"Nationalism in a Mixed Jurisdiction and the Importance of Language."
(South Africa, Israel and Québec/Canada)

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[*] 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. A preliminary version of this article was presented at the First Worldwide Congress on Mixed Jurisdictions, at Tulane University, New Orleans, on November 8, 2002.

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Abstract

In this article, Prof. Tetley first defines and examines the characteristics of the "civil law", the "common law", "legal systems", "mixed legal systems" and "mixed jurisdictions", focusing particularly on those jurisdictions where the common law tradition has encountered the tradition of the civil law (either codified, as in Québec and Louisiana, or uncodified, as in Scotland and South Africa). Acknowledging both the challenges and the advantages of mixed jurisdictions, he then reviews the history and development of three of them -- Israel, Québec/Canada and South Africa, and demonstrates how a number of key factors are crucial to strengthening and fostering their development. Especially important are: the presence (in federal states) of two legislatures, dual court systems, universities and specialized law institutes, and, above all, the recognition and use of two or more official languages in legislation, judicial proceedings and documents, government services and education. Conversely, he shows how the absence of such elements can leave a mixed jurisdiction prey to gradual erosion through the influence of its more powerful legal tradition. He also considers the role of language within the contemporary European Union and further indicates how maritime law is itself a complete, mixed legal system drawing on a rich heritage of civilian and common law components, enshrined and expressed in more than one language. He concludes with the challenging view that two or more languages may well be essential to the viability of mixed jurisdictions today, as well as the more widespread acceptance of the concept of two nations within a single State.

I Introduction

The study of mixed jurisdictions, like all comparative law, requires a rigorous analysis, followed by the collation of the observed comparisons and finally the drawing of conclusions. The First Worldwide Conference on Mixed Jurisdictions, held at Tulane University from November 6 to 9, 2002, provided very interesting comparisons, while the panel discussion of Professor Max Loubser, of the University of Stellenbosch, South Africa, Professor Celia Wasserstein Fassberg of Hebrew University, Israel, and myself on language raised perhaps the most lively discussion of the Conference, which discussion continued on during the social events.

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The present document is a revision of my two discussant papers transmitted to the organizers of the Conference. After I had transmitted my first discussant paper, I received the fine text of keynote speaker Professor Loubser, and the equally excellent text of Discussant Professor Fassberg.

I therefore sent in haste, a second discussant's paper to the organizers of the Conference, but this consolidation is appropriate, especially in the light of the discussions which followed at the Conference.

II The Plan and Purpose of This Paper

This paper will first briefly define civil, common, statutory, and customary law and then, legal traditions, legal systems, mixed legal systems and mixed jurisdictions. Then a discussion will follow of the principal characteristics of a mixed jurisdiction - two distinct systems of law, two legislatures, two court systems, at least two centres of teaching (universities) and two languages, each intentionally or unintentionally supporting one of the systems of law and thus preserving its distinctness. The benefits to a mixed jurisdiction of existing in a federal constitutional state will also be discussed, as will the fact that no tradition or system or jurisdiction is pure but each has elements borrowed from its neighbours or even from far away.

Finally the importance of language will be considered in the creation, survival and decline of mixed jurisdictions, as well as in mixed systems and jurisdictions such as maritime law and the European Union.

III Definitions

No consistent definitions were used throughout the conference, especially of "legal tradition", or "mixed legal system" or "mixed jurisdiction", or even "civil law" and "common law". It therefore seems appropriate to first present definitions. This seems especially fitting in the light of the progress made at the conference as to what constituted a mixed jurisdiction and in comparison with earlier works on the subject and in particular in Professor Palmer's excellent texts, *Louisiana: Microcosm of a Mixed Jurisdiction*[1] and *Mixed Jurisdictions Worldwide: The Third Legal Family*.[2]

My own earlier paper, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)",[3] contains some definitions as well. That article may be seen on my website at http://tetley.law.mcgill.ca/comparative/mixedjur.pdf, or on the UNIDROIT website at http://www.unidroit.org/english/publications/review/articles/1999-3.htm (Part I) and http://www.unidroit.org/english/publications/review/articles/1999-4a.htm (Part II).

The 2002 Tulane Conference and the papers given there have, however, sharpened and even changed my views. In consequence, here are some basic definitions, for what they are worth. In doing so, I recognize the difficulty of defining anything at all and am reminded (by the Hon. Mr Justice Ralph Zulman) of what Humpty Dumpty said in "Alice in Wonderland": "When I use a word it means just what I choose it to mean – neither more nor less."

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[1] Carolina Academic Press, Durham, North Carolina, 1999 [hereafter cited as Palmer, ed., *Louisiana*, 1999].

[2] Cambridge University Press, 2001 [hereafter cited as Palmer, ed., *Mixed Jurisdictions Worldwide*, 2001].

[3] (1999-3) Unif. L. Rev. (N.S.) 591 (Part I) & (1999-4) Unif. L. Rev. (N.S.) 877 (Part II) and (2000) 60 Louisiana Law Review 677. See also http://tetley.law.mcgill.ca/comparative/mixedjur.pdf.

1) Civil law

Civil law may be defined as that legal tradition which has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian (528-534 A.D.), 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 systematised and structured and relies on declarations of broad, general principles, often ignoring the details. Civil law has its own style, in fact its major distinction is its style, in particular its "conciseness".

2) Common law

Common law is that legal tradition which evolved in England from the 12th 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, upon 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. Where civil law is "concise", the common law is "precise" and detailed.[4]

3) Statutory law

Statutory law, or law found in legislation other than civil codes, has now become a part of both the civil and common law traditions. In common law traditions, most rules are found in the jurisprudence and the role of statutes is to complete the jurisprudence. In civil law traditions, the important principles are stated in the code, while the statutes complete them. Statute law today often serves the purpose of bridging the gap between the civil law and the common law in a mixed legal system.

4) Customary law

Customary law is now a part of both civil law and common law traditions and has been for centuries. For example, as far back as 1881, Oliver Wendell Holmes Jr. distinguished "customs of the realm" from the common law.[5] Customary law is that part of the law which is not established by precedent or is not found in a code or statute. It includes generally accepted practices and formulas (e.g. CIF and FOB, as defined in Incoterms 2000[6]) or in accepted forms of bank cheque, bill of lading or notice of default, and the Uniform Customs and Practice for Documentary Credits.[7] Much customary law is in respect of commercial matters and the best-

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[4] On the concision of the civil law syle, compared to the precision of the common law style, see Louis-Philippe Pigeon, *Rédaction et interprétation des lois*, 3 Ed., Gouvernement du Québec, Québec 1986 at pp. 7 and 8.

[5] Oliver Wendell Holmes, Jr., *The Common Law*, Little, Brown, and Company, Boston, 1881 at pp. 187, 189, 190 and 192.

[6] Incoterms, the internationally accepted and employed terms for contracts of sale, were first published by the International Chamber of Commerce (ICC) in 1936. They were revised in 1953 and reprinted in 1974, including two new terms that had been adopted in 1967, and again in 1976, 1980 and 1990. The latest revision, known as "Incoterms 2000", came into force on January 1, 2000. See ICC publication No. 560 or the ICC's website at http://www.iccwbo.org/

[7] The Uniform Customs and Practice for Documentary Credits was adopted by the International Chamber of Commerce in Paris, and came into force on January 1, 1994. See ICC Publication No. 500 (1993).

known modern example is perhaps the UNIDROIT Principles of International Commercial Contracts, 1994.[8]

5) Civil, common, statutory and customary law

Any legal tradition or any system of law contains elements of statutory and customary law and usually some major elements of civil and common law as well. Thus a common law system consists not only of the common law, but also of stat utes and customary law. Similarly a civil law system consists not only of a civil code (or received civil law), but also of statutes and customary law.

6) Definition of a legal tradition or legal family

Until the decline of the Soviet Union, there were three influential, legal traditions or families in the world: civil law, common law, and socialist law.[9] To these must be added other important and distinctive legal traditions, including Moslem law, Hindu law, Jewish law, laws of the Far East, African tribal laws and the Scandinavian tradition.[10]

Merryman's definition of a legal tradition is especially broad:[11]

> "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."

7) Definition of a legal system

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.

Hector L. MacQueen even speaks of an "independent legal system".[12]

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[8] The UNIDROIT Principles of International Commercial Contracts constitute a major restatement of fundamental principles applicable to international commercial contracts, prepared by a working group of respected specialists in contract law and international trade law from the civil law, common law and Socialist legal traditions. The Principles were approved in 1994 by the General Council of UNIDROIT (the International Institute for the Unification of Private Law, based in Rome) and are generally regarded today as codifying much of the modern *lex mercatoria* in respect of contracts in international trade. For the English version of the UNIDROIT Principles, with commentary, see or the English version, see J.M. Perillo, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review" (1994) 63 Fordham L. Rev. 281. See also the UNIDROIT website at: http://www.unidroit.org/english/principles/pr-main.htm

[9] See René David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3 Ed., Stevens & Sons, London, 1985 at pp. 22-27.

[10] See J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2 Ed., Stanford University Press, Stanford, California, 1985 at p. 5.

[11] *Ibid*. at pp. 1-2.

[12] Hector L. MacQueen, "Mixed Jurisdictions, the Future and Convergence: Scotland", discussant's paper delivered at the session on "The Mixed Jurisdiction in the Fullness of Time" at the First Worldwide

8) Definition of a mixed legal system

A mixed legal system is one in which its force is derived from more than one legal tradition or legal family. For example, the Québec legal system is derived principally from the civil law tradition, but in some part 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.

An early definition of a mixed legal system of nearly one hundred years ago was that of F.P. Walton:[13] "Mixed jurisdictions (sic) are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law." (Walton was really referring to a mixed legal system, not a mixed jurisdiction.)

A modern definition of a mixed legal system is that of Robin Evans-Jones:[14] "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."

If Walton and Evans-Jones are both referring to common law/civil law mixed legal systems, they are not concerned with the same civil law tradition. Walton was more concerned with codified systems, such as Québec and Louisiana, while Evans-Jones gave Scotland as his example, which received Roman law over a considerable period of time without ever adopting a code. This distinction is important when one analyses 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.

9) Definition of a mixed jurisdiction

Mixed jurisdictions are really political units (countries or their political subdivisions) in which a mixed legal system prevails. Common law/civil law mixed jurisdictions include Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe (formerly Southern Rhodesia), Botswana, Lesotho, Swaziland, Namibia, the Philippines, Sri Lanka (formerly Ceylon), and Scotland. 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.[15]

It is also useful to remember that different types of mixed jurisdictions 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

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Congress on Mixed Jurisdictions, Tulane University, New Orleans, November 9, 2002 at p. 1 [hereafter cited as “MacQueen, “Mixed Jurisdictions, the Future and Convergence”].

