



## Mixed Jurisdictions: Lessons for European Harmonisation?

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### 1. Introduction

There are several reasons for the renewed interest in mixed jurisdictions.<sup>1</sup> Apart from the general academic climate, becoming more and more favourable towards comparative law,<sup>2</sup> and the interest of jurists in the mixed systems themselves,<sup>3</sup> mixed jurisdictions are often said to offer an example for the future European harmonisation of private law. The idea itself seems appealing enough: if a new private law for the European Union is to come about, it will necessarily have to be a mixture of both the civil law and the common law tradition and therefore it may be useful to look at the experience of mixed jurisdictions such as Scotland, South Africa, Quebec and Louisiana. I have embraced this general idea in my previous writings.<sup>4</sup> In this contribution the thesis is discussed again, but now with a special focus on the specific *lessons* we may learn in Europe from the experience of mixed jurisdictions.

After a short discussion of the standard view of the experiences mixed systems have to offer the European Union (section 2), this article identifies the specific framework in which the experience of mixed systems is useful for the European harmonisation process (section 3). Subsequently, the main part of this article can consist of a discussion of three debated aspects of this experience (sections 4-6).

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<sup>1</sup> For an elaborate overview of this renewed interest and the reasons for it: Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, Tulane LR 78 (2003), 5, 17 ff. Also see Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in: Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, p. 477 ff.

<sup>2</sup> Instead of many: see the interest in mixed systems expressed in Matthias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, Jan Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham 2006 and Esin Örüci and David Nelken (eds.), *Comparative Law: A Handbook*, Oxford 2007.

<sup>3</sup> Cf. e.g. Vernon V. Palmer (ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2001 and Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds.), *Mixed Legal Systems in Comparative Perspective*, Oxford 2004.

<sup>4</sup> See e.g. Jan Smits, *The Making of European Private Law*, Antwerpen-Oxford 2002; id., *Introduction: Mixed Legal Systems and European Private Law*, in: Jan Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law*, Antwerpen-Oxford 2001, p. 1 ff.

## 2. The Standard View

The idea of mixed jurisdictions as models for a future European private law is not new. Already in 1924, the French comparative lawyer Lévy-Ullmann noted that ‘Scots law gives us a picture of what will be some day (...) the law of the civilised nations, namely a combination between the Anglo-Saxon and the continental system.’<sup>5</sup> It is no surprise that, with the present efforts to create a more common private law for the European Union, this idea has found new grounds among comparative lawyers.<sup>6</sup> If a possible connection between the civil law and common law is already established in mixed systems, these systems may provide a ‘wealth of experience’<sup>7</sup> of how these two legal traditions may be accommodated in the framework of the European Union.

There is a good reason why this traditional view of looking at mixed systems has gained so much interest. It is that the view is usually put in such general terms that it is difficult *not* to agree with it: the way this view is usually formulated, still leaves open what type of experience one can draw from in looking at mixed jurisdictions. Is it that the legal method used by mixed jurisdictions jurists is superior to that of jurists in either civil law or common law countries? Is it the substantive law that may offer fruitful insights? Or is it more the *negative* experience of mixed systems we can learn from in Europe? The latter may be the right conclusion if one focuses on what the process of ‘critical picking and choosing’<sup>8</sup> from both legal traditions led to in some areas of Scots and South-African law. In particular among Scots lawyers, it is debated whether Scots law is not more of a muddle than an optimal mix of the best ingredients of the two great legal traditions.<sup>9</sup>

This open-endedness of the idea of mixed systems as a model for Europe makes it an attractive view for several strands of thought in the debate about European harmonisation of private law. Those who are in favour of a top-down approach by way of enacting a European Civil Code can for example point at similarities in substance between several sets of principles of private law (or even the future Common Frame of Reference as envisaged by the European Commission<sup>10</sup>). Apparently, the drafters of some of these instruments were partly inspired by Scots law.<sup>11</sup> But the idea also appeals to those who favour a bottom up approach towards legal harmonisation: they can point at the importance of a legal system growing in an organic way, as Scots and South African law have done to a large extent in the past. It will

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<sup>5</sup> Henri Lévy-Ullmann, *The Law of Scotland*, *Juridical Review* 37 (1925), p. 390. Cf. Hector L. MacQueen, *Scots Law and the Road to the New Ius Commune*, *Ius Commune Lectures on European Private Law* 1, Maastricht 2000, p. 2.

