

Mixed jurisdictions : common law vs civil law (codified and uncoded) (Part I)

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I. – INTRODUCTION

Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between

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Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland.¹

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

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

Both Walton and Evans-Jones are referring to common law/civil law mixed legal systems which stem from two or more legal traditions. Mixed jurisdictions are really political units (countries or their political subdivisions) which have mixed legal systems. Common law/civil law mixed jurisdictions include⁴ Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe (formerly Southern Rhodesia),⁵ Botswana, Lesotho, Swaziland,⁶

The following abbreviations have been used in the footnotes: A.C.: Appeal Cases (Law Reports); A.L.J.R.: Australian Law Journal Reports; A.L.R.: Australian Law Reports; All E.R.: All England Reports; Am. J. Comp. L.: American Journal of Comparative Law; AMC: American Maritime Cases; C.C.L.I.: Canadian Cases on the Law of Insurance; *Clunet*: Journal du droit international; *Comp. and Int'l. L. J. of Southern Africa*: Comparative and International Law Journal of Southern Africa; D.L.R.: Dominion Law Reports; E.R.: English Reports; *Edinburgh L. Rev.*: Edinburgh Law Review; ETL: European Transport Law; *Fed. Cas.*: Federal Cases; *Fordham L. Rev.*: Fordham Law Review; *JMLC*: Journal of Maritime Law and Commerce; *J.O.*: Journal Officiel (France); *LMCLQ*: Lloyd's Maritime and Commercial Law Quarterly; *L.Q.R.*: The Law Quarterly Review; *La. Acts*: Louisiana Acts; *La. L. Rev.*: Louisiana Law Review; *Lloyd's Rep.*: Lloyd's Reports; *Louisiana Rev.*: Louisiana Review; *Maine L.R.*: Maine Law Review; *McGill L.J.*: McGill Law Journal; *Nfld. & P.E.I.R.*: Newfoundland & Prince Edward Island Reports; *N.R.*: National Reporter; *N.Z.L.R.*: New Zealand Law Review; *P.C.*: Privy Council; *RabelsZ*: Rabels Zeitschrift für ausländisches und internationales Privatrecht; *Rev. cr. dr. int. pr.*: Revue critique de droit international privé; *R.S.C.*: Revised Statutes of Canada; *SA*: South African Law Reports; *S.C.*: Session Cases (Scotland); *S.C.R.*: Supreme Court Reports (Canada); *S.C.L.R.*: Session Court Law Reports (Scotland); *Sess. Cas.*: Session Cases (Scotland); *S.L.T.*: Scots Law Times; *Sp.*: Spinks Ecclesiastical & Admiralty Reports (England); *Syracuse J. Int'l. L. & Com.*: Syracuse Journal of International Law and Commerce; *U.S.*: United States Reports (U.S. Supreme Court); *Tul. L. Rev.*: Tulane Law Review; *Tul. Mar. L.J.*: Tulane Maritime Law Journal; *Tulane Law Rev.*: Tulane Law Review; *U.B.C. L. Rev.*: University of British Columbia Law Review; *Unif. L. Rev.*: Uniform Law Review; *West's L.S.A.*: West's Louisiana Statutes Annotated; *W.L.R.*: Weekly Law Reports.

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

² F.P. WALTON, *The Scope and Interpretation of the Civil Code*, Wilson & Lafleur Ltée, Montreal (1907), reprinted by Butterworths, Toronto (1980), with an introduction by M. TANCELIN, 1.

³ 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, 228.

⁴ See R. DAVID / J.E.C. BRIERLEY, *Major Legal Systems in the World Today*, 3 Ed., Stevens & Sons, London, 1985, paras. 56-58 at 75-79.

⁵ See R. ZIMMERMANN, "Das römische-holländische Recht in Zimbabwe" (1991), 55 *RabelsZ* 505.

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

Namibia,⁷ the Philippines, Sri Lanka (formerly Ceylon),⁸ and Scotland.⁹ It goes without saying that some mixed jurisdictions are also derived partly from non-occidental legal traditions: the North African countries, Iran, Egypt, Syria, Iraq and Indonesia, for instance.¹⁰

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

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

It is also useful to remember that different mixtures of legal systems and institutions exist in the world today. ÖRÜCÜ, for example, distinguishes: (1) "mixed jurisdictions" such as Scotland, where the legal system consists of historically distinct elements but the same legal institutions (a kind of "mixing bowl"); (2) jurisdictions such as Algeria, in which both the elements of the legal system and the legal institutions are distinct, reflecting both socio-cultural and legal-cultural differences (assimilated to a "salad bowl"); (3) jurisdictions such as Zimbabwe where legal dualism or pluralism exists, requiring internal conflict rules (akin to a "salad plate"); and (4) jurisdictions

⁷ Roman-Dutch law, as applied in the province of Cape of Good Hope on 1 January 1920, was made applicable in what is now the Republic of Namibia when that territory was taken over by South Africa after World War I. Since attaining independence on 20 March 1990, Roman-Dutch law continues to apply there by virtue of Art. 140 I of the Constitution of the Republic of Namibia. See R. ZIMMERMANN / D. VISSER, "South African Law as a Mixed Legal System", being the Introduction to R. Zimmermann / D. Visser (eds.), *Southern Cross. Civil Law and Common Law in South Africa*, Clarendon Press, Oxford (1996), 3, n. 16. See also D. CAREY MILLER, "South Africa: A Mixed System Subject to Transcending Forces", in E. ÖRÜCÜ, E. Attwooll & S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing*, Kluwer Law International, The Hague, London, Boston (1996), 165-191.