[13] Maurice Tancelin, “Introduction” in F.P. Walton, *The Scope and Interpretation of the Civil Code*, Wilson & Lafleur Ltée, Montreal, 1907, reprinted by Butterworths, 1980 at p. 1.

[14] R. Evans-Jones, “Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law” (1998) 114 L.Q.R. 228 at p. 228.

[15] W. Tetley, “Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)” (1999-3) Unif. L. Rev. (N.S.) 591 at pp. 592-593, (2000) 60 La. L. Rev. 677 at p. 679.

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). 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.[16]

A mixed jurisdiction may therefore be defined as 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.

It is interesting as well that outside of Europe and such places as Québec, Louisiana, South Africa, Israel, the Philippines and Puerto Rico, 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 mixed jurisdictions takes place.[17]

10) The three characteristics of a mixed jurisdiction

Palmer notes that mixed jurisdictions have three characteristic features, which distinguish them:

> "The *first characteristic feature* is the specificity of the mixture to which we refer. These systems are built upon dual foundations of common-law and civil-law materials." [18]
>
> "A *second characteristic* is quantitative and psychological. … There is probably quantitative threshold to be reached before this will occur. This factor explains why the states of Texas and California, which indeed have *some* civil law in their legal systems, are generally regarded as "common-law" states, while the state of Louisiana is regarded as a mixed jurisdiction. [19]
>
> "The *third characteristic* is structural. In every case the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law. This structural *allocation of content* is invariable in the family. Of course the content of these respective spheres is never *purely* civil nor *purely* common, but it will be *predominantly* of one kind rather than the other."[20]

"If they are accepted as reliable criteria, however, they afford a means of differentiating mixed jurisdictions from a wide variety of hybrid and pluralist systems."[21]

How predominant the civil law or the common law is in a tradition or system or jurisdiction is thus a question of judgment or what seems apparent.

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[16] Esin Örücü, "Mixed and Mixing Systems: A Conceptual Search", in Esin Örücü, Elspeth Attwooll, Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing*, Kluwer Law International, The Hague and Boston, 1996 at pp. 335-344 [hereafter cited as Örücü, "Mixed and Mixing Systems"].

[17] W. Tetley, *supra*, note 15, (1999-3) Unif. L. Rev. (N.S.) at p. 593, (2000) 60 La. L. Rev. at p. 680.

[18] V. Palmer, "Introduction to the Mixed Jurisdictions" in Palmer, ed., *Mixed Jurisdictions Worldwide*, 2001 at p. 7.

[19] *Ibid*. at p. 8.

[20] *Ibid*.

[21] *Ibid.* at p. 10.

11) Purity, pluralism and hybrids

Of course, legal traditions and legal systems are never pure and have various degrees of civil, common, statutory, customary law and other laws in their make-up. They are also in a constant state of modification and change from "penetration" by other systems and traditions.

And as Palmer has said, language has a role to play in identifying the cultural groups in a mixed or pluralist jurisdiction:

> "With some exception, language has served as an excellent proxy to indicate legal as well as cultural identity. Historically, it has been a powerful factor in the well-known cleavage between so-called 'purists' and 'pollutionists'."[22]

One should also mention the work of Esin Örücü et al, *Studies in Legal Systems*, *Mixed and Mixing*,[23] a collection of essays that has much relevance to the process and progress of legal integration in hybrid systems and pluralistic societies, and the study published by Jagtenberg, Örücü and de Roo, entitled *Transfrontier Mobility of Law*.[24]

12) Creation of hybrids

Palmer distinguishes hybrids and pluralism: "Indeed, Israel and Scotland are the only states of this kind which one might say freely *chose* to become hybrid and did so as independent countries."[25] I expect many more examples will come to light as time passes.

13) Harmonization in a mixed jurisdiction

Some mixed jurisdictions are formed of two distinct legal systems, such as the Québec civil law on the one hand, and, on the other, the criminal and administrative and other federal matters, which are of the legislative authority of the Government of Canada. Such "pluralism" is especially strong in a jurisdiction subject to a federal constitution. It is noteworthy that in Canada, the federal Parliament has enacted legislation[26] providing for the harmonization of federal statutes (which are often couched in terminology derived from the common law), with the Québec Civil Code, in an effort to ensure that federal statutes take account of Canada's civil law, as well as its common law, tradition.

This is an extraordinary development. I know of no other mixed jurisdiction in the world where this has been done or attempted.

IV. The Strength and Survival of a Mixed Legal Systems and Mixed Jurisdictions

Much was made during the conference of November 6 to 9, 2002 of the penetration of one legal tradition by another legal tradition in a mixed legal system or mixed jurisdiction. It is my view that the survival of mixed systems and jurisdictions is more likely if each tradition of law is principally attached to (and thus protected by) its own court, its own legislature, its own language and its own law school, teaching that law. May I add that having two "nations" in a

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[22] V. Palmer, "A Descriptive and Comparative Overview", *ibid*. at p. 41.

[23] Örücü, "Mixed and Mixing Systems".

[24] R. Jagtenberg, E. Örücü and A.J. de Roo, eds., *Transfrontier Mobility of Law*, Kluwer Law International, The Hague and London, 1995.

[25] Palmer, ed., *Mixed Jurisdictions Worldwide*, 2001 at p. 5.

[26] The *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, which came fully into force on June 1, 2001. As the preamble to the statute indicates, the federal government of Canada has also "established a harmonization program of federal legislation with the civil law of the Province of Quebec to ensure that each language version takes into account the common law and civil law traditions;…"

single state is also a support and aid to the existence of a mixed jurisdiction. The case of French Canadians in Canada is an example. Two or more nations can also be seen in South Africa, Israel, Malta, Spain, Egypt, and much of the modern Moslem world.

1) Two legislatures in a federal state

A federal state, such as Canada or South Africa, also aids in promoting and preserving a mixed jurisdiction, because in Canada, for example, the provincial legislatures are dedicated to domestic law, which is their general constitutional domain, while the federal legislature and federal courts look after matters pertaining to the whole of Canada, as well as international matters. Each has its domain, which it jealously protects. Thus Québec protects and promotes the civil law and its civil code and the federal government protects and promotes the common law.

2) Two court systems

Similarly, two court systems are important, if not necessary, in order for a mixed jurisdiction to survive.[27]

3) Two languages and cultures are important, if not essential, in a mixed jurisdiction

It would seem as well that the existence of two languages is important, in a viable, mixed jurisdiction - each language supporting one of the two legal systems. The cases of Québec, Louisiana, Scotland, South Africa, and Egypt are examples.[28]

> As Professor Esin Örücü has said:[29]
> "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*." (italics added for emphasis)

> Roger K. Ward, referring to Louisiana, has written:[30]
> "Despite the death of the French language, Louisiana has managed, against incredible odds, to retain the French civil law system for almost two centuries.

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[27] See (2000) 60 La. L. Rev. 677 at pp. 732-737, (1999-4) Unif. L. Rev. (N.S.), supra, note 15 at pp. 900-905 and my website at http://tetley.law.mcgill.ca/comparative/.

[28] See parts of my article on the subject as it appeared in (2000) 60 La. L. Rev. 677 at pp. 726-732. See also (1999-3) Unif. L. Rev. (N.S.) 591 & (1999-4) Unif. L. Rev. (N.S.) 877 at pp. 895-900 and on my website at http://tetley.law.mcgill.ca/comparative/. See also Palmer, ed., *Louisiana*, 1999 at pp. 19 and 59.

[29] Örücü "Mixed and Mixing Systems", at pp. 349-350.

[30] Roger K. Ward, "The Death of the French Language in Louisiana" in V. Palmer, ed., *Louisiana*, 1999, 41 at p. 59.

> However, this system is rapidly being dismantled by elected officials and others who are bound and determined to remake Louisiana in the image of Blackstone."

Christopher L. Blakesley adds:[31]

> "When one considers the impact of religion, language, art, and culture, on the law, one senses its metaphysical qualities. I will argue below that law and language have common features that may be spiritual and deeply imbedded in our being."

Blakesley immediately explains his concept of the interrelationship of law and language:[32]

> "Here, I use the term 'language' in not only its usual sense of the language we use to speak and write, but also as a metaphor for law as language. I will focus more on this below."…"To be sure, law is more than language, but in its essence it has many of the characteristics and fullness, including the cultural imprint, that a language has."

4) Two universities or two learning centres of law

Two universities or two centres of law, each specializing in or promoting a legal system or tradition is important in maintaining a mixed jurisdiction. Professor Örücü emphasizes legal education and legal literature, and her observations are worthy repeating:[33]

> "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." (Emphasis added)

Extolling the advantages of a mixed jurisdiction such as Louisiana for the study of law, Blakesley asserts:[34]

> "Louisiana is the only state of the Union that has a *Civil Code of the European style*. Because of the *Civil Code*, and because we also have a common law foundation in other legal arenas, we are able to teach students *all of the basics* of both. We teach them how to resolve legal problems as would common law, as well as European or Latin American jurists. If they do what they should, they develop the capacity to understand how their colleagues from both of these systems think about the law and solve legal problems. The '*Civilian*' or *Civil Code* aspect of Louisiana provides not only a fascinating and rich legal history, it provides the educator with the wherewithal to allow our students to become adept in both the common law and the civilian traditions and the legal analysis required in each. Substantively and pedagogically, Louisiana has the best of both worlds for those who wish to take advantage of it. The Civil Code and 'code courses' can prompt deep analysis of legislation that is designed to cover a subject coherently, systematically, and completely. At the same time, the common law subjects provide opportunity for classic Socratic style case analysis and synthesis. Thus, we have a double benefit, not available in law schools in

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[31] Christopher L. Blakesley, "The Impact of a Mixed Jurisdiction on Legal Education, Scholarship and Law" in Palmer, ed., *Louisiana*, 61 at p. 69.
[32] *Ibid*. at p. 69, footnotes 11 and 12.
[33] Örücü, "Mixed and Mixing Systems".
[34] *Ibid*. at pp. 65-66 [footnotes omitted].

> unitary systems of either the common law of the 'civilian' or *Romano-Germanic* tradition."
>
> He concludes his observations on this point by reiterating:[35]
> "Thus, *en fin*, our students have the opportunity to become better common law lawyers for having had civilian methodology and they are better "civilians" for have had the common law. We teachers may do the same. If we all allow ourselves to become inculcated with both 'civilian' and 'common law' systems of thought and analysis, we may improve our capacity as comparativists. Our students may become, not only good case analysts and synthesizers, but also better conceptual thinkers, statutory analysts, drafters, and interpreters than their common law counterparts They may gain a unique perspective from which to solve legal problems in either system. They may also become better international lawyers. Good students from Louisiana become naturals at negotiating and resolving problems relating to international contracts, interpreting treaties or other international instruments, and litigating cases in and on international law."

