THE PROBLEMATICAL NATURE OF MIXED JURISDICTIONS: The Algerian Approach

A Thesis submitted

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by

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To my parents,

my wife

and my "wee" Scottish-born daughter

Linda

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SUMMARY

The present study is a survey of a quite restricted number of particular systems called 'Mixed Jurisdictions'.

The study opens with a first part which gives an overview of the particularities of the laws in these mixed systems by retracing the origins of their 'mixture', their essential characteristics and finally by selecting and inquiring into some of their problematical aspects. Occasionally, a topic considered in the law of one system is elaborated upon more than in that of another system. This is done deliberately to bring out some relevant details which may be of some (theoretical or academic) interest; and also to avoid an exclusive reference to one particular mixed system. As may be noticed, this first part is essentially a work of synthesis, a macro-comparison which will provide the comparative data for the second part.

The second part is, however, a work of research in the scientific sense of the term. It proceeds to describe the legal system of Algeria on the basis of the 'STILLEHERE' or doctrine of style outlined by the German comparatist Zweigert some years ago. The account given of the development and ethos of Algerian law is amplified and exemplified (as

proposed by Zweigert) by a study of some legal institutions typical of the Algerian legal style. Different topics are treated in this part to allow for a reappraisal of the law of Algeria with, however, more emphasis on her private law; an area upon which by tradition comparatists generally concentrate their researches.

The link between the two parts is indeed a 'big jump', but not an impossible one. While the first part presents a certain type of mixed jurisdiction, the second, taking the law of Algeria as a model, tries to demonstrate the existence of a new and totally different type of mixed system; a trend of a sort which seems continuously increasing amongst some contemporary legal systems.

And finally, the purpose pursued through this study in its ensemble is to ascertain, as far as possible, the extent to which these mixed jurisdictions - whether 'traditional' or 'new', work adequately; that is to say avoid any specific problem(s) which may, as a result of the mixed nature of the systems, adversely affect their legislative, jurisdictional or institutional functioning.

P A R T O N E

AN ANALYTICAL INTRODUCTION TO THE NOTION OF MIXED JURISDICTIONS IN GENERAL

By their respective common features and characteristics, the legal systems of the entire world might be - "for taxonomic purposes"[1] - comprehensively grouped into various legal families. Although no common agreement over a universal grouping has been reached hitherto, three major families amongst the best known grouping have emerged over a long period of time. These are the civil law, the common law and the socialist law (or the law of the socialist countries).[2] In an oversimplified view, all the modern legal systems belong to one of these legal families according to some specific criteria.[3] The legal systems which will form the purpose of this enquiry have the particularity of falling in none of these families and cannot be annexed to any of them. These systems are some of the few, which for various reasons happen to comprise of elements which have their origins in more than one legal family. There are numerous instances of this, and it will be sufficient to cite here the cases of Scotland, Louisiana, Quebec, Sri Lanka, the Seychelles and South Africa. In legal terminology, these systems are called "hybrid" or more commonly "mixed jurisdictions", precisely because of this inherent legal diversity in their sources.

CHAPTER ONE

The Idea of Mixed Jurisdictions

The notion of a mixed jurisdiction seeks to provide the answer to some ambiguous questions in comparative law. For example, the diversity of laws brought together poses intriguing problems. "Since the laws of the world are expressed in many different languages and forms, and since they have evolved in societies where the social organisation, beliefs and social manners are so different",[4] how then is it possible to combine satisfactorily such diverse laws? Is this combination simply a matter of technical device, say when legislating from various laws, or does it depend on some specific factors such as culture or race etc? Moreover, by nature and function, law is according to one definition "the reflection of the spirit of a people"; in other words the confirmation of a social behaviour. Then, how does a law initially set up for a particular type of society fit into an entirely different background?

Before attempting an answer to these questions, a preliminary consideration of the historical developments out of which the idea of mixed jurisdictions has come into being requires some attention. As Watson observes: comparative law without history is unthinkable.[5]

A/ Historical background

The aim is not to describe any existing mixed jurisdiction. Rather, the purpose sought is to describe certain powerful historical forces or events that have deeply influenced the growth of contemporary mixed jurisdictions. Amongst the various events perhaps the most significant are reception and colonialism. For, not only have these two phenomena had a tangible effect on the past of these systems; but they still exercise considerable influence on their present style.

1) Reception:[6]

This is an important causative factor upon which legal pluralism generates, develops and subsequently alters the entire style and social quality of the recipient legal systems. In this particular context; and as a basis for a meaningful view of the idea of reception, we may accept the interpretation of Professor Rheinstein that: "A certain legal phenomenon developed in a given legal climate is consciously put into effect in another climate".[7] This eliminates from the scope of reception these similar situations (imposition, transplantation, infiltration etc), on the one hand, and emphasises the importance of the element of consciousness and voluntariness on the other hand. For, both observations are of particular significance in the context of a mixed jurisdiction. According to Papachristos;[8] the causes of reception of an alien law must be sought primarily within the recipient society

itself. For, if the legislator in that society has turned to foreign sources to rejuvenate his legal system there must be prima facie internal reasons for having done so. On the whole, it seems that in many countries, reception was sought in the first place to deal with practical situations and to remedy the shortcomings of the existing law. As such it presents various aspects and considerably varies from one country to another:

a) Resurrection:[9]

In a literary manner, this word means the conscious revival of an ancient practice. Legal theoricians apply this phenomenon on the laws of a system to describe the re-adaptation at a later time of a law of a past age in a given society.

In this respect the resurrection of the Roman Byzantium Law in Greece at the end of the XVIII and the beginning of the XIX century is a good illustration.[10] A more recent illustration is the resurrection of Muslim law in many Islamic countries. These last two or three decades have witnessed an accelerated movement of renaissance somewhat comparable to the revival of Roman law in Germany in the earlier modern ages.[11] Strong indications show today that many Islamic countries are making a conscious shift towards the law of the Sharia. In Pakistan e.g. the enforcement of Islamic law is gradually taking place. Beside the numerous piece-meal Islamic enactments, Pakistan is considering the replacement of its whole public law by an

adoption of the Islamic hanbalite rite.[12] In Turkey, after the Kemalist legal revolution, successive legislative amendments are being introduced in some areas of the law to allow Islamic law some authority.[13] In Egypt, in May 1980 an amendment of the constitution of 1971 brought back the Sharia as the main source of legislation.[14] In Iran, it is not yet certain what will be the outcome of the Islamic Revolution. So far all the trends are that Islamic law will enjoy a privileged position in the Iranian legal system should the revolution win.[15]

This phenomenon of resurrection is not peculiar to Islamic law and Islamic countries,[16] but extends also to many parts of Africa. On the black continent, the general law of many territories not only includes the received law of a western country, but also a substratum of customs and local traditions that many African states wish to revive, now that they are independent.[17] Taken to its extreme interpretation, it is quite plausible that such resurrectionist movements may well have a determining impact for the future of the development of the law in general, and the legal systems of these countries in particular.[18] Incidentally, it is in part this resurgence of Islam that will serve later on as one of the main arguments I sustain to prove the mixed nature of the law of Algeria.

b) Importing:

This is a voluntary decision taken by an independent nation to import a system of law, or part of that system, which is not only foreign but is the product of a markedly

different culture. What happened in Scotland to Scots law in the XIV and XV century fits very much into this description.[19] Historically the Roman occupation was practically insignificant and had absolutely no substantial effect on Scots law. Yet, the work of Justinian and other great Romanists still marks the legal system of Scotland today. It was Scots scholars such as Stair, Erskine, Bell who went to the continent (Holland, Italy, France), studied Roman law and, once back, injected it into the core of the Scottish law.[20] "The Institution of the Law of Scotland" (1681) by Lord Stair is, in this respect, a remarkable masterpiece on the Roman model. One can cite some examples of Scots law from the bulk of legal material imported which are still of considerable importance today e.g. the law on pupils and minors, tutors and curators, moveable property, servitudes, securities etc...[21] Scotland thus, could be said to have had a true voluntary reception.

To a varying degree, we may observe the same phenomenon of a voluntary reception taking place in Japan since the aftermath of World War II till present time, save in that country it is the Anglo-American common law which is in the "bill" of importation.[22] In reality it was the arrival of the US in 1945 which started the penetration of the common law in the Islands of Japan. Although the occupation did not last too long (1945-1949), the primacy of German law, (which was then the law of Japan) was seriously threatened. A new American-style constitution and several code reforms were enacted to reinforce the occupation. After the withdrawal of the Americans, close contacts were maintained

between the two countries, and the United States became the place where young scholars went for advanced legal studies. This resulted in the importation of other legal materials from America.[23] One of the most interesting importations has been the Right of Privacy in 1963. Also of relevant importance are the provisions of Art.72 par.2. of the Japanese Constitution which had the effect of abolishing continental style administrative courts.[24] Schlesinger sees in this latter initiative a "significant shift from civil law to common law institutions".[25] In the meantime a formidable combination of continental and Anglo-American flavour was developing as exemplified by some use of the case method and occasional recruitments of judges from the bar.

As a result of a voluntary importation the law of Ethiopia in this respect has become another mixed jurisdiction.[26] There, it was rather the continental legal experts (mainly French and Swiss), headed by the eminent Professor R. David who were at the origin of the introduction of the civil law through codification.[27] In preparing the civil code of Ethiopia, the draftsmen relied heavily upon the Fetha Negast which is merely and no less than a collection of statutes largely inspired by the Roman law. Moreover the exodus of American lawyers to staff the law faculties and the courts of Ethiopia, coupled with the use of the English language and English legal materials aided greatly the establishment of the common law.[28]

Lastly, it will be observed that the reception of

foreign law has become a "fashion" today. For, many countries, developing as well as developed, resort to it as a "method to induce law reform in their existing law".[29] However, as the importation occurs mainly within the same legal sphere, it has accordingly no special interest in relation to this comparative study.

2) Colonialism:

It is in part the extent of European colonialism which gives our enquiry its importance, and particularly the implications such a phenomenon has for the formulation and development of the legal system it has penetrated. This is typical of practically all countries which have experienced European domination and where reception occurred, mainly because the law received in these countries was in a powerful position. This is also called "imposed reception".[30]

In order to give an oversimplified presentation of the problem, it would be possible no doubt, to proceed to some rough classification and say that some countries have been influenced by the civil law system, while others were influenced by the Anglo-Saxon system: these two old rival systems being generally considered as the major legal systems, at least until very recently.[31]

As the various European powers established their rule over a large number of territories - whether by annexation, conquest or cession - [32] they soon introduced their particular system of law, which was either civil or common law. There are, naturally, obvious differences as regards

both the manner of introduction and the subject of the law.[33]

However, in all situations there has been a merger of people of different origins, cultures and ideas which has brought about conflict and divergencies in legal concepts. These conflicts mainly arose from divergencies in the general principles of law which were very often dissimilar or from more specific disagreements such as between an imported statute or "Loi" and a local rule of traditional law. But whenever they were received (not to say imposed) the European laws were frequently subject to some adjustments and various substantial transformations by reason of their co-existence with the tradition of the previous civilisation.[34] This generally occurred when a law of European origin abruptly came into contact with a comparably strong native law as it happened to the common law in India and to the civil law in some Arab countries. In these countries there was already a well established legal order consisting mainly of various customs or "Adat" and religious norms which has bitterly - but not always successfully - resisted European penetration. Confronted with such opposition, the European immigrants had no alternative than to live within a different cultural environment to which their own way of thinking and acting, no less than their law, were totally alien. What was for example traditionally contra bonos mores or "against natural justice" in European mentality, constituted a usual practice and a respectable way of life in the conquered or colonized territory and vice versa. Such differences extended also

into the courts where noticeable variations in the administration of justice sharply distinguished the two communities. (See infra p.121). Similarly, what seemed to be fairly "justiciable" in one system was considered as "non-justiciable" in the other, but on the main, nothing prevented both systems to operate within their own boundaries notwithstanding such obvious contradictions. Thus, by way of example the Appeal Court of Algiers in 1868 (then staffed by Europeans) when Algeria was under full French administration, applied a jewish divorce rule to a jewish case, at a time when divorce was not only unrecognised in French law, but also vehemently prohibited by the Christian Church.[35] Theoretically it has been recognised that there must eventually be reconcilliation of the different systems (i.e. colonial and native) but in practice, such reconcilliation has not always been feasible or even desirable. The only alternative was in most situations, the application of different laws within a single but ethnically and culturally multiple society. As a result of such socio - legal heterogenity a certain legal plurality then took form and gradually evolved with the colonial presence. In other instances, the law of a country may have been simultaneously subject to the domination of more than one European legal systems. This was almost a current practice especially during the last two and a half centuries of European expansionism for European colonialists (mainly French, Spanish, Portuguese, British, and to some extent Dutch and Italians) to settle in the same conquered territory, or even to sell, cede, or exchange conquered lands amongst them.[36]

From the viewpoint of law (le Droit) and legal structure, there is nothing of particular importance for a comparative study such as this, notably in instances where the law of the conquered territory was subject to two (or more) different legal systems historically pertaining to the same legal tradition. Examples of this type of mixture were abundantly common in Latin-America and Black Africa where Spaniards, French, Portuguese and Dutch happened to "meet" quite frequently.[37] However, of much more significance and interest is the situation where two comparable European legal systems belonging to two distinct legal traditions; thus materially different, were brought together and started to co-habit. Their combination as it will be seen; has led to some interesting outcomes with regard to the historical bases of law in general and to the birth of a few original legal systems in particular. In Louisiana, which is a good illustration in this connection[38] the French settlers who were the first Europeans to settle there, originally lived under French law which they imported and introduced into the province. But as a result of military conquest and subsequent treaties the province successively passed under Spanish and French again (but only for a few weeks), then American domination. The consequence has been that the influence of the three colonising powers can still be detected in the present law of the province. Perhaps the best illustration that may be provided here is an investigation into the origins of the Louisiana code of 1808, the very foundations of which are basically the civilian (French and Spanish) and the Anglo-American laws.[39]

3) Other factors:

Besides reception and colonialism there are other extra-legal factors of equal importance and which apparently today can play a determinative role in the construction of a mixed legal system. Such factors are of various kinds (socio-ethnical, political, religious, economic, ideological etc...) and fall under the scope of various social sciences, which for obvious reasons cannot be considered in this approach. At this point it may, however, be relevant to recall only two of these extra-legal factors because of their relative importance in the later analysis of the law of Algeria.

a) Political factors:

One important factor is the decolonisation of the law.[40] By decolonising its law, a country seeks to extrapolate it from the influence of the former colonial law. The process of decolonisation is quite often carried out by a "purification" of the law, which amounts to rejecting the former legal order because of its "colonialist character" i.e. serving in the first place other interests rather than the natives. By doing so, the new country may either revive its dormant law and institutions, or resort to the importation of another "friendly" foreign law(s). Both alternatives have been discussed already (see Supra p. 3). On a large scale, the "Africanisation" of the law in the dark continent in opposition to decolonisation could be added here as a remarkable experience. Amongst the political factors, which have become almost a fashion today is the frequent internal upheaval which is generally followed by a change in the

political regime of the country. But not all the sudden turnovers necessarily bring alterations in the legal systems of the countries in which they occur.[41] Only very few amongst these countries (which claim themselves to be "revolutionary" e.g. Libya, Algeria, Iran) have in fact undertaken radical changes in their political as well as legal structure. It is only in such circumstances that the legal systems of these countries may become of certain interest for a comparative legal study.

b) Economic factors:

In a wider sense this is a social factor; which perhaps a few years ago could well have been understood in the light of purely economic or even political considerations rather than any substantial "legal" connection. This economic factor is more visible in the so called developing countries as they desperately fight to acquire new economic hopes and aspirations - to be prosperous and industrially strong; but the tactics followed by individual countries widely differ. Depending into which direction they look (East or West), the government of these countries, while shaping their economic stature (un)voluntarily shape their political and legal structure.[42] Red China for instance, by taking over from the Soviet Union many socio-economic institutions such as the collectivisation of the means of production was also attracted by various legal institutions such as the Peoples' Courts and the Prokatura which she subsequently adopted.[43] Among the newly independent countries for which, as Hazard observes: "Contemporary Marxists seem to offer more suitable institutions",[44] a

large number is already engaged "on the road to socialism". In Africa for example, Mali is to be said - leading the way.[45]

In the field of the development of the law (le Droit) in general, this will undoubtedly give a new dimension to socialist law and institutions to the detriment of the Western (bourgeois) legal tradition. As civil law and common law have expanded and occasionally interacted in the past, socialist law, via totally different methods seem increasingly to exhibit the same geographical expansionism. And it may come with no surprise that mixed systems combining socialist law and civil (Romano-germanic) law[46] or socialist law and common law[47] will perhaps break the traditional civil-common prototype of mixed jurisdictions experienced so far.