<sup>6</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., Oxford 1998, p. 204; MacQueen, o.c.

<sup>7</sup> Kenneth Reid and Reinhard Zimmermann, *The Development of Legal Doctrine in a Mixed System*, in: Reid and Zimmermann (eds.), *A History of Private Law in Scotland*, Oxford 2000, Vol. 1, p. 3.

<sup>8</sup> Lord Cooper of Culross, *The Importance of Comparative Law in Scotland*, in: id., *Selected Papers 1922-1954*, Edinburgh 1957, p. 145.

<sup>9</sup> Cf. Alan Rodger, *Thinking about Scots Law*, *Edinburgh Law Review* 1 (1996), p. 3; Niall Whitty, *The civilian tradition and debates on Scots law*, *Tydskrif vir die Suid-Afrikaanse Reg* 1996, p. 227 and 442 and in particular Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, *Law Quarterly Review* 114 (1998), p. 228 ff.

<sup>10</sup> See Communication from the Commission to the European Parliament and the Council, *A More Coherent Contract Law – An Action Plan*, COM (2003) 68 final, OJ EC 2003, C 63/01.

<sup>11</sup> See for such similarities MacQueen, o.c. In particular the PECL (O. Lando and H. Beale (eds.), *Principles of European Contract Law*, Parts I and II, The Hague 2000; O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.), *Principles of European Contract Law*, Part III, The Hague 2003) and the PETL (D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen (eds.), *Principles of European Trust Law*, The Hague 1999) were inspired by Scots law.

become clear in the next section of this article that this bottom up perspective fits in best with attaching importance to the experiences of mixed jurisdictions.

The above should make us realise that when we try to draw lessons from the development of mixed systems, we are to turn away from generalities and ask in more detail what we can learn *exactly* from the experiences of mixed systems. This, however, does suggest a specific view of the harmonisation process. This view is set out in the next section.

### **3. European Harmonisation: Where does the Experience of Mixed Systems Fit in?**

There is no lack of opinions on how to establish a more uniform private law for the European Union.<sup>12</sup> It is clear that not all of these take the same stance towards the experience to be drawn from mixed jurisdictions. If one does not believe in the feasibility of European legal convergence or disputes the unifying effect of legal transplants,<sup>13</sup> one considers things differently than if one thinks highly of centralist European intervention to protect the weaker party in the European marketplace.<sup>14</sup> Also the drafting of coherent sets of European principles<sup>15</sup> seems to be at odds with attaching importance to the organic legal development mixed jurisdictions are known for.

The view of European harmonisation most compatible with attaching importance to the experience of mixed systems seems to be the one that takes jurisdictional competition as a starting point. In the original version of jurisdictional competition as put forward by the American author Charles Tiebout,<sup>16</sup> each jurisdiction is governed by the preferences of its citizens. As preferences among citizens may differ, competition among several jurisdictions is likely to emerge: consumers and firms will leave the jurisdiction they dislike ('vote with their feet') in favour of the jurisdiction they find more attractive. This means that national governments are stimulated to make their jurisdiction as attractive as possible.

Jurisdictional competition is said to have two advantages over centralist lawmaking. First, it allows experiment: looking at other countries' solutions to legal problems shows whether or not these solutions function in any way. In this respect States can indeed be seen as 'experimenting laboratories'.<sup>17</sup> It is likely that these types of experiment will lead to innovation: countries that see how certain legal rules and solutions are successful abroad will be tempted to adopt these for their own citizens. Second, jurisdictional competition allows the satisfaction of diverging preferences. Centralist lawmaking would reduce this. But unlike it is the case in the original Tiebout thesis, jurisdictional competition need not take the form of

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<sup>12</sup> For a short overview: Jan Smits, *Convergence of Private Law in Europe: Towards a New Ius Commune*, in: Esin Öricü and David Nelken (eds.), *Comparative Law: a Handbook*, Oxford 2007, p. 219 ff.

<sup>13</sup> Pierre Legrand, *The Impossibility of Legal Transplants*, *Maastricht Journal of European and Comparative Law* 4 (1997), p. 111 ff.

<sup>14</sup> Ugo Mattei, *Hard Code Now! A Critique and a Plea for Responsibility in the European Debate over Codification*, in: id., *The European Codification Process: Cut and Paste*, The Hague 2003, p. 107 ff.

<sup>15</sup> Study Group on a European Civil Code, *Principles of European Law*, Munich 2006-.