For notable examples of the contribution academe can make to the enrichment of legal culture and the advancement of mixed jurisdictions and their respective linguistic heritages, one need only think of the "Centre International de la Common Law en Français"[36] (CICLEF), created in 1989 at the Université de Moncton, in New Brunswick, which offers francophone students from all over the world the opportunity to learn common law in French, and which also works to develop and improve common law terminology in that language.[37] Nor can one overlook the prestigious Civil Law Centre of Aberdeen Law School[38] at the University of Aberdeen in Scotland, devoted since 1994 to the study of the civil law, modern civil law systems, and modern mixed systems of law. One should also note the bold experiment being undertaken since 1999 by the Faculty of Law of McGill University in Montreal, Québec, where law students study the civil law and the common law *simultaneously*, from the first year of law school, in a three-year programme known as the "transsystemic system".[39] Other examples might also be given, including, in particular, this First Worldwide Congress on Mixed Jurisdictions hosted by Tulane Law School and the World Society of Mixed Jurisdiction Jurists which has come to life during these few days.

5) Two "nations" in a single state

Is it possible to have two nations in a single state, each with its own language and culture, legal institutions, laws and centres of learning? That is the challenge for a truly mixed jurisdiction. It is the fundamental challenge for Québec, South Africa, Israel and all mixed jurisdictions. See the Québec/Canadian struggle in this respect for 250 years.[40]

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[35] *Ibid*. at pp. 67-68.
[36] For further information on CICLEF, see http://www.umoncton.ca/droit/ciclef.html.
[37] See, for example, C. Blanchard & G. Snow, *Lexique anglais-français de la common law*, 2 Ed., Université de Moncton, 1990.
[38] For further information on the Civil Law Centre in Aberdeen, see http://www.abdn.ac.uk/~law113.
[39] For more details on the new "transsystemic" curriculum of the McGill Law Faculty, see http://www.law.mcgill.ca/undergraduate/prog_bcl_llb-en.htm.
[40] See discussion surrounding notes 60 to 69, *infra*.

V The Advantages of a Mixed Legal System

Blakesley further sees substantial benefits accruing to legal practitioners, judges and legislators who make the effort to learn about one another's legal systems:[41]

> "Practitioners, judges, and others in different, unified systems benefit when they take the opportunity to study the law and scholarly works from a mixed jurisdiction. When a lawyer, judge or scholar faces foreign or international law problems from time to time (and most do), ideas from mixed jurisdictions are invaluable. Even if one's focus is fully 'domestic', it is self-deception to think that a comparative perspective is not helpful. Legislators, for instance, who fail to realize this may promulgate inferior legislation. Judges may render inferior decisions. Although wholesale or simplistic borrowing is wrong and actually proves often to be harmful, careful comparative study, especially comparison of how mixed jurisdictions solve similar problems is most helpful. Works from a mixed jurisdiction, therefore, naturally provide the partaker, not only with insight into the discipline of comparative law, but also into how other scholars, judges, legislators and practitioners perceive, read, think about, draft, and interpret the law. One is able to see how one's foreign counterparts litigate, negotiate, adjudicate, and envision their law, legal system, and their role in problem solving. This is most practical and stimulating."

Blakesley goes yet further, by declaring his belief in the "metaphysical" or "spiritual" qualities inherent in law, language and scholarship, capable of enriching the mind and the human spirit in general, particularly by means of exposure to a mixed jurisdiction where more than one language flourishes. He claims:[42]

> "To penetrate the values underlying a mixed jurisdiction may provide new perspective on problems of a philosophical, even metaphysical nature, This, I will suggest that there may be a spiritual element to law, language, and scholarship and that this may be quite important. It comes through more clearly for me in a mixed-jurisdiction. My vision is enhanced by study in a mixed jurisdiction because it allows me to see from various and varied angles. My vision of what is law, even what is learning, teaching, thinking, and being is made keener as I vary my 'linguistic' perspective…. Thoughts prompted by good work from knowledge of a foreign language, or from a foreign or mixed jurisdiction provide keen new insight into how to approach law, legislation, jurisprudence, doctrine, philosophy and life."

VI 19th Century Thinking on "Lesser Languages" and Assimilation

It should be understood that assimilation of peoples and of their language and cultures was deemed as acceptable in the 19th century, not only to statesmen, but to theorists from the left and the right. Here are some typical observations of Friedrich Engels and John Stuart Mill.

In 1849, Friedrich Engels wrote in "Hungary and Panslavism"(1849):[43]

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[41] *Supra*, note 34 at pp. 68-69 [footnotes omitted].
[42] *Ibid*. at p. 69 [footnotes omitted].
[43] F. Engels, "Hungary and Panslavism" (1849), cited in Will Kymlicka, ed., *The Rights of Minority Cultures*, Oxford University Press, Oxford, 1995 at pp. 5 and 69 [hereafter cited as "Kymlicka, 1995"].

> "There is no country in Europe which does not have in some corner or other one or several fragments of peoples, the remnants of a former population that was suppressed and held in bondage by the nation which later became the main vehicle for historical development. These relics of nations, mercilessly trampled down by the passage of history, as Hegel expressed it, this ethnic trash always became fanatical standard bearers of counterrevolution and remain so until their complete extirpation or loss of their national character, just as their whole existence in general is itself a protest against a great historical revolution. Such in Scotland are the Gaels…Such in France are the Bretons…Such in Spain are the Basques."

Commenting on Engels' thesis, Will Kymlicka concludes: [44]

> "Engels' writings are particularly revealing. According to him, it was not only the right of the German nation to 'subdue, absorb and assimilate' smaller nationalities, but also its historical 'mission', and a proof of its 'vitality'. 'By the same right under which France took Flanders, Lorraine and Alsace, and will sooner and later take Belgium – by that same right Germany takes over Schleswig; it is the right of civilization as against barbarism, of progress as against stability…[This] is the right of historical evolution.'"

John Stuart Mill wrote in his text *Considerations on Representative Government* (1861) that progress requires the assimilation of minority groups.[45]

> "Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist."

Mill continued:[46]

> "Experience proves it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilised and cultivated people – to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship…than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman or the Scottish Highlander as members of the British nation."

Reflecting on the overall attitude of Mill and Marx to minority nationalities, Kymlicka states:[47]

> "Mill and Marx did not reject all group identities between the individual and the state. Rather they privileged a particular sort of group - the 'great nation' - and

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[44] F. Engels, "Democratic Panslavism" (1849), cited in Kymlicka, 1995.
[45] J.S. Mill, *Considerations on Representative Government*, London, 1861, ch. 16, cited by Vernon Van Dyke in Kymlicka, 1995 at p. 35.
[46] J.S. Mill, *ibid*., cited by W. Kymlicka in Kymlicka, 1995 at p. 5.
[47] Kymlicka, 1995 at p. 6.

> denigrated smaller cultures… They insisted that progress and civilization required assimilating 'backward' minorities to 'energetic' majorities."

Mill and Marx were strange bedfellows. Fortunately, in many cases, their views on assimilation did not take hold.

VII Modern Views on Second Languages

- The twentieth century is also noteworthy for the assimilation of peoples and their language. The examples are legion, particularly from Nazi Germany and the Soviet Union, but even President Franklin Delano Roosevelt in 1942 wrote to Canadian Prime Minister W.L. Mackenzie King of language and the "assimilation" of French Canadians. Roosevelt was upset by Québec's opposition to conscription during the Second World War, and said that French-speaking Americans of the New England states "…are at last becoming a part of the American melting pot.… Most of them are speaking English in their homes." Roosevelt suggested that he and King assimilate French-speaking people "into the whole of our respective bodies politic".[48]

VIII Language and the South African Experience

Prof. Loubser succinctly describes the South African experience:[49]

> "Dutch and its derivative Afrikaans were the dominant languages of government and law from 1652 until the end of the initial period of Dutch occupation in 1795, when governance of the Cape was first taken over by the British for a period of eight years. The British governed at the request of the Dutch until 1803, during the upheavals of the Napoleonic wars. From 1803 to early 1806 there was another spell of Dutch rule, which ended when the Dutch sided with the French in a renewed Anglo-French war, as a result of which the British fleet took over the Cape in January 1806."

Prof. Loubser continues:[50]

> "The British retained the Cape at the end of hostilities in Europe in 1815 and it remained a British colony until the four British colonies in South Africa united and became self-governing as the Union of South Africa in 1910. For almost one and a half centuries after the end of Dutch rule, English was the language of the colonial power and of the ruling political group in South Africa."

The Constitution of the Union of South Africa of 1909 declared English and Dutch to be official languages and in the *Official Languages Act*[51] of the Union, Dutch was defined as including Afrikaans. The South African Constitution of 1961[52] stated that Afrikaans included

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[48] The letter, never answered by Prime Minister King, was discovered by historian Lawrence Martin in 1982 and caused embarrassment for the Québec Government when its existence was revealed publicly in May 1998, just as the Government was preparing to unveil a statue honouring President Roosevelt in Québec City.

[49] Max M. Loubser, "Linguistic Factors into the Mix. The South African Experience of Language and the Law", keynote address presented during the session on "The Linguistic Factors" at the First Worldwide Congress on Mixed Jurisdictions, Tulane University, New Orleans, November 8, 2002 at p. 7.

[50] *Ibid*. at pp. 7-8.

[51] Act 8 of 1925.

[52] Act 32 of 1961.

Dutch, while the 1983 Constitution only refers to English and Afrikaans. As Prof. Loubser says:[53] "The language clauses, providing for equal status and privileges of English and Dutch/ Afrikaans were entrenched in the 1909, 1961 and 1983 constitutions, i.e. the language clauses could not be amended without special parliamentary procedures being followed."

IX Language and the Israeli Experience

Prof. Fassberg clearly outlines the predominant role of language in general and Hebrew in particular in the Israeli legal system:[54]

> "As a result of the Foundations of Law Statute of 1980, Israel now has no formal foreign sources (except for those already part of the system). Statute, precedent, and analogy are the formal sources of Israeli law and, in case of a *lacuna,* the courts are referred to 'the principles of freedom, justice, equity and peace of the Jewish tradition'. All English laws inherited from the Mandate are now translated into authoritative modern Hebrew versions. New legislation is all in Hebrew. The civil law that served as a basis for Israeli private law was put into legislative form directly in Hebrew and, since competency in the civil law languages is on the decline, the ideas and concepts appearing in these laws are virtually cut off from their sources. Judicial decisions of the civil courts are written exclusively in Hebrew. Legal publishing is almost all in Hebrew and an entire body of legal literature in Hebrew has been created virtually *ex nihilo*. Arabic is also an official language but it is barely used for legislation although it does appear with Hebrew on a large number of official forms and signs wherever it is thought that Arab citizens will make use of them, and a recent landmark Supreme Court decision requiring municipal authorities to put up all road signs in Arabic as well as Hebrew is expected to produce more far-reaching results in this area. Arabic is also a living formal source language in all those areas in which Islamic law applies even in secular courts. Although in practice litigation is carried out almost exclusively in Hebrew, litigants are entitled to use Arabic in court, as in their relations with administrative authorities."