⁸ See M.H.J. VAN DEN HORST, *The Roman-Dutch Law in Sri Lanka* (1985); A. COORAY, "Sri Lanka: Oriental and Occidental Laws In Harmony", in ÖRÜCÜ *et al*, *supra* note 7, 71-88.

⁹ In the case of Scotland, see R. EVANS-JONES, *supra* note 3, 228.

¹⁰ DAVID & BRIERLEY, *supra* note 4, para. 58 at 77-78.

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

where the constituent legal traditions have become blended (like a "purée"), either because of legal-cultural affinity (e.g. Dutch law, blending elements of French, German, Dutch and Roman law) or because of a dominant colonial power or national élite which eliminates local custom and replaces it with a compound legal system drawn from another tradition (e.g. Turkey, blending elements of Swiss, French, German and Italian law).¹² She also notes the existence today of "systems in transition", such as Slovenia, in which only time will determine the character of the composite system now being developed.

II. – PLAN AND PURPOSE OF THIS PAPER

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

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

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

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

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

III. – RELATED LEGAL ENTITIES AND THEIR DEFINITIONS

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

¹² See E. ÖRÜCÜ, "Mixed and Mixing Systems: A Conceptual Search", in ÖRÜCÜ *et al*, *supra* note 7, 335 at 344-335.

1. Legal systems

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

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

"Legal order: Body of rules and institutions regulating a given society. *Obs.* Some hold to the view that a legal order may be contemplated as forming or striving to form a coherent body of law. *Syn.* juridical system, legal system, system of law." ¹⁴

"Each law in fact constitutes a system: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of the law in that society." ¹⁵

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

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

2. Legal traditions or families

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

"There are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law ... A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective." ¹⁶

"This grouping of laws into families, thereby establishing a limited number of types, simplifies the presentation and facilitates an understanding of the world's contemporary

¹³ 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), 1.

¹⁴ Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons*, 2 Ed. Revised and Enlarged, Les Editions Yvon Blais, Cowansville, Québec (1991), 243.

¹⁵ DAVID & BRIERLEY, *supra* note 4, para. 15 at 19.

¹⁶ MERRYMAN, *supra* note 13 at 1, 2.

laws. There is not, however, agreement as to which element should be considered in setting up these groups and, therefore, what different families should be recognised. Some writers base their classification on the law's conceptual structure or on the theory of sources of the law; others are of the view that these are technical differences of secondary importance, and emphasize as a more significant criterion either the social objectives to be achieved with the help of the legal system or the place of law itself within the social order ... There would appear to be three at least which occupy an uncontested place of prominence: the Romano-Germanic family, the Common law family and the family of Socialist law." 17

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

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

3. 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,²⁰ and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators – Continental Europe, Québec and Louisiana being examples); and uncodified Roman law (as seen in Scotland and South Africa). Civil law is highly systematised and structured and relies on declarations of broad, general principles, often ignoring the details.²¹

17 DAVID & BRIERLEY, *supra* note 4, paras. 16-17 at 20, 22.

18 *Ibid.*, para. 14 at 18 and paras. 22-25 at 27-31.

19 MERRYMAN, *supra* note 13 at 5.

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

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

4. *Common law*

Common law is the legal tradition which evolved in England from the 11th century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States of the British Commonwealth.²²

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

5. *Statutory law*

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

6. *Mixed legal systems*

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

7. *Mixed jurisdictions*

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

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

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

²³ DAVID & BRIERLEY, *supra* note 4, para. 56 at 76.

8. Maritime law

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

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

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

9. Legal traditions are also mixed

One could also argue that the distinction between so-called "pure jurisdictions" and "mixed jurisdictions" is not very relevant, because legal traditions are "impure" in any event. Indeed, legal traditions consist largely of rules, some of which have been borrowed from other legal traditions.²⁶

The development of the common law illustrates the point. Common law derives in part from the French local customs imported from Normandy into England by William the Conqueror in 1066. Moreover, common law, being more vulnerable than civil law to foreign intrusions because of its less systematic structure and less coherent nature, was "civilised" at various points throughout history, particularly in recent years.²⁷ In 1832, the Chancellor's permission to take suit was eliminated.²⁸ In 1852, forms of action were abolished.²⁹ In

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

²⁵ *Ibid.*, *Syracuse J. Int'l. L. & Com.*, 115-117, 122-128; [1996], *ETL* 478-480, 484-491. See also W. TETLEY, "A Definition of Canadian Maritime law" (1996), 30 *U.B.C. L. Rev.* 137, 151-156; *idem*, "Maritime Law as a Mixed Legal System" (1999), 23 *Tul. Mar. L.J.* 1 at 4-6 and 10-29.

²⁶ R. POUND described the history of a system of law as largely a history of borrowings of legal materials from other legal systems. See A. WATSON, *Legal Transplants: An Approach to Comparative Law*, 2 Ed., University of Georgia Press, Athens, Georgia (1993), 22.