<sup>16</sup> Charles Tiebout, *A Pure Theory of Local Expenditures*, *J. of Political Economy* 64 (1956), p. 416 ff. Also see Anthony Ogus, *Competition between national legal systems: a contribution of economic analysis to comparative law*, *International and Comparative Law Quarterly* 48 (1999), p. 405 ff. and Gerhard Wagner, *The Virtues of Diversity in European Private Law*, in: Jan Smits (ed.), *The Need for a European Contract Law*, Groningen 2005, p. 5 ff.

<sup>17</sup> L. Brandeis, in: *New State Ice Co. v. Liebmann*, 285 U.S. 262: 'To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' Cf. Friedrich A. Hayek, *Der Wettbewerb als Entdeckungsverfahren*, *Kieler Vorträge N.S.* 56, Kiel 1968.

people actually moving *physically* to another jurisdiction. Competition among legal systems can also take place in a less expensive way, namely by a *choice of law* for a specific jurisdiction (like English law or the law of the state of Delaware). In contract and company law, this choice of law can usually<sup>18</sup> be made by the parties. And in so far as national legislators or courts decide to take over law of foreign origin – as happened on a large scale in mixed systems – this also fits in with the Tiebout thesis: the preferences satisfied are then simply those of the national legislators, courts and other ‘Rechtshonoratioren.’<sup>19</sup>

There is still one other aspect in which the theory of Tiebout should be amended to fit the experience of the mixed jurisdictions. Both in the original Tiebout thesis and in the variant in which not so much the citizens as the law itself moves, it is the *entire* legal system that is chosen as the relevant law. But it is paradigmatic for mixed systems that they take over only *parts* of the law existing elsewhere, subsequently adapting these parts to their own needs. Typically, areas like procedural law and trust law are taken from the common law tradition, whereas others (like property law) are more based on the civil law. This important characteristic of mixed jurisdictions is formulated well by Derek van der Merwe:<sup>20</sup>

the legal practitioner in a “mixed” (or “hybrid”) legal system is an instinctive eclectic: he or she will seek authority in the grand manner, the process of distilling legal wisdom largely uninhibited by rigid doctrinal boundaries. Such a state of mind is conducive to an unfussy flexibility in the application of the law.

In my view, the theoretical framework of jurisdictional competition explains best the development of mixed jurisdictions. I am also a fierce proponent of the idea that the private law of the European Union should develop along the same lines.<sup>21</sup> Here it is that we can learn from mixed systems: they offer experience on how courts and legislators are able to make use of materials of both the civil and the common law tradition.<sup>22</sup> At the same time, we should not forget that this selection process – how to make the right choices out of a plurality of different sources – is not unproblematic. In the following, three different problems are discussed.

#### **4. How to Find the ‘Best’ Rules?**

One of the most problematic aspects of lawmaking in mixed jurisdictions is that the supposedly superior way of creating a legal system – by critically picking and choosing the ‘best rules’ from a plurality of sources – is not properly applied in practice. Both Scots and South-African law are examples of where sometimes the wrong choices were made by the courts, thus posing a threat to the quality of these legal systems.<sup>23</sup>

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<sup>18</sup> In the European Union within the limits set by the Convention on the law applicable to contractual obligations (Rome 1980), OJ EC 1998, C 27/34 and by the Centros case (ECJ 9 March 1999, Case C-212/97, ECR 1999-I, 1459).

<sup>19</sup> Cf. Max Rheinstein, *Die Rechtshonoratioren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen*, *Rabels Zeitschrift* 1970, p. 1 ff.

<sup>20</sup> Derek van der Merwe, *Property in Mixed Legal Systems: South Africa*, in: Gerrit van Maanen and André van der Walt (eds.), *Property Law on the Threshold of the 21<sup>st</sup> Century*, Antwerpen 1996, p. 356 ff.

<sup>21</sup> Jan M. Smits, *European private law: a plea for a spontaneous legal order*, in: Deirdre M. Curtin, Jan M. Smits et al, *European Integration and Law*, Antwerpen-Oxford 2006, p. 55 ff.

<sup>22</sup> Also see Reid, o.c., p. 26: the experience lies not so much in new substantive law, but in lessons for ‘selection, combination, and rationalization of existing rules drawn from a variety of sources.’