In conclusion to this historical survey the following observations are of paramount importance.

a) It would be wrong to maintain the idea that whenever reception or colonialism occur; the mixture in the legal system in question automatically follows. These two factors are relevant only when they have a substantial effect on the legal systems they penetrate to the extent of creating within these systems a different and almost independent corpus juris. For, many countries have been colonized, and many others have foreign elements in their substantive law, yet neither the former countries nor the latter can always be called mixed jurisdictions.

b) The reception, whether voluntary (resurrection, importation), or involuntary (colonialism) of a foreign law

frequently poses the double problem of the transferability and adaptability of the foreign legal norms into their new environment.[48] For the Comparatist, in many instances it would be interesting to discover the extent to which the imported legal norms succeeded in imposing the same standard of behaviour in their new milieu. Also of potential interest for him would be the reaction of the recipient system; whether it would brutally reject the foreign law or on the contrary allow it to be assimilated gradually into society. To answer these and similar questions, the assistance of legal sociology is specially required by comparative law.[49]

c) Quite frequently the two types of reception (i.e. resurrection and importation) occur in the same society.[50] Here the resurrection of a particular law, or the preservation of an influential customary law in a society which has accepted the importation of a new highly developed legal system inevitably will give rise to a conflicting situation; because the purpose in maintaining or reviving traditional values and concepts very often does not go hand in hand with the purpose of modernism and modernisation. In general, the preservation or resurrection of a traditional law has a different function in the society in which it takes place. Thus, the revival of Roman Byzantium Law by Greece for instance, was principally aimed at preventing the infiltration of the code Napoleon which the Greek conservatives strongly opposed.[51] Whereas, the renaissance of Islamic law in the Muslim world today is rather a sort of reaction to a particular (western) way and mode of

living.[52] However, in all events it has been admitted that these traditional laws were neither self sufficient, nor adequate to meet fully the need of a modern society.

d) The historical events which give rise to legal transplantations are generally temporary events. They occur following on from certain situations for the achievement of a particular purpose(s), last for a certain period of time, and often lose their significance or disappear completely. Colonialism, for instance, is a factor which is today obsolete as new developments in relations between nations are changing. Reception, on the other hand is a phenomenon which has so evolved that it has become one of the most attractive topics in many social sciences such as sociology and comparative law. (See supra. pp2ff)

e) Regarding the other "extra-legal" factors, their contribution to the life of a legal system varies from one country to another.[53] Political and economic factors are certainly preponderant in the less advanced countries where law is inexorably linked with both.[54] This is not so however, in western advanced democracies where these three factors enjoy some sort of autonomy and especially where law fulfils a completely different function.[55] Nevertheless, there too, other extra-legal factors such as culture (notably language) are still a potent force.

The present situation in Quebec where the French language prevails can well be contrasted with that in Louisiana where, despite a civil code on the French pattern the tendancy for the common law to gain supremacy is closely linked with the establishment of English as the official language.[56]

Generally speaking, these extra legal factors, whether occurring in a developed or developing country must not be exaggerated in relation to the development of the legal systems of these countries; though perhaps such a relationship should well be emphasised in the context of a mixed legal system.

Finally when a system becomes mixed, the interaction of the different laws is complete. It extends practically to every aspect, formal as well as substantial of the legal system. The mixed system then may adopt for instance a civilian code and at the same time operate in a judicial organisation structured on a purely common law pattern such as in Quebec or Louisiana. Similarly the system may adopt a particular law, e.g. the law of contracts, of one legal tradition and the law of property, of another legal tradition. South African law for instance, includes a law of property based on Roman principles as it includes a law of contract and tort heavily influenced by the English common law.[57] Also, within one specific law, elements from both traditions may be assembled to form one law, e.g. the law of co-ownership of the Seychelles is in this respect quite illustrative, for an attempt is made to graft into the code the convenient techniques of the trust for sale of Anglo-American origin.[58]

B/ Essential Characteristics and Definition

What is a mixed jurisdiction?[59]

The term "mixed" prima facie suggests diversity; within a legal system this term has many connotations and may be a frequent case of errors and misinterpretations. As it often happens, several laws may co-exist within the same state. Thus, in addition to a federal law, there may be laws of states, provinces, or districts as in Australia, Canada or Switzerland, which may give the impression of a pluralistic legal system. The Anglo-American law may also be regarded as a mixed system in that it utilizes common law principles and statutory provisions.[60] Egypt (prior to 1949)[61] or Uganda, Sudan, Somalia and many African countries are another type of mixed systems, mainly because they have a dual order of jurisdictions viz; states courts and traditional courts.[62] France and similar civilian systems which have another type of dual courts i.e. administrative and ordinary courts are also quoted as mixed systems, precisely because of this internal jurisdictional duality. Turkey (and the like systems) which by reforming its laws introduced a great deal of foreign legal elements which led many to think of Turkey as a mixed jurisdiction.[63]

In all these cases; although these systems offer the appearances of being mixed systems; "in fact" they are not. In comparative law, and more specifically in the field of classification, the epithete "mixed" when used to qualify a legal system, generally refers to and means, a certain

type of legal system. These systems are distinguished from others by the following characteristics:-

1) A mixed jurisdiction involves not only different laws, but laws derived from distinct legal families.

The question of differentiating the laws and in delimiting the legal traditions to which these laws originally belong are in a hybrid jurisdiction of equal importance. For, quite often, the legal system of a country manifests an evident multiplicity of laws but when traced, all these component laws are found to converge at the same source. The best example in this respect is undoubtedly the case of Turkey.[64] Since the institution of the Republican regime in (1923/24) the founder of the republic Kemal Ataturk proceeded to a vast programme of law reform which put the Turkish legal system of today as "an outstanding case of mixture". As it stands the system comprises:

- A Swiss civil code and Swiss code of obligation received in bloc.
- An adaptation of the Italian penal code of 1889.
- A code of criminal procedure based on the German code of 1877.
- And a commercial code based on the German (1897) code and French (1808) code.

As it may appear for the "unwary" there is nothing more than a truly mixed system. But for the comparatist, the four components (Swiss, German, Italian and French) are all members of one parent legal family, that of the Romano-

germanic family; into which the Turkish legal system comes only as another system to be added to the membership.

However, even when various legal traditions happen to interact this does not necessarily imply a mixture of the legal system in the sense sought to define in this particular study; as new ideas tend today to bring many countries from the four corners of the globe together in order to achieve, by way of legislation, a common welfare and to benefit from each other's experience.[65] After all, and beyond any overgeneralisation, there is no legal system today which exists in its pure form, even the common law of England of which Schlesinger says that "there are no jurisdictions with a pure English common law with the exception of England itself".[66] Without requiring to resort to any historical investigation to prove the contrary, one need only refer to the present membership of the U.K. in the EEC and the participation of England (or U.K. in general) in international conventions such as the carriage of goods by sea for example, to trace continental elements in the common law of England.[67] But Schlesinger's statement may be right in the sense that these various European laws are still substantially insignificant for the time being, since they have no real or decisive effect in changing the original course of the common law of England.[68] Similarly, in the United States, no one can deny the remnants of the Spanish De Siete Partidas and the code Napoleon. But no one also can go as far as putting Anglo-American law as a mixed system on the same footing as e.g. Louisiana or Quebec.

2) In theory, the legal families which form the components of the system have no relationship or connection between them.

This of course, presupposes the acknowledgement of separate legal families, but there still exists some speculation regarding the real division of the legal families into different independent groupings.[69] Thus if Malström is to be followed and many other comparatists sharing the same opinion, there is no major difference between all Western European laws, including the common law of England, since they all belong to the same pattern of culture and share the same (capitalist) ideology.[70] Johnson, however, goes far beyond this, and associates the law of the socialist with the western bourgeois legal families "despite all ideological differences". For, according to the Author "both (systems) give similar solutions to the similar problems".[71] While some legal writers venture to make such general statements, others like Buckland and McNair go even further in regarding e.g. that the common law of England is more Romanist than French law![72] But, on the whole, one must well be aware of the circumstances in which these kinds of qualifications are made. For heedless or random generalisation would undoubtedly undermine any division of the world's legal systems on which the concept of a mixed jurisdiction is basically founded. Historical developments of the civil, common and socialist laws have known different stages of formation, have developed in and according to certain circumstances and finally have elaborated particular institutions and through

them a certain type of society. Not only that, but also wide dissimilarities in legal structure and judicial organisation, as well as in legal techniques and methodologies distinguish remarkably the various legal families from each other.

3) The mixed system shows characteristics of the different legal families but stands in none of them.

As Lord Cooper says "The seat must be on the fence".[73] Actually it is this peculiar dilemma of "putting the system in the right family" which puzzles comparatists. In speaking of the law of South Africa Zweigert writes:[74]

> No simple answer can be given to the question whether the law of South Africa should be put in the Anglo-American legal family or whether it should be classed with those legal systems which have developed on the basis of Roman law...

To justify his hesitancy the author goes on to say:

> In South Africa, the nature of the basic concepts and structures of the legal system are unquestionably Roman. But, the techniques of applying the law in the courts today (i.e.) the way the trial is conducted, the methods of proof, the treatment of precedents as well as the court structure and the activities of judges and lawyers are all clearly based on English models.

Thus concludes Zweigert:

> The element of Roman Dutch law and English law are so intermixed that it cannot, without distortion be put in one or other pigeon hole.

The same dilemma can also be seen for example in Louisiana or Quebec where the legal systems of both concurrently share a civilian code and a host of common law institutions. In both systems the influence of the civil and common law is so reflected everywhere in their laws that it is not possible to draw a clear dividing line between the two traditions. Moreover any attempt to attribute the legal systems of both Louisiana and Quebec to an exclusive tradition may not only prove inadequate, but will certainly not escape criticism.[75] Again, the same scepticism seems to soar above the legal systems of the Scandinavian countries where there too the intermingling of the civil and common law traditions has made any intelligible answer difficult.[76]

4) The mixture of the various laws which form the system is not haphazard.

In order to maintain a certain legal unity and stability within the system, the different laws must evolve in a coherent and orderly legal atmosphere. In other words the manner in which the laws are combined must genuinely reflect a certain culmination of a long process of analysis and deliberate choice of legal objectives. In the Seychelles for example, it is not "by accident" that family law is profoundly influenced by English law, though it is incorporated in a civilian code. It seems that the Seychellois, despite their racial origins (whether French, English, Creole or otherwise) find their familial relations more secure under the English commonlaw than the cloth of

the French law; whereas in other fields such as contracts, delict, commercial law etc. the French influence largely prevails over the common law of England.[77]

Similar fragmentations are also discernible in the legal system of Sri-Lanka,[78] where broadly speaking, criminal law and procedure and the commercial law are as they were introduced by the English settlers; but the law of property, contracts, delicts... have their foundations in Roman law which was introduced there by the Dutch. Whereas falling in none of these two groups (i.e. English law and Roman-Dutch law) is the law of persons which is left rather to various legal customary laws.[79] In fact, the parcelling of the laws in a mixed jurisdiction is only one side of the dilemma. The second side, perhaps more complex but equally important for the survival of the entire legal machinery is the way i.e. the techniques and the methods utilized to expressly "cement" the cleavages which may well exist between the legal components. This aspect will be considered in detail, when appropriate. However, by way of example, it will be instructive later to look at the treatment of precedents in the legal systems of Quebec and Louisiana.

These are the main characteristics which enable us to identify a mixed jurisdiction from other legal systems, however, the weight to be given to each of these features is equally important in each circumstance.

Besides these formal characteristics, the mixed jurisdiction may also develop certain peculiarities and a whole series of intrinsic properties of its own. Enigmatic questions such as the organisation and constitution of the courts (whether dual or one dimensional), the role of the judge (whether interpreter or lawmaker), the nature of the courts decision (lois v precedents), the actual development and tendancy of the "jurisprudence" may also be useful indications regarding the heterogenity of a system. But not very often the mixture of a legal system is easily achieved. For, the overlapping of different laws and legal traditions unquestionably involves the combination of various legal techniques and methods, which are not always reconciliable without some practical difficulties. It will be the purpose of the following chapter to consider in the light of existing experience some of these problems.

CHAPTER TWO

Fundamental Problems Due to Legal Dualism In A Mixed Jurisdiction

In a mixed system, as in any other legal system, the question whether legal norms or institutions of various origins can be easily fused into a single social unit, may, besides sociological resistances, breed other difficulties which directly impute on the legal system of the country. As a result the legal system, may suffer considerable shortcomings in either inserting the norm into its legislation and making it part of its corpus, or in adopting the new institution to meet social changes which may be badly needed for the country.[1] So the problems presented to us are essentially of a legal nature (i.e. juridical by opposition to other legal sciences such as legal history, legal sociology and so forth...). These problems can comprehensively be divided into three main categories: legislative, jurisdictional and institutional. Each of them will be discussed under separate headings; but on the whole as will be noticed they all interrelate.

A/ Legislative Problems

Probably one of the most perplexing tasks in a mixed jurisdiction is the process of lawmaking or legislation as it is more commonly known.[2] The task calls for variegated legal knowledge and technique as well as finesse and delicacy. Problems are obvious, for the legislator is faced with not only one but two or more legal traditions. This dual originality of the problem is to some extent a "necessary evil" as the adage goes. The fact that law has in various ways come to be composed of elements drawn from different sources does not constitute a defect or disadvantage. In my opinion the different laws can on the contrary, contribute positively to improve or develop particular areas of the law. Valuable elements may be selected from the various traditions and cautiously engrafted onto a new legal environment under different legislative forms (code, statute, ordinance etc...). Taking as an example Seychelles whose law is originally a blend of common and civil law, I would like to point to a few legislative problems which emerge from the recent work of codification (or re-codification) of the civil code of that country.[3]

- The Seychelles experience: An evaluation.[4]

To begin with, some preliminary remarks regarding the mixture of the legal system of the Islands may be necessary. In the first place there were in Seychelles two legal systems in force: the old code of Napoleon,

introduced by the French settlers at the beginning of the XIX century, and English style legislation enacted by the British after the cession of the Islands to the Crown in 1814. Notwithstanding the British Administration over the colony this legislation does not (as a tradition) interfere with the private French legislation; but progressively introduced and developed its own law and institutions. By the second half of the XIX century, as Chloros writes; "it became abundantly clear that the existence of English style legislation side by side with a mainly unreformed French legislation was creating an uncertainty in the law...". It is for this reason that a work of this codification was initiated. In the second place, the main task of the draftsmen was not simply to "revise" the old code civil, but also to undertake a complete programme of code reformation. This latter process is much more important than a mere revision, for it involves decision making on what constitutes bad or good law; in which case, the deletion from the code of "unnecessary" pieces and their replacement by novel principles is highly probable. It is precisely through such fissures that the substance of the common law principles has been engrafted onto the civil code of Seychelles. But, as will be seen, their insertion was not without difficulties.

The first difficulty is technical; how would it be possible to contain principles of the English common law within a system of codified legislation? In other words, how to ensure the passage of English statute onto a

civilian code?[5] An answer to that question rests by and large on a preliminary appreciation of what is meant by an English statute and a civilian code.[6] Once this question is elucidated the next and quite logical step is to determine roughly which area(s) of law could be subject to codification - i.e. inserted into the code, and which area(s) should be left to the ordinances - i.e. kept outside the code?[7] Bearing in mind the dual background of the Seychelles legal system it is not possible, nor desirable to substitute one legal system for the other. In all probability a choice in either direction is "not sensible"; hence, the tacit use of both modes of legislation, viz code plus ordinance. In its conception then, the new code did not, logically speaking, deal with all matters, viz, that a civilian code is conventionally supposed to cover. This involved inter alia the deletion from the code of a certain number of sections, articles or even chapters, the substance of which was left to the ordinances.[8] To give a picture of what so far has only been indicated generally, let us consider the following examples.