Prof. Fassberg continues:[55]

> "The first question is why Hebrew rather than one of the source languages? If in other societies the legal language is usually that of the common law source or the civil law source or both, why did this not happen in Israel? It is clear why neither of the civil law languages was chosen; the civil law element was introduced only after the official languages were fixed. But why did English not dominate in Israel as it had in other systems? After all, to a very large extent, Hebrew was as dead a language as was Latin to the Christians. It has a huge ancient and mediaeval corpus of literary, scientific, and legal texts. It lived as a language of prayer and liturgical literature throughout the ages. It also had a very significant role in the survival of the Jewish people as a unifying legal language – in the literature of the *responsa*, and as a *lingua franca* between and among

[53] *Supra*, note 49 at p. 19.
[54] Celia Wasserstein Fassberg, "Language and Style in a Mixed System", discussant's paper presented during the session on "The Linguistic Factors" at the First Worldwide Congress on Mixed Jurisdictions, Tulane University, New Orleans, November 8, 2002 at pp. 8-9.
[55] *Ibid*. at pp. 9-10.

> Jews from different communities. Nonetheless, Jews in the diaspora spoke the language of the society in which they lived and, often among themselves, a variety of Jewish languages - Yiddish, Ladino, Judaeo-Arabic – composed of elements of Hebrew and a relevant local language. English had served as a kind of official lingua franca during the Mandate and it could surely have continued to do so once Israel was established.
> "It was the renewal of Jewish life in the Holy Land that revived Hebrew. With the help of a small number of what might be called language fanatics it became a living language - of speech, and journalism and drama and everyday transactions - as if Latin were suddenly to be spoken once again as a national language. This revival was conceived of as being closely connected with the national revival of the Jewish people in their historic homeland. The traditional secular Jewish languages were rejected both as symptoms of diaspora existence and as divisive elements. A conscious and determined effort was made to institute Hebrew as a unifying and identifying feature of the new State. Hebrew was both a symbol of revival and national identity and a cultural adhesive in a multilingual society where many people still had a foreign mother tongue."

Considering the language factor in the mixed jurisdiction of Israel, Palmer observes:[56]

> "While the source languages of its mixed laws are English, German, and Italian, the first language of the society and the exclusive language of Israeli law is Hebrew. Hebrew is one of two official languages (along with Arabic) and is spoken by more than 80 percent of the population. All legislation and judicial opinions are published only in Hebrew. Consequently, no official or primarily spoken language serves as a source language supporting Israel's common law and civil law."

Against the background of this juridical unilingualism, it is scarcely surprising that Israeli commercial law should bear the imprint of only one legal tradition, as Palmer further notes:[57]

> "Today, Israel's commercial law is essentially a reflection of English law and could be considered as highly anglicized as Scottish or South African commercial law."

X Language and the Québec/Canada Experience

Herewith a few brief historical references to the question of language and culture in Québec and Canada and the creation of mixed jurisdictions.

1) The French Regime (1608-1763)

From 1608 to 1763 the French regime in Canada had uncodified French civil law (the *Coutume de Paris*) and French administrative and criminal law. In 1763 the Treaty of Paris and the British occupation brought a mixed system of English administrative and criminal law along with a continuation of the French civil law in private matters.

2) The Rebellions of 1837/1838

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[56] Palmer, "A Descriptive and Comparative Overview" in Palmer, ed., *Mixed Jurisdictions Worldwide*, 2001 at p. 44.
[57] *Ibid*. at p. 75.

In I837 and 1838, rebellions took place against the British colonial regime and for representative government in Ontario (Upper Canada) and in Québec (Lower Canada). The Québec rebellion was very French Canadian and very nationalistic. A declaration of independence was even made in 1838.

The rebellions were quelled and in Québec, 12 rebels were hanged and nearly one hundred were ordered deported to Australia. In Ontario 22 rebels were hanged and many more deported.

3) Lord Durham's Report (1839)

In 1839, Lord Durham was sent out from England to discover the causes of the rebellions and to propose find a solution to the problem. At the end of the year he reported:[58]

> "I find two nations warring within the bosom of a single state … a struggle not of principles but of races: The national feud forces itself on the very senses, irresistibly and palpably, as the origin or essence of every dispute which divides the community; we discover that dissensions which appear to have another origin are but forms of this constant and all-pervading quarrel; and that every contest is one of French and English in the outset, or becomes so ere it has run its course." (Emphasis added)

Durham's solution was threefold: a) to join Lower Canada with Upper Canada in order to submerge French Canadians in a single province, where the English would constitute the majority; b) **to assimilate French Canadians into English society and to lessen the use of the French language;** c) to grant responsible government to the new united colony.

It is scarcely surprising that John Stuart Mill, that staunch proponent of the assimilation of linguistic minorities, spoke of the Durham's proposals in glowing terms:[59] "A new era in the colonial policy of nations began with Lord Durham's Report; the imperishable memorial of that nobleman's courage, patriotism, and enlightened liberality, …"

4) The Result in Québec/Canada

Fortunately, for historical reasons, Lord Durham's plan was never realized, (nor was Roosevelt's[60]) and the assimilation of French Canada did not take place. Québec in Canada has remained a viable, strong mixed jurisdiction, with two systems of law, two court systems, two legislatures, four French universities and three English universities, and two languages, each supporting one of the two systems of law.

The path has not been easy and there is still considerable tension over language in education and in public and private life in Québec and Canada, but there is constitutionally enshrined bilingualism in the Parliaments of Québec and Canada,[61] in the laws as

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[58] See *The Durham Report, an abridged version with an introduction and notes by Sir Reginald Coupland*, Clarendon Press, Oxford, 1945 at p. 15.

[59] J.S. Mill, *Considerations on Representative Government*, London, 1861, ch. 18, "Of the Government of Dependencies by a Free State", at sect. 1.

[60] See discussion surrounding note 48, *supra*.

[61] Under Canada's *Constitution Act, 1867*, R.S.C. 1985, App. II, no. 5 (first enacted as the *British North America Act*, U.K. 30 & 31 Vict., c. 3 (1867) and renamed by virtue of the *Canada Act 1982*, U.K. 1982, c. 11), either English or French may be used in the debates of the Houses of the Parliament of Canada (i.e. in the House of Commons and the Senate) and of the Houses of the Legislature of Québec; and both those languages shall be used in the respective records and journals of those Houses. (N.B.: Today, Québec has only one House: the National Assembly of Québec). See *Constitution Act, 1867,* sect. 133, first para. See also the *Canadian Charter of Rights and Freedoms*, being Part I of Canada's *Constitution Act, 1982*, enacted by Schedule B of the *Canada Act*, U.K. 1982, c. 11 (in force April 17, 1982), at sect.

promulgated[62] and in the courts.[63] There are also provisions securing, with some restrictions, the rights of citizens to communicate with the Governments of Canada[64] and Québec,[65] and to be served by them, in either French or English.

16(1): "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada" and sect. 17(1): "Everyone has the right to use English or French in any debates and other proceedings of Parliament". See also Canada's *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), enacted in 1988, as amended, at sects. 4(1), (2) and (3), relating to the official languages of the federal Parliament, simultaneous interpretation facilities there and official reports of Parliamentary debates and other proceedings, and their translation.

[62] Under Canada's *Constitution Act, 1867*, sect. 133, second para., the Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those languages. See also the *Canadian Charter of Rights and Freedoms* at sect. 18(1): "The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative". See also Canada's *Official Languages Act*, sects. 5 to13, particularly sects. 5, 6 and 7. By virtue of Québec's *Charter of the French Language*, R.S.Q. c. C-11, first enacted in 1977, although French is declared the official language of Québec (sect. 1), as well as of its legislature and of its courts (sect. 7, introductory para.), Québec legislative bills must nevertheless be printed, published, passed and assented to in French and in English, and the statutes of Québec must be printed and published in both those languages (sect. 7(1)). In addition, Québec regulations and other similar acts to which sect. 133 of the *Constitution Act, 1867* applies must also be printed and published in French and in English (sect. 7(2)), and both French and English versions of Québec legislative bills and statutes, and of those regulations to which sect. 133 of the *Constitution Act, 1867* apply, are equally authoritative (sect. 7(3)).

[63] Under the *Constitution Act, 1867*, sect. 133, first para., either English or French may be used by any person or in any pleading or process in or issuing from any court of Canada established under that Act, and in or from all or any of the courts of Québec. See also the *Canadian Charter of Rights and Freedoms* at sect. 19(1): "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament." See also Canada's *Official Languages Act*, at sects. 14 to 20, with respect to the use of both English and French in federal courts and court documents. In Québec, the *Charter of the French Language*, at sect. 7(4), provides that either French or English may be used by any person in, or in any pleading in or process issuing from, any court of Québec.

[64] See the *Canadian Charter of Rights and Freedoms* at sect. 20(1): "Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French." Canada's *Official Languages Act*, sects. 21 to 33, particularly at sects. 21, 22, 23, 24 and 27, also requires communications and services to be available to the public in English and French in many federal institutions, including in particular head or central offices of such institutions, offices within the National Capital Region or those in Canada or elsewhere where there is "significant demand" for such communications and services. These provisions are intended to ensure that members of the public, including the travelling public, can communicate with federal government organizations and receive the services they provide, in both English and French, orally as well as in writing.

[65] Québec's *Charter of the French Language*, at sect. 2, recognizes that every person has a right to have the "civil administration", the health services and social services, the public utility enterprises, professional orders, associations of employees and all enterprises doing business in Québec communicate with him in French. Sect. 15, second para., nevertheless permits the "civil administration" to correspond with "natural persons" (i.e. individuals) in a language other than French (which, in practice, is usually English) when such persons address the civil administration in such a language. The term "civil administration" includes the Québec Government and its departments and agencies; municipalities and school boards and bodies operating under their authority; metropolitan communities and transit authorities; as well as health services and social services (see the definition of "civil administration" in the Schedule to the Charter).

The Canadian *Charter of Rights and Freedoms*[66] grants Canadian citizens rights to educate their children in English or French in provinces where either language is the minority official language, provided that numbers warrant.[67] Québec respects the essence of those provisions.[68] Québec, as well, has permitted education in languages other than French and English in state-supported private schools,[69] with the result that there are numerous Geek, Hebrew, German and Arabic, etc. schools, and the immigrant population has increased immeasurably.