<sup>23</sup> Cf. Alan Rodger, *The Use of the Civil Law in Scottish Courts*, in: David Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997, p. 225. Also see Jacques du Plessis,

The main reason for this problem seems to be that mixed systems often show a bias towards one legal tradition or the other. Both in Scotland and South Africa, there have been strong ‘purist’ tendencies to preserve and reinforce the civil law element at the expense of common law influence.<sup>24</sup> One well-known example from South-African law is the case *Regal v. African Superslate (Pty.) Ltd.*,<sup>25</sup> in which the Appellate Division of the Supreme Court replaced the doctrine of nuisance (that had been well-established for over 80 years) by the fragmentary Roman-Dutch law on rights of neighbours. In doing so, the court considered it a pity that there were so few rules in the relevant Roman-Dutch law, but that they would then simply have to be developed. But also the opposite happened: in some areas of Scots law (notably in the law on unjust enrichment<sup>26</sup>), there was common law influence precisely because little was known about the civil law approach: with better access to civil law materials, the law would probably have looked different.

Can we draw any lessons from this for the European harmonisation process? One lesson seems to be that any bias towards one legal system or the other should be avoided. At the same time, we should submit that this is not unproblematic within the European Union. Unlike it is the case in mixed systems, there is no natural tendency among national courts and legislators in Europe to look abroad for comparative inspiration, even though this has improved over the last decade.<sup>27</sup> One cannot really blame the national institutions for this: the necessary prerequisite for better comparatively informed national judiciaries and legislators is the emergence of a transnational academic dialogue.<sup>28</sup> This dialogue has not developed yet but as soon as it has, substantive arguments in favour and against certain outcomes will be similar across the European Union. This does not mean national legislation or outcomes of concrete cases will be the same: when it comes to weighing the relevant arguments, every legal system has to make its own choice. In the *McFarlane* case, Lord Steyn put it like this: ‘The discipline of comparative law does not aim at a poll of solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations.’<sup>29</sup>

## 5. How to Keep the Law Coherent?

A second problem related to lawmaking in mixed jurisdictions, is how to keep the law coherent. When choosing from different sources – as mixed jurisdictions have done in the past extensively – a lack of coordination in selecting the proper rules may cause the law to become incoherent. Any legal system is in need of some mechanism by which the law is made coherent. In civil law systems, both the national legislator and legal science have a key role in ensuring this coherence, whereas in the common law this is mainly reached by the

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The Promises and Pitfalls of Mixed Legal Systems: the South African and Scottish Experiences, *Stellenbosch Law Review* 9 (1998), p. 338.

<sup>24</sup> See in more detail Smits, *The Making of European Private Law*, o.c., p. 125 ff.

<sup>25</sup> 1963 1 SA 102 (AD).

<sup>26</sup> Evans-Jones, o.c., p. 236 ff.

<sup>27</sup> See in more detail Jan M. Smits, *Comparative Law and Its Influence on National Legal Systems*, in: Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, p. 513 ff.

<sup>28</sup> Cf. Reinhard Zimmermann, *The Civil Law in European Codes*, in: D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997, p. 293: ‘the essential prerequisite for a truly European private law would appear to be the emergence of an “organically progressive” legal science, which would have to transcend the national boundaries and to revitalize a common tradition.’ Also see H. Patrick Glenn, *Mixing It Up*, *Tulane LR* 78 (2003), p. 79 ff.

<sup>29</sup> *McFarlane v. Tayside Health Board*, 2000 SC (HL) 15 per Lord Steyn.

system of precedent. Mixed systems have sometimes fallen pray to a lack of such coordination in their formative stage. Thus, in South-African law and Scots law, the exact place of *stare decisis* and the role of academia was for a long time not that clear.<sup>30</sup>

At the same time, this problem of coherence should not be exaggerated. In the law of obligations, the civil law and common law approaches often do not contradict but rather supplement each other. The South-African law of delict is a wonderful example of this: it accepts the general liability for wrongful acts in delict, while at the same time it recognises the importance of identifying specific manifestations of delictual behaviour. The generalising civil law approach thus goes hand in hand with the simultaneous recognition of specific torts as we know it from the common law.<sup>31</sup> Such co-existence can also be found in the field of contract law and in the field of trusts and covenants. Acceptance of truly alien elements is far more exceptional. One recent example is the Scots case of *Sharp v. Thomson*,<sup>32</sup> in which the House of Lords imported a common law idea into the essentially Romanist system of Scots property law.