A glimpse at Book One of the new Seychelles civil code shows that most of the law governing family and persons - which in theory are the subject of Book One - have almost disappeared. This particular part of the code, to use Chloros' term has extensively been "pruned". Instead a great deal of that book is comprehensively dealt with by special ordinances, the spirit of which is predominantly English. The other example relates to the law

of domicile. On this point, British law has a specific stand.[9] An attempt to insert or incorporate the English concept of domicile into the right civilian style is hardly conceivable, not to say utopian. Here the difficulty is heightened, especially because of the fundamental differences between the common and civil law attitudes vis a vis the concept of domicile in general.[10] It is, I believe, at such a precise conflicting point one can judge the utility of the ordinance. Had the English ordinance in the case of domicile been convenient as it was in the case of civil law status for example, there would have been no need to incorporate it in the code. It might be interesting to note in passing that in the case of domicile neither the English nor the French definition was retained. The draftsmen significantly departed from the law of both countries by adopting the definition of domicile recommended by the Council of Europe Resolution on the Standardization of the Legal Concepts of "Domicil" and "Residence".[11]

The second legislative difficulty is a consequence of the first but it is much more a matter of form than substance. As stated earlier, the incorporation into the code of some ordinances on the one hand, and the deletion from that code of unwanted provisions on the other, undoubtedly introduced disturbance into the code. The internal form, for example the numbering, as well as the content of the code may well be directly or indirectly altered. The question which is likely to arise here is, to what extent would the changes made to the code effect

its logical structure? This question invites thoughts, principally on the following points: i.e. as to the nature of the relationship between the code and the ordinances and whether these ordinances intended to amend, complement or supersede the code? In case of frequent use of these ordinances, would not this extensive use render the code redundant? Perhaps even useless? And finally, supposing that a substantial incorporation into the code or ordinances is made possible, would not such incorporation denature the code from its civilian character by making it much too detailed?

The third and last difficulty is that of adaptation. The legislator's task here is to ensure a certain harmony in the law by creating a co-ordination between the logic of the code and the ordinances. For neither a code nor an ordinance may in this particular case stand on its own. Both are meant for the welfare of one community. It is therefore obvious, if not imperative to provide within this dual form of legislation a reciprocal relation so to ensure a certain uniformity and stability in law. In the process of adaptation difficulties may also arise when there is an overlapping of the code and the ordinances on a subject which they both treat differently. In the area of family law for instance, the new civil code of Seychelles expressly abolishes the old French concept of "family council". Nevertheless, few ordinances such as status of married women ordinance, income tax ordinance, still continue to make reference to it.[12] Another example though presented differently could be the law of Trust.

The code has finally to be adapted to the socio-political and administrative structure of the country. In a mixed system such as Seychelles, two legal traditions mean amongst several other things, two different types of terminology. An adequate or inappropriate use of terms is most likely to create ambiguity and uneasiness amongst lawyers. On this particular point, it is interesting to note Chloros' remark on the use of the term "commune" - a purely French type of local administration from which the new Seychelles civil code rightly departed, since this type of locality does not exist in the Islands.[13]

The Franco-British experiment of codification as the Seychelles experience is often called has unquestionably proved a noticeable attempt in lessening the dissimilarities on the attitude traditionally ascribed to both great legal systems.[14]

On a more practical level the experience, as Chloros observes, may be of great assistance in the development of a new European law which is likely to grow in the remaining decades of this century. On a smaller and national scale, the civil code of Seychelles could also be preeminantly significant for countries like Scotland and South Africa where civil and common law elements can also be found to have become blended. In one extremely important particular, however, Seychelles had a considerable advantage over the two countries. Because of prior implementation of a civil code and the development of continental style legal thinking and education dating from the establishment of the French

on the island, Seychelles have trained a generation of lawyers and jurists quite well prepared and ready to handle the new code even under a new formulae. But this is not so grave, for in Scotland for instance there is something perhaps more important which has lain for centuries in the hearts of Scots legal scholars; that is the willingness for codification.[15] The problem for Scotland is not, for the time being, of legislation, but one of legislating.[16] This aspect is purely political, for a successful Scottish civil code might well eventually drive the legal system of Scotland outside the confines of the common law (of England), and will only reinforce ardent wishes of devolution amongst the people of Scotland. By contrast, in South Africa attitudes towards codification are less enthusiastic. There has been even strong opposition towards it; Hahlo: "...and Saveth Us from Codification".[17] Nevertheless, the problems that South Africa have avoided by simply not codifying reappear rather at another level which is that of the practice, i.e. the courts. It thus becomes extremely interesting to observe the reactions and attitudes of the courts in the interpretations of Acts of parliament, especially when these Acts employ a general expression leaving it to the court to work out their ramification, (See e.g. the 1951 Rent Act).[18] These and similar problematical situations relating to the functioning of the court in a mixed jurisdiction in general will be considered in a later section.

Outlook

Codification in its civilian meaning, thus in a traditional mixed system of civil and common law, appears to be one of the major problems that such a system might eventually face when legislating.[19] It seems however, that similar, but not quite identical problems of codification are found with some variations in the Socialist camp.[20] In the view of many experts in the law of the Socialist countries[21] the difficulties encountered are "occasioned by the task of reconciliating the comprehensive stabilizing idea of a traditional civil code with new approaches" to contracts, property, torts, labour, and all matters which are largely controlled by the extensive discretionary powers of the totalitarian states.[22] This is especially true if one retraces the movement of codification in the Socialist legal systems. The first civil code to be enacted was that of Czechoslovakia which dates only from 1958; followed by Hungary in 1959. In other Socialist countries the work of codification is still not accomplished (East Germany, Yugoslavia), or has not started yet (Bulgaria).[23] This enquiry into the legislative problems (mainly codification), facing the Eastern European countries leads to the observation made earlier (supra p.12), that many countries namely those of the third world which heavily draw from the Socialist sphere are at this moment facing great difficulties too. As the vast majority of these countries are already deeply imbued either by civil law or common law (or both); it remains to be seen how these countries will arrive at

finding a medium between the different attitudes in legislating, and can form their own legal systems through a uniform pattern of law.

On a quite different reasoning, the codification of Islamic law also needs in this respect some attention. In view of the growing influence of Islam in different parts of the world, many countries tend increasingly not only to embrace the principles of the Mohamedian religion, but to adopt through legislative methods such Islamic principles as part of their own corpus juris. As it is known, Islamic law, like the common law is an unwritten set of basic rules. It may be submitted, as a simple hypothesis which would need to be verified, that in attempting a systematic codification of Islamic law, these countries have to probably overcome certain technical viz, legislative difficulties, on the pattern of those encountered in the common law and Socialist law previously mentioned.[24]

In conclusion, it becomes clear that those developing countries which are engaged in the socialisation of part of their laws; as well as the various Muslim countries which are endeavouring to bring Islamic principles into their private law, must be aware of the difficulties that the process of legislation of such laws may have in their respective enterprises.

B/ Jurisdictional Problems

Another means by which a mixed jurisdiction can be tested is the courts themselves. It is in the courts that the distinction between law in fact and law in action fully appears.[25] The problem which the comparatist habitually discusses at the theoretical level, such as the reconciliation of different legal concepts, or the contrast in the approach of common and civil law as to the interpretation of the law has to be met and answered at the practical level. As mixed jurisdictions are by definition dual or plural in character, one might legitimately expect a parallel duality (or plurality) in the structure of the courts of such systems. Writing on the effect that acculturation (i.e. legal pluralism)[26] may have on the courts of a legal system Papachristos says:[27] "L'acculturation juridique va de pair avec la pluralite des ordres juridiques au sein du milieu social recepteur." What Papachristos is suggesting is that a plurality of laws in a given society necessarily implies a plurality of courts in the legal system of that particular society. If I were to comment on this statement, I would say that it is not always imperative to link - mutatis mutandis - plurality of laws with plurality of courts. Nor is it necessary to have - de facto - for each type of law, a corresponding type of court.[28] Papachristos' hypothesis is rather limited to a certain category of legal (traditional) systems - namely those of Africa.[29] This view cannot be generalised. It should, in my opinion, be seen in a purely societal

context. If the French in North Africa and most of the Arab countries were ultimately forced to recognise (in fact to tolerate), separate Muslim Sharia courts, it would strictly be for their own politico-administrative interest. Again, if the British through the system of indirect rule[30] did not interfere with the local laws and courts of the native population, it would surely not be for the sake of justice. Broadly, it may be said that the institution or recognition of an indigenous body of courts running parallel to a western system of courts, not only proved convenient for purposes of administration, but also worked significantly in maintaining a certain dualism of law and with it a dualism of court.[31]

However, the experience of some "apparently" mixed jurisdictions offers completely the opposite picture.[32] Though the components of these systems are originally multiple, the courts are generally unified. In the civil - common law orbit practically all mixed jurisdictions so far known have one dimensional system of courts. Even in Sri-Lanka where there is a dual system (Islamic and State courts) this duality is preserved only at the bottom of the hierarchy, and essentially for exceptional reasons (infra p.47); for the two orders of jurisdictions converge at the subsequent higher level which is that of appeal.[33] Moreover, the very existence of a single supreme court at the top of the whole judiciary excludes - de facto - the notion of court duality. If the formula of one court system seems to be most common, how is it then possible, particularly when the system is hybrid, to gather many laws, that is to say

different legal traditions, different modes of thinking, different techniques, methods, procedures and so forth, within a single judicial unit?

Certainly, one of the advantages of a unified court system is the development of a uniform body of law, a process in which the courts play an important role and bear great responsibility. However, notwithstanding the practicability of such a unified system, problems of particular interest arise, mainly because of the mixture of the system. For example, is it not inevitable that the court would be faced with the final question of which particular law (civil, common) is to apply to a particular case? If this happens, what are the criteria in determining the application of one law rather than another? What motivates the court in this choice? What are the methods used in developing from a variety of laws a uniform body of "jurisprudence"? And finally, would not an attempt to relate the "jurisprudence" of a particular system to several laws result in this "jurisprudence" losing contact with all these systems?[34] In considering these questions, it might be useful, for clarity, to use Bayitch's division of the mixed jurisdictions into codified and uncodified mixed jurisdictions.[35]

The first group includes those mixed jurisdictions with codes on the civilian model such as the Philippines, Japan, Louisiana, the Seychelles and Quebec... In these jurisdictions the civilian influence prevails. Formal sources of law are typically on civilian patterns. The

civil code and code of procedure are broadly based on the code Napoleon. In general terms, when a system adopts a code, usually this latter breeds a series of implications which may have significant repercussions on the whole legal machinery. A code means, inter alia, that the legislator is the law-maker and that "la loi" is supreme.[36] It defines and limits the role of the judge as a "simple fonctionnaire", to use Marryman's terminology. It also affects the structure and staffing of the court by calling for more judges because of their numerical importance in a codified system.[37] It conditions the work and function of the courts in the sense that in a codified system of law, justice is rendered mechanically and judicial decisions have no binding force.[38] Naturally all these references may well prove to be instructive should one endeavour an exploration of the system. But should one expect that the mere adoption of a code implies that the system is civilian? The experience of some mixed jurisdictions in this respect presents exceptional and somewhat ambiguous standpoints. In adopting the civil code of Napoleon, neither Quebec nor Louisiana have fully adhered to the civilian circle. For, through judicial decisions, a certain number of common law rules, materials and institutions were brought in to allow the civil law to adapt to socio-economic changes. It seems that there is some sort of complementarity between the code and the non code elements extraneous to it. Most of the time it is hard to ascertain the extent of this complementarity for there are many extra legal factors such as politics, language, ideology etc... which contribute greatly to the

maintenance (or damaging) of such complementary relationships (supra p.15f)

The second group includes jurisdictions without codes such as Scotland, the Republic of South Africa, Sri-Lanka and British Guiana. In general, the sovereignty of the common law is predominant in these systems and thus tends to be even more reinforced when a code which could potentially serve as the main bastion of the legal system is lacking. This is why, e.g. the mixture of Scots law has been and still is questioned, (supra p. 32). Broadly, in these uncodified mixed systems, although it may be said that the law substantially deviates from the allegedly predominant mother common law, nevertheless the procedure followed in legal practice, the methods used in the administration of justice and many other technicalities do in fact show great affinity with the common law tradition. The influence of the civil law varies from one system to another, but generally exists in the same form, mainly in the adoption of general principles and in the reception of commentaries, and treatise on Roman law written by early glossators.

Here too, it is the responsibility of the courts to undertake the delicate task of preserving the civilian heritage. How this could be done is a question which depends basically on the theory of the sources of law the mixed system in question espouses and the role of the judge in that particular system.

a) The sources of law: Loi v Precedent[39]

Generally speaking, systems which cherish codes regard legislation as the main source of their laws. In contrast, uncodified systems tend to rely more on judicial precedents. What is the position of a mixed jurisdiction between these two extremes? The situation is rather confusing because of the clash between a tradition strongly hostile to legislation, and a tradition originally nurtured through legislation. The source of law theory is relevant in such circumstances only insofar as it strengthens one component to the detriment of the other or vice versa. For instance, it is easy to admit that in an uncodified mixed jurisdiction much more emphasis is placed on case law, though officially statutes are at the top of the hierarchy of the sources. For it would be unreal to imagine, e.g. the courts in South Africa or Scotland operating in a fully "statutory" atmosphere, just because statutes are (in law books) the primary source. The living law is however different.[40]

The confusion between "loi" and precedent becomes more complicated in a mixed system where there is a code on the continental model.[41] Normally one might expect the code to be the only authoritative source of law to which all others including case law are subordinate. But when one considers the particular legal environment in which the code operates, it becomes doubtful whether the code alone is the real source. As Barham writes with reference to Louisiana[42] "though we may really believe that legislation

is the primary source of law, we practice under the principle that jurisprudence is a major source of law." The treatment of precedents by Louisiana courts is indeed a good illustration; and more particularly the period covering the second half of the XIX century.[43] A survey of some cases during that period reveals an increasing reliance upon judicial decisions, and that was only 50 years after the promulgation of the civil code of Louisiana. The provisions of this code were totally neglected, and so were the citations of French judicial authorities. The code started to lose respect and vigour not because it was mal-drafted or unsuitable to the conditions of Louisiana, but merely because of its malapplication by the judges who seemed more akin to case law than to codal provisions. This leads us to consider the second point which is:

b) The role of the judge in a mixed jurisdiction[44]

Being caught in an amalgam of different legal traditions, the role of the judge in a mixed system is very significant, for it shows a certain amount of wavering between different legal methods, hence it contains many valuable contributions for our subject. In their frequent dealings with cases judges without exception express their own opinions, which may have a considerable effect on judicial decision making. For not only the individual judge is conditioned by his own background, but the decades, centuries of a traditional training in particular methods create a corpus of professional habits which affects judicial methods and through it the legal order. Moreover, as Professor David observes, the

personal style and preference of each judge certainly plays a great part in giving a certain direction to the evolution of the law.[45] In his article on "The function of Roman law in South Africa" P.Van Warmelo gives the following description of the South African judge's attitude:[46]

> The extent of the use of Roman law lies within the discretion of the judge and indeed it is frequently purely a matter of personal inclination whether the judge turns to Roman law or not. Some are wholly satisfied to base their decisions on precedents and are prepared to ignore Roman and Roman Dutch Authority unless it is absolutely indispensable, others are always prepared to examine older authorities and do not look for precedents only.

This is quite understandable if one looks at the particular legal atmosphere in which the law of South Africa has developed.

However, as a general observation, the experience of the few existing uncodified mixed jurisdictions shows that in such systems the judge would consciously or unconsciously give preference to case law. Accordingly, the courts in such systems will obviously tend to be more "English" in their approaches to cases as well as other judicial activities. The civilian elements in these courts are not and do not constitute "special cases". It is above all the same judge who deals with the same case, whether this case involves common law concepts or civilian principles. The role of the judge comes into the forefront especially when considering which law to apply.[47] Reading through the Scottish decisions, one undoubtedly has the impression

that English law has a tremendous influence on the Scottish judges. Except for brief references to some eminent Scots institutional writers, there is no particular civilian flavour. There is no reference to any civilian code at all, or the citation of any code provision. Similarly the proceedings differ widely and very often present more familiarity with the common law. In this respect, it remains problematic how the civilian influence could be preserved and how a judge can manoeuvre to preserve it.[48]

However, if we consider the role of the judge in a codified system, the situation is quite different.[49] Usually the courts bound from the very beginning by the code, insist on legislative supremacy and by the same token reduce the judge's power. Complications however arise when the use of precedents is still extensive. In systems such as Seychelles, Louisiana and Quebec, the courts indeed refer to the code, but at the same time give authority to previous cases. It seems that the judge may use either of the two sources, and often does.[50] This delicate situation is well illustrated by the Donalson case, in which the Quebecquois judges departed from the civil code and applied a concept inspired from the English common law.[51] An earlier case decided by Louisiana judges offers however an opposite attitude. In McBride v Crocheron, it has been reported that all 37 pages which were allotted to the defendant's and plaintiff's arguments were based on common law principles. However, the court in its final decision slightly exceeded 3 pages

and entirely relied on Pothier![52] Three obvious questions arise in such circumstances:

1) What is the real value of the code? 2) To what extent can precedents influence judicial decisionsin a codified system? And 3) what is the weight of such a legal decision?