XI Indigenous and Other Secondary Languages, Cultures and Laws

1) Introduction

Almost every country in the world, which has been subject to Western conquest has indigenous languages and cultures, supporting indigenous laws other than the laws on which the principal legal system of the conquerors is based. These native laws often have profound social meaning and content, although they may be much less developed than the civil law or the

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Certain recognized municipalities and municipal bodies operating under their authority, where more than half the residents have English as their mother tongue, and certain recognized health and social service institutions which serve persons a majority of whom speak a language other than French, are also permitted to provide services in that language as well as in French (sect. 29.1), and to erect signs and posters in both French and another language, the French text predominating (sect. 24). The civil administration must use only French in signs and posters, except where reasons of health or public safety require the use of another language as well (sect. 22). Professional orders must use French in communicating with their general membership but, in communicating with an individual member, may reply in his language (sect. 32.). In practice, the "other language" in all these cases is usually English. It is also noteworthy that by sect. 89, the use of both the official language and another language together is permitted wherever the Charter does not require the use of the official language exclusively.

[66] *Supra*, note 61.

[67] The *Canadian Charter of Rights and Freedoms* provides at sect. 23: "Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province." By sect. 23(2), Canadian citizens *any* child of whom has received or is receiving primary or secondary school instruction in Canada in English or French have that same right for *all* of their children. In the case of both sect. 23(1) and (2), these minority official language educational rights exist wherever in the province the number of children of citizens having such rights is sufficient to warrant the provision of such instruction out of public funds and includes, where the numbers so warrant, the right to have them receive that instruction in minority language educational facilities provided out of public funds (sect. 23(3)).

[68] Québec's *Charter of the French Language*, R.S.Q., c. C-11, at sect. 73(1) and (2), grants English language schooling rights in Québec to children of a Canadian father or mother who received elementary instruction in English anywhere in Canada, and to the brothers and sisters of a child either of whose parents is a Canadian who received or is receiving elementary or secondary education in English in Canada. Québec does not, however, provide access to its English schools to the children of Canadian citizens whose first language learned and still understood is English if neither parent received instruction in English in Canada. This is an ongoing conflict with sect. 23(1)(a) of the *Canadian Charter of Rights and Freedoms*.

[69] By virtue of its *Act respecting private education*, R.S.Q., c. E-9.1, the Minister of Education of Québec may issue permits authorizing the operation of private educational institutions, which authorizes the granting of public funds to private schools of various kinds, including those where instruction is provided in languages other than French or English.

common law. Nor are they usually complex or detailed enough to meet the exigencies of modern commerce and international trade.

2) South Africa

In South Africa official bilingualism (English and Dutch/Afrikaans) was enshrined in the South African Constitution of 1909,[70] the *Official Languages of the Union Act* of 1925,[71] the South African Constitution of 1961[72] and the 1983 Constitution,[73] where language rights were entrenched (i.e. the language clauses could not be amended without special parliamentary procedures being followed). But the 1996 Constitution of South Africa[74] provides for eleven official languages, i.e. Afrikaans, English, isiNdebele, Sesotho, sa Leboa Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu.

Clearly, Afrikaans is second in importance to English. As Prof. Loubser has said:[75] "In the aftermath of the Anglo-Boer War the strong anti-English and nationalistic sentiment among Afrikaans-speakers led to intensive interest in their own language. … Between 5 and 6 million people out of the 42 million in South Africa now speak it [Afrikaans] as a first language, and it is one of the eleven official languages."

English would seem to be the *lingua franca*, but indigenous languages have considerable interest. As Prof. Loubser has said:[76]

> "The movement towards acceptance of English as the legal *lingua franca* appears to satisfy black language aspirations, hence the absence of concerted constitutional challenge to non-recognition of black languages as languages of record in courts. There are dissenting voices, however. In a recent article a black lawyer urgently demanded that the use of indigenous languages in the courts be promoted, lest these languages be abandoned to a 'political museum'." (emphasis added)

3) Québec and Canada

There are almost 1 million aboriginal peoples in Canada, of a total population of roughly 30,000,000. Native languages cultures and laws have been recognized, although they are more adapted to personal, family and tribal matters of the various indigenous "nations" or bands as they called themselves. The indigenous population is the fastest growing segment of the population .

Aboriginals live in particular in three regions of Canada, the Yukon, the Northwest Territories and Nunavut.

Arboriginal peoples and their languages and cultures have been protected by the *Constitution Act*[77] *of* April 17 1982, which entrenched Aboriginal and treaty rights and protected them from the other dispositions of the *Canadian Charter of Rights and Freedoms* (sect. 25)[78]

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[70] The *South Africa Act, 1909*, 9 Edw. 7, c. 9 (U.K.).
[71] Act 8 of 1925.
[72] Act 32 of 1961.
[73] *Constitution of the Republic of South Africa*, Act 110 of 1983.
[74] *Constitution of the Republic of South Africa*, Act 108 of 1996.
[75] *Supra*, note 49 at p. 39.
[76] *Ibid*. at p. 47.
[77] Canada's *Constitution Act 1982* is Schedule B to the *Canada Act 1982*, U.K. 1982, c. 11.
[78] The Canadian Charter of Rights and Freedoms is found at Part I of the *Constitution Act, 1982* (sects. 1 to 34 inclusive). Part II of the same *Act* (sects. 35(1) to (4) and 35.1), entitled "Rights of the Aboriginal Peoples of Canada", further recognizes and affirms the aboriginal and treaty rights of Canada's aboriginal peoples (including the Indian, Inuit and Metis peoples).

and the Constitutional amendment of 1984[79] gave additional protections and guarantees. The *Official Languages Act* of the Northwest Territories[80] came into effect in its entirety on December 31, 1993. There are 8 official languages in the Northwest Territories: Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut and Slavey.[81]

In 2001 (the last census), the three largest Aboriginal languages reported as mother tongue were Cree (80,000 people), Inuktitut (29,700) and Ojibway (23,500). The ability to converse in an aboriginal language varied. Knowledge of an Aboriginal language was most widespread among the Inuit of the Canadian Arctic (90%) but was much lower among North American Indians (32%) and Métis (16%). Natives speak 50 languages, which have been classified into 12 families. Half of these are only spoken in what is now known as British Columbia. The most widespread are Cree and Inuktitut.

In 1993 the *Canada Nunavut Act*[82] *de*creed that a territory covering one-fifth of Canada[83] is self-governed by the Inuit beginning in 1999. On April 1, 1999, Nunavut, meaning "Our Land", being the ancestral home of the Inuit of the central and eastern Arctic, was officially created.[84] The French-speaking community of Iqaluit is the new capital.[85] Nunavut is the result of the largest land claim ever settled in Canada.[86] The population was 27,000.

The *Nunavut Act* provides that the language regime currently in place under the *Official Languages Act* of the Northwest Territories will continue to apply (as is the case with all the other statutes of the Territories) until the Legislative Assembly of Nunavut replaces it with its own statute,[87] the concurrence of the Parliament of Canada also being required if the rights and services provided for would thereby be diminished.[88]

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[79] The *Constitution Amendment Proclamation 1983*, issued on June 21, 1984, SI/84-102, amended the *Constitution Act, 1982*, in particular, by adding sect. 35(3), providing that "treaty rights" of Canada's aboriginal peoples includes "rights that now exist by way of land claims agreements or may be so acquired." The Proclamation also added sect. 35(4) to the *Constitution Act, 1982*, guaranteeing aboriginal and treaty rights equally to male and female persons. Sect. 35.1 was also added, requiring the aboriginal peoples to be represented at any conference of the first ministers of Canada and its provinces at which certain constitutional amendments relating to aboriginal rights were to be discussed. The same Proclamation also repealed and re-enacted sect. 25(b) of the *Act* (in the Canadian Charter of Rights and Freedoms), so as to define "treaty rights" to include those rights that "now exist" by way of land claims agreements, as well as those that "may be so acquired" (the original 1982 *Act* having referred only to those rights or freedoms that "may be acquired" by the aboriginal peoples of Canada by way of land claims settlement).

[80] R.S.N.W.T. 1988, c. O-1 as amended.

[81] *Ibid*. at sect. 4. By sect. 1 of the Act, "Inuktitut" includes Inuvialuktun and Inuinnaqtun, and "Slavey" includes North Slavey and South Slavey.

[82] S.C. 1993, c. 28.

[83] This immense territory is described in sect. 3 and Schedule I of the *Nunavut Act*.

[84] *Nunavut Act*, S.C. 1993,c. 28, sect. 79(1).

[85] See the *Nunavut Act*, sect. 4 and the Nunavut *Legislative Assembly and Executive Council Act*, S. Nu. 2002, c. 5, sect. 7(1).

[86] See the *Nunavut Act*, sect. 25, empowering the Nunavut Legislature to make laws for the purpose of implementing the land claims agreement of May 25, 1993 between Her Majesty the Queen in right of Canada (i.e. the Canadian Government) and the Inuit and any other land claims agreement which may be designated by order of the Governor in Council (i.e. the federal Cabinet).

[87] The *Nunavut Act* at sect. 29(1) provides that subject to that *Act*, on the day that sect. 3 comes into force (i.e. April 1, 1999), the ordinances of the Northwest Territories and the laws made under them that have been made, and not repealed, before that day are duplicated to the extent that they can apply in relation to Nunavut, with any modifications that the circumstances require. The duplicates are deemed to be laws of the Legislature of Nunavut and the laws made under them.

[88] See the *Nunavut Act*, sect. 38, referring to sect. 29(1), and requiring the concurrence of Parliament (i.e. the Parliament of Canada) if the law of Nunavut repealing, amending or rendering inoperable the law that

The *Nunavut Act* provides that English and French will be official languages of the Legislative Assembly, the government of Nunavut and their institutions and courts.[89] The right to receive government services in Cree, Inuktitut, English and French (the principal official languages in Nunavut) is thus provided for,[90] as is the right to use Cree, Inuktitut, French or English in Nunavut's courts.[91] There is also a right to receive any public documents issued by the Government of Nunavut, its boards and agencies in French, English, Cree and Inuktitut.[92] The right of French speaking parents to have their children educated in French is also guaranteed.[93]

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is the duplicate of the ordinance of the Northwest Territories entitled the *Official Languages Act* would have the effect of diminishing the rights and services provided for in that ordinance as enacted on June 28, 1984 and amended on June 26, 1986.

[89] See the *Official Languages Act* of the Northwest Territories, R.S.N.W.T. 1988, c. O-1, sects. 10 and 12, which apply in Nunavut as well, pursuant to sects. 29(1) and 38 of the *Nunavut Act*, unless and until repealed or amended by the Legislative Assembly of that territory. Note, however, sect. 9 of the Northwest Territories *Official Languages Act*, providing that any of the official languages may be used in the debates and other proceedings of the Legislative Assembly of the Territories. The Commissioner of the Territories in Executive Council may also prescribed the translation after enactment, as well as the printing and publication, of Acts of the Legislature into one or more of the official languages of the Northwest Territories other than English and French (sect. 10(2)). These provisions would seem to apply to Nunavut, by virtue of sect. 29(1) of the *Nunavut Act*.

