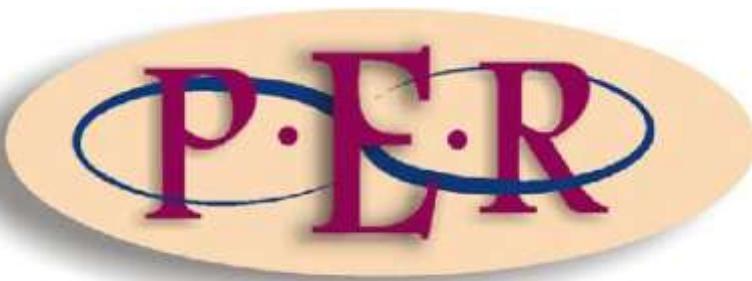


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**MIXED AND MIXING SYSTEMS WORLDWIDE: A PREFACE**

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## MIXED AND MIXING SYSTEMS WORLDWIDE: A PREFACE

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This issue of the *Potchefstroom Electronic Law Journal* (South Africa) sees the publication of a selection of articles derived from the Third International Congress of the *World Society of Mixed Jurisdiction Jurists* (WSMJJ). That Congress was held at the Hebrew University of Jerusalem, Israel in the summer of 2011. It reflected a thriving Society consolidating its core scholarship on classical mixed jurisdictions (Israel, Louisiana, the Philippines, Puerto Rico, Quebec, Scotland, and South Africa) while reaching to new horizons (including Cyprus, Hong Kong and Macau, Malta, Nepal, etc). This publication reflects in microcosm the complexity of contemporary scholarship on mixed and plural legal systems. This complexity is, of course, well-understood by South African jurists whose system is derived both from the dominant European traditions as well as from African customary systems, including both those that make up part of the official law of the state as well as those non-state norms that continue to be important in the daily lives of many South Africans.

This brief introduction provides a short overview of the WSMJJ, its three congresses, and the resulting publications.

Neither hybrid legal orders nor scholarship exploring such orders is entirely new. Both Western and non-Western legal traditions are deeply plural or mixed, though this is frequently obscured by the rise of the modern state and common national laws. The modern systems designated as "mixed" reflect these crucial changes, especially across the nineteenth century. As a result, jurists within mixed traditions have discussed their systems intermittently for well over a century. But this mixed scholarship was frequently anecdotal and too often limited to internal debates, both the often self-congratulatory bromides of those who viewed their tradition as special or the attacks of outside scholars who lacked a clear understanding of the complex questions involved. This led, all too frequently, to inter-fraternal disputes about the

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true nature of the jurisdiction, whatever that means. To be fair, there was also solid scholarship that took seriously the bi-jural or multi-jural nature of both Western and non-Western hybrids. Most notable was the pioneering work of Esin Örücü, who sought to encourage both high-level thinking about the nuances of mixity and the necessity of studying more exotic hybrids.<sup>1</sup>

An important turning point in scholarship on mixed systems occurred when, just over a decade ago, Vernon Palmer (Tulane University (US)) published *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001).<sup>2</sup> There, he argued that a number of "classical mixed jurisdictions" combining Anglo-American and continental law were so alike that they might be considered a "third legal family". While there were dissenters, *Mixed Jurisdictions Worldwide* galvanised scholarship on mixed systems, especially for jurists in those jurisdictions included in Palmer's "third legal family".<sup>3</sup> Through the efforts of Palmer and his allies, the WSMJJ was subsequently formed in November 2002.<sup>4</sup> Palmer was elected its President. The founders dedicated the association to comparative and international research, collaboration, and meetings. They sought to bring together jurists from otherwise isolated mixed jurisdictions that, because of numerous parallel developments, understood "one another very easily and do not feel alien in each other's legal culture."<sup>5</sup>

The First World Congress of the WSMJJ was held in New Orleans, Louisiana at Tulane University. My native state, Louisiana is a member of the "third legal family", a hybrid of private law French and Spanish in origin combined with criminal and public law of Anglo-American stock. That first Congress was positively received and well-supported by the Tulane Law School's *Eason-Weinmann Center of Comparative Law*, the *American Society of Comparative Law*, the *International Academy of Comparative Law*, the *International Association of Legal Science* and numerous law faculties across the classical mixed jurisdictions. Papers from it, focusing on both these classical systems and more exotic hybrids, were made available in (2003) 78 *Tulane Law Review*. The depth and quality of these articles - by Patrick Glenn, Hein

1 See especially Örücü, Attwooll and Coyle (eds) *Studies in Legal Systems*.

2 Palmer *Mixed Jurisdictions Worldwide*. A second edition, including reports on Botswana and Malta and a special report on Cameroon, has been published this year (2012).

3 See the special issue of *Electronic Journal of Comparative Law*, EJCL 2001 [www.ejcl.org](http://www.ejcl.org).

4 See WSMJJ 2002 [www.mixedjurisdiction.org](http://www.mixedjurisdiction.org)

5 Palmer 2003 *Tulane Law Review*.

Kötz, Örücü, Palmer, Kenneth GC Reid, and Symeon C Symeonides - set a high bar for future collections and have been invaluable for mixed and comparative scholarship over the last decade.