Also of particular interest in a mixed jurisdiction is the situation where there are conflicting opinions in determining the real nature of a case. In other words, is the matter before the court a common law or civil law case? i.e. should the solution applicable to it be a common law or civil law solution?[53] At first sight it might appear that the debate is a misconceived one. But as far as law applicable to the case is concerned, there are good reasons why the court prefers one particular law instead of the other;[54] for it should be noticed that there can be no compromise and it would be wrong to look for one. To take an example, a civil case involving damages or compensation must either be settled according to the Roman law principle of culpa, or according to the common law concept of fault and negligence, but not in-between! In the case of Orleans Navigation Company v Mayor of New Orleans[55] judge Mathieus argues, while clearly favouring the common law, that, in general both civil and common law are the same. "Such a choice" he says "is quite unnecessary". Whereas judge Martin dissenting takes the view that "The two laws differ toto caelo", and urges that the law to apply is civil law in the case beforehand.

In conclusion, not very often the intermingling of different laws find easy application in the courts. Although it may be said that there are some similarities between the different laws, there do in fact exist substantial disparities in many respects. The merger of two or more different laws in one court would in principle require from the judge an enormous burden of learning both systems. This means the formation of a class of judges familiar with both types of law. Finally, one interesting point attributable to the courts in a mixed jurisdiction, is that they show in substantive terms the clash between the different laws, and how the courts are affected by such a clash. It also has the merit of demonstrating the particular importance of the judge and gives indications - no matter how broad they are - of what the system is likely to be in the future.

C/ Institutional Problems

Any legal system is a set of legal institutions.[56] By the term legal institution is meant, to quote Boris, "rules, (whether statutory, judicial, administrative or customary in origin), principles of interpretation and concepts".[57] The legal position in a mixed jurisdiction is as in many other fields, a blend between different legal institutions. But very often a blend is not without complications and in many cases it may bring institutions into conflict. An attempt shall be made in this section to bring to the fore such problems.

Within a mixed jurisdiction, the complex pluralism which characterises such systems is also reflected in the interplay of their institutions. Quite frequently certain legal institutions in one legal system, such as family, contract, property, may completely differ from that in another. Generally, in the classical type of mixed jurisdictions blending common and civil law, it is not always possible to speak of a "clash" between different institutions in the real sense of the term; for both traditions are in many respects - though certainly not in all - basically similar.[58] However, examples are abundant as new types of mixed jurisdictions combining differently oriented legal cultures are developing. This can be clearly seen amongst certain countries of Africa (Ethiopia, Somalia, Sudan etc.), some of the Far Eastern countries (China, Japan) and few Arab countries (Egypt, Algeria, Libya, Saudi-Arabia, Yemen...).

To give the reader an approximation to the kind of institutional conflict which may occur in a mixed system, two institutions: polygamy in Sri-Lanka and the trust in Louisiana will be considered in turn with some general observations.

a) Polygamous marriages in Sri-Lanka.

If we consider as a distinctive part, the position of Islamic law and Islamic institutions in the legal system of Sri-Lanka, we realize that polygamous marriages have always been a common and legal practice amongst the Muslim community there.[59] Despite the various and successive western dominations whose conception of marriage is totally different, polygamy has never been under threat. The Muslim Marriage and Divorce Ordinance No.9 (1934) which is still valid in today's secular Sri-Lanka, regulates polygamy and makes provisions for Cadi courts.[60] Section 4 provides for the appointment of "any Muslim male of good character and position and of suitable attainments to be a Cadi". It vests in the Cadi exclusive and comprehensive jurisdiction to perform marriages, to hear and adjudicate upon applications for divorce on all grounds known to and recognised by Muslim law. There is also a provision made for a board of Cadis of five to whom appeals can be made. The ordinance delimits the power and duties of the Cadi as well as the procedures to be followed by the Sharia courts set up for the circumstances. Every Cadi is considered as a juristic person and all proceedings before him or the board of Cadis are also regarded as judicial proceedings in the true sense of the word; that is to say, the decisions

rendered by the Cadi carry full authority and are legally binding on the parties. The relationship between the Cadi courts and the rest of the "formal" or ordinary courts is visible at the level of the supreme court, which may or may not give leave to an appeal against a decision of the board of Cadis. In cases in which it does, the supreme court may affirm, alter, amend or reverse the order of the Cadi or the board of Cadis; but in all cases the decision of the supreme court is based on Muslim law.[61] Besides, to officiate on the Cadis activities, each one of them is required once a month to forward to the provincial registrar copies of all entries made by him in his book.

It follows from this brief excursus that it does not seem convenient for the Sri-Lanka legislature to impose ONE form of marital union as one would impose a highway code for instance. Nor does it seem to be sensible to think of a combination between the local institutional forms of marriage and devise a uniform law which would be common and satisfactory to all the islanders.[62] It is only by legally accepting as an inherent part of the law such a dual situation (i.e. polygamy beside monogamy), that the institution of marriage can work properly and effectively in the legal system of Sri-Lanka.[63]

b) The trust in Louisiana.

In a mixed jurisdiction we may also be confronted with another different set of problems specifically relating to the process and method of applying transplanted legal institutions. It may be duly argued that this phenomenon

is not particular to mixed jurisdictions, but commonly valid for any legal system. This is true, and there is no intention to argue the authenticity of this view here. But what differentiates a mixed jurisdiction from a "simple" legal system is precisely the heterogenous character of the former. In a mixed jurisdiction, the very fact that the system has a dual background may pose a few problems which do not exist in a "simple" system. In this respect the Louisiana attempt to incorporate into its civil code the trust deserves some attention.[64]

The first complicated question that had to be faced in Louisiana was the problem of defining the trust, a purely common law institution, in the language of the civil code. As it appears, it is a fundamental complex which brings us back to, and indeed can be tackled only through the thorny question of code and codification.[65] In this connection, it will be best to recapitulate, at the risk of being redundant, some elementary observations. It will be good to recall in the first place that the trust is an "exotic institution" which answers to a certain tradition and to a particular mentality. On a purely legal ground, it is the invention and principal subject of judicial equity. In the second place, many writers in their penetrating research have established that the institution of the trust cannot find a place in the system of the civil law; meaning principally its unsuitability in a system of codification.[66] Technically this is true.[67] A short survey of the trust shows that

this institution is intimately related to the duality of law and equity.[68] Such division is alien to civil law, and it "stands to reason that a legal system in which there is no duality of law and equity cannot divide ownership into a legal and an equitable title."[69]

In the light of the legal background of Louisiana, the basic difficulties surrounding the problem of incorporating into a civilian code the institution of the trust are quite exceptional. They are exceptional in the sense that both the civil and common law which form the basic law of Louisiana, know and indeed comprehensively regulate fiduciary relationships.[70] However, the difference between the two legal traditions lies chiefly, and this is very important, in their respective approaches to the notion of trust and fiduciary relationship.[71] What gives Louisiana its significance is precisely its attempt to amalgam the two approaches i.e. to treat the common law trust by civilian methods. This means in practice the application of certain rudiments and techniques which may not always be capable of translating in stricto, the real significance and purpose of the institution, either because they are not available, or perhaps unsuitable. To view the situation concretely, one has only to consider the efforts of various legislative bodies since 1938 to arrive at a comprehensive Louisiana trust enactment.[72] "Some of the difficulties", writes Oppenheim, "have been created because the trust is a creation of the common law which comprehends a dual idea of ownership in law and equity which is extremely difficult

for the civilian to understand".[73]

The Louisiana "adventure" is a clear demonstration of the kind of institutional problem that a mixed jurisdiction may have to overcome. It shows that as a result of conflicting conceptual stands, an institution may suffer substantial shortcomings. The trust in Louisiana has not been modified as it was in Quebec, but it has not been completely adopted either.[74] The Louisiana specie, it must be said, is a "bob-tailed" trust as Peter Hefti rightly observes. It concerns only a part of the trust.[75]

It follows from the foregoing that even in a mixed jurisdiction where laws supposedly complement each other, an institution which is exceptional to and familiar with a particular legal system - as the trust is to the common law, may well, once subjected to a different treatment, lose its physionomy or at least part of it. By way of comparison, it would be interesting to notice that in Seychelles, a country which shares an approximately similar historical background to Louisiana, there has been no attempt to incorporate the trust into the recent work of re-codification.[76] There, it seems that the draftsmen thought it safer - legislatively speaking - to leave the whole subject of the trust to the care of special ordinances rather than falling in a pell-mell similar to that of Louisiana.[77]

Besides legislating or inserting the institution into a legal and convenient framework, the legislator in a mixed jurisdiction, more than in any other legal system,

might also be required to provide the necessary "structure d'acceuil"; in other words, to offer the material means and facilities for the expression and articulation of the institution without which this institution may be paralysed or restricted in its socio-legal function. In the previous case of Sri-Lanka, the institution of polygamous marriage could have been reduced to insignificance had there been no special Cadis courts installed, and no Muslim jurists trained to deal with polygamy and all legal matters relating to it, (supra p.47). Further complications may also develop in a mixed jurisdiction whenever two different legal institutions overlap without either conflicting or complementing each other. For example, the introduction of the office of the "Notaire Public" as a corollary of civilian heritage, beside the common law institution of the Attorney, reflects exactly the type of "institutional overlapping" which may occur in many countries sharing both common and civil law traditions.[78] Possibly, one interesting question is to ask why such dual institutionalism is tolerated i.e. why the two institutions should not be merged?[79] If there are sound factors which make it reasonable to have such duality then, as a consequence of this, one is implicitly led to enquire into the respective scope and function of the legal institutions. As well as the utility of such questions there is also a judgement of value: by comparing or delimiting the legal power of each legal institution, a useful comparison is obtained by measuring the degree of influence that

one tradition exercises on the other within the whole structure of the legal system in question. This is partly true if we consider e.g. that in Scotland, because of the predominant influence of the common law, the notary public is less important than it is in Quebec or Louisiana where civilian sway is apparently more active and stronger; though in general in all the three countries, the notary public has very little in common with the civil law "Notaire".[80]

In conclusion to this section certain themes stand out: Firstly there is the problem of applying unfamiliar legal procedures and techniques to an institution. This may be unavoidable in any legal system, but is particularly crucial in a mixed jurisdiction; because there is no alternative for the system to do other than to ensure the institution its place within the law of the system by some means.[81] The clearest example, as already noted, is undoubtedly the trust in a jurisdiction such as Louisiana. If the trust has always been one of the manifestations of English mentality, it is certainly not its "uncodifiability" into the civil code that would lessen or prevent its application, especially amongst the English innate community. The strong attachment of this community to the trust, in a sense, made it imperative for them to have their fiduciary relations governed or settled according to the rules of the trust, regardless of the way this institution was expressed (be it code, ordinance or statutes and so forth).

Secondly, there is the problem of "filling the gaps" in a mixed jurisdiction. This problem can be cautiously approached from the following hypothetical example:

If Scotland were to adopt on a wide scale, the system of contracts similar to that of the French (because of the apparent kinship of the two legal systems), she would inevitably be faced at least with the following shortcomings. Regarding certain contracts, namely administrative contracts, these cannot be integrally fitted into Scots law because 1) there is no clear division between public and private law and 11) there is no system of administrative law as properly developed as it is on the continent. It is for these reasons that the concept, or institution of administrative contracts will be difficult for Scots law to digest. This leads us to consider the following remarks. Owing to the dual background of the Scottish legal system, what would be the preferable alternative for the system in the event of Scotland wanting to remedy some defects in her law or simply to improve it? Would it be preferable to look upon a legal system with which she has some kinship or should she look upon a system which she resembles?[82] Professor Walker of Glasgow University seems to sustain the first view. In his opinion "it would be advantageous... to look at the Roman law and system thereon...for guidance".[83] However, this statement needs some qualifications. It seems (and this is a personal view) that it would be better for Scotland to look at a law with which she has

more affinity, like South Africa, Sri-Lanka, rather than to look at the law of France or Germany simply because Scots law contains civilian elements.[84] If, however, the institution sought for the purpose of filling the gap does not exist or exists but is undeveloped in the "similar" system, this is quite a different matter. To the same extent, Scotland cannot afford to rely heavily on the English common law for fear of being finally anglicised and consequently losing her mixed stature.[85] To sum up, it may be duly speculated that when it comes to filling a gap, the status of a mixed jurisdiction is sometimes fallacious. The fact that the system is mixed does not signify or imply that elements emanating from one or the other component may be correctly fitted in the law of that particular system.

Conclusion to Part One

In this first part a great deal of liberty has been taken in modifying the theme under study by simultaneously broadening it in some respects and narrowing it in others. It has been broadened by frequent attempts to survey although in the briefest compass, the trend which may be referred to as the "mixing" of the laws of various countries. It has been narrowed by the careful selection amongst the herd of mixed jurisdictions of those which offer salient characteristics, and whose laws or institutions may be of particular interest. Notwithstanding the complexity of the phenomena of mixed jurisdictions which renders difficult any generalisation, it may be said that the mixture of a legal system responds in the first place to certain social conditions which are the offspring of certain events or forces. History has been useful mainly to retrace and explain such events as colonialism, reception, resurrection and importation of legal materials etc... Current ideas of economic interpretation, on the other hand, have pushed many countries outside their shells in search of what could result in a rapid modernisation of their society. Grosso-modo, for these countries it seemed that "the best was good enough (for them), no matter where it comes from".[86] Such events whether historical, economic, ideological or otherwise, as sociologists explain, frequently bring social transformations which in turn rebound on the law and the legal system of these countries.

In this first part, emphasis was placed on the particular circumstances where, as a consequence of such events, the law of one society has resulted in an amalgamation of several laws of different origins, and thus has become somehow "bastardised". The main interest forthwith was to venture for an exploration of different aspects and areas of the law in these systems, and more particularly the conditions in which these systems have completed a harmonisation of the different laws which they have accumulated. From legislative enactments to the practice of the courts, experience has shown that the mixture of the various laws did not always materialize unhindered. Differences in concepts and conflicts of ideologies surged bluntly and made legislative activity in particular areas almost impossible. The various legal techniques did not always correspond adequately in expressing the same concept or translating the same ideology which intrinsically feature the different laws. The result achieved in most cases was either a partial legislation of the law concerned or a substantial modification of it.

In the courts the judge, without wholly adhering to a particular legal tradition, was nevertheless compelled to look upon the premises of another legal tradition for a solution to the case before him. What was questioned there was not so much the legal background of the judge than the real weight of the "foreign" solution he had reached.[87]

All the way along this approach, various solutions have been expounded here and there to curtail diverse shortcomings and to bring together the different legal components as close as possible. Depending on conditions suitable for individual systems, these solutions generally vary from reconciliation to integration or a combination of both whenever necessary and feasible. In all cases however, it must be said that it is not just a question of finding a "via-media" between different laws, but rather a question of finding an alternative law which would bring into agreement different laws by putting them side by side with or without reaching a complete fusion.

PART TWO

THE CONCEPT OF A MIXED JURISDICTION AS IT APPLIES TO THE LAW OF ALGERIA

"Il Faut procéder à une refonte totale... à la fois par un Retour aux sources du Droit Musulman et par une adaptation... aux objectifs de notre Revolution Socialiste".

President H Boumedienne
March 1971

In the first part of this essay most of the references have been directed at mixed jurisdictions in a special sense, namely one in which civil and common law traditions interracted. The world, however, is no more divided between Rome and Westminster. As Professor T.B. Smith rightly observes: "there are of course more complex mixed jurisdictions".[1] In this second part, I submit that the Algerian legal system is one of these complex and novel mixed jurisdictions which combines three different and completely distinct legal systems: French, Islamic and Socialist. My analysis of the system will be based on Zweigert's doctrine of the style of legal families (Doktrin des Stillehre).[2] The reasons are threefold: a) to use a scientific method to approach the subject, b) to test the validity of the theory in question and c) to support my thesis that the law of Algeria is a complex mixture of different laws. Lastly, I hope that those who have enquired about the identity of the Algerian legal system, will find in this approach at best, an approximation of what the Algerian law is now.

