which they are drafted. Such teaching would surely assist Scotland in maintaining the integrity of its civilian tradition within the United Kingdom and the European Union.

It is therefore clear that the presence of two (or more) official and "living" languages in a mixed jurisdiction makes a major contribution to the flourishing of the two (or more) legal systems of that jurisdiction, as well as to the preservation

---

265. Robin Evans-Jones, *supra* note 3, at 231.

266. *Id.* at 232. *See also* Alan Rodger, *Thinking about Scots Law* 1 Edinburgh L. Rev. 3 (1996), who notes: "a tendency from the later years of the nineteenth century onwards for Scots to see themselves as part of a larger English speaking family of lawyers scattered throughout the Empire; a vision which began to speak of the white races of the Empire and the United States being linked by a unique heritage of law. . . ." Rodger observes that the civil law was reviled at this time, because it was associated with dictatorship.

267. Evans-Jones, *supra* note 3, at 246. Evans-Jones further observes that the lack of familiarity of Scottish lawyers with concepts that are part of their own law "will in time lead to its ossification." *Id.* at 247.

of the genius and tradition underlying each system. Conversely, the existence of only one official language in a mixed jurisdiction tends to foster the erosion of any legal system other than the one of which that language is the principal medium of expresssion. As Örücü has stressed:[268]

> Racial and cultural dualism lead to legal dualism, whether as a mixed system or legal pluralism. . . . The preservation of a legal tradition has been shown to be related to the growth of national and cultural consciousness, a feeling of "otherness" and "power". However, when two systems co-exist, the stronger one, demographic or otherwise, may take over, over-shadow or overthrow the other. The conclusions may seem simple, that is, if one hopes to preserve fidelity to a legal culture or heritage, one must rescue it from suffocation by the other law, in most cases by Common Law procedural methodology. *The factors in maintaining a legal tradition generally referred to are: shared language and terminology, legal education and legal literature; closeness to the mother of the component to be preserved and the value attributed to the distinct cultural background.*

5. *Other Jurisdictions*

It would be interesting to study the effect on the law of Israel of the presence in that country of two languages (Hebrew and English),[269] and the effect on Egypt of the presence of two legal systems (Sharia law and French civil law) in that country, which has only one official language (Arabic).

B. *Separate Legislatures*

Where a mixed jurisdiction has its own legislature separate from the legislature of the federation (if any) of which it forms part, and separate from the legislature of any other country, it is easier to secure the future of the divergent legal traditions of the jurisdiction than it is where only one assembly exercises legislative power.

---

268. Örücü, *Mixed and Mixing Systems*, *in* Örücü et al., *supra* note 7, at 349-50 (italics added for emphasis) (citing T.B. Smith, *The Preservation of the Civilian Tradition in 'Mixed Jurisdictions' in Civil Law in the Modern World* (A. N. Yiannolopoulos, ed., 1965)), who states that mixed legal systems which use English as the language of the courts are particularly exposed to subversion through the imposition or incautious acceptance of technical terms) of Common Law as equivalent to civilian concepts. He notes that the influence of English law has frequently resulted from terminological misunderstandings or manipulations usually initiated by the appellate courts, especially in uncodified mixed jurisdicitons such as Ceylon, Scotaland and South Africa.

269. For an interesting study of Israel as a mixed jurisdiction, with private law which has changed from primarily common law to primarily civil law, and public law which has developed in the direction of common law (notably, American common law), *see* Stephen Goldstein, *Israel: Creating a New Legal System from Different Sources by Jurists of Different Backgrounds*, *in* Örücü et al. at *supra* note 7, at 147-63.

Québec has had its own legislature, separate from the federal Parliament in Ottawa, from the beginning of Canadian Confederation in 1867. This feature of Canadian federalism has not only helped maintain Québec's distinct cultural identity as the one jurisdiction in North America where the language and culture of the majority of the people is French; it has also served to safeguard and to foster the development of the civil law tradition of the province, as a mixed jurisdiction, within Canada. Scarcely a session of the Québec National Assembly goes by without at least one statute being introduced to amend the Québec Civil Code or the Code of Civil Procedure. Indeed, it is quite likely that had there been no separate Québec legislature, the civilian heritage of the province would have been considerably eroded by the influence of the common law of the surrounding Canadian provinces and the neighbouring United States. The new Civil Code of 1994,[270] the product of some forty years of labour by Québec jurists, and among the most modern codifications in the contemporary world, would most likely never have been enacted had Québec been forced to rely on the federal Parliament to adopt its internal legislation.