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

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

²⁹ *Common Law Procedure Act*, 1852, 15 & 16 Vict., c. 76 (the form of action no longer needed to be stated in the new uniform writ and different courses of action could be joined in the same writ). The

1873, the Courts were unified.³⁰ In 1875, a Court of Appeal was established.³¹ New substantive law of a civilian flavour was introduced (see *infra*) and recently, case management rules have been added.

IV. – FORMS OF CIVIL LAW JURISDICTIONS AND HOW THEY DEVELOPED

1. Introduction

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

Continental Europe received civil law from ancient Rome and then retained it by codification, imposed for the most part by victories of Napoleon and later on by the example and great influence of the French Civil Code of 1804.³² Other jurisdictions, particularly the countries of Latin America, as well as Egypt, imitated the French Code (or other codes based upon it) in enacting their own codifications.

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

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

2. France

The French Civil Code of 1804 was no mere consolidation or systematisation of existing law, but rather was intended to be a “revolutionary code”, reflecting the achievements of the French Revolution. As YIANNOPOULOS states:³³

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

forms of action had been largely abolished by the Uniformity of Process Act, 1832, *supra* note 28, and by the *Real Property Limitation Act*, 1833, 3 & 4 Will. IV, c. 27, sect. 36.

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

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

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

³³ YIANNOPOULOS, *supra* note 20 at 22.

namely, as an assertion that a legal order is legitimate only when it does not contradict such precepts."

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

3. *The influence of the French Civil Code*

Napoleon's victorious armies imposed the French Civil Code on various territories, notably the French-occupied German-speaking areas on the left bank of the Rhine, as well as the Netherlands, Belgium, Italy and the Hanseatic cities. Political suasion led to its introduction into various other German principalities, as well as Danzig, Warsaw and the Swiss cantons. After the downfall of the Emperor, the Code's prestige caused the adoption of similar codifications, in the form of either direct translations of the French Code or national codes based on the French model but with local modifications. These codes include those of Parma (1820), Sardinia (1837), the Netherlands (1838), Modena (1852), unified Italy (1865), Romania (1864), Portugal (1867) and Spain (1889).³⁵

In Latin America, the French Code was introduced into Haiti in 1825, while the codes of Bolivia (1830) and Chile (1855) follow the arrangement and copy much of the substance of the *Code Napoléon*. Chile's code served in turn as a model for those of Ecuador (1857), Uruguay (1868), Argentina (1869) and Colombia (1873), while Puerto Rico and the Philippines largely copied the Spanish Code of 1889.³⁶

The movement towards codification which the French Civil Code set in motion also gave birth to the German Civil Code of 1896 (in force in 1900), although its terminology is more academic and technical and its rules more precise than those of the French Code. The Swiss Civil Code of 1912, by comparison, is simple and non-technical, relying heavily on general principles. The combined French, German and Swiss influence influenced the codifications of Brazil (1916), Mexico (1928), pre-Communist China (1931) and Peru (1936). Japan adopted the German Civil Code in 1898 and Turkey, a translation of the Swiss Code in 1926.³⁷

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

³⁵ *Ibid.* at 24.

³⁶ *Ibid.* at 25.

³⁷ *Ibid.* at 26-27.

4. Scotland

Not all civilian jurisdictions have, however, codified their private law. One striking example of uncoded civil law is to be found in Scotland.³⁸

Scots Law has been divided into four periods:³⁹

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

The feudal period saw Scotland's establishment as a separate kingdom; the introduction of feudalism from England, which continues even now to be a basic element of the law of land ownership, particularly in the Highlands,⁴⁰ and the influence of Roman Catholic Canon Law, administered by Church courts, which continues to be at the basis of much modern Scots family law. The establishment of sheriffdoms under King David I (1124-53), where the sheriffs administered civil and criminal justice in the name of the king and heard appeals against rulings of the baronial courts, was also of major importance in this first period. The other main source of law in and after this initial period was custom.

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

³⁸ On Scots law generally, see R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, The Stair Society, supplementary series vol. 2, Edinburgh (1995); see also D.L. Carey Miller / R. Zimmermann, eds., *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays*, Dunker & Humblot, Berlin (1997); E. ATTWOOLL, "Scotland: A Multi-dimensional Jigsaw", in ÖRÜCÜ *et al.*, *supra* note 7 at 17-34.

³⁹ E.A. MARSHALL, *General Principles of Scots Law*, 4 Ed., W. Green & Son, Ltd., Edinburgh (1982), 1-11.

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

courts consolidated their hold on marriage and family law, and in 1532, the Court of Session was established.

The third major period, the age of the "reception" of "Roman Law" in Scotland, was really the fruit of the Renaissance and the reawakening of classical learning to which the Renaissance gave birth on the Continent. Scottish lawyers, trained in the great universities such as Paris, Orléans, Utrecht and Leiden, returned home imbued with the terminology, concepts and structured thinking of Roman law and familiar with the Institutes of Gaius and the Digest of Justinian, as well as with the writings of sixteenth and seventeenth century European civilian legal scholars. Civilian rules and principles were thus incorporated into the corpus of Scots law, to supply rules and principles which the old customary law could not provide.⁴¹ It is to this period that the great "institutional writings" on Scots law belong, notably the works of STAIR,⁴² ERSKINE,⁴³ BELL⁴⁴ and a few others,⁴⁵ the authority of whose statements on any point is even today "... generally accepted as equivalent to that of an Inner House decision to the same effect."⁴⁶ The immense importance of this "doctrine" as a source of law relied upon by judges as much as, if not more than, precedent, is, of course, in itself evidence of the civilian character of Scots private law.