Indeed, the creation of the WSMJJ had important practical effects, especially in the "third legal family". There, a much more engaged collaboration developed. A number of books were published, several of which were rooted in targeted cooperation across two specific mixed systems, including Louisiana, Scotland, and South Africa.<sup>6</sup> Articles on the subject proliferated. More generally, the experiences of mixed systems, especially Anglo-American and continental hybrids, became part of wider debates on the future of European law.<sup>7</sup> Jan Smits, whose *The Making of European Private Law: Towards a *Ius Commune Europaeum* as a Mixed Legal System* (2002) coincided with the development of the WSMJJ, seemed to suggest that Europeans could learn much from the experience of mixed jurisdictions.<sup>8</sup> And as Palmer noted, with the publication of articles generated by the Second World Congress of the WSMJJ, "mixed jurisdictions [had] moved center stage as paradigms for comparative study."<sup>9</sup> That Congress was held at the University of Edinburgh, Scotland in 2007. Publication of Congress materials was expanded, this time in numerous journals across four jurisdictions. These included the (2008) 3 *Journal of Comparative Law* (UK), the (2008) 19 *Stellenbosch Law Review* (South Africa), and the (2009) 25 *Tulane European and Civil Law Forum* (Louisiana).<sup>10</sup> Indeed, these articles, and a handful of others from the Congress, were collected and published in the (2008) 12 *Electronic Journal of Comparative Law* (the Netherlands).<sup>11</sup>

Both the Congress and the related publications showed continuing momentum on scholarship focusing on the "third legal family" and a clearer, if somewhat cautious engagement with more exotic hybrids and "legal pluralism", the focus - rooted in the social sciences - on non-state normative systems in addition to the "official law" of

6 Zimmermann, Visser and Reid (eds) *Mixed Legal Systems* and Palmer and Reid (eds) *Mixed Jurisdictions Compared*.

7 See Du Plessis 2005 [www.ejcl.org](http://www.ejcl.org). See also Du Plessis "Comparative Law".

8 Smits *Making of European Private Law*.

9 Palmer 2008 [www.ejcl.org](http://www.ejcl.org).

10 Örücü subsequently edited another collection, *Mixed Legal Systems at New Frontiers* (2010), based on the material published in the (2008) 3 *Journal of Comparative Law*. See Örücü 2008 *Journal of Comparative Law* 1 and Örücü "Mixed Legal Systems".

11 These are available at WSMJJ 2007 [www.ejcl.org](http://www.ejcl.org).

the state.<sup>12</sup> Indeed, while the WSMJJ and its members continued to produce first-rate scholarship on classical mixed jurisdictions, the Society and its members also began to more directly engage with non-Western hybrids. For example, a joint colloquium on "Mixed Jurisdictions as Models? Perspectives from Southern Africa and Beyond" was held at the University of Stellenbosch in May of 2009. Co-sponsored again with the *International Association of Legal Science*, those essays revealed an interest in systems beyond the "third legal family". Indeed, it was noted that mixed systems "are the most prevalent type of legal system in the world today" and "they may be considered the wave of the future".<sup>13</sup>

The theme of the 2011 Congress was "Methodology and Innovation in Mixed Legal Systems". The event was again well-attended and featured a variety of jurists from mixed and plural jurisdictions and, reflecting the growing importance of these jurisdictions, a large number of other comparatists. Excluding the host nation, South Africans made up the largest contingent of foreign jurists; the North-West University in Potchefstroom provided the largest group of attendees from any one institution. The WSMJJ again chose to publish articles derived from the Congress, this time enlisting the (2012) 7 *Journal of Comparative Law* (UK), the (2012) 72 *Loyola Law Review* (Louisiana, US), and the (2012) 57 *McGill Law Journal* (Quebec, Canada). The *Potchefstroom Electronic Law Journal* (South Africa) was also asked to participate. An additional article, my own, also appeared by prior arrangement in the (2011) 4 *Journal of Civil Law Studies* 355. All of these will again be collected and re-published in the *Electronic Journal of Comparative Law* later this year.

In this volume the participating authors explore the complexity of contemporary scholarship on mixed and plural legal systems, both in the "third legal family" and beyond. Antonios Platsas and Haim Sandberg each investigate aspects of the Israeli tradition. Platsas provides a general overview of what he calls "the enigmatic but unique nature of the Israeli legal system", while Sandberg looks at Israeli constitutional review. Biagio Andò discusses Malta, a system closely related to the

12 Indeed, a spin-off of the WSMJJ, *Juris Diversitas* (Juris Diversitas Date Unknown [jurisdiversitas.blogspot.ie](http://jurisdiversitas.blogspot.ie)) also seeks a more direct engagement with legal and normative hybridities, including multi-disciplinary collaboration. Conferences (2009-2012) and publications, including Cashin-Ritaine, Donlan and Sychold (eds) *Comparative Law and Juris Diversitas 2011 Journal of Civil Law Studies*. *Juris Diversitas* remains closely allied to the WSMJJ.

13 Palmer 2010 *Tulane European and Civil Law Forum* i.

classical mixed system, but until recently largely overlooked by mixed scholarship.<sup>14</sup> Lukas Heckendorf Urscheler goes still further afield to explore Nepal's hybrid system. Finally, the two South African selections show how fertile the study of its legal system is. Flip Schutte looks at South African property law. Gerrit Pienaar looks beyond the two Western traditions to customary law; in particular, to land tenure. All of the articles reflect a thriving, flowering subject that is no longer the merely internal focus of isolated and ignored jurisdictions, but research of obvious import far beyond explicitly mixed systems, to comparative law, legal history, and legal theory.

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14 See, eg, Donlan, Andò and Zammit 2012 *Tulane European and Civil Law Forum*. A report by Andó, Aquilina, Scerri-Diacono and Zammit has also been included in Palmer's *Mixed Jurisdictions Worldwide* (Andó *et al* "Malta").

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### **List of abbreviations**

EJCL      Electronic Journal of Comparative Law

WSMJJ      World Society of Mixed Jurisdiction Jurists