Louisiana too possesses its own legislature, but the less extensive legislative authority of the states of the American Union compared to the provinces of the Canadian federation, coupled with the power of the federal common law of the United States, makes it more difficult for Louisiana than for Québec to preserve and enhance its civilian tradition. Nevertheless, the 1870 Civil Code has been amended very significantly in recent years to make it more responsive to contemporary social realities and the Code as revised continues to be the basic private law of Louisiana. The state also has the benefit of the Louisiana State Law Institute, which in 1976 assumed the task of studying and proposing amendments to the Civil Code to the Legislature.[271]

South Africa, with its own national and provincial legislatures, is also able to protect and stimulate the growth of its mixed legal system.

Scotland has its own Parliament again after nearly two hundred years during which its legislation has been enacted by the United Kingdom Parliament sitting at Westminister. It should therefore be able to take action to develop both the civilian and common law components of Scots law by legislation.[272] With respect to the civilian heritage, it is to be hoped that Scots legislators, now that the new Parliament has assumed its functions, will set in motion a planned process for the

---

270. *See supra* notes 79-86 and text accompanying.

271. *See supra* notes 104-05 and text accompanying.

272. The new Scottish Parliament, pursuant to §§ 28-30 of the *Scotland Act 1998*, U.K. 1998, ch. 46, is empowered to enact laws on a wide range of subjects ("devolved matters"), other than those "reserved matters" which continue to be under the exclusive legislative jurisdiction of the U.K. Parliament pursuant § 30 and Schedule 5 of the *Act* and other than certain matters which relate to European Union law. In general, all matters not defined in the *Act* as falling outside the jurisdiction of the Parliament will be devolved. In particular, the whole of Scots private law will be devolved, except for provisions which make modifications to that law as it applies to reserved matters. *See* the *Scotland Act 1998*, § 29(4). *See also* the White Paper, "Scotland's Parliament" (Cmnd 3658), dated July 24, 1997, at para. 2.4, indicating that devolution will extend to "civil law except in relation to matters which are reserved."

codification of Scottish civil law, entrusting this task to a carefully-selected group of experts, who will have the general civilian background and language skills necessary to permit them to draw inspiration from contemporary codifications in the States of the European Union, as well as from Louisiana, Québec, Japan, and the Latin American countries, in drafting a code responding to the needs of contemporary Scotland.

It should be noted, however, that where a mixed jurisdiction lacks its own legislature, the protection and promotion of its different legal traditions can nevertheless be supported beneficially by the involvement of an active law commission or other specialized legal agency. Scotland again affords a notable example. For many years, there has been a Scottish Law Commission working in tandem with the Law Commission[273] in studying and proposing reform of the law applicable in Scotland. Eventually the proposed reforms are submitted to the United Kingdom Parliament, often in special statutes applicable only to Scotland. Mention must also be made of the Scottish Office,[274] the main arm of the United Kingdom Government dealing with Scottish affairs, under the direction of the Secretary of State for Scotland, and which, *inter alia*, has played the leading role in the preparation of the *Scotland Act 1998*,[275] giving effect to the long-awaited "devolution."

It is also significant that the *Scotland Act 1998* provides for the appointment of an Advocate General for Scotland, who is a minister in the United Kingdom Government, with the responsibility for providing advice on Scots law.[276] This would seem an important reform, designed to secure greater respect for the integrity of Scotland's mixed legal system in future United Kingdom legislation applicable to that country.

Separate legislative structures, or at least separate law enforcement and law reform agencies, are vital to the survival of mixed jurisdictions.

C. *Separate Courts*

Apart from distinct languages and separate legislatures, another major support for a mixed jurisdiction is a separate court system.

---

273. The Law Commission (for England and Wales) and the Scottish Law Commission were set up in 1965 to study and propose law reform. The two Commissions consist of experienced barristers, solicitors and teachers of law, supported by a Secretary, and other staff members, including research assistants. In addition to law reform, the Commissions are involved with the consolidation of statutes and statute law revision.

274. The Scottish Office was first established in 1885 in London, as the administrative structure within which the "Secretary for Scotland" (renamed the "Secretary for State of Scotland" in 1926) took responsibility for administering Scotland's separate legal system and various Boards dealing with Scottish affairs. In 1939, the headquarters of the Office relocated to Edinburgh, while retaining an office in London for purposes of liaison with Whitehall. Today, the Scottish Office has five departments operating under the Secretary of State for Scotland, who, as a member of the U.K. Cabinet, is directly responsible to Parliament for those functions of government which are separately administered in Scotland.

275. U.K. 1998, ch. 46.

276. *Id.* at § 87. *See also* the White Paper, "Scotland's Parliament" (Cmnd 3658) at para. 4.9.