The period of "reception" also brought momentous political changes affecting law and the legal/judicial system in Scotland. The Scottish Reformation culminated in 1560 in the removal of the Roman Catholic Church courts and their jurisdiction over marriage, annulment and legitimacy. The Union of the Crowns of Scotland and England under James VI in 1603 involved Scotland in the struggle of King and Parliament which raged throughout the seventeenth century in England. The establishment of the General Register of Sasines in 1617 (for the registration of land ownership and encumbrances); and the creation of the High Court of Justiciary in 1672 (still Scotland's highest criminal court), left enduring effects. The Treaty of Union of 1707,⁴⁷ which eliminated the Scottish

⁴¹ See EVANS-JONES, *supra* note 3 at 230-231, who notes that "receptions" of foreign law usually occur when a "weak" legal system confronts a "strong" one. In the case of Scotland, he argues that Roman law was appealing to Scots lawyers because it was written, whereas the customary law was unwritten; because it was systematic and better organised than customary law; and because it was the law in which the lawyers, as a social and professional elite, had received their training on the Continent.

⁴² Sir John DALRYMPLE, Viscount STAIR, *Institutions of the Law of Scotland* (1681).

⁴³ Professor J. ERSKINE, *Institute of the Law of Scotland* (1773).

⁴⁴ Professor G.J. BELL, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence* (1804) and *Principles of the Law of Scotland* (1829).

⁴⁵ Sir Thomas CRAIG, *Jus Feudale* (1655); Sir George MACKENZIE, *Institutions of the Law of Scotland* (1684); Andrew MCDOUALL, Lord BANKTON, *Institute of the Laws of Scotland* (1751-1753), Henry HOME, Lord KAMES, *Principles of Equity* (1760); and Baron David HUME, *Commentaries on the Law of Scotland respecting Crimes* (1797).

⁴⁶ D.M. WALKER, *Principles of Scottish Private Law*, vol. I, 4 Ed., Clarendon Press, Oxford (1988), 26, citing Lord NORMAND, *The Scottish Judicature and Legal Procedure* (1941).

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

Parliament, while purporting to preserve Scots laws and courts,⁴⁸ in fact resulted in English law replacing Roman law as the most influential external influence on the legal system. Finally, the quelling of the Jacobite Rebellion of 1745 culminated in the eradication of the clan system and the abolition of military service as a condition of landholding.

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

In the modern period, beginning about 1800, Scots law has been increasingly affected by English common law and statutory law, especially in commercial, labour and administrative matters.⁴⁹ The doctrine of judicial precedent has been accepted, and Scottish lawyers have looked to English case law and legal literature. European Union law has also exerted a major influence in Scotland, as it has in other parts of the United Kingdom, since 1973.

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

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

"While, however, Scots law is a distinct legal system, it is far from being an original legal system in the sense of having developed independently of outside influences: there is little in Scots law which is purely native to the country; most of the Scots law has been

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

⁴⁹ See A. RODGER, "Thinking about Scots Law" (1996), 1 *Edinburgh L. Rev.* 3, who notes a tendency from the later years of the nineteenth century for Scottish lawyers to see themselves as part of a large, world-wide family of English-speaking lawyers sharing a unique heritage of law rooted in English principles of freedom and justice. Scots law, with its civilian heritage, became unpopular at this time because it was associated with political dictatorship. See also EVANS-JONES, *supra* note 3 at 232.

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

⁵¹ MARSHALL, *supra* note 39 at 12.

contributed to Scotland by other legal systems, and the distinctiveness of the Scottish legal system springs from the original way in which the law-makers of Scotland have over past centuries formed a coherent body of law out of these diverse contributions.”

A similar conclusion has been reached by Robin Evans-Jones in his more recent study of Scots private law.⁵² Evans-Jones points out, however, that the civil law tradition in Scotland is in constant danger of being overwhelmed by English common law, because the process of reception of that law is ongoing, the common law continuing to exercise a strong influence on Scots lawyers and judges.⁵³ Moreover, Scots legal education has tended to limit the study of civil law to Roman law and to ignore developments in modern civilian legal systems, which because usually discussed in legal literature written in languages other than English, is unfortunately inaccessible to many Scots jurists.⁵⁴

5. South Africa

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

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

⁵² Cf. *supra* note 3.

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

⁵⁴ EVANS-JONES, *supra* note 3 at 241-242.

⁵⁵ See this “narrow view” expounded in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (ADiv.); *Gerber v Watson* 1955 (1) SA 158 (ADiv.); *Du Plessis v Strauss* 1988 (2) SA 105 (ADiv.). See also E. FAGAN, “Roman-Dutch Law in its South African Historical Context”, in R. Zimmermann / D. Visser (eds.), *supra* note 7, 33 at 37-41.