Also at the European level, the problem of incoherence resulting from consulting different sources should not be overstated. A transnational legal debate does not mean that rules from one jurisdiction are simply imported into another one. Instead, the debate should take place at the level of *arguments*. The only convergence of private law that is useful, does not consist in a search for uniform rules or outcomes, but in identifying common sets of arguments to be weighed in different ways in the various national jurisdictions.<sup>33</sup> This fits in well with the experience of the ‘real’ common law: English common law, as it spread out over the world, is a good example of this type of argumentative community. When deciding a case, common law courts tend to look at the arguments used by their foreign colleagues, but this does not mean that the rules or outcomes are the same everywhere. Thus, in the New Zealand case of *Invercargill City Council v. Hamlin*<sup>34</sup> (a negligence case), the Privy Council denied that there was only *one* common law. Lord Lloyd of Berwick held that ‘the ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths’.<sup>35</sup> It led the court to apply a concept of negligence in New Zealand that was essentially different from the one in England. What is important here is that these varying views are based on a different weighing of similar arguments.

This does of course not mean that there is no need for any coordination at all if one adheres to a harmonisation process from the bottom up. In areas of the law where coherence is unlikely to result from the activities of courts and academia alone – like in parts of property and insolvency law – some coordination by the legislator is certainly needed: spontaneous orders have their limits.<sup>36</sup> But legislative activity need not take the form of classic statutory

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<sup>30</sup> Cf. Daniel Visser, who mentions a constant ‘concern for coherence’ in South-African law: Visser, *Placing the Civilian Influence in Scotland: A Roman-Dutch Perspective*, in: David Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997, p. 49.

<sup>31</sup> See e.g. Johann Neethling, *Tort Law in South Africa: The Mixing of the General and the Particular*, in: Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law*, o.c., p. 81 ff.

<sup>32</sup> 1997 SC (HL) 66. Cf. Kenneth Reid, *Property Law: Sources and Doctrine*, in: Kenneth Reid and Reinhard Zimmermann (eds.), *A History of Private Law in Scotland*, Vol. 2, Oxford 2000, p. 196.

<sup>33</sup> This is elaborated in Jan M. Smits, *Contract Law in the European Union: Convergence or Not?*, in: *Proceedings of the 4<sup>th</sup> European Jurists’ Forum*, Vienna 2008 (forthcoming).

<sup>34</sup> *Invercargill City Council v. Hamlin*, [1996] 2 W.L.R. 367.

<sup>35</sup> *Invercargill City Council v. Hamlin*, [1996] 2 W.L.R. 367, 376 per Lord Lloyd.

<sup>36</sup> Cf. Arndt J. Kanning, *The Emergence of a European Private Law: Lessons From 19<sup>th</sup> Century Germany*, *Oxford Journal of Legal Studies* 27 (2007), p. 193 ff.

intervention. One alternative is to draft optional sets of (internally coherent) rules that exist next to the national codes.<sup>37</sup>

## 6. How to Ensure a Continuous Comparative Inspiration?

One of the things that surprises any outsider to the debate about mixed jurisdictions is the lack of consensus on how to define such a jurisdiction. There is no generally accepted criterion by which to decide what constitutes a mixed system.<sup>38</sup> Thus, it is not clear what the degree of mixture should be, whether this mixture should concern only substantive law or also methodology, how the mixture is structured,<sup>39</sup> or how long the mixture must have been there. It is equally uncertain whether the qualification of a mixed system mainly concerns the way the jurisdiction was formed in the past or also applies to certain contemporary characteristics of that system. In my view, the latter question refers to one of the most important debates: can we still speak of a mixed jurisdiction if it is no longer open to the influences of both the civil law and the common law tradition? Such a legal system has become autonomous and one no longer needs to look abroad for inspiration. But the mere fact there is no *need* for it, does not mean it is not *useful* to do so. In my view, the definition of a mixed jurisdiction is therefore decided primarily by the *process* that jurisdiction makes use of in making and applying the law. If this process is led by the *continuous* desire to look for comparative inspiration, resulting in a jurisdiction that effectively consists of elements of both the civil and the common law, we can speak of a mixed jurisdiction.