[90] The *Official Languages Act* of the Northwest Territories, sect. 14(1), grants any member of the public the right to communicate with, and receive services from, any head or central office of any institution of the Legislative Assembly or Government of the Northwest Territories in English or French, as well as with respect to any other office of such an institution, where there is a “significant demand” for services in both those languages, or where, by reason of the nature of the office, it is reasonable that services be available in those languages. See also sect. 14(2), whereby the public has the right to communicate with, and receive services from, any regional, area or community office of any institution of the Legislative Assembly or Government of the Northwest Territories in any official language, other than English or French, which is spoken in that region or community, where there is a “significant demand” for services in , or where, by reason of the nature of the office, it is reasonable that services be available, in any such language. As applied to Nunavut, by virtue of sect. 29(1) of the *Nunavut Act*, this provision in effect ensures the availability of many services of the Nunavut Government in Inuktitut.

[91] The *Official Languages Act* of the Northwest Territories, at sect. 12(1), (2) and (3), provides that English or French may be used in any pleadings in, or process issuing from, any court established by the Legislature, and any of the other official languages may be used in any court established by the Commissioner, with the advice and consent of the Legislative Assembly. Courts may have proceedings simultaneously interpreted from one official language into another. As applied to Nunavut, these provisions would provide for the use of Inuktitut, as well as English and French in many proceedings.

[92] The *Official Languages Act of the Northwest* Territories, at sect. 11, requires that written instruments directed to or intended for the notice of the public purporting to be made or issued by or under the authority of the Legislature or Government of the Northwest Territories, or any judicial, quasi-judicial or administrative body or Crown corporation established by or under an Act, shall be promulgated in both English and French and such other official language as may be prescribed by regulation. As applied to Nunavut, this would secure access to official documents in Inuktitut, as well as in English and French. See also the *Nunavut Act*, sect. 23(1)(n), empowering the Nunavut Legislature, subject to any other Act of Parliament [of Canada] to make laws in relation to “the preservation, use and promotion of the Inuktitut language, to the extent that the laws do not diminish the legal status of, or any rights in respect of, the English and French languages.”

[93] Northwest Territories *Education Act*, S.N.W.T. 1995, c. 28, sect. 72, referring to the right of parents who have the right to have their children receive instruction in French under sect. 23 of the *Canadian Charter of Rights and Freedoms* to receive that instruction in accordance with the regulations wherever in the Territories that right applies. See also the *French First Language Education Regulations* of the Northwest

Québec has also made special provision for its aboriginal peoples in its *Charter of the French Language*.[94]

Today, bands administer more than 80% of the government's budget for its Indian and Inuit Affairs Program. Aboriginals, however, must still seek federal approval for many financial initiatives. For example, Natives still cannot mortgage their reserve lands to obtain capital for economic projects.

4) Conclusion

With self government within Canadian federalism, the aboriginal peoples have exerted a right to impose certain of their band laws, practices and customs and have thus created a mixed legal system in a mixed jurisdiction. It is too early to judge how far this will go but certainly language is one of the strongest protective forces of the law of each band, of the aboriginal people in general and of their jurisdictions.

XII The Effect of Language on Other Mixed Jurisdictions

1) Introduction

There are many more mixed legal systems and jurisdictions, which we of the World Society of Mixed Jurisdiction Jurists could examine in the future. In particular, we could study jurisdictions from South America, where the main body of law is civilian, but where there has been strong penetration by the common law. There is also the Arab world, which was not represented at this first worldwide conference, and in particular Arab scholars from Pakistan (where Sharia law faces the common law) and Egypt, where Sharia law faces the civil law. In each case, the national language protects the principal, and often the minority legal system as well, in the mixed jurisdiction.[95]

2) The European Union and the effect of language.

The European Union is already a mixed jurisdiction or is rapidly becoming one. It is a federal (or at least a confederal) system, with a constitution,[96] a citizenship,[97] a common

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Territories, Regulation R-166-96, as amended by Regulation R-033-99, in force January 31, 1999. These provisions apply in Nunavut, pursuant to sect. 29(1) and 38 of the *Nunavut Act*, R.S.C. 1993, c. 28.

[94] R.S.Q., c C-11. See in particular sect. 87, providing: "Nothing in this Act prevents the use of an Amerindic language in providing instruction to the Amerinds, or of Inuktitut in providing instruction to the Inuit". Sect. 88 of the *Charter* guarantees instruction in Cree and Inuktitut in the schools of their respective school boards in Northern Québec, as well as in the languages of instruction in use in the Cree and Inuit communities of Québec on November 11, 1975, the date of signing of the Agreement concerning James Bay and Northern Québec. Sect. 95 guarantees the right to use Cree and Inuktitut to persons contemplated by the statute approving that Agreement (R.S.Q., c. C-67), in the territories envisaged by the Agreement and to the bodies established by it, and exempts the Cree and Inuit from most of the provisions of the *Charter of the French Language*, while also requiring the introduction of French into those bodies, so as to facilitate communication with the rest of Québec and with persons in the region concerned who are not Cree or Inuit. The Naskapi people of Schefferville are also contemplated by some of these same provisions of the *Charter of the French Language.*

[95] See generally W. Tetley, "Mixed Jurisdictions. Common Law vs. Civil Law (Codified and Uncodified) (1999-3) Unif. L. Rev. (N.S.) 591 at pp. 611-613, (2000) 60 La. L. Rev. 677 at pp. 699-700, and 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* (K. Boyle and A.O. Sherif, eds.), CIMEL Book Series No. 3, Kluwer Law International, London, The Hague, Boston, 1996 at pp. 13-15.

[96] Among the principal elements of the constitution of Europe are the Treaty Establishing the European Community (the Treaty of Rome) of March 25, 1957, in force January 1, 1958; the Single European Act,

currency (the Euro) and bank (the European Central Bank), an elected, representative parliament (the European Parliament), an executive (the European Commission), a court system (including the European Court of Justice and the European Court of Human Rights), a judiciary and private and public law of its own. The private law is in the form of either treaty, regulation, directive or recommendation[98] and now a European Civil Code is proposed.[99] There is thus 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.[100]

There are twelve official languages in the European Union (Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish), and the citizens of the Union have the right to write to any of the European institutions in any of those official languages and to be answered in that same language.[101] Gradually, too, English is

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signed at Luxembourg on February 17, 1986 and The Hague on February 28, 1986 and in force July 1, 1987; the Treaty on the European Union (the Treaty of Maastricht) of February 7, 1992, in force November 2, 1993; the Treaty of Amsterdam of October 2, 1997, in force May 1, 1999; and the Treaty of Nice of February 26, 2001.

[97] Nationals of any Member State of the European Union have citizenship in the Union, in addition to their national citizenship. See the Treaty Establishing the European Community (the Treaty of Rome 1957), as amended by the Treaties of Maastricht 1992, Amsterdam 1997 and Nice 2001, at arts. 17-22, concerning the major effects of European citizenship.

[98] On the structure and law of the European Union, see generally Josephine Steiner, *Textbook on EEC Law*, 3 Ed., Blackstone Press Limited, London, 1992.

[99] The European Parliament, by its resolutions of May 26, 1989 (O.J. C 158 (28.6.1989)) and May 6, 1994 (O.J. C 205 (25.7.1994)), called on legal academics to study the advisability and possibility of a Civil Code for the Member States of the E.U. The Dutch Ministry of Justice organized a conference on the subject in The Hague in 1997. See the speech of the Minister, dated February 28, 1997, at http://www.minjust.nl:8080/C_ACTUAL/SPEECHES/SP0006.htm. The E.U.'s Directorate-General for Research funded research into the possibility and necessity of a European Civil Code by a group of scholars, completed in June 1999, leading to a hearing of their study in 2000 before the E.U. Parliament's Committee on Legal Affairs and the Internal Market. See "The Private Law System in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code" on the website of the European Parliament at http://www.europarl.eu.int/workingpapers/juri/default_en.htm. This Study Group of legal experts was set up to pursue comparative law research into the private law of the E.U. Member States on matters of a patrimonial (i.e. property) nature, with a view to formulating a codified and annotated statement of the core of European private law, as well as to examine the legal basis in European Union law for such a Union-wide codification. The Study Group, chaired by Prof. Christian von Bar of the Institut für Internationales Privatrecht und Rechtsvergleichung of the University of Osnabrück, has a Steering Committee whose members include such scholars as Guido Alpa, Ulrich Drobnig, Sir Roy Goode, Arthur Hartkamp and Ole Lando, as well as a website (http://www.sgecc.net/). The Study Group is conducting its activities through a number of working groups and is also contributing to the work of the Forum of the European Convention on the future of the European Union. See the presentation made to that Forum on April 4, 2002 by Prof. von Bar on behalf of the Study Group on a European Civil Code, at http://europa.eu.int/futurum/forum_convention/documents/contrib/acad/0022_r_en.pdf. Among the published articles on the proposed European Civil Code, see Sjef van Erp, "Ius Commune: A European Civil Code?" in vol. 4.4 of the Electronic Journal of Comparative Law (December 2000) at http://www.ejcl.org/44/editor44.html and Hector L. MacQueen, "Scots Law and the Road to the Ius Commune" also in vol. 4.4 of the Electronic Journal of Comparative law (December 2000) at http://www.ejcl.org/44/art44-1.html.

[100] On the growing convergence of the civil law and the common law, see H.P. Glenn, "La Civilisation de la Common Law" in *Mélanges Germain Brière*, E. Caparros, ed., Collection Bleue, Wilson & Lafleur Ltée, Montreal, 1993 at pp. 596-616.

[101] The Treaty Establishing the European Community (the Treaty of Rome 1957), art. 21, third para., added by the Treaty of Amsterdam 1997.

becoming the *lingua franca*, of the European Union,[102] which gives precedence to the English system of common law, while the universities (centres of learning) are treating European Union law as a single system of law. As yet as well, there is no centre of learning which deals with the civil law tradition in European Union law and another for the common law tradition. Thus there is assimilation, as a whole new system of law is being created.

3) Maritime law as another complete, mixed legal system

There are also legal systems which cut across international borders. One of these is maritime law, which is a complete, as well as a mixed, system of law, both public and private, substantive and procedural, national and international, with its own courts and jurisdiction. Recorded maritime law goes back to at least Rhodian law of 800 B.C.[103] and pre-dates both the common law by 2000 years and most civil law. Its more modern origins were civilian in nature, as first seen in the Rôles of Oléron of circa 1190 A.D.,[104] and it was subsequently greatly influenced and formed by the English Admiralty Court and then by the common law itself, [105] becoming, in the end, a mixed legal system in its own right.