CHAPTER ONE

The Application of Zweigert's Theory on the Algerian Law

Before introducing the Algerian legal system, it is probably best to start with a short reference to Zweigert's discussion of the various features which determine the specific style of a legal family.[3] Theoretically, the five criteria enumerated by Zweigert (and Kotz) cover, or try to cover the maximum of difficulties that can stand in the way of identifying a legal system as pertaining to a particular legal sphere or tradition.[4] As to the question of determining these criteria, Zweigert thinks in terms of "style"[5] and says that every legal system has a style. What is the style then? "The dress of thoughts" says Samuel Wesley.[6] Or, according to the Author's definition, "the sum total of the criteria which determine the individual character and shape the particular forms of a legal order".[7] As examples of style, Zweigert cites the position of illegitimate children as a "style shaping" characteristic of the Romanistic family. Meanwhile, it is the law of contract which determines the style of socialist systems.[8] In the present study of Algerian law only four criteria will be considered in depth under separate headings, The fifth criterion, relating to "the way of legal thinking" is scattered in various parts of the different sections and may be inferred easily from them.[9]

A/ Historical Introductions

Three main phases may be distinguished in the history of Algeria.[10]

a) The pre-colonial period:

During this period and until 1830 Algeria knew two different kinds of law applicable to two different types of community:
The Islamic law which was brought into the country through the Ottoman Empire, and the native law which was a totally different body of rules and customs. The former (i.e. Islamic law) consisted mainly of religious principles and formed the basic law of the majority of the Arabic population. The latter (i.e. customary law) was almost insignificant and was restricted to an ethnic minority called "Berberes".[11]

b) The colonial period:

In 1830 France conquered Algeria. In many areas of the law, the colonial power introduced its own metropolitan law or a variant of it. The legal system thus created applied - in principle - throughout the territory and to all its inhabitants. But there were very substantial exceptions. In the area of private law there were more difficulties in the French pattern being adapted or even in being imposed, e.g. in land tenure or land title or land law in general, the penetration of French law was severely obstructed by the local forms of land property and exploitation. This had the effect of the "improvisation" of a series of "Lois speciales" aimed at coping with the existing situation.[12] These special laws were a purely

colonial device, since they were neither French laws (i.e. laws that were in force in metropolitan France), nor did they resemble the native laws (i.e. those which were originally applied in the country). But since this topic is discussed to a greater extent later on it is sufficient to say at this point, that the purpose behind this colonial policy was primarily to facilitate legally the commercialisation (i.e. the trading) of the land; in other words, the transfer of land ownership from the native owners to the European settlers.[13] In other parts of private law, especially in family law and the law of succession, the penetration of French law was, without exaggeration, a complete failure because of the vast cleavage that existed between the two cultures. In these particular areas, the first to recognise the difficulties of applying the laws were the colonial judges themselves. As a result, the French legislature was subsequently forced to recognise the necessity of a separate system of laws and with it, a separate system of jurisdictions. By the end of the colonial period (1954-1962) it may be said that two different legal systems were clearly in force in Algeria:[14]

1) The French colonial law, being in a privileged position, was applicable as the general law of the land. It covered almost all matters and also served to complement or "fill the gaps" whenever the local law was underdeveloped or showed weakness.

2) The Islamic law, though it had lost a great deal of its significance in many areas such as commercial law,

criminal law, penal law and so forth, had however resisted western infiltration in many other areas of private law as shown earlier in this section.

c) The post colonial period:

In July 5th 1962 Algeria recovered her independence. However, with regard to various socio-administrative and economic institutions, many remained on the previous (French) pattern so as to ensure a certain stability in the country. As far as law and legislation were concerned, a great deal of French law, and French institutions were expressly maintained in force as long as these laws were not "contrary to natural sovereignty, discriminatory or colonialist in their character".[15] This, naturally, was intended to be a provisional solution until new Algerian legislation could be enacted.

B/ Sources of Law

The sources of Algerian law are various and complex. It is above all religiously inspired. In a number of areas of civil (private) law, it is purely and simply the malekite conception of Islamic law (figh Malekite) which is applied.[16] French law which was superimposed during the years of colonisation is however still a potent source. The growing amalgamation of civil law and Islamic law is well illustrated by Art.1 of the new (1975) civil code (hereinafter CCA) which reads as follows:

Sect (1): "The code governs all questions of law which come within the letter or spirit of any of the provisions".[17]

Sect (2): "If the code does not furnish an applicable provision, the court shall decide in accordance with Islamic Sharia law, and failing that, in accordance with the principle of equity."

In order to understand the forces underlying the sources of Algerian law better, it is necessary to analyse briefly the various component parts which make up this law.

a) Islamic law or Sharia

Ancient Algeria was founded on a religious basis on a sacred law. Even 150 years of French colonialism could not detach the Muslims from their Islamic culture and traditions. Instead, it was partly the disdain for western values that partially prevented French cultural infiltration. Moreover it was in the name of Islam and for the revival

of Islam that the war of liberation (Jihad) was waged against the French. Today Islam is being used nearly for the same purpose: to preserve the Algerian Islamic identity by striking back at the west and more precisely at western moral values.[18]

b) Legislation

Until 1830, the only law applicable was Islamic unwritten law under the Ottoman Empire. It was only with the French occupation of Algeria that legislation started taking roots in the legal history of the country. First of all, for practical (colonial) reasons it was felt necessary to have a body or a system of law applicable to all the inhabitants of the territory without ethnical distinction. But the existence of Moslems affiliated to different and sometimes irreconciliable religious sects on the one hand,[19] and the continual increase in the number of non-Muslim settlers on the other hand, led to insurmountable difficulties in the domain of law and legislation in general.[20] French legislators intruded first in fields where the hold of Islamic law was at its most fragile, such as criminal law and commercial law, and then gradually spread to other fields. Perhaps the most significant legislative achievement was the 1949 decree which gives-de facto-French nationality to all natives of Algeria to mark, it was said "the equality of all citizens before La Loi".[21] This was in reality, another colonial device to subject the natives to colonial rules and tribunals and to divert them from Islamic law and the Sharia courts. Broadly, till the end of the French occupation two kinds of legislation existed in Algeria: Firstly, the laws and decrees passed in the

metropole and concerning all French citizens - including the natives who had been "vested" with French citizenship. Secondly, a host of special laws (mentioned earlier) which were enacted in the metropole specially for the colony.

By the end of the French domination, the Algerian legislator was faced with the formidable task of reconciling the two systems: The Islamic and French laws. Many codes were promulgated to replace the old French ones.[22] These codes, modern in style and organisation reflect different flavours which give a certain particularity to Algerian law. French law, in all events, is not blindly followed. To the extent that they do adopt solutions taken from other sources, Algerian legislators tend increasingly to be more selective. However more emphasis seems to be placed in the socialist camp in response to a desire to establish a new socialist state. As a result, a considerable number of laws and regulations were introduced in many areas of public, labour, commercial and even civil law.[23] New institutions reflecting socialist ideas have emerged. Very often, they were either imported from socialist systems (Yugoslavia, Czechoslovakia, USSR), or cautiously imitated.[24] However, certain aspects of this socialist legislation were quite often seen as "not conforming" to Islamic precepts and institutions. The controversial question of the incompatability of Islam and socialism came sharply to the foreground. "How is it possible" it is said, "that religion and socialism can be reconciled?" Surely in a country like Algeria where both Islam and socialism constitute the very foundations of the new society, there must exist an answer. This aspect will be considered later.

C/ Legal Institutions

a) The conceptual division between public and private law.

The division between the two laws is a corollary of the French legal heritage.[25] The practical importance of this dichotomy lies in its jurisdictional aspect which in Algeria has undergone two phases: The first phase starts with the French occupation during which separate administrative courts similar to that of France were installed in Algeria, with however, appeal to the French institution of the Conseil d'Etat in Paris. The second phase extends back to the law and judicial reform of 1966 which simply abolished the administrative courts and transferred their competency to specialised divisions within the appelate courts. (See diagram infra). In effect, what the Algerian legislator did was only to reduce materially the number of courts. But the dualism of substantive law has been preserved. In broad terms, an understanding of Administrative law in Algeria cannot be dissociated from an outlook into its French origins by which it still remains largely inspired. As Dean A. Mahiou of Algiers Law Institute observes: "French administrative law is in Algeria both a heritage and a reference".[26] It is a heritage since it was bequeathed to Algeria by the French administrative jurisprudence which developed it throughout a long judicial practice, and it is a reference, because the present Algerian administrative law cannot function without constantly referring to the practice of the French courts.[27] It is certainly one of the rare

areas of Algerian law which will remain under French influence for a long time to come.[28]

b) Private law.

It is undoubtedly this branch of law where the mixture of Algerian law is felt most. Practically there is no private institution which has escaped this "melange". Meanwhile for the purpose of simplification I shall confine my illustration to a brief presentation of two of the most complex institutions in Algerian law: Family law and the law of land ownership. A third, but no less important institution concerning the law of contracts will be however scrutinised in a subsequent and appropriate context.

ba) Family law.

On the whole Algerian family law is an area which the French have failed to penetrate and which Islamic law, even today has not been able to monopolize. All over the years of French domination, there was an appalling state of conflict, not of rules but of precepts. On the one hand there was the western style of family essentially based on the concept of the nucleus family, preaching the equality of sexes and giving more freedom to women. On the other hand there was the traditional Islamic family, extended in its form, restricted in its capacity and above all, male dominated.[29] As may be gathered, the two concepts are widely different from each other. The following examples will serve to demonstrate further these basic differences which are in my opinion, at the very

origin of the complexity of the private law of the system:

(i) Marriage:

According to an objective interpretation, marriage in Islam can be construed in modern times as a contract of sale.[30] The pecuniary element being the dowry, without which the marriage is null and void (Coran, Chap.IV, v.16). This differs widely from the Napoleonic code according to which marriage is a contract of association (Art.1387). Moreover, polygamous marriages were not only divine principles laid down by the Coran, but very often were encouraged by the Suna; the binding sayings of the prophet Mohamed.[31] In the French civil code which reflects the Christian faith, monogamy is regarded as the sole form of marital union, whereas polygamy is a sin or a criminal offence by law. In Islamic law, a Muslim can espouse a woman from another faith whereas a Muslim female cannot marry a non muslim man.[32] This inequality is unknown to the French civil code.

(ii) Divorce:

The unilateral declaration of divorce is the general rule in the Sharia. The procedures are simple and very often to the advantage of the husband. In French law, the mutual consent is required before any divorce is granted.

(iii) Matrimonial matters:

The powers of women are extremely reduced in Islamic law and show a latent anachronism. Also, whenever these powers are present, they are always subject to the consent of the

husband. Though in theory there is a separate matrimonial regime, in practice, the wife concedes her rights to the husband "voluntarily". In French law, however, much more liberty (which is actually increasing) is given to women.

(iv) Succession:

The situation is at its most blatant. In Islamic law women are openly disadvantaged compared to men in cases of inheritance.[33] Thus if the deceased leaves two legitimate offsprings, a son and a daughter who are invited to succeed from an estate consisting of £300, the male heir will receive £200 and the female £100.

Against this background, French legislation in Algeria remained incapable of removing the substance of these traditional laws; for these were seen by the Muslim natives of Algeria as divine and that man, especially if he is not a Muslim has no power to interfere in Allah's prescriptions. However, the French influence on Algerian family law appears only in areas where substantive Muslim law showed lacunae or in some particular places where it was possible to introduce legislation without changing the meaning of the Islamic rule. In marriage for instance, some provisions concerning the formalities of marriage were encroached upon here and there, e.g. the age of marriage was fixed at a particular age (16 for a girl and 18 for a boy), whereas in Islamic law, the age was usually left vague (when parties reach puberty(?)). Another French intervention was the compulsory registration of marriage before an official registrar, who was not necessarily a

French official. In other parts of family law where legislation has been possible, it was essentially Islamic law but in a French style which was enacted. A good illustration in this connection is the 1957 law of guardianship which still governs that part of the present law. In short, the statute codifies the rule of Islamic law on the matter and adds some procedural innovations derived from the French model.[34]

However, the French legislation, it must be stressed, remained a dead letter whenever basic divergencies emerged between an Islamic rule of conduct and a French enactment, especially if the French legislation aimed at altering an existing traditional institution or openly legislated against it. It is mainly for such reasons that the famous 1916 Code Morand, which attempted to codify a family law in Algeria on the French pattern, has never come into being. It has been straightforwardly disregarded as being impracticable since it has at many points in time fallen short of reflecting Muslim tradition and genuine familial relationships. For instance, regarding filiation (i.e. the determination by the court of the paternity of a child), in French law there exists four categories of children: legitimate, legitimated, recognised natural and non recognised natural. In Algerian Islamic law only the first and the last categories exist legally, there being no illegitimacy. Adoption also differs greatly in both French and Algerian views. As understood from the view-point of French law adopting is non-existent in Algerian law. However there are other substitutes such as the

"Kafala", and "Ouassia", but these are in essence a far cry from western systems of adoption.[35]

To sum up, one can say that these contradictions between French and Islamic law, though partly a direct consequence of the colonial era, have not found an adequate solution with the departure of the French. It remains that the family in Islamic Algeria should be studied and understood in the context of the scheme of life Islam wants to establish. It cannot be understood in isolation. However, "the tragedy of our time", as the belief goes amongst the elderly is that changes are being imposed upon society under the stress of technology and other external developments, and the entire process of change is becoming somewhat indiscretionary and involuntary. In Algerian private law, one of the greatest tasks that lie ahead is precisely to counter-balance these two contradictory forces: traditionalism v modernism. So, the "familial" problem is not at the end solely or essentially a pure colonial legacy.

bb) The law of ownership: land law.

Throughout and after the colonial era the law relating to the ownership of land suffered considerable transformations. Its growth and development is in a way inextricably mixed up with the history of the country and its prospective future. Traditionally the soil belongs to the community. This mythical link between the community and the land was tremendously shaken during the years of colonialisation. The first objective of the settlers was to acquire more

land by elementary and easy legal means before resorting to force. This meant the application of certain procedures and methods which could ensure a safe and legal transfer of the land from the natives to the new settlers.[36] As mentioned earlier, the rules governing land ownership in metropolitan France were in their vast majority not applicable to Algerian conditions. As in family law, a wide ideological and conceptual gap separated the institution of land ownership on both sides of the Mediteranean sea. Realising such inconveniences, special laws were soon "improvised" by the French administration and later on put into effect. The main purpose of these laws was to relax the marketing of the land. As the French legal sociologist Gonidec writes:[37] "from the moment the notion of individual property succeeded to the notion of collective tenure, the land then becomes a merchandise susceptible to trade, (therefore) alienation. Individual property was guaranteed by the code and the tribunals quite frequently intervened to recognise the validity and facilitate the conclusion of contract of sale". Thus, following such measures a great deal of land superficies (notably those of good quality and high output) passed into the hands of Europeans. Nonetheless despite all these alien interferences, the Islamic element did not wholly disappear from the arena of land ownership. A remarkable Islamic institution known as the "waqf"[38] roughly comparable to the trust in the common law, strongly resisted French infiltration and remained exclusively under the control of the Muslim clergy (Zaouia) and Islamic law.

By the end of the colonial domination then, much of the land was "Frenchified" and a system truly based on a capitalistic mode of possession and exploitation was thus prevailing in Algeria. Upon gaining her independence, and in conformity with socialist principles, the country endeavoured to produce a radical change in the law of ownership in general. In land law, the first transformations appeared on the eve of independence when major French landowners left the country. Regulations were forthwith introduced thus enabling the state to take over any settler's property which was declared "Bien vacant". In March 1963 another government statute decreed that the state was the sole owner of all evacuated lands.[39] By May 1966 practically all land property which belonged to the remaining European settlers was taken over by the state. These expropriated or nationalized lands were then formed into organised state farms - very much on the Yugoslav model - run by workers' committees. (Comite de gestion). Since their creation, further decrees were and still are constantly issued in order to ensure a good functioning of these farms. Perhaps the most important law in this respect is the 1968 ordinance which clearly defines the rights and duties of the workers inside their agricultural enterprises thus putting an end to a lengthy period of internal confusion and disorganisation. If there is something to retain from these first socialistic steps, it is certainly the emergence of a distinct body of exceptional courts to deal expressly with litigations arising from these self-managed farms. In this connection, it is interesting to

note that neither the ordinary (i.e. civil or private) courts, nor the administrative chambers were assigned jurisdiction (i.e. competency) over such litigations. This will probably lead to the development of a new kind of "jurisprudence" with a socialist stamp, so far unknown to Algerian law.[40]

To sum up this section, it seems that "Institutionally", the legal system of Algeria knows three types of legal institutions. 1) Those inherited from France and which have not disappeared such as administrative law for instance. 2) Those of traditional Islamic law which are rather painfully making their way particularly in private law. And lastly 3) Those new ready-made or inspired socialist institutions called upon to save the country from social inequality and to boost national economy.[41] From an amalgamation of these three types or forms of institutions, reflecting three modes and ways of acting totally different - if not contradictory - arise a huge conflict of ideologies. To enquire into this ideological conflict shall be the purpose of the next section.

D/ The Ideological Conflict or Conflict of Ideologies

This conflict is perpetuated in practically all legislative documents, texts and official speeches.[42] Its genesis dates from the 1954-1962 war of liberation (or even before), when a promise for an Islamic-socialist Algeria was made once the country was liberated from the yoke of colonialism. Today, this promise has been kept and officially carried out. Thus, under constitutional provisions, Article 1 (1976 Constitution) recalls that: "The state is socialist", whereas Article 2 reads: "Islam is the religion of the state". Taking as a starting point these two articles an analytical approach to the conflict of ideology (thus deliberately created) will be considered. It will also be followed by a brief synthesis on the real impact and significance of this ideological conflict on the legal system of Algeria.