⁵⁶ See FAGAN, *supra* note 55 at 44-45. See also R. ZIMMERMANN, “Roman Law in a Mixed Legal System: The South African Experience”, in R. Evans-Jones (ed.), *supra* note 38, 41 at 62 *et seq.*

⁵⁷ *Comentarius ad Pandectas*. Other major Dutch authors relied on include GROTIUS, *Inleiding tot de Hollandsche Rechtsgeleertheyd*; VAN DER LINDEN, *Koopmans Handboek* and VAN LEEUWEN’s *Rooms-Hollands-Regt*.

the country's legal literature.⁵⁸

Roman-Dutch law continued to develop after the British occupations of 1795 and 1806 and the transfer of the Cape to Britain in 1815, and was taken by the *voortrekkers*, beginning in the 1830s, into the territories later known as the Transvaal and the Orange Free State.⁵⁹ As the nineteenth century progressed, however, English law began to be imported by statute into the Cape Colony, including the principle of freedom of testation, as well as in commercial and corporate fields, insurance, insolvency, constitutional, administrative and criminal matters.

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

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

6. Québec

Before the Treaty of Paris of 1763 by which New France was ceded to Great Britain, the territory now forming the Canadian province of Québec, as part of New France (generally called "*le Canada*" by its inhabitants), had a private law primarily governed by the *Coutume de Paris* (Custom of Paris). This customary law, first reduced to writing in France in 1580, applied in the City of Paris and the surrounding province of Ile-de-

⁵⁸ Among the best-known works on Roman-Dutch law published in South Africa are C.H. VAN ZYL, *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope and of South Africa Generally* (1893); Sir Andries MAASDORP, *Institutes of Cape Law*, vol. 1 (The Law of Persons, 1903), vol. II (The Law of Things, 1903), vol. III (the Law of Obligations, 1907), vol. IV (The Law of Actionable Wrongs, 1909); Ma. NATHAN, *The Common Law of South Africa*, 2 vol. (1904); J. WESSELS, *History of the Roman-Dutch Law* (1908); R.W. LEE, *An Introduction to Roman-Dutch Law in South Africa* (1915); G. WILLE, *The Principles of South African Law* (1937) (D. Hutchison, 8 Ed., 1991). More contemporary scholars include H.R. HAHLO and E. KAHN, *The Union of South Africa: The Development of its Laws and Constitution* (1960), as well as R. ZIMMERMANN, *supra* note 56.

⁵⁹ FAGAN, *supra* note 55 at 46-57.

⁶⁰ FAGAN, *ibid.* at 60-64.

⁶¹ ZIMMERMANN / VISSER, *supra* note 7 at 9-12.

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

France and was administered judicially by the *Parlement de Paris*. The *Coutume* was imposed on New France by King Louis XIV's Edicts of April 1663⁶³ and May 1664.⁶⁴ Because it was directed primarily at rights in immoveable property (particularly the feudal rights of seigneurial ownership), rather than at the law of persons, however, the *Coutume de Paris* was supplemented in the latter regard by Roman law, as systematised and formulated in the doctrinal writings of eminent French legal scholars, especially POTHIER (1669-1772) and DOMAT (1625-1696), as well as by the Canon Law of the (established) Roman Catholic Church. The third principal source of private law in New France was the royal ordinances, including the *Ordonnance sur la procédure civile* (1667), the *Ordonnance sur le commerce* (1673) and the *Ordonnance de la marine* (1681). In last place came the *arrêts de règlements*, promulgated by the local *Conseil souverain* (a local governing council composed of the Governor, the Bishop and the Intendant) on diverse subjects such as agriculture, public health and fire prevention.⁶⁵

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

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

⁶⁴ *Edit de mai 1664*, *ibid.*, vol. I, 40.

⁶⁵ See J.E.C. BRIERLEY / R.A. MACDONALD, *Quebec Civil Law. An Introduction to Quebec Private Law*, Emond Montgomery Publications Limited, Toronto (1993), paras. 6-12, 6-14.

⁶⁶ *Ibid.*, para. 13 at 15.

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

⁶⁸ *An Act to Repeal certain Parts of an Act passed in the fourteenth Year of His Majesty's Reign, intituled, An Act for making More effectual Provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province*, U.K., 31 Geo. III, c. 31.

⁶⁹ See BRIERLEY / MACDONALD, *supra* note 65, para. 14 at 17: "The result, in private law matters, was the alteration over the next years of Québec Civil law into the law of a bijural jurisdiction: portions of English law coexisted with the body of old French law reinstated under the [Quebec] Act."

Under the *Act of Union* of 1840,⁷⁰ reuniting Upper and Lower Canada as the "Province of Canada", a land registration system was established (1841), seigneurial tenure was abolished (1854)⁷¹ and legislation was adopted confirming that the civil law, rather than the common law, applied in territories where land had been granted in free and common socage since 1774.⁷² New ideas began to circulate. The diversity of the sources of the civil law, the diversity of languages in which it was expressed, the absence of contemporary commentaries on that law and the reputed "advantages" of the French and Louisiana codes, resulted in pressure for codification, which led to the formation of a commission in 1857.⁷³ The commission produced the Civil Code of Lower Canada of 1866⁷⁴ and the Code of Civil Procedure of 1867,⁷⁵ both of which were in force when the Province of Québec became part of the Dominion of Canada on 1 July 1867.⁷⁶

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

The Code, it has been said, "... superimposed elements of English and commercial law, as well as local variations on received Civil law, all woven together into a synthetic whole. Substantively, it reflects a blending of institutions and values of the *ancien droit* (particularly in marriage, filiation, and inheritance) with the rationalistic and liberal

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

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

⁷² See BRIERLEY / MACDONALD, *supra* note 65, paras. 17-19 at 20-22, and statutes cited there.