The general maritime law[106] evolved from various maritime codes including Rhodian law (circa 800 B.C.),[107] Roman law,[108] the Rôles of Oléron (circa 1190),[109] the *Ordonnance de la*

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[102] Although all twelve official languages of the European Union are used in the publication of its documents, there are in fact three working languages in the European Commission: English, French and German, and English is tending to predominate, although French tends to be the principal language used at the European Court of Justice. French and English are the official languages of the European Court of Human Rights. As Claude Tourchot pointed out in "Towards a Language Policy for the European Community" in David F. Marshall, ed, *Language Planning*, J. Benjamins Publishing Co., Amsterdam ; New York 1991, 87 at p. 90, the E.U. is being "… built above all in fields where the English language has acquired, all over the world, a dominating role". Tourchot also notes the tendency towards the expanded use of English in many areas of European society. This phenomenon was a major factor leading France's National Assembly to legislate to protect and promote the use of its national language, in the "*Loi Toubon*" (*Loi relative à l'emploi du français*). Law no. 94-665 of August 4, 1994 (J.O. August 5, 1994 at p. 11392).

[103] The Rhodian law was an unwritten body of sea law, purportedly administered on the Island of Rhodes, dating from approximately 800 B.C., some fragmentary portions of which were recorded in the sixth century A.D in the Digest of Justinian, especially in Book XV, Title 2, "*De lege Rhodia de jactu*", concerning general average. See W. Tetley, *Maritime Liens and Claims*, 2 Ed., Les Éditions Yvon Blais, Montreal, 1998 at pp. 7-8 [hereafter "Tetley, *Maritime Liens and Claims*, 2 Ed., 1998"]; W. Tetley, "The General Maritime Law - The *Lex Maritima*" (1994) 20 Syracuse J. Int. L. & Comm. 105-145 at p. 109; reprinted in [1996] ETL 469-506 at p. 473.

[104] The Rôles of Oléron were a primitive, 12th century codification of maritime law rules developed in specific cases, which defined the duties and responsibilities of masters, crews, shipowners and merchants. The Rôles take their name from the Island of Oléron off Bordeaux, which played an important part in the medieval wine trade between France and England. The Rôles were translated into various languages and exist in several manuscript versions. They were used by judges and arbitrators throughout Northern Europe for centuries in deciding maritime law disputes, and are still occasionally cited in court decisions. See Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 13-18; Tetley, *International Maritime and Admiralty Law*, Les Éditions Yvon Blais, Montreal, 2002 at pp.12-16 [hereafter "Tetley, *International Maritime and Admiralty Law*, 2002"].

[105] On the mixed nature of maritime law, see W. Tetley, "Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)" (1999) 23 Tul. Mar. L.J. 317-350, and at http://tetley.law.mcgill.ca/maritime/marlawmix.htm.

[106] On the general maritime law, both ancient and modern, see W. Tetley, "The General Maritime Law – The *Lex Maritima*" (1994) 20 Syracuse J. Int'l L. & Comm. 105-145, reprinted in [1996] ETL 469-506.

[107] *Supra*, note 103.

Marine (1681),[110] all of which were relied on in Doctors' Commons[111] (the English Admiralty Court) and the maritime courts of Europe. This *lex maritima*, part of the *lex mercatoria*, or "Law Merchant" as it was usually called in England, was the general law applicable in all countries of Western Europe until the fifteenth century, when the gradual emergence of nation states caused national differences to begin creeping into what had been a virtually pan-European maritime law system.[112]

That maritime law is a complete legal system can be seen from its component parts. For centuries maritime law has had its own law of contract – of sale (of ships), of service (towage), of lease (chartering), of carriage (of goods by sea), of insurance (marine insurance being the precursor of insurance ashore), of agency (ship chandlers), of pledge (bottomry and respondentia), of hire (of masters and seamen), of compensation for sickness and personal injury (maintenance and cure) and risk distribution (general average). It is and has been a national and an international law (probably the first private international law). It also has had its own public law and public international law.[113]

Maritime law, like any legal system, is composed of many parts - national maritime statutes and international maritime conventions on the one hand, and the general maritime law (*lex maritima*) on the other.

Today's general maritime law consists of the common forms, terms, rules, standards and practices of the maritime shipping industry[114] – standard form bills of lading,[115] charterparties,[116]

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[108] Roman law made only modest contributions to maritime law, including an early form of bottomry; a loan to buy, build and equip a ship; a privilege for repairing the ship or supplying the crew; and a privilege on cargo by the shipowner or by the person who lent money to pay freight. See Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 9-10; Tetley, *International Maritime and Admiralty Law*, 2002 at pp. 10-12. The Romans also preserved some elements of the earlier Rhodian Law, particularly in the Digest of Justinian. See note 103, *supra*.

[109] *Supra*, note 104.

[110] An important piece of French maritime legislation, dating from 1681, the *Ordonnance de la Marine* codified much of French maritime law and practice. The best text concerning the *Ordonnance de la Marine* is the commentary written in 1760 by René-Josué Valin, who, at the time, was the King's advocate at the admiralty's headquarters in Larochelle, France. See Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 18 and 24-25; Tetley, *International Maritime and Admiralty Law*, 2002 at p. 14.

[111] Doctors' Commons was the seat of the High Court of Admiralty in London, from c. 1430. Located first near London Bridge, it later moved next to St. Paul's Cathedral. Its judges were required to be doctors of civil law from either Oxford or Cambridge and, for many centuries, only advocates trained in the civil law were permitted to plead there. In addition to maritime law, the judges at Doctors' Commons had jurisdiction over the probate of wills and "divorce" (annulment of marriage). Doctors' Common was dissolved in 1858 and the building was subsequently demolished.

[112] For a brief history of maritime law in Europe and North America, see Tetley, *Maritime Liens and Claims*, 2 Ed., 1998, Chap. 1 at pp. 7-60, and Tetley, *International Maritime and Admiralty Law*, 2002, Chap. 1 at pp. 3-30.

[113] *Ibid*. at pp. 320-321.

[114] Examples of standard rules used in contemporary shipping include the CMI's (Comité Maritime International's) Uniform Rules for Sea Waybills 1990 and the Voyage Charterparty Laytime Interpretation Rules 1993, issued by the Baltic and International Maritime Council (BIMCO); the Baltic Code 2000 Charterparty and Laytime Terminology and Abbreviations; and Lloyd's Standard Form of Salvage Agreement 2000 ("LOF 2000").

[115] Among many standard-form bills of lading are the "Conlinebill 2000" form of BIMCO, issued in November 2000. Most liner companies also issue their own standard-form bills of lading.

[116] Standard-form charterparties in widespread use around the world include the Barecon 1989 and 2001 forms of bareboat charterparty (BIMCO), the "Baltime 1939" form of time charterparty (BIMCO), the New York Produce Exchange (NYPE) and NYPE '93 forms of time charterparty (Association of Ship Brokers and Agents (U.S.A.) Inc.) and the Gencon 1994 form of voyage charterparty (BIMCO).

marine insurance policies[117] and sales contracts[118] are good examples of common forms and the accepted meaning of the terms, as well as the York/Antwerp Rules[119] on general average and the Uniform Customs and Practice for Documentary Credits.[120] Much of this contemporary *lex maritima* is to be found in the maritime arbitral awards rendered by arbitral tribunals around the world by a host of institutional and ad hoc arbitral bodies.[121]

Admiralty law began with various Admiralty courts, throughout the world, particularly in England in the 12th Century. It was very procedural and common law-oriented, as opposed to maritime law, but the two branches of law have been merged over the centuries by the unification of the courts of each branch (particularly by the dissolution of Doctors' Commons[122] in England in 1858 and by the unification of English Courts in 1873).[123]

This unification in turn facilitated and encouraged the gradual injection of important elements of England's common law heritage into the civilian core of English maritime law.[124] These contributions, added to the underlying civilian substratum, slowly turned England's maritime law into an authentically mixed legal system. Eventually some of these common law rules and principles became features of the maritime law of civilian countries,[125] as well as of

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[117] Standard marine insurance policies are often the Lloyd's Marine Policy (MAR) of 1982 and the similar policy of the International Underwriting Association (I.U.A.) of London (formerly the Institute of London Underwriters).

[118] "BIMCOSALE" is BIMCO's recommended bill of sale form for selling ships. See also Saleform 1993 of the Norwegian Shipbrokers' Association, adopted by BIMCO in 1956 and as previously revised in 1966, 1983 and 1986/87.

[119] The York/Antwerp Rules on general average were adopted in their most recent version by the Comité Maritime International (CMI) at Sydney, October 8, 1994.

[120] The Uniform Customs and Practice for Documentary Credits is a document adopted by the International Chamber of Commerce in Paris, which came into force on January 1, 1994. See ICC Publication No. 500 (1993).

[121] International maritime arbitration institutions such as the London Maritime Arbitration Association (LMAA), the Society of Maritime Arbitrators (SMA) in New York and the Chambre Arbitrale Maritime de Paris render a great volume of arbitral awards in maritime matters annually. Some maritime awards, particularly those of the SMA, are published and can be (and are increasingly) cited in subsequent arbitral awards. On the development of arbitration in commercial and maritime matters generally, see W. Tetley, *International Conflict of Laws. Common, Civil and Maritime*, Les Éditions Yvon Blais, Montreal, 1994, Chap. XII at pp. 385-419.

[122] See note 111, *supra*.

[123] See in general W. Tetley, *supra*, note 106; and Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 35-37. The unification of the English court system was effected by the *Supreme Court of Judicature Act*, 35 & 36 Vict., c. 77 (1873), as amended by the *Supreme Court of Judicature (Amendment) Act*, 38 & 39 Vict., c. 77 (1875). By these enactments, the English Admiralty Court became the Probate, Divorce and Admiralty Division of the High Court of Justice. When that Division was later abolished by the *Administration of Justice Act 1970*, U.K. 1970, c. 31, sect. 2(4)), the Admiralty Court became part of the Queen's Bench Division of the High Court. See the *Supreme Court Act 1981*, U.K. 1981, c. 54, sects. 5(1)(b) and 6(1)(b).

[124] Among the notable contributions of English common law to maritime law were the ship mortgage, the maritime tort lien and the "no-cure-no-pay" principle in marine salvage law, as well as the arrest *in rem* of ships and other maritime property. See generally Tetley, *International Maritime and Admiralty Law*, 2002 at pp. 25-26 and 474-475. See also Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 56 and 473.

[125] Note, for example, that France accepted the English concept of the ship mortgage in 1874, where it is still known as the "*hypothèque maritime*". Portugal had done the same in 1833 and Prussia in 1861, while Spain followed suit in 1893. See Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at pp. 473-474 and 517. The common law tort lien was eventually received into French maritime law as a "*privilège maritime*" in 1949 pursuant to Law no. 49-226 of February 19, 1949 (J.O. February 20, 1949 at p. 1890) and the

certain international maritime law conventions.[126] The "reception" of these common law concepts by civilian and international legislators no doubt reflected the influential position occupied by Great Britain in international shipping and maritime commerce, particularly in the nineteenth and early twentieth centuries.