At first glimpse, the adoption of these two principles amongst the fundamental basis of the organisation of the Algerian society makes Islamic law and socialist law - de facto - the laws of the country. This could, in my way of thinking, equally serve as a basic argument for an implementation and application of both laws.[43] However, the reality of the situation naturally deserves great attention. Under separate headings, an identification of each ideology will be considered in relation to the area(s) of law in which it is more influencial.

a) The dynamic of Islam

Strongly attached to its Arab-islamic tradition, Algeria has always claimed allegiance to Muslim culture and adhered to Muslim moral values. After 1962, in independent Algeria, Islam regained its place amongst the new institutions and according to R. David "is expected to occupy even a privileged part in the law of the country".[44] The only issue at that particular time was to discover if the influence of Islam and the substance of its rules were still strong enough to justify their application in contemporary Algeria. In the meantime however, concrete measures closely linked to Islamic law were expressly embodied in a series of piecemeal legislation under diverse law decrees, ordinances and the like. With the exception of private law, which as already mentioned, is a particular area of the religion, other areas of the law were gradually made, via legislation, to conform with Islam. Apparently most of this legislation was of little significance and had little repercussion on the substance of the law in general. It was actually more a psychological measure than a legal prerogative as one may imagine.
Amongst these laws are:
The decree No.75-37 which forbids pig breeding in accordance to the Coran (Surat V, 193).
The decree No.75-76 which condemns (but does not abolish) the consumption of alcoholic drinks (Coran, Surat V, 197).
The recent law No.46-76 which deletes the western week-end, i.e. Saturday and Sunday holidays, and replace it by Thursday and Friday because of the holiness in Islam of

these other days. Besides these decrees, various "instructions" were also passed on private educational institutions, directing them to include a religious (Islamic) teaching in their programmes. In order to coordinate all these activities and to give more impetus to Islam, the Ministry of Religion, which is an official body of the governmental structure, plays a great part in promoting Islamic education by the creation of religious establishments and institutes all over the country.

In other areas of the law, Islam appears more symbolic than really authoritative in its function. In constitutional matters e.g. beside the presidential oath (Art.16 Const.) which is religious in essence,[45] there is a certain category of high functionaries of the government who are also compelled to pronounce a religious oath before undertaking their posts.[46] In the law of nationality too, there is an implicit reference to Islam. Thus, in order to define the notion of the Algerian entity, the legislator demands that the person claiming to be Algerian must, besides being born in Algeria, prove to have at least two ascendants of Muslim faith.[47]

Certain manifestations of Islamic law can also be detected in labour law through a variety of fragmentary and specific regulations. For instance, special holidays are guaranteed by the labour code (Art.229) to anyone who endeavours pilgrimage (Hadj) to Mecca. Conversely, the same code requires (Art.209) a non-Muslim contractor or employer to apply for a special authorisation from the

local authorities, should he close his factory for a holy celebration in his particular faith.

Finally, in penal law, the 1964 ordinance, while maintaining the death penalty requires that its execution should be carried only in accordance with Islamic law and procedure.

However, there are circumstances where in a strictly Muslim area it may appear impracticable or inadvisable to displace wholly the relevant Islamic law. In these circumstances, as will be seen later when dealing with legislation in Algeria (see infra. p.121) the legislator, may in a circumspect way avoid a flagrant conflict with the Islamic rule. This process known as the "Fetwa" amongst Muslim jurisconsults, thus enables the Algerian legislator to depart from the Sharia and to achieve his legislative purpose. However it must be noted in passing, that this device is severely limited and rarely utilised. In nearly 18 years of Algerian legislation, the "fetwa" was resorted to on very rare occasions (e.g.in 1971,in order to validate the percentage of interest in loans concerning some governmental forms of transactions, known as "les bons d'equipement".)[48] It should be recalled here, that in Coranic law, the entire notion of loan interest or usury is strictly forbidden. The main intention of this short survey has been to show the scope and value of the Islamic element in other branches of the law of Algeria. Contrary to general belief, Islamic law is not primarily and solely confined to private law. Though its significance,

as demonstrated above, might appear of minor importance outside the private law, nonetheless it does mirror the actual tendancy that Islamic law is gradually extending and expanding in other areas of the law of the country's legal system.

b) The socialist option.

The "irreversible option of socialism" is seen by Algerian leaders as the only path to complete national economic independence. Socialism, like Islam is one of the fundamental principles upon which the new social order must be founded. Thus, on the basis of constitutional principles, the organisation of the legal system has seen the recent and multiple adoptions of codes and other legislative enactments of predominantly socialist inspiration. The spirit, in general, of this legislation is mostly reflected in the fields of public and economic law, fields which neither French (capitalist) law is suitable to regulate, nor Islamic (traditional) law can entirely handle with efficiency. However, in order to show the impact of some of these socialist legislations on the Algerian law the following two important reforms will be considered.

1) The 1971 agrarian law reform (or revolution).

In applying the sacred principle that "land may belong only to those who work it with their personal labour", an agrarian programme was carried out under the law No.71-173 of 8th November 1971.[49] It aims primarily at a radical change in the whole agrarian structure of the country,

hence its denomination of agrarian revolution. (I shall be referring to the term "reform" instead of revolution, since this latter term is very often associated more with political events). This process of land reform consisted of various sensitive legal points such as the delimitation of the private property of large landowners,[50] the nationalization of all lands (regardless of size) whose owners were absent (absenteeism),[51] and lastly the expropriation of the lands when owned by individuals exercising another profession.[52] As to the first point concerning delimitation, a maximum of a private holding was calculated on the basis of various data (family need, number of children, arability of the land etc.) and a certain quota was accordingly fixed. Concerning the second (nationalization) and third (expropriation) points, individuals who failed to cultivate personally (i.e. physically) their lands because they were away, were urged to return and work their lands. As to those who were already in possession of another profession (or business or any lucrative source of income), they were invited either to give up their particular profession, or the ownership of the land. In order to proceed smoothly, the law reform was staged in three separate phases. Only the first and second phase will be considered here mainly because of their importance for the law of ownership and its evolution in the development of Algerian law.

ba) The first phase.

All domainal lands (i.e. belonging to council districts) and all lands belonging to public or private institutions were systematically nationalized and distributed to families of landless peasants. The impact of these measures was very significant on the socio-legal structure of the country. The first objections soon echoed from the "Zaouia" (the Muslim clergy) whose land (i.e. the waqf) did not escape nationalization. Quoting various surats (verses) from the holy book, the Zaouia portrayed the measure of nationalization of the sacred land not only as contrary to Islamic principles, but executed all the necessary propaganda to dissuade peasants to take over such lands. For, the "waqf" was not, according to them a private (in the capitalistic sense) institution. Instead, it was one characteristic of the Islamic sense of community, which even the enemy of yesterday (i.e. the French) had respected and which socialism today was destroying. It was in this particular context, that for the first time in independent Algeria, the debate between Islam and socialism was openly taking place.

bb) The second phase.

This phase was comparatively more provocative and more delicate in its application, for it concerned directly the break up of large Algerian owned farms. As it was not intended to "unjustly" deprive nationals of their own property, the state undertook a series of sensitive legislative measures so as to ensure a smooth process of nationalization. To that effect special courts called

"Commissions de recours"[53] were set up. (Art.271 agrarian code). Their role was to hear complaints or objections emanating from farmers concerned with the measure of nationalization. These complaints were heard well before the state took over ownership of the lands. However, after expropriation, a fair system of indemnification was provided for compensation.[54]

From this brief survey let us now consider what has been the effect of this agrarian law reform on the concept of land ownership, and to what extent has this been affected by the conflict which has arisen between the Islamic dogmatism and Marxist ideology.[55] Generally speaking, these reforms have given the concept of land law in Algeria a new visage besides the already confusing and complex one. Not only were the Islamic (traditional) rules anachronistic for a modern system of land law, but they did not also always accord with the view of the new socialist approach. As far as this aspect is concerned, its application posed as well as ideological perturbations, new legal and unexpected problems. Thus Art.1 of the agrarian law reform stipulates that "land belongs (only) to those who work it". But in real terms what is the legal validity of such a right? Does a person to whom a piece of land has been attributed own the land in the Roman sense of "to possess, to enjoy and to dispose"? Or is it just a limited right of ownership? Even if this is so, what are then the exact limits of such a right? Otherwise, what is the legal relationship between the limited right of the individual (i.e. the beneficiary)

and "his" land? Can he, for example, bequeath it to his heirs? These are some examples of the difficulties of today's Algerian legislator as far as socialist ownership of land is concerned; difficulties to which one can find solutions only by a consideration of the law of certain countries which have experienced similar problems, that is to say the law of the socialist countries.[56]

2) The socialist charter for public enterprises

This other measure of socialism is much more linked to public, than to private law.[57] Reference to it in this particular context is motivated by two objective considerations. Firstly, because it concerns an area which has been thoroughly exposed to "socialisation" and so illustrates the penetration of socialist law into Algerian law. Secondly, this area of public law is still in many respects a mixture of French and socialist law, thus quite attractive for consideration in some of its mixed aspects.

As to the first point, it could be said, that almost the same tide of nationalization which occurred in the agricultural sector was on a parallel basis extended to the industrial sector. Besides the state property which included nationalized industries taken from private owners, the state endeavoured for the creation of new enterprises. These were subsequently transformed to self-managed industrial plants i.e. the enterprise was collectively run by workers' committees. As in the farms the worker in the factory was not just a simple labourer-

producer,but a manager-producer, actively participating in the production and administration of the enterprise. In socio-economic terms such mutations principally aimed at promoting social changes through and via new economic methods. In terms of law and legislation this meant the adoption and adaptation of a great number of laws on the socialist model, though not any particular one. The law No.71/74 of November 16th 1971 is, to that effect, the backbone of the socialist legislation in Algerian law. As to the second point, the remnants of French law in the public sector can indirectly be inferred from the survival of a substratum of a small private ownership in the new Algerian legislation. Thus, outside the socialist sector small industries and commercial concerns were not nationalized.[58] Contrary to many socialist regimes (such as the USSR and to some extent Romania, Bulgaria...) there is still in Algeria a residue of private economic activity. However, though the private sector is permissible in Algerian law, its undertakings are envisaged only in a particular (socialist) context. According to the National Charter (p.132) and the new constitution (Art.110) only "non-exploitative" property i.e. that with a certain productive social function - is allowed. It is partly in this narrow area of public law that reference to French legislation is still of some utility. But on the whole, French law remains much more in form than in substance. Though for instance, the private companies may retain the same characteristics (external as well as internal structure, form of administration and management and so forth) of the French model, the substantive law which

governs these companies differs widely from the French purely capitalist ones, especially in matters of contracts and the law regarding employment where state intervention is particularly noticeable. Another peculiarity of the Algerian private sector appears also at the level of the national courts between this sector and the socialist (i.e. state owned and self-managed) sector. Whereas the latter comes exclusively under the competence of special courts of exceptional jurisdictions, the former still continues to be, as in France, a matter for the ordinary courts. However, it would be wrong to assume that socialist laws have been influencial only in the specific area dealing with public law. To take a few examples, in commercial matters, major modifications were introduced into the old French code of Commerce. The new Algerian commercial law of 1975 abolishes many commercial activities which were previously carried out by private individuals or companies, as it introduces many novelties in the law of partnership and various types of corporations to match state planned policy. In penal law, too, the socialist infiltration may be easily felt. Thus, the new Algerian penal code of 1966 includes a new category of economic crimes called "les crimes et delits contre les enterprises et exploitations d'autogestion". (title III Alg.Pen.Code). These are mainly crimes against the socialist sector such as attempts against the integrity of the nationalized lands, the intention to shackle or to foil the normal carrying out of the

agrarian reform, sabotage of the means of production, and various other crimes against "The Revolution", which in their content are reminiscent of the Soviet Hozjajstvennye Prestuplenija (Chp.III special part of the 1960 penal code of R.S.F.S.R.)

To sum up this section, what are then, the ideological reasons of the incompatability between the various laws. Having discussed the salient features of the Islamic and socialist outlooks on various aspects of Algerian law, effort shall be made here to synthesise briefly the actual conflictual tendancies which in my opinion are the very cause and reason for the present complexity (i.e. mixture) of Algerian law.

Contrary to a positive legal rule of socialist character, the "fiqh" (or the Islamic jurisprudence) is not bound by political imperatives.[59] The concept of the legal rule in Islam goes beyond that which is purely materialistic. Islam seeks to reach an ideal (Theological) standard of life in conformity with Allah's will. It aims at imbuing the daily life with a religious dress. Islam has a social vocation more than anything else; whereas socialism has first and foremost an economic interpretation which does not always coincide with Islam.[60]

It is true that Islam represents an ideal of justice, nonetheless it has never prohibited ownership of large areas of land by private individuals which socialism categorically opposes. Islam has also never

questioned the differentiations of the social classes in society. Instead, it considered such cleavage as inherent in Islamic principles, called on to develop and evolve within society;[61] whereas it is precisely against such social inequality and class distinction that socialism took roots and is incessantly fighting.[62] Yet, both Islam and socialism preach social equality, justice and above all the welfare of individuals and society in general. To justify their stands vis a vis such conceptual points of view, Algerian leaders have repeatedly voiced that there is no incompatability between Islam and socialism. "Islam is a socialist religion", and "our socialism is specific".[63] The objectives of socialism in Algeria are essentially economic. "We take from socialism only the method but not its ideological (Marxist-atheistic) interpretation". (Boumedienne). This is why Art. 192 of the constitution forbids any constitutional revision as far as religion and socialism are concerned.[64]

CHAPTER TWO

Problems Peculiar to Algeria

Viewed from a schematic stand, the existence of a variety of differences in the Algerian legal system is attributable partly to an indiginous (pre-colonial) origin and partly to innovations which were imported or imposed by the colonial power, and finally to the new socialist concept deemed necessary to bring about a change.[1] All these components are equally important, first in their respective areas, and second as forming a coherent unit in which the legal system evolves as a whole. Notwithstanding an apparent state of internal contradictions or specific conflicts amongst these components it would be incorrect to think of a somewhat "compartimentalised" legal system. Nor would it be proper to speak in terms of a "competition" or "challenge" between the different legal orders.[2] The entire structure of the system should, in my view, be visualized in a conciliatory perspective. It is a fact that all the three components have founded origins which largely account for their presence in the legal system. But it is also a fact that the legislator - unless he wants to play the Ataturk - does not want to depart deliberately from any of these components. What seems to be actually taking place in the Algerian legislator's mind is an attempt to unify all these three components into a single legal unit. As it appears then, the first main problem seems to be that of unifying the laws.

A/ The Unification of Law

This process, in reality, started very soon after the independance from the top with the institution of a supreme court at the national level. It was followed three years later in 1966 by a unification of the lower courts throughout the territory. On the whole, though it can safely be said that the entire judicial machinery has in principle been unified, nevertheless, there still persists inside the same machinery a multitude of laws.[3] It is precisely this multiplicity which is now the main concern of unification. The intention here is to give a description of the measures that have so far been taken to unify the different legal orders and to outline, whenever appropriate, some of the problems that have arisen as a result of such unification. To that end, the role of the supreme court is of significant importance.

The role of the supreme court can clearly be understood from the dispositions of the law no.63-281 of 18th June 1963 which first established the institution of a supreme court in Algeria. Since then however, several modifications have been introduced into the structure of the judiciary which have in turn substantially modified the original role and function of the court. As it stands in its present form this role is re-defined in Art. 177 of the 1976 Constitution which reads as follows:

La cour supreme constitue dans tous les domaines du droit, l'organe regulateur de l'activite des cours et tribunaux.