⁷³ *Ibid.*, para. 23 at 25, citing the preamble of the *Act respecting the codification of the Laws of Lower Canada relative to civil matters and procedure*, Stat. Prov. Canada, 1857, c. 43, being the statute under which a commission was constituted to prepare the Civil Code of Lower Canada and the Code of Civil Procedure.

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

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

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

values of the enlightenment (particularly in contract, civil liability, and property).“ 77

A distinctive feature of the Code of 1866 was that it was drafted in both French and English, with both versions official. The original Article 2615 (renumbered as Article 2714 in 1974) directed the interpreter to the language version most in accord with the existing law on which the article concerned was founded. 78

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

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

77 BRIERLEY / MACDONALD, *supra* note 65, para 33 at 35.

78 BRIERLEY / MACDONALD, *supra* note 65, para. 27 at 30-31 and para. 120 at 147-149. Both language versions continued to be consulted even after the repeal of Art. 2714 by the *Charter of the French Language*, S.Q. 1977, c. 5, sect. 219. The two language versions of all enactments of the Québec National Assembly have equal authority under Canada’s *Constitution Act 1867*, sect. 133, as reaffirmed in *A.G. Quebec v Blaikie* [1979], 2 S.C.R. 1016 (Supr. Ct. of Can.).

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

80 BRIERLEY / MACDONALD, *supra* note 65, para. 70 at 83.

81 *Ibid.*, para. 75 at 88.

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

83 BRIERLEY / MACDONALD, *supra* note 65, para. 78 at 93.

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

85 See BRIERLEY / MACDONALD, *supra* note 65, para. 82 at 96-97.

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

The new Civil Code gives full recognition to the human person and human rights as the central focus of all private law, while also consolidating the position of the Code as the *ius commune* of Québec.⁸⁷ Its specific rules give expression, in more contemporary language, to the social changes in Québec society since the “Quiet Revolution”. The new Code continues to reflect the impact of certain English principles and institutions (e.g. freedom of testation, trusts – now called “foundations” – and “moveable hypothecs” -- an adaptation of the English chattel mortgage), while still respecting the basic structure and terminology of civilian codification. It takes account of contemporary technological developments (e.g. computerisation of registers of civil status and registers of personal and moveable real rights). It also includes a very important Book X on private international law, which is marked by recent developments in the conflict of laws in Europe (e.g. the Rome Convention 1980⁸⁸ and the Swiss Statute on Private International Law 1987⁸⁹), and which also incorporates a number of common law concepts, such as *forum non conveniens*, into what is essentially a civilian codal regime. The French and English versions of the new Code are official, and may be used to assist in interpreting ambiguous provisions.

7. Louisiana

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

After the transfer to the U.S., pressure came from incoming Americans to impose the common law in Louisiana, particularly because six different compilations of Spanish laws existed and it was unclear which of over 20,000 individual laws of Spain applied in the territory. Thanks, however, to the leadership of Edward LIVINGSTON, a New York

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

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

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

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

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

common lawyer who had become a convert to the superiority of the civil law after moving to New Orleans, and following a political crisis surrounding the matter, a two-man committee was mandated by the Louisiana legislature to prepare a compilation of the civil law applicable in the "Territory of Orleans".⁹² The product was a digest,⁹³ known as the Louisiana Civil Code of 1808, which was approved even by Governor CLAIBORNE, who had formerly been a major advocate of the common law.

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

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

The 1808 and 1825 Codes were both drafted in French and translated into English, after which they were published in both languages, both versions being official. The enabling statute of the 1808 Code⁹⁹ required consultation of both language versions in the event of ambiguity of any provision. The 1825 Code, on the other hand, was merely published in both French and English, without any provision in its enabling statute for resolving conflicts. Because the French text was the original, however, and because the translation was known to have errors, the French version came to be regarded as controlling.¹⁰⁰

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

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

⁹⁴ See YIANNOPOULOS, *supra* note 20 at 31; TATE, "The Splendid Mystery of the Civil Code of Louisiana" (1974), 3 *Louisiana Rev.* 1; PASCAL, "Sources of the Digest of 1808: A Reply to Professor Batiza" (1972), 46 *Tul. L. Rev.* 603.

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

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

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

⁹⁸ See, for example, *Flower v Griffith* 6 Mart. (N.S.) 89 (La. 1827) and *Reynolds v Swain* 13 La. 193 (La. 1839), cited by YIANNOPOULOS, *supra* note 20 at 34-35, ns. 17 and 20 respectively.

⁹⁹ La. Acts 1808, No. 29.

¹⁰⁰ YIANNOPOULOS, *supra* note 20 at 34.