4) Maritime law and the effect of language

Maritime law, as a complete, mixed legal system, is formed of component parts drawn from the civil and common law legal traditions and is spread over 150 or more nations. And each of those nations has translated the various international maritime conventions into its national language and incorporated them into its law.

The international acceptance of maritime law principles and concepts was always, and continues to be, influenced by the pre-eminence enjoyed, at different periods of history, by either the French or English languages.

For centuries, France has been a major political and economic power in European and world affairs. It was therefore quite natural that the *Ordonnance de la Marine* of 1681,[127] and later the *Code civil* of 1804[128] and the *Code de commerce* of 1807[129] as applied to maritime trade, reflected the principles and style of French civil law. This civil law has been and is held in high esteem throughout Europe and elsewhere, is referred to frequently by lawyers, judges and authors, and is used by legislators as a model for their own national maritime laws. When jurists began to draft international conventions on matters of private maritime law at the dawn of the twentieth century, French, already long established as the language of international diplomacy,

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collision lien exists to this day in France under Law no. 67-5 of January 3, 1967, art. 31(5) (J.O. January 4, 1967 at p. 106). See Tetley, *ibid*. at p. 388.

[126] One example of common law contributions to international maritime law conventions is the tort lien, which was permitted, in respect of ship collision damages, by the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted at Brussels, April 10, 1926 and in force June 2, 1931, at art. 2(4). Another example is the acceptance of the common law principle of "no-cure-no-pay" in the International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, adopted at Brussels, September 23, 1910 and in force March 1, 1913, at art. 2, requiring every act of assistance or salvage to have had a "useful result" in order to give entitlement to "equitable remuneration" for the salvor. The Convention, although referring to both *assistance* and salvage in its title thus, in practice, did not recognize the right to remuneration for unsuccessful efforts to salve the ship and goods, as the civilian concept of *assistance* would have permitted, but rather enshrined only the "no-cure-no-pay" principle derived from English maritime law and common law, whereby salvage remuneration was only payable if the ship or its goods had been successfully salved, at least in part.

[127] *Supra*, note 110.

[128] Promulgated March 21, 1804, as the "*Code civil des français*" (Civil Code of the French), the French Civil Code also became known as the "*Code Napoléon*" because of the significant role played in its enactment by Emperor Napoleon I, but in contemporary France is called simply the "*Code civil*".

[129] The French Commercial Code of 1807 was promulgated by Emperor Napoleon I on September 15, 1807, and came into force on January 1, 1808. The French Commercial Code refined and developed many principles first codified in the *Ordonnance de la Marine* of 1681 (see note 110, *supra*), and these rules endured virtually unamended until the 1960's, when France undertook a complete revision of its maritime legislation. Various other civilian jurisdictions in Europe and Latin America enacted commercial codes (as well as civil codes) based on the French models in the nineteenth and twentieth centuries. See Tetley, *Maritime Liens and Claims*, 2 Ed., 1998 at p. 25; Tetley, *International Maritime and Admiralty Law*, 2002 at pp. 14-15

was automatically accepted as the *sole* official language of such maritime law instruments as the Collision[130] and Salvage[131] Conventions of 1910 and the Hague Rules of 1924.[132]

More recently, and particularly since the end of World War II, English has replaced French and other languages, in both diplomacy and maritime practice, as the *lingua franca* of international maritime law. The worldwide political and economic power and prestige of the United States of America and of English, its national language, have been largely responsible for this change. As a result, most international maritime law conventions are negotiated and drafted in English today, even where both the English and French texts are declared to be "equally authentic" (as in the case of the Hague/Visby Rules 1968[133] and 1979[134]), and even where versions in other languages are accorded the same status (as in the case of the Hamburg Rules 1978[135]). The more frequent recognition of languages other than English and French as authentic in such instruments is also attributable to the increased international profile since 1945 of countries such as Russia, China and the various Moslem states, as well as to the fact that the International Maritime Organization (I.M.O.), an agency of the United Nations, has replaced the Comité Maritime International (C.M.I.), a private organization of maritime jurists founded in 1897, as the main architect and prime mover in the contemporary development of international private and public maritime law.

XIII Language in the Defence of a Mixed Legal System

Giant international law firms, usually of American or British origin, having English as their principal language and the common law as their principal law, are entering mixed jurisdictions throughout the world and are drastically challenging those jurisdictions. They impose their law and forms, right or wrong, because they find it convenient and efficient. They often do not have time to consider or even use the local legal system, its advantages or disadvantages. Their model is the utilitarianism of John Stuart Mill.

A second official or partially official language in mixed jurisdictions can be a defence against such incursions. In such circumstances, the international law firms are obliged to use the national language and this requires employment of local lawyers who are trained in the local language and local law. The result in Québec, where French is the language of 86% of the

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[130] International Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels, 1910, adopted at Brussels, September 23, 1910 and in force March 1, 1913.

[131] International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1910, adopted at Brussels, September 23, 1910 and in force March 1, 1913.

[132] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, August 25, 1924 and in force June 2, 1931, commonly known as the "Hague Rules 1924".

[133] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, adopted at Brussels, February 23, 1968 and in force June 23, 1977 (commonly known as the "Visby Protocol 1968").

[134] Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924), as Amended by the Protocol of February 23, 1968, adopted at Brussels, December 21, 1979 and in force February 14, 1984 (commonly known as the "Visby S.D.R. Protocol 1979", because it changed the monetary unit used to express the limitations of liability of the carrier of goods by sea from poincaré gold francs to Special Drawing Rights (S.D.R.'s) in the International Monetary Fund). The Hague Rules 1924, as amended by the Visby Protocols of 1968 and 1979 are frequently termed the "Hague/Visby Rules".

[135] United Nations Convention on the Carriage of Goods by Sea, 1978, adopted at Hamburg, March 31, 1978 and in force November 1, 1992 (commonly known as the "Hamburg Rules 1978"). The Arabic, Chinese, English, French, Russian and Spanish texts of the Hamburg Rules are all equally authentic.

population, is that ultra-large, foreign, English-speaking firms have not gained a foothold in the Province. By comparison, the Province of Ontario, which is not a mixed jurisdiction, and where 90% of the population is English-speaking, has been subject to the incursions of large foreign, English law firms, which have established themselves, their laws and their practices.

Vernon Palmer has offered these reflections on the defensive role played by language in mixed jurisdictions:[136]

> "With some exception, language has served as an excellent proxy to indicate legal as well as cultural identity. Historically, it has been a powerful factor in the well-known cleavage between so-called 'purists' and 'pollutionists'."

In other words, a national language can at times prevent "pollution" of the mixed jurisdiction.

XIV The Importance of the English Language in Mixed Jurisdictions

If it is clear that two languages are extremely helpful to strengthen and preserve two legal traditions in a mixed legal system and in a mixed jurisdiction, it is equally clear that the English language is especially dangerous to a mixed jurisdiction. T.B. Smith stated some forty years ago 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 Anglo-American common law as equivalents to civilian concepts."[137] He noted that the pervasive influence of English law has frequently resulted from terminological misunderstandings or manipulations, usually initiated by the appellate courts, especially in uncodified mixed jurisdictions such as Ceylon, Scotland and South Africa.

The Israeli experience in respect of the down-sizing of the English language is very petinent. Hebrew has displaced English in the legislature, the courts, and the universities. This has been a successful factor in protecting the Israeli legal tradition.[138]

XV Conclusions

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 one of the legal systems there. Added to this is the need for dual systems of legislation, as in a federal state, and even dual systems of courts, and at least two universities or centres of learning, dedicated to safeguarding and enhancing the respective legal traditions of the jurisdiction in question. Only with such reinforcement can a mixed jurisdiction truly flourish, especially in the face of the contemporary pressures of "globalisation".

The papers of Profs. Loubser, Fassberg and myself emphasize the importance of language in a mixed jurisdiction, in the cases of South Africa, Israel and Canada respectively.

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[136] Palmer, "A Descriptive and Comparative Overview" in Palmer, ed., *Mixed Jurisdictions Worldwide*, 2001, 17 at p. 41.

[137] T.B. Smith, "The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'" in A.N. Yiannopoulos, ed., *Civil Law in the Modern World*, Louisiana State University Press, Baton Rouge, Louisiana, 1965, being a compilation of the papers presented at the first annual meeting of the Civil Law Section of the Louisiana State Law Institute, held in New Orleans, Louisiana on May 17-18, 1963.

[138] See discussion surrounding notes 54 and 55, *supra*.

We point out the major influence of language on the laws, the judiciary and judicial systems of a mixed jurisdiction. A comparison of the three papers, however, illustrates a major divergence in result. It would seem that the mixed jurisdiction in South Africa has been strengthened over 3½ centuries, and especially since 1910, by the acceptance of two major languages, while in Israel (a very new country, which is also engulfed in war), the recent imposition of a single language (Hebrew) has so far resulted in a weakened mixed jurisdiction, at least in respect to the Jewish/Arabic dichotomy, which is of unequal parts. (This is not to say that the Israeli private law system is not a mixed legal system, being composed, as Prof Fassberg has said, of elements drawn from English, German, Italian, Turkish, French and religious sources.)[139]

From the paper of Professors Loubser, we may conclude that South Africa has evolved into a mixed jurisdiction with two principal languages – Afrikaans and English - and nine other African languages. Canada, for its part, has managed to have two constitutionally enshrined languages in both Québec and the federal government, with a strong mixed jurisdiction in Québec. On the other hand, it would seem that Israel, in the space of 50 years, has replaced English (the language of the former colonial authority), as well as Arabic (the language of what was a large proportion of the population) and Yiddish (the language of many of the early Jewish immigrants) with Hebrew.

South Africa, which is over 300 years old, has thus used language as a unifying force in a mixed jurisdiction. Israel, which has the enemy without and within the gates, and which has only 50 years of existence, has used language to strengthen the role of what is now the Jewish majority, creating, in the process, what is a much less mixed jurisdiction than South Africa. (This is obviously a delicate subject, particularly in the light of the newness of Israel and the conflict taking place at this time. In consequence, any thorough analysis of the matter will require many more facts, much more study and the passage of much more time).

Québec/Canada is much more on the South African model, but the civil law of Québec is codified, which strengthens its resistance to the inroads of the common law, as opposed to the much more vulnerable, uncodified Roman-Dutch law of South Africa.

May I finally conclude that the struggle to maintain the duality of a mixed jurisdiction may require the acceptance of the principle of two nations in a single state.

In any event, two languages, if not essential to a mixed jurisdiction, would nevertheless seem essential to a strong and sustainable mixed jurisdiction, having generally equal, or at least viable, parts.

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[139] Celia Wasserstein , “Language and Style in a Mixed Jurisdiction”, *supra*, note 54 at pp. 4-7.