Elle assure l'unification de la jurisprudence a travers le pays et veille au respect du droit.[4]

As may be understood, the first part of Art.177 describes the supreme court as a "regulatory organ" of the different jurisdictions (i.e. courts), in all areas (penal, civil and administrative) of the law. It is the highest body in the hierarchy of the judiciary. Its role consists principally in embracing the functions of three earlier and separate high jurisdictions: the Court of cassation, the Conseil d'etat, and the "Chambre de revision musalmane". It is exactly at this juncture that emerges the most delicate task of the supreme court which is, as described in the second part of Art.177, to ensure the unification of the jurisprudence. Art.5 of the law establishing the supreme court (1963) had already anticipated this and attempted to make such unification easier. Thus, despite the organic composition of the supreme court into three chambers (or divisions), penal, civil and administrative (see diagram infra); Art.5 empowers any chamber to consider any matter which is submitted to the supreme court regardless of the nature of the case.[5]

From a survey of some of the decisions of the supreme court during its fifteen years of experience it appears that the court has mainly been preoccupied in re-adjusting the law as administered in the lower courts and trying to lay down the foundations for a uniform line of "jurisprudence" for these courts.[6] The majority of the cases brought before the supreme court however seem

related to land ownership, an area in which the influence of French law has been particularly intensive. A study of these cases shows an appalling state of confusion between French law and the special laws and Islamic law. At the origin of this conflict was the emergency law No.62-157 of 2nd December 1962, which as mentioned earlier, brought all previous French legislation back into effect in Algeria. In broader terms, this law expressly invited the judge to apply either French law or Islamic law thus leaving him a considerable power of discretion. In its practice, the court generally tended to favour the Islamic law whenever feasible and very often it did, especially when the Sharia had clearly been abrogated or superseded by colonial legislation. Thus, in a recent case[7] involving the application of the "chefaa",[8] the supreme court unanimously rejected the provision of Art.841 of the French civil code and re-introduced the Islamic rules governing the "chefaa" as they applied before 1817, the date of their deletion, and replacement by French law. It appeared clear to the court in this particular case of the "chefaa", that the French rules were openly against the rules of the Sharia, and that alone was sufficient ground for revoking French law.

There are also situations where the application of the colonial law was revoked, not only because it was in flagrant conflict with the Sharia, but rather because of the malicious character of that particular law. This mostly concerned what were termed "lois speciales" (special

laws) previously referred to (supra p.62).

In some cases, the supreme court adopted an attitude which strictly speaking was not an "Islamic attitude", viz, to the extent of calling upon an Islamic rule of law for solution as in the previous case of the "chefaa". It was rather due to the necessity of protecting and preserving certain typical Islamic traditions or institutions that the application of French law was disregarded. The two following cases will serve as an explanation of the situation.

In the first case concerning "les biens francises", the question was whether a valid transfer of ownership of an immoveable object could be created merely by a notarial act of execution. Previously, (i.e. during the colonial era) both the French court of appeal and the chambre de revision musulmane had decided that once an immoveable object had been subject to a purchase before a notary public or certified by a notarial act, the property ceased to be subject to the rules of the Islamic Sharia and fell under French legislation - ab-inito -. In its decision of the case now under discussion the supreme court answered the question negatively, thus providing a tremendous jurisprudential shift on the subject matter. In its reasoning, the court was of the opinion that such a notarial act does not in itself establish ownership. In the court's view the notarial act is only an appreciation of the convention between the parties: it cannot alter the legal status of the

immoveable sold or ceded. In its conclusion the court sustained the idea that in the absence of a title to land there could be no legal and full transfer of property even if authenticated by a notarial act.[10] Two important jurisprudential points emerge from this decision: 1) The court still recognises religiously-governed property and provides safeguards for all immoveables which originally fell under the rules of Islamic law. 2) Implicitly the court maintains the principle that all other immoveables i.e. which do not pertain to religious law, remain under French law.

In a second case, this time dealt with by the appeal court of Algiers, it was decided that an immoveable though not religious in its nature, could be subject to the Coranic law.[11] Thus, invoking the famous law 62-157 (to justify the application of Islamic law) the court unanimously agreed on the transfer of an immoveable made by a simple testimonial proof. In Islamic law this is the mode of proof par excellence. The written proof is secondary.[12] However when the case reached the supreme court, the judges while favouring the Islamic rules regarding the modes of proof; considered these rules inappropriate in the particular case before hand. Since, according to the view of the majority, the immoveable in question was not of religious character, it was therefore outwith the scope of the rules of the Islamic Sharia. In its conclusion the court decided that the matter should be classified as one pertaining to French law and as such, a written proof as required by the code civil was thus necessary.

In the other complex area of family law, almost the same disconcerting atmosphere prevails. The extensive and not infrequent random use of Islamic law created a certain discordance of judicial opinions and a feeling of uneasiness amongst the judiciary in a great number of cases. Thus, and to take only just one illustration, in the Chebouka-chadly v Yahiaoui, Z. the court of the district of Mostaganem, invoking the application of the law no.62/157 (supra), referred to a surat (verse) from the Coran on which to base and render its decision.[13] In this case, the plaintiff, a woman, sued her husband for cruelty and ill-treatment. The court decided that in accordance with the authority given by the law of the Sharia to the husband, to whom the wife manifests disobedience or disinclination, it is the husband's right to use the necessary means against his wife from simple reprimand to punishment. The original text in the Coran indeed stipulates: "And if they (women) disobey you, beat them." (Cor.II, Sur.19). This case, apart from its juridical importance from a jurisprudential point of view, is also a good illustration of how judges were generally confused. Very often they did not know precisely which of the two laws (i.e. French or Islamic) to apply. This in a cautious way, is quite similar, for instance, to the position of Louisiana (or Quebec) judges when confronted with the question as to whether civil or common law is the law to apply, as illustrated previously (supra p.43). It seems roughly, that as in Louisiana, in Algeria this hesitation is very much a matter of legal education, accentuated by the diversity of the judge's

personal background. In Algeria as Gamal Bousri notices, there are those magistrates recruited from amongst the old judges of the traditional Sharia courts, and those who underwent a western legal education. While the first group favoured an application of Islamic law, the second tended naturally and quite understandably towards the (French) civil code.[14]

From this brief survey of the judicial process it appears that the "jurisprudence" of Algerian law has been "like a pendulum swinging between two poles". From practically no solid basis, the supreme court has been very concerned in elaborating a new pattern of "jurisprudence". For it was obvious and essential that after independence, the law and a fortiori, the "jurisprudence" should be devoid of their "colonialist character". Accordingly an extrapolation from the French law could be achieved only by a fresh start; but even a new start needs some preliminary basis to rely on. This is what justifies to a large extent the maintenance of the French raw material. Islamic law was on the other hand, another ingredient that seemed to be used in most areas when French legislation was deemed unsuitable. Quite amazingly, during the colonial period it was rather the reverse phenomenon! So far I have been tracing this "jurisprudential evolution" mainly within the supreme court. It is also interesting to note that the same phenomenon was (and still is) manifested in the lower jurisdictions. Moreover, it seems that the decisions of the supreme court enjoy a great authority and are

generally followed by the lower courts and tribunals, though in principle they are not bound to do so. In theory each court is neither bound by its own decision, nor by the decision of the highest court. Nevertheless, it is almost certain that by following the decisions of the supreme court, the judges in the lower jurisdictions contribute enormously and concretely in assisting to the unification of the law. On the whole, it is still premature to speak of an "Algerian jurisprudence" which would reflect a clear image of an Algerian law interpreted and elaborated in entirely Algerian courts. The law which as J. Carbonnier says, is the main ingredient of jurisprudence is not yet clearly defined in the new Algerian legal system. The question should not be, in my opinion, what is the situation or the importance of the "jurisprudence" in Algerian law, but rather what is the tendancy of the current evolution of "jurisprudence", or put another way, in what direction Algerian "jurisprudence" tends to develop. This aspect will be examined later.

B/ The Judiciary

In Algeria, as in all mixed systems the question which comes immediately to mind is how it is possible to envisage a multiplicity of systems of laws within a unitary judicial order. In Scotland, just as in Quebec, Louisiana, the Seychelles etc., there is a duality of law but there has never been any question of duality of courts. Algeria is in this respect an exception: it offers the double advantage to the researcher of presenting a legal system where, as submitted earlier (supra p.35), a plurality of laws may carry with it a plurality of courts and it also confirms and demonstrates the common practice, which like several mixed systems consists in maintaining a duality of law but not of courts. To understand this double phenomenon better, I shall consider a short review of the two main phases in the evolution of the judicial system of Algeria. The first phase will be presenting Algeria as a mixed jurisdiction evolving within a double system of courts,[15] while the second phase, which is actually the present situation, will be describing Algerian law, but this time within a unitary judicial order. In analyzing the various reforms which brought about the passage from the first to the second phase (i.e. from duality to uniformity of the courts) some relevant problems will successively be considered. Moreover, and in order to give as complete a general view as possible of the judicial system, an outlay of the organic composition of the courts will also be

considered, followed finally by an estimation of the new definition of the concept of justice in the contemporary Algerian judiciary.

a) The judiciary before independence (1962)

During the colonial period and until the French left the country in 1962, the judicial system of Algeria was structured on a double basis, according to the two "national" laws which were then in force. On the one side was the French legal system with all its judicial apparatus, including naturally the classical dichotomy of the ordinary and administrative jurisdictions. On the other side was the Islamic law, widely spread amongst Muslim Algeria, but modestly represented at the lowest order by an archaic set of courts known as "Mahkamet of the Cadis" and at the top by a kind of supreme or high court known as "the Chambre de revision musulmane". Though there was a separate corps for each judicial order, liaison between the Mahkamet of the Cadis and the French tribunal was always possible (by way of appeal) and very often encouraged.[16] Such appeals from the French judicature to the Muslim were in effect very rare, but when they did occur, the French tribunal sat as a Muslim court and applied Islamic Sharia law in cases where litigants were of Muslim faith.[17]

However, the distinction between the two orders of jurisdiction is more visible at the apex of the hierarchy of each order. For the French there were obviously two high jurisdictions: The court of cassation and the conseil d'etat, very similar to that of metropolitan France. For

the native Islamic law, there was, as already mentioned, one single high jurisdiction represented by the chambre de revision musulmane. The competency of this latter court, as well as the authority of its decisions were, to some extent, comparable to those of the court de cassation. At this highest level, the split between the two was strict as each of the high jurisdictions enjoyed a complete autonomy in relation to the other. Unlike at the lowest level, there was no liaison between the two orders at the high level. This marked an important development of a dual system of law, which as evidenced by the foregoing, was made possible only by a corresponding duality in the court system.

b) The judiciary after independence

This is an interesting period in the transformation of the judicial system of Algeria. For if we have previously imputed the duality of both law and courts to the French presence in the country, we can ask what form the judiciary will take now Algeria has become independent. It is also an important phase because, whatever reform(s) the country might undergo, it may indirectly provide an indication of what particular system of law the reformers seem to favour or are likely to adopt.

ba) The first reforms (1962-1966)

Amongst the major innovations during this period in the judicial machinery were:-

(i) the ceasing of all Algerian jurisdictions to be subordinate to the French court de cassation and the conseil d'etat in Paris.

(ii) The abolition of all the Sharia courts ranging from the Mahkamet of the Cadis to the high chambre de revision musulmane.

(iii) The institution of a supreme court to replace and fulfil the function of the previous French high jurisdictions (conseil d'etat plus cour de cassation).

(iv) The abolition of a variety of "exceptional courts" which were typical of the French judiciary such as the commercial tribunals, the conseil de prud'hommes (labour courts), the court of expropriation, the court of social security claims, the landlord - tenants courts and so forth.

A few of these courts were abolished simply because they had no more raison d'etre. The rest were fused into a new ordinary and single court. The material disappearance of the former courts was essentially due to extrinsic factors namely the lack of personnel created by the sudden departure of the French magistrates.

As far as the substantive law was concerned, there was no significant change during this period. In court-room practice all previous techniques and procedures proper to the French judiciary were maintained, and even a small number of French magistrates still continued to adjudicate in the Algerian courts at every level.[18] Islamic law did not wholly disappear as a consequence of the abolition of the Sharia courts. On the contrary its integration into the new structure gave it (Islamic law) greater respect and wider application.

This was briefly the first step taken to unify the judicial system of Algeria before the main reform of 1966, a situation which one can summarise as a preparatory or a transitory period.

bb) The 1966 judicial reform

This is the "big" reform which technically shapes the present judicial organisation. The work of reformation which, as has already been seen, started well before (since 1962), was strengthened by the introduction of new decrees and regulations aimed at a systematic organisation and consolidation of the new jurisdictions.[19] In general, the judiciary as a whole, has been simplified to maximum effect by a two-level system with a single supreme court at the apex.

At the lowest level there are 132 tribunals which are as a rule, competent over a variety of litigations: penal (i.e. minor offences, delicts, contraventions), civil (private), commerciale, prud'hommes etc... They have a general jurisdiction save for criminal cases and cases involving juvenile delinquency, which are expressly excluded from the competency of the ordinary courts and are entrusted to exceptional or special tribunals. A tribunal may however be divided into two, three or four sections, depending only on the size and importance of the Daira (local form of geographical and administrative division) within which it operates. The sections are limited by law to four: civil (private), penal, commercial and prud'hommes. As may be noticed, there is no Sharia

section, but substantive Islamic law is abundantly used in the civil (private) section and to a lesser degree in the others.

At the second level of the judiciary there are the courts of appeal. Their judicial attributions are co-extensive to those of the tribunals. Unlike the tribunals, however, each court is divided into four divisions regardless of the area or place where it sits. One particularly interesting division is the administrative division which, before the reform constituted a separate jurisdiction from the ordinary one, it has now been reduced to a simple administrative chambre within the ambit of each appeal court. (see diagram) Contrary to the other three divisions (civil, penal and accusatory) which hear appeals from the lower tribunals, the administrative division always sits as a court of first instance with appeal from its decisions to the supreme court. This novelty brought into the structure of the judiciary is a major modification of the entire judicial machinery in particular and the legal system in general, for it furthers the process of unification,and simultaneously puts an end to the other duality of jurisdictions represented by the administrative and ordinary courts that the judicial system had inherited from the French legal tradition.

Finally, at the apex of the hierarchy is the supreme court which, as already discussed, is the first institution to have been set up in the process of the unification of the law and "jurisprudence". But a uniform law cannot by

itself bring about a secure and stable legal system. The other challenge once the unification begins is to create on a parallel basis, as the reformers did in Algeria, a unified and homogenous judicial system. In its basic form, it may be said, that the new structure of the judiciary in Algeria stands far from any of its predecessors. There is no extensive French domination, nor is there any indication that the judiciary is religiously inspired or adopted on a particular religious (Islamic) model. On the contrary, it is from both sides and other original systems that the judiciary in Algeria without breaking completely with its past, has gradually moved from a basically dual system of courts towards a new unitary one.

In conclusion, the process of the various reforms, apart from the unification of the judiciary, aimed at its simplification without endangering its inner philosophy of legal dualism. The experience is by and large alien to and has no comparison with the common-civil law type of mixed jurisdiction. However, it could well be of some practical guidance for many African countries which still experience a dual system of courts they may no longer find convenient. My description of the new judiciary would perhaps be incomplete without an appraisal of the members who form and work in it. It is those people and the hierarchical framework in which they perform their duties to which I now turn.[20]