A third Civil Code was promulgated in 1870,¹⁰¹ which changed the numbering of articles, but otherwise essentially re-enacted the 1825 Code, except for inserting amendments required to take account of the abolition of slavery after the American Civil War, as well as amendments and new laws enacted since 1825 which affected codal provisions. Although the 1870 Code was published only in English, it was the general view that the French texts of the articles of the 1825 Code which were unamended continued to be determinative in the event of ambiguity.¹⁰² A Compiled Edition of the three Codes was published in 1938.¹⁰³

Beginning in 1976, the Louisiana State Law Institute, now responsible for the Code, has secured the adoption by the Louisiana Legislature of various partial revisions.¹⁰⁴ Among the most important of these is the new Book IV on Conflict of Laws (Articles 3514-3549 c.c.) adopted in 1991.¹⁰⁵

8. Egypt

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

The accession to power of Mohammed Ali as ruler of Egypt in 1805 resulted in the increasing influence of European law, and particularly of French law, in the country. Beginning in 1856, a system of fourteen judicial councils was created to administer non-Moslem family law in Egypt (especially for the benefit of foreign residents). In 1875, a system of "mixed courts" was established, to administer the so-called "mixed codes", being different civil, commercial, penal and procedural codes governing relations between foreigners or between foreigners and Egyptians. These codes, notably the Civil Code of 1875, were modelled on the corresponding codes in force in France. In fact, the Egyptian government

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

¹⁰² YIANNPOULOS, *supra* note 20 at 35.

¹⁰³ For a new Compiled Edition of the Civil Codes of Louisiana, see 16 and 17 West's L.S.A. Civil Code (Dainow, ed., 1972).

¹⁰⁴ Among the parts of the Louisiana Civil Code revised piecemeal since 1976 are the provisions dealing with ownership, servitudes, building restrictions, boundaries, legitimate children, successions, obligations in general, contracts, matrimonial regimes, partnership, occupancy and possession, as well as prescription. See A.N. Yiannopoulos, ed., *Louisiana Civil Code*, 1986 Ed., West Publishing Co., St. Paul, Minn. (1986), xxvii-xxviii, and the different Louisiana statutes cited there.

¹⁰⁵ La. Act No. 923 (1991), in force 1 January 1992.

¹⁰⁶ A.O. SHERIF, "The Origins and Development of the Egyptian Judicial System", being Chapter 2 of K. Boyle / A.O. Sherif (eds.), *Human Rights and Democracy. The Role of the Supreme Constitutional Court of Egypt*, CIMEL Book Series No. 3, Kluwer Law International, London / The Hague / Boston (1996), 13-15.

would only adopt them after their approval by those foreign countries (principally Britain and France) which enjoyed a privileged status in Egypt.¹⁰⁷ In 1883, a system of "national courts" was set up to administer French-inspired national codes on the same subjects applicable to Egyptian citizens. Meanwhile, the *Sharia* courts continued to enforce Islamic *Sharia* law in respect of family matters among Moslems and Moslems married to non-Moslems. And different religious judicial councils applied their respective religious rules of family law among the non-Moslem Egyptian minorities, such as the Coptic Christians.

Not surprisingly, considerable confusion and jurisdictional conflict arose out of this complex legal and judicial structure, leading to demands for simplification and rationalisation. The mixed courts were abolished in 1949 and the *Sharia* courts and religious judicial councils in 1955, their jurisdiction being transferred to the national courts, which came to be known as "ordinary courts".¹⁰⁸ The old "mixed codes" were replaced by national codes of universal application to Egyptians and foreigners alike, notably the new Egyptian Civil Code of 1948 and the Egyptian Code of Civil Procedure of 1968, which continued to reflect French influence. Significantly, however, family law, although now administered in a unified judiciary, continued to be subject to the "personal law" of each of the principal religious groupings within the population, in accordance with the "Personal Status Law" of 1929.¹⁰⁹

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

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

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

Common law and civil law legal traditions share similar social objectives (individualism, liberalism and personal rights) and they have in fact been joined in one single family, the *Western law* family, because of this functional similarity.¹¹¹

¹⁰⁷ *Ibid.*, at 16-17.

¹⁰⁸ *Ibid.* at 17-18.

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

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

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

My analysis will therefore explore the sources, concepts and style of the two Western sources of law.¹¹²

1. *Order of priority : jurisprudence and doctrine*

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

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

2. *Doctrine : functions*

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

3. *Doctrine : style*

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

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

4. *Jurisprudence : function*

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

¹¹² DAVID / BRIERLEY, *supra* note 4 at 20 – "The law's conceptual structure ...".

¹¹³ DAVID / BRIERLEY, *supra* note 4 at 94.

5. Stare decisis

The English doctrine of *stare decisis* compels lower courts to follow decisions rendered in higher courts, hence establishing an order of priority of sources by “reason of authority”.¹¹⁴

Stare decisis is unknown to civil law, where judgments rendered by judges only enjoy the “authority of reason”.¹¹⁵

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

6. Jurisprudence : style

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

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

7. Statutes : functions

Although statutes have the same paramountcy in both legal traditions, they differ in their functions. Civil law codes provide the core of the law – general principles are systematically and exhaustively exposed in codes¹¹⁶ and particular statutes complete them. Finally follows the jurisprudence.

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

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

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

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

8. *Style of drafting of laws*¹¹⁷

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

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

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

Those styles can be found in international Conventions. The Hamburg Rules¹²¹ were drafted in a civilian style with the rule of responsibility in one sweeping article.¹²² The Hague Rules,¹²³ by comparison, were drafted in a common law fashion, with responsibility in three very long and detailed articles, being Article 3(1) on

¹¹⁷ See W. TETLEY, *Marine Cargo Claims*, 3 Ed., Les Editions Yvon Blais, Montreal (1988), 45-47.