The history of most mixed jurisdictions shows that the more autonomous the jurisdiction becomes, the less courts and the legislators look abroad.<sup>40</sup> This is unfortunate. If one adopts my view of what forms the core of a mixed system, it even means such a jurisdiction is no longer mixed. The way to prevent this process from taking place is to allow the competition between the various legal traditions to be continuous. As William Tetley explained before,<sup>41</sup> the long time survival of a mixed system is contingent upon the presence of at least two different cultures or even languages within the relevant jurisdiction. Only if the importance of *both* traditions ('two "nations" in a single State'<sup>42</sup>) is emphasised, the mixed system will flourish. This finding is in line with the fact that Scots law blossomed up again with the Act of Union of 1707, in which the civil law was protected. The same is true for South Africa, where civil law was on the rise again after the creation of the Union of South Africa in 1910. There is no need to explain that this phenomenon fits in well with the theoretical framework of jurisdictional competition.

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<sup>37</sup> See the suggestion to introduce an optional code in the field of contract law: Communication from the Commission to the European Parliament and the Council, A More Coherent Contract Law – An Action Plan, COM (2003) 68 final, OJ EC 2003, C 63/01.

<sup>38</sup> See on this debate e.g. Esin Örüci, Elspeth Attwool and Sean Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague 1996 and Du Plessis, o.c., p. 478 ff.

<sup>39</sup> T.B. Smith, for instance, uses a narrow definition of a mixed legal system, namely one in which the 'civilian or Romanistic foundations have been overlaid by Anglo-American jurisprudence'. See T.B. Smith, *Studies Critical and Comparative*, Edinburgh 1962, p. ix.

<sup>40</sup> Cf. Claire McDiarmid, *Scots law: the turning of the tide*, *Juridical Review* 1999, p. 156 ff.; Hector L. MacQueen, *Mixing it? Comparative Law in the Scottish Courts*, *European Review of Private Law* 6 (2003), p. 735 ff. For South Africa, see Reinhard Zimmermann, *Roman Law in a Mixed Legal System*, in: Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, Edinburgh 1995, p. 55 ff.

<sup>41</sup> William Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language*, *Tulane LR* 78 (2003), p. 175 ff. Also see Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, *Tulane LR* 78 (2003), p. 151 ff.

<sup>42</sup> Tetley, o.c., p. 190.

What lessons to draw from this for the European harmonisation process? The experience of mixed jurisdictions confirms the importance of separate jurisdictions claiming to be attractive suppliers of law on the European market: the advantages of a mixed system are exploited most if there is a permanent competition among rules of several origins. The requirements William Tetley<sup>43</sup> defines for a mixed system to be successful are all fulfilled at the European level: next to the existence of various (legal) cultures and languages, Tetley explains that also the co-existence of several legislatures and court systems within the jurisdiction helps to promote and preserve its mixed character. In addition, it is important that legal education reflects the various legal traditions. The present political structure of the European Union guarantees all these requirements can be fulfilled, although there remains the practical problem of ensuring there is enough information available about other jurisdictions. Again, the only possible way to deal with this information problem is to promote a European legal debate.

## 7. Conclusion

This contribution did not seek to draw lessons from the *substantive* private law of mixed jurisdictions for future European developments.<sup>44</sup> Instead, its focus was on what lessons can be drawn from how mixed systems develop as successful or unsuccessful mixes of civil law and common law. The core of the view expressed in the above is that a mixed jurisdiction should be constantly looking for what are the ‘best’ rules and institutions and should not be led by any ‘nationalist’ considerations in doing so. To me, there is no doubt that the future of private law in the European Union also lies in this process of finding comparative inspiration in arguments used elsewhere. In this respect, the new *ius commune* will always be in the making: it is much more a continuous process than an end product in which national legal systems have been replaced by some harmonising instrument. Just as mixed systems may benefit from the powerful defence of both the civil law and the common law tradition, Europe can benefit from the vast experience of individual member states on how to make and apply the law.

It seems appropriate to end with a quote by the famous T.B. Smith. When in the 1960’s Lord Denning called for English and Scots law to become one,<sup>45</sup> Smith replied as follows: ‘You honour me with your proposal, Sir, but I will not marry you. We have much in common, but perhaps not as much as you think. We should remain friends and share ideas (...).’<sup>46</sup> Let this view also be the right one for the European Union.

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<sup>43</sup> Tetley, o.c., p. 186 ff.

<sup>44</sup> Cf. Hein Kötz, *The Value of Mixed Legal Systems*, Tulane LR 78 (2003), p. 435 ff.

<sup>45</sup> Lord Denning, *Borrowing from Scotland*, 26<sup>th</sup> David Murray Lecture, Glasgow 1961, p. 40.

<sup>46</sup> T.B. Smith, *British Justice: the Scottish Contribution*, London 1961, p. 228.