

# An Introductory Overview

The chapters in this collection are the culmination of an idea that was conceived as we strolled through the city of Valetta, Malta, on our way to a conference dinner.<sup>1</sup> While Malta itself appears to be a stable ‘happy union’ of British and Continental laws, we asked whether some mixed systems might evolve in such a way that they would appear to lose their mixed identity.<sup>2</sup> Were, we asked, some mixed systems in danger of disappearing or of being overwhelmed by one or other elements within them? Did certain accidents of history or contemporary events make some mixed systems more ‘at risk’ than others? At the time we did not pause greatly to consider that the term ‘endangered’ might prove contentious and evoke quite strong reactions when applied to different mixed legal systems. However, when we held a conference in June 2013 in Glasgow, to bring together colleagues to discuss this broad theme and the ways in which it did or did not apply to particular legal systems, it was soon evident that being ‘endangered’ is not only relative, but for some might be seen to be a positive characteristic of the evolution of legal systems. The risk of losing some aspects of a system could be a sign of healthy growth matching changing circumstances rather than something to be viewed negatively. It also became evident that because mixtures change and are reinterpreted, some mixed systems continue to be regarded as mixed although they are remodelled, while conversely some systems which appear to be becoming mixed, or have historically been so, do not embrace this as a classification.

The aim of the project was to explore different models of mixing and to consider the challenges that confront many mixed jurisdictions which may endanger their present composition as mixed systems. In particular we were interested in: the history of the jurisdiction which created a mixed system; the events that marked a cut-off point from the parent system or events which marked the point at which the system, or parts of it, became endangered; the

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1 ‘Mixed Legal Systems, East and West: Newest Trends and Developments’ (14–15 May 2012), organized by the World Society of Mixed Jurisdiction Jurists, the *Protection Project* of the Johns Hopkins University, the Eason Weinmann Center for Comparative Law, and the Parliament of Malta. A collection generated by that conference will be published as MY Mattar, VV Palmer and A Koppel (eds), *Mixed Legal Systems: East and West* (Ashgate forthcoming).

2 See SP Donlan, B Andò and D Zammit, ‘“A Happy Union”?: Malta’s Legal Hybridity’ (2012) 27 *Tulane European and Civil Law Forum* 165.

significance of language to the evolution or survival of the system; the influence of legal education and the legal profession; the role of geographical proximity or distance from other systems or parent systems; and the influence of regional or international memberships or agencies in shaping the law.

All modern legal traditions are both mixed and mixing.<sup>3</sup> That is, each is a hybrid; each continues to evolve over time. Modern *mixed legal systems*, where State laws of diverse origins lie in reasonably visible and frequently discrete, identifiable sections are simply the most overt mixes. The coherence and harmony in contemporary legal systems, or the appearance of such coherence and harmony, is the result of the long and complicated development of modern nations and States.<sup>4</sup> But if all traditions are effectively mixed, there is a meaningful division to be made between, as Joseph McKnight once put it, 'what may be termed mixed and that which has already been blended to an extent that [the] origins of rules are lost in ordinary legal practice.'<sup>5</sup> The distinction is 'at once ... practical and ... psychological', obvious to those both within it and without.<sup>6</sup> In this sense a 'blended' system or part of a system, might be regarded as one that no longer appears to be 'mixed'. Of course the system itself still remains mixed if there are new mixes or if the now blended part is only one element in a more complex mix.

Historically, this is not an unusual development. Indeed, throughout most of history a complex mix of laws and norms was typical. Only the rise of the modern nation-state makes our modern concept of a 'mixed' legal system possible, as one in which there may be multiple elements, but which all receive their authority – directly or indirectly – through the sovereign State. This process of moving from a mixed to a blended form is even true, for example, of English law. Only over the course of many centuries was the law of the courts of common law

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3 See, for example, E Özücü, 'Mixed and Mixing Systems: A Conceptual Search' in E Özücü, E Attwooll and S Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer Law International 1996); PH Glenn, *Legal Traditions of the World* (4th edn Oxford University Press 2010), and V Palmer, 'Mixed Legal Systems ... and the Myth of Pure Laws' (2007) 67 *Louisiana Law Review* 1205.

4 The transition from considerable legal complexity to greater legal unity, much of it occurring in the nineteenth century, effectively created the modern conceptual distinction between 'pure' and 'mixed' legal traditions. See P Glenn, 'Quebec: Mixité and Monism' in Özücü et al (n3) and SP Donlan, 'Remembering: Legal Hybridity and Legal History' (2011) 2 *Comparative Law Review* 1.

5 J McKnight, 'Some Historical Observations on Mixed Systems of Law' (1977) 22 *Juridical Review* (ns) 177, 186. Others might use 'blended' to suggest either a coherent or well-functioning system, whether mixed or nominally pure.

6 *ibid.* See I Castellucci, 'How Mixed Must a Mixed System be?' (2008) 12 *Electronic Journal of Comparative Law*, available at <[www.ejcl.org/121/art121-4.pdf](http://www.ejcl.org/121/art121-4.pdf)> accessed 10 December 2013.



that they would appear to lose their 'mixed' identity? Would they be reclassified, within the simplistic, dominant taxonomies of comparative law, as belonging to a single legal tradition? Were some mixed systems, or elements within such systems, more at risk than others? What strategies have been adopted to accelerate or counteract change? In addition, to what extent could the experience of these explicit mixed systems be seen as barometers of legal change more generally? What, if anything, do they tell us about legal evolution globally? We left it to the contributors to select the terms they thought appropriate and to express their own views on whether or not their particular system was at risk.

Legal traditions rarely begin with a tabula rasa. Short of revolution, even extensive legal reform is rare and more likely to be piecemeal and ad hoc. More typically, legal traditions are the products of long and complex histories. They are all 'systems in transition'.<sup>11</sup> The stability or instability of a legal tradition, its maintenance and preservation, may be due to a number of different factors, either singly or in combination. This includes the work of its jurists and politicians, as well as more global and shifting influences and powers. Some such systems will maintain equilibrium among their different component parts. Their legal identity, whatever it is, will be maintained. They are 'entrenched'. For our purposes, an 'entrenched' mixed system is simply one in which the various elements that compose it are stable. Such a system could be calm or contentious, but the traditions within it have achieved a sort of balance. This cycle is ongoing. Indeed, in his contribution, Achilles Emilianides notes the famous metaphor, attributed to Heraclitus that, 'you cannot step twice into the same river'. Nothing endures, that is, but change. In fact, moving from one legal categorization to another is a very rare event, not least because our taxonomies shift along with changes in the legal systems. We chose the term 'endangered' as meaning where the identity of a system appears to be changing. But such change is not easy to measure and the direction of change may be uncertain. It is rarely the result of a single event, but a process of its and starts, of gradual accretion or decay. The bottom line here is whether the system alters so much that it leaves one classification to enter another. With such systems, one or more elements which make up the mix is being overtaken by a stronger influence either within, or possibly even from without, the system. Concerns about this type of endangerment are especially delicate in mixed systems that are hybrids of the two dominant Western legal traditions, common law (Anglo-American law) and civil law (Continental law) – although we certainly do not mean to imply that mixed systems are limited in this way. There Anglo-American global hegemony

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<sup>11</sup> E Örtücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 (1) *Electronic Journal of Comparative Law*, available at <[www.ejcl.org/41/abs41-1.html](http://www.ejcl.org/41/abs41-1.html)> accessed 11 February 2014.



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