¹¹⁸ See L.-P. PIGEON, *Rédaction et interprétation des lois*, Québec, 3 Ed., Gouvernement du Québec (1986), 19. Montesquieu, in his celebrated *De l'Esprit des Lois* (Book XXIX, Ch. 16), gives as his first and foremost admonishment on composing laws that: "The style ought to be concise." (*The Spirit of Laws*, A compendium of the First English Edition with an Introduction by D.W. CARRITHERS, University of California Press, Berkeley (1997), 376).

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

¹²⁰ See generally G.C. THORNTON, *Legislative Drafting*, 2 Ed., Butterworths, London (1979), 53 *et seq.*; *Bulmer v Bollinger*, [1974] 2 All E.R. 1226 at 1237 (C.A. *per* Lord Denning M.R.).

¹²¹ United Nations Convention on the Carriage of Goods by Sea, adopted at Hamburg, 31 March 1978, and in force 1 November 1992, commonly known as the "Hamburg Rules". For the official English text of the Hamburg Rules, see TETLEY, *supra* note 117, Appendix "A" at 1143-1165; see also *Unif. L. Rev.* 1978-I, 134.

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

¹²³ International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted at Brussels, 25 August 1924, commonly known as the "Hague Rules". For the official French text of the Hague Rules, see W. TETLEY, *supra* note 117, Appendix "A", at 1111-1120, with an English translation, *ibid.* at 1120-1129; see also *Unification du droit / Unification of Law* 1948, 488.

seaworthiness, Article 3(2) on care of cargo and Article 4(2)(a) to (q) on 17 exculpatory exceptions.¹²⁴

9. Interpretation of laws¹²⁵

In civil law jurisdictions, the first step in interpreting an ambiguous law, according to MAZEAUD,¹²⁶ is to discover the intention of the legislator by examining the legislation as a whole, including the "*travaux préparatoires*", as well as the provisions more immediately surrounding the obscure text.¹²⁷ In common law jurisdictions, by comparison, statutes are to be objectively constructed according to certain rules standing by themselves,¹²⁸ such as that an enactment must be read as a whole, and that special provisions will control general provisions, so as to meet the subjects' reasonable understandings and expectations.¹²⁹

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

10. The appointment of judges

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

11. Consequences – evolution of the law

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

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

¹²⁶ H. MAZEAUD, *Leçons de Droit Civil* (François Chabas, ed.), 11 Ed., Paris, Montchrestien (1996), t. 1, vol. 1, para. 110 at 172.

¹²⁷ See, for example, the Civil Code of Panama, Art. 9, which provides: "When the sense of a rule of law is clear its literal text cannot be disregarded with the pretext to consult its spirit. However, for the interpretation of an obscure expression of Law, the interpreter may refer to the intent or spirit that can be consulted through the Law or its history clearly manifested within the Law or in the genuine history of its creation." This provision was cited in *Phoenix Marine Inc. v China Ocean Shipping Co.*, [1999] 1 *Lloyd's Rep.* 682 at 686 (*per* Moore-Bick J.).

¹²⁸ Sir Courtney ILBERT, *Legislative Methods and Forms*, Clarendon Press, Oxford (1901), 250-251.

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

¹³⁰ Rousseau and Hobbes' theories are compared in Y. GUCHET, *La pensée politique*, Paris, Armand Colin (1992), 56-60.

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

12. Concept of the legal rule

"In countries of the Romano-Germanic family, ... in which doctrinal writing is held in high esteem, the legal rule is not considered as merely a rule appropriate to the solution of a concrete case. Through the systematising efforts of the doctrinal authors, the legal rule has risen to a higher level of abstraction: it is viewed as a rule of conduct, endowed with a certain generality, and situated above the specific application which courts or practitioners may make of it in any concrete case ... In the eyes of an Englishman, the French *règle de droit* is situated at the level of a *legal principle (principe juridique)*; to him it appears to be more a moral precept than a truly 'legal' rule."¹³³

The English *legal rule* is situated at the level of the case for which – and for which alone – it has in fact been found and enunciated in order to ground a decision. The English legal rule [...], in the eyes of a French jurist, is situated at the level of a particular *judicial application* made of the rule; it is easy enough for him to understand but to him such a concept gives English law a case-by-case and therefore an organisationally unsatisfactory character."¹³⁴

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

¹³¹ DAVID / BRIERLEY, *supra* note 4, para. 74 at 101.

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

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

¹³⁴ DAVID / BRIERLEY, *supra* note 4, para. 320 at 358, 359.

¹³⁵ *Ibid.*, para. 322 at 360-361.

¹³⁶ *Ibid.*

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

13. *Categories of laws*

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

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

14. *Rights versus remedies*

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

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

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

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¹³⁷ *Ibid.*, para. 325 at 364-365.

¹³⁸ *Ibid.*, para. 60 at 81.

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

¹⁴⁰ See W.W. BUCKLAND / A.D. McNAIR, *Roman Law and Common Law: A Comparison in Outline* (F.H. Lawson, ed.), 2 Ed. rev., Cambridge, Cambridge U.P. (1952), 399.

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

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

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