In Canada, the administration of justice in the provinces generally falls under the jurisdiction of the provincial legislatures.[277] The federal Government nevertheless has the power to appoint judges of the superior courts of the provinces (including the provincial courts of appeal),[278] with the appointment of judges of inferior courts being the responsibility of the provincial governments. The provincial courts (superior and inferior) adjudicate *all* claims within their respective monetary jurisdiction, whether those claims arise under federal or provincial law. For this reason, Canada is said to have a "co-operative" court system (sometimes called a "unitary" court system, not to be confused with a unitary State). There are also two federal courts established by Parliament for the "better administration of the laws of Canada":[279] the Supreme Court of Canada (the final court of appeal for Canada since 1949 in all cases decided by the provincial courts of appeal) and the Federal Court of Canada (which has both a Trial Division and an Appeal Division and is a statutory tribunal deciding disputes in a limited number of fields of federal law, such as industrial property, admiralty matters and immigration appeals).

As a Canadian province, Québec has the Court of Québec (an inferior court with provincially-appointed judges), as well as the Québec Superior Court (a superior court of general jurisdiction) and the Court of Appeal of Québec (a superior court of appeal), both of which have federally appointed judges. These judges decide civil cases arising under both federal and provincial law, and therefore under both of Québec's legal systems. The judges are appointed from among practising lawyers trained in Québec civil law, and who are also familiar with common law, at least to the extent that it underlies much statutory law, both federal and provincial, which they are called upon to apply.

It is also noteworthy that the Supreme Court of Canada, the highest court of appeal in both civil and criminal cases, ordinarily has three justices from Québec who are jurists trained and experienced in the civil law of the province. They sit with six judges drawn from the common law provinces. The Québec justices normally write the leading decisions in all appeals in cases involving Québec civil law. The common law justices are in most cases well versed in the civil law, however, as are the Québec judges in the common law. The two legal traditions therefore continue to be living realities in the highest court of the land, and they interact with one another without compromising the integrity of either system.

Louisiana, like other American states, has both federal and state courts of first instance and appeal. Most of the civil litigation involving the Louisiana Civil Code is tried in the state courts,[280] whose elected judges are former lawyers with at least five years of practice in the state.[281] As former lawyers, they must have passed Bar

277. *See* the *Constitution Act, 1867*, *supra* note 254, at § 92(14).

278. *Id.* at § 96.

279. *Id.* at § 101.

280. In the hierarchy of Louisiana's state courts, district courts have original jurisdiction in civil and criminal matters. Appellate jurisdiction in civil matters is exercised by the circuit courts of appeal, and above them, by the Louisiana Supreme Court. *See* the La. Const. Art. V, §§ 3, 10(A) and 16(A).

281. *See* La. Const. Art. V, § 24.

examinations testing their knowledge of civil law before being admitted to legal practice,[282] as well as those aspects of common law which apply in Louisiana. There is no tradition, however, of having Louisiana civil law justices on the U.S. Supreme Court, which means that appeals to that Court from decisions of the Louisiana Supreme Court in disputes governed by the civil law of the state are usually heard and decided by justices schooled and experienced only in the common law. Despite the unquestioned learning of all U.S. Supreme Court justices, there is therefore always a certain risk that the civilian component of Louisiana law will be unduly influenced, in this context, by the common law which predominates elsewhere in the United States.

In South Africa, under the 1996 Constitution, the judicial structure of the Republic consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts, the Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.[283] The judges of these courts are trained ex-practitioners of both Roman-Dutch and common law, as are those of the Supreme Court of Appeal, the Republic's final court of appeal, and of its Constitutional Court. The legal profession consists of "advocates" (similar to English barristers) and "attorneys" (similar to English solicitors). The advocates are organized into Bar associations or societies (one each at the seat of the various divisions of the Supreme Court), with the General Council of the Bar of South Africa acting as the co-ordinating body of those associations. The attorneys are organized into one law society for each province, with the Association of Law Societies playing the co-ordinating role. Advocates must pass the National Bar Examination of the General Council of the Bar, and attorneys must meet certain degree requirements.

The key part which the South African courts play in maintaining the country's distinct legal heritage is recognized officially in the 1996 Constitution, which provides at Section 173: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own proces, *and to develop the common law, taking into account the interests of justice.*" (italics added for emphasis). "Common law" is taken to mean the full South African law, including both its English and Dutch legacies, as they have evolved in the Republic.

Scotland too has long had a separate court system, including sheriffs' courts and the Court of Session, with its Outer and Inner Houses. The fact that the House

---

282. *See* Rule 17 of the Rules of the Louisiana Supreme Court, which provides that the rules set forth in Art. XIV of the Articles of Incorporation of the Louisiana State Bar Association, as amended, and as approved by the Court, govern all admissions to the Bar of that State. Article XIV of those Articles of Incorporation requires applicants for Bar admission in Louisiana to have passed at least seven of nine subject examinations, including four "Code examinations." Generally, there are three examinations on the Louisiana Civil Code and one on the Code of Civil Procedure.

283. The Constitution of the Republic of South Africa (Act 108 of 1996), signed into law Dec. 10, 1996, § 166.

of Lords is the final court of appeal for Scotland in civil cases has sometimes been invoked by authors concerned over the maintenance of the civilian heritage of Scots law. It is significant that the *Scotland Act 1998* provides that judicial appointments are a devolved matter, in the sense that although the Lord President of the Court of Session and the Lord Justice Clerk shall continue to be recommended by the Prime Minister to the Queen for appointment, such recommendations must be based upon a nomination by the Scottish Executive.[284] The other judges of the Court of Session, sheriffs principal and sheriffs shall be recommended for appointment to the Queen by the First Minister (of Scotland), after consulting the Lord President.[285] These provisions indicate a firm commitment to ensuring that the selection of all judges for Scotland shall be controlled there, where persons best suited to maintain the mixed tradition of Scots law can be best identified. There is also a Scottish presence in the House of Lords in London, where final appeals on Scots law in civil matters will continue to be decided.

Egypt no longer has its Sharia courts administering Sharia law, separate from the national courts administering its codes. Nonetheless, the judges of the unified, national courts possess expertise in both Sharia and codal law, so that Egypt's mixed legal heritage appears to be safeguarded for the future.

The survival of mixed jurisdictions is immensely aided by the existence of separate judicial structures, staffed by judges possessing a thoroughgoing understanding of the different legal traditions concerned. Such separate court structures exist in virtually all mixed jurisdictions today. It is desirable to ensure as well the representation, in the highest court of the State in which a mixed jurisdiction exists, of a certain number of judges trained in the two legal systems, especially where one of the systems applies to a minority population and/or to only one particular region (e.g. Québec, Louisiana and Scotland).

XV. CONCLUSION

This paper has identified some of the principal mixed jurisdictions in the contemporary world and has sketched (very briefly) the historical development of their respective mixed legal systems. Special attention has been devoted to systems combining elements of the common law tradition with elements of the civilian tradition in either uncodified form (e.g. Scotland and South Africa) or in codifications (Louisiana and Québec). Some major differences in content,

284. *Scotland Act 1998*, U.K. 1998, ch. 46, §§ 95(1), (2) and (3) provide that it shall continue to be for the Prime Minister to recommend to Her Majesty the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk, but the Prime Minister shall not recommend to Her Majesty the appointment of any person who has not been nominated by the First Minister (the leader of the Scottish Executive) for such appointment. Before nominating persons for such appointment, the First Minister shall consult the Lord President and the Lord Justice Clerk (unless, in either case, the office is vacant).

285. *Id.* at § 95(4). Similar provisions govern the removal from office of a Court of Session judge (*see* § 95(6)).

structure and style as between these two traditions have been explored, and some examples of differences between the substantive law rules of each have been presented.

The contribution of the *lex mercatoria* (both ancient and modern) to reconciling differences between legal traditions has been surveyed. In this domain, the UNIDROIT Principles of International Commercial Contracts 1994, that remarkable synthesis of fundamental values and ideas on international trade law achieved by specialists from different legal systems, is of particular importance, because it is increasingly accepted as a guideline and applied as a substantive restatement of supranational commercial norms. The paper has also noted the recent Canadian project of harmonizing federal legislation (reflecting common law) with Québec civil law by statute. I have also made personal observations on mixed legal systems, from the viewpoint of a practitioner, a legislator and a law teacher. Finally, I have warned that mixed jurisdictions can best survive if each legal system has its own language, courts and legislature.

The preservation of different languages, cultures and institutions (legislative and judicial) within a mixed jurisdiction, high quality legal education and the enactment of codes and statutes, can all be of significant assistance in the continuance and evolution of a mixed legal system, in the face of globalization and pressures for standardization. Equally important to the survival and development of any mixed legal system, however, is the *awareness* of judges, lawyers, legislators and academics of the distinctiveness of the legal traditions underlying the system. This must be coupled with a profound *commitment* to defend, and indeed to celebrate, the integrity of each of those traditions, so that they may make their particular contributions to the system as a whole.

For those of us living and practising in mixed jurisdictions, the fate of our mixed legal systems at the turn of the millennium depends, in the final analysis, not on our stars, but on ourselves.