c) The judicial profession and auxiliary personnel

After the many reforms that have been engrafted

TABLEAU I ORGANIGRAMME DES JURIDICTIONS EN 1962

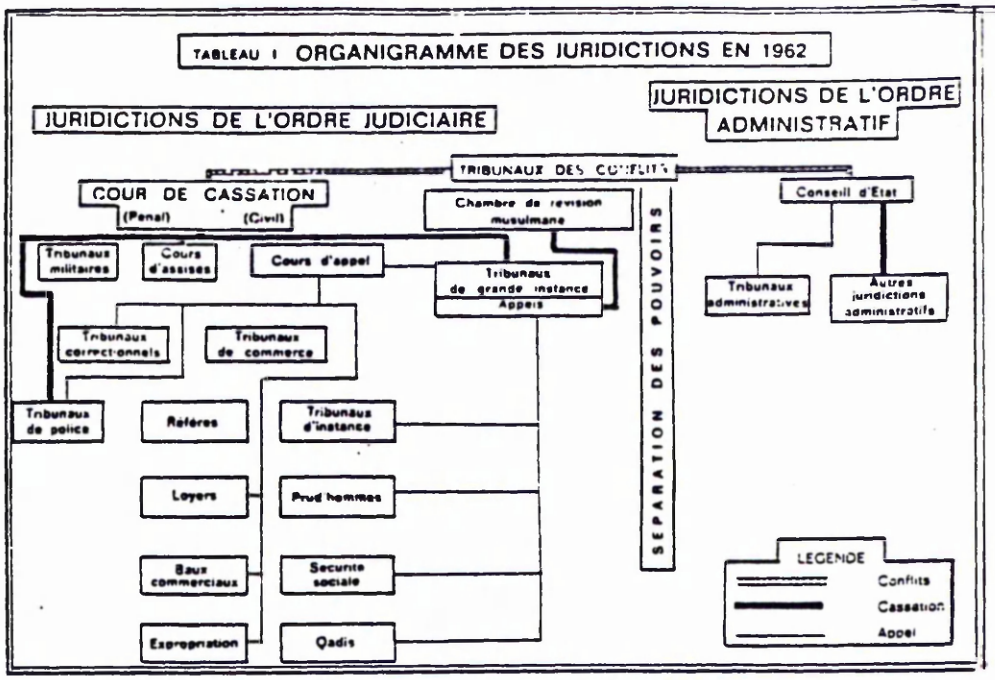


TABLEAU II LES JURIDICTIONS ALGERIENNES DE 1962 A 1966

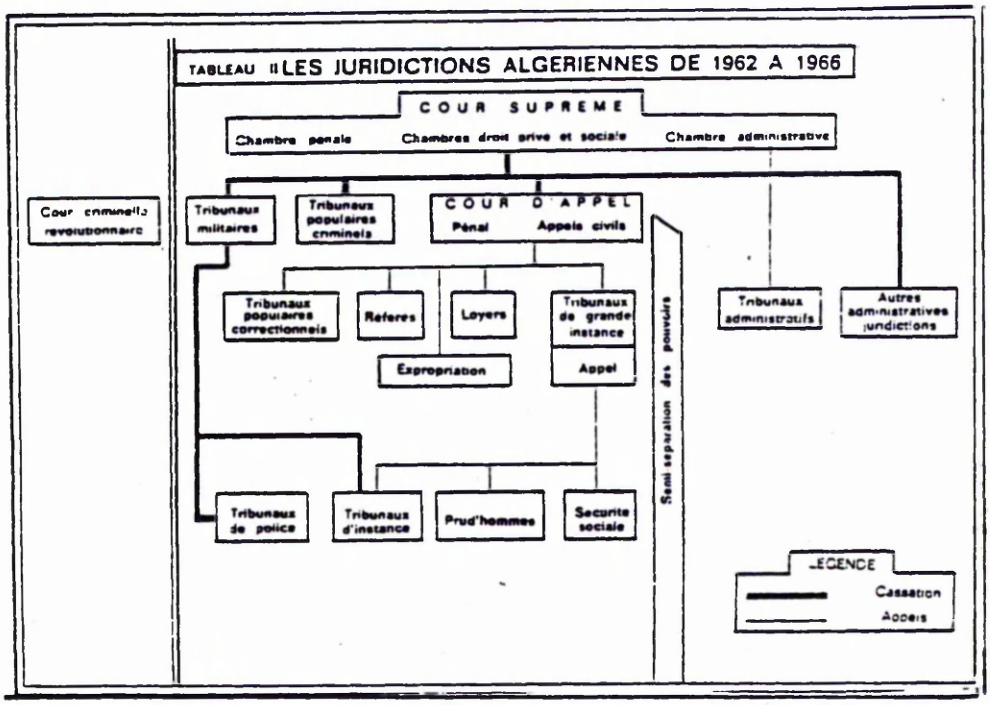
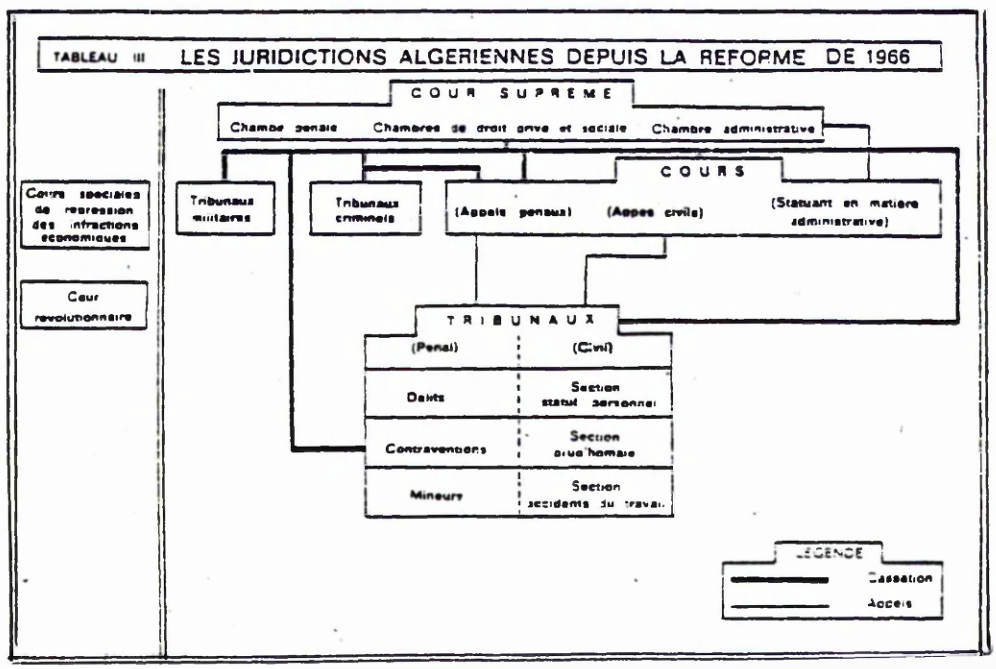


TABLEAU III LES JURIDICTIONS ALGERIENNES DEPUIS LA REFORME DE 1966



Source: J. Lapanne

onto the judiciary, it may be instructive to discover the impact of such reforms and to what extent the changes brought about by these reforms have affected the judicial corps and the rest of the legal profession. Let us divide the legal profession into two separate branches and consider each branch individually.

ca) The judicial profession.

Let us first consider the judicial profession, that is to say the personnel of the courts. As in France, the division of the bench into two separate bodies; la magistrature du siege and la magistrature du parquet, has not changed.[21] The two professions, as in the French system, are quite distinct careers and attract different personality types:

- La magistrature du siege; thus called because it represents the function of the judge. The role of this magistrate is roughly similar to the corresponding role in any civilian system. It consists mainly of applying the law (la loi) by weighing the arguments presented to him by the parties and giving a judgement upon the case. He does not make law. Contrary to other members of the judiciary the judge enjoys full independence vis a vis his hierarchical superiors. The only recourses against his decision are those regulated by way of legal procedure such as appeal, cassation, etc...

- La magistrature du parquet, also called the public ministry (or ministere public). They form the pleading and prosecuting side of the bench. The role of the

public ministry is not to defend, as it may appear, the interests of the state or the executive, but those of society and integrity of the law. The members of the parquet are organised hierarchically, i.e. unlike their counterpart in the "siege" (the judges), the members of the parquet adhere to the rules of the hierarchical superiority. While participating in the administration of justice the agents of the public ministry have almost complete autonomy vis a vis the judges. Their relationship with the ministry of justice is that they can be directed by and are responsible to the ministry of justice, but this latter may on no account act on their behalf. However, both judges as well as prosecuting magistrates have constant contact with each other and consider themselves part of a single corps, but at the same time each with his own domain of responsibility. A prosecutor's view has no binding force on the judge's decision and judgements rejecting the opinion of the former are quite frequent. Both magistrates of the "siege" and the "parquet" are selected by means of the same examination. During his career, a magistrate can exercise both functions successively. Moreover, both may aspire to be appointed to the summit of the hierarchy after a start from the lowest jurisdiction as promotion is largely encouraged. In their duties, both magistrates and judges still utilize French methodology and technique. By way of illustration, in the "parquet" the inquisitional procedure (as it is conceived in France) is still the practice of the courtroom in criminal cases, while in the "siege", judges

retain the secrecy of their judicial deliberation. The anonymity of the court opinions remains as in France a taboo subject, and the judges have little occasion to assert their personality outside of the courts. The writing of minority opinions is not only unknown, but is strictly forbidden. All these observations are relevant as their importance and development may well increase or decrease the authority and influence of the French system on the practice of the Algerian judiciary.

cb) The auxiliary personnel.

Contrary to the judicial profession this category of the legal profession has been profoundly transformed by the new reforms. Many legal offices saw their abolition as a consequence of the unification of the courts and the integration of the various jurisdictions into one simplified judicial unit. Thus the "legal interpreter" and the "interpreter-translator" as well as the "bachadels", the "adels", and the "aouns" whose performances were previously needed at the Mahkamet court have been totally eliminated as Islamic courts no longer exist.[22] Moreover, several professions, principally known to the French legal profession such as the "avoues", the "notaries" the courts reporters (Greffiers) and the baillifs (Huissiers) were either transformed or abolished. Their very "raison d'etre" has become irrelevant now that the French judiciary system has been substantially altered and replaced by a different one proper and particular to Algeria. Amongst the remaining legal professions all are

French only by name. For instance, the office of "greffier" which used to be a semi-liberal profession, has been totally integrated into the public service and "greffiers" have now become civil servants. Another key liberal profession in the civilian system is the office of the public notary. The institution existed in Algeria until recently (1975) when it was "nationalised". According to the commission of reform, this was seen as "too liberal" and therefore contradictory (i.e. useless and inefficient) in a socialist context; for, says the commission "it is unthinkable that in a socialist system, a state controlled enterprise should go and use the legal services of private individuals". Almost the same threatening atmosphere is at present surrounding another typical liberal profession which is that of the advocate (avocat). The idea that the advocate is par excellence, an aristocratic or bourgeois profession is no longer valid because of the new judicial policy and more precisely the new concept of law and justice in Algeria today. The work of the advocate, besides being literally transformed has also been increased. It has been increased because of the abolition of the office of "avoue" and the transfer of its work to the advocate.[23] His task is now to represent and to defend his client, whereas before, the representation was under the avoue's responsibility. The profession of advocate has also been transformed in the sense that according to new Algerian judicial (and especially political) policy, the Algerian advocate must in the course of his duty place in the foreground the interests of the nation. Like his soviet counterpart, he

must be "a striver for the principle of the revolutionary legality, rather than a defender or legal representative concerned only with the interests of his client." (R. David)[24] Judging by the increasing number of fragmentary reforms which are produced quite regularly, the aim is clearly towards a total socialisation, or put differently, nationalisation of the profession in the near future. And lastly, amongst the purely Algerian novelties in this respect, it is worth mentioning the creation of a caste of semi-advocate, known as "defendeurs de justice" (the literal translation would be the defender of justice). The profession has no counterpart in the French judicial function. The role of defender of justice is roughly like that of the advocate. The main difference is purely academic. While a university degree and hard training is required from an advocate, a lesser academic qualification and degree is required from a defender of justice. The difference, quite naturally, appears also at the level of the practice. While the advocate can exercise at all levels (tribunal, court, and for certain cases the supreme court) the defender of justice is strictly restricted to the lowest jurisdiction, i.e. the tribunal. It is a rare exception that a defender of justice would appear before a court of higher instance. In general, it is true that the role of a defender of justice can be viewed as a palliative to the lack of advocate, especially in the lower - and relatively numerous - jurisdictions. For, in these courts, litigations are generally less serious and therefore no special need for an advocate may really be felt. But if we look at

the origin of the profession itself, there is much resemblance between the defender of justice and the traditional Islamic institution of the OUKIL. In effect, the two professions look perfectly identical, as J. Lapanne says "They (the defenders of justice) well seem to be the successors of the old Oukils."[25]

To sum up all these organic reforms, one can say that these are only a quite logical and necessary step to accompany the simultaneous reforms made in the judicial machinery as a whole. Thus, by adopting a new structure and giving a new shape to the judiciary, and by systematically abolishing some legal or judicial professions while altering and introducing some others, the reformers in Algeria seem to have constantly remained cognisant of the three different types of law that govern the system. In general, the judiciary, whether in Algeria or in any country, is not a perameter whereby a legal system can be measured or evaluated. Nonetheless, it can provide the key to many suggestions. In this respect, the mixture of the Algerian judicial system should be obvious if we note certain characteristics:

Let us recall the concurrent and dual process of unification in the legislative as well as the judicial domains which started soon after the independence. It is particularly interesting to note in this connection, how the reformers frequently meandered between various (western liberal, socialist, religious) orientations without however striking out in any particular direction. These oscillations are not simply accidental: in a mixed jurisdiction they are

considered as obvious and quite normal.

Also, there is the fact that courts display a commonly held ideal: judges are expected to be "polyvalent" and hence, if the judiciary is to be efficient, it must develop an "elite" of judges who would, in the case of Algeria, be familiar with Islamic, French and socialist laws.

Another factor of no less importance is political intervention which plays a determinative role in the administration of justice in Algeria. This has started by a rejection of the principle of the separation of powers and has gradually been accentuated by the affirmation of the principle of the "revolutionary legality", a concept somewhat similar to the principle of socialist legality existing in some countries, e.g. USSR. This has resulted, as in the Soviet Union, by an almost blind subordination of the judiciary to the organs of state powers. As Hubert Gourdon observes: "There is the willingness of the governmental authorities to link the functioning of justice with the political and economic evolution of Algeria..."[26] This principle has a tremendous effect in providing the foundation of the new judicial policy and giving a new look to the concept of justice in Algeria. In view of important changes brought into the concept, the following investigation may be of some theoretical interest, as it may, in my opinion, be one of the results of the effect of socialist law on the Algerian judiciary.

d) The new concept of justice in Algerian law

"Justice (must) concur to the defence of the acquisitions of the socialist revolution and to the protection of its interests . . ." (Art.162 const.)

It is clear that under such circumstances justice cannot have the status of an independent power, and in all its aspects it means something rather different from the (superficial) judicial independence in western liberal countries. With the affirmation of the principle of revolutionary legality, law and justice in Algeria are given the character and authority that they have in socialist countries: to ensure politico-economic objectives.[27] From the moment justice is linked with economic development its politicisation becomes obvious. In Algeria as in any other socialist system all that is economic is political.[28] Law is only the instrument to shape both, and then justice enters to take part, besides other institutions such as the party, in application of such law.

The principle of revolutionary legality as conceived and understood in the Algerian context differs partially from the socialist legality known to the socialist bloc. In Algeria, the notion of revolutionary legality appears wider than the notion of socialist legality, since the latter according to K. Mustapha, finds its real significance in the class struggle which in Algeria is non-existent. On the contrary, by adopting a revolutionary principle, the political leaders of Algeria aimed especially at a generalisation of the principle to all social classes

without, as in e.g. USSR, relying on any specific one (the proletariat).[29] This perhaps may be valid for an analytical approach to the two principles, but not for their ideological interpretation. According to my way of thinking, there is no real difference between the socialist and the revolutionary legalities. Both principles seek or aim primarily to make respect for the law much more imperative than it is in bourgeois countries in which this respect is often said to be of more interest to private individuals than it is to society in general.

These few observations on the idea of justice as a concept heavily impregnated with the principle of revolutionary legality, should enable us to approach the question of the role of the judge in the elaboration of this revolutionary principle, the application of which, he is so required to ensure.[30] The most obvious answer seems to be the Marxist principle that law is determined exclusively by its political function. Accordingly, the judge, not being a politician, is excluded - de facto - from the creation of the law and consequently from any participation in the elaboration of the principle of revolutionary legality. This is clearly manifested by a complete absence of the judge's creativity in the exercise of his function. This is to some extent deplorable, because it means that, in their duties, judges are conditioned in advance to carry out the socialist message and to forget about the creating or making of law (lato sensus) and legislation. For "to obey law, is to obey the interests of the socialist revolution." (Boumedienne)

In reality, law, and a fortiori revolutionary legality are exclusively under the monopoly of the state power, and judges participate neither in the elaboration nor the formulation of the revolutionary legality. In the light of this information it may be possible now to attempt a definition of justice as perceived in socialist Algeria: A specialised function of the revolutionary power (i.e. state/party).[31]

da) Justice: a new definition

Addressing a magistrates seminar, the late President H. Boumedienne insisted that "The revolution must embrace the vital sector of justice..." "popular and revolutionary" added the president, "should be the characteristics of justice in Algeria." A year later, in 1969, when the "high council of magistrature" was established, the same idea reappeared in the ordinance setting up the institution of the high council. "Justice", recalls the preamble, "is an attribute of the people". Stating its place amongst the other state bodies, "justice", says the ordinance, "constitutes a specialised function of the revolutionary power."

db) An evaluation of the concept:

In a country like Algeria where law has become closely linked to ruling state policies, it is obvious that justice must be confined as much as possible to the strict application of the law and to a rigorous observance of the directives given by the revolutionary party and the government.

This new approach is a far cry from the classical view according to which "justice is essentially limited to restrict the application of the law (le Droit)".[32] Unlike western democracies, justice in Algeria is not supposed to set limits to politics; its role is not to restrict state action, but to perfect such action by constantly militating for the respect of the revolutionary legality.

At the origin of this change, there is not simply a desire to improve the judicial system. The whole operation in fact forms only part of a much wider politico-legal policy which aims at what is termed "the Algerianisation" of the law. This will be the third and last of the series of problems so far considered as peculiar to Algeria.

C/ The Algerianisation of the law

By the expression "Algerianisation" is meant the elaboration, or even the creation of an original system of law which would not only replace the previous (unsuitable) one, but would also reflect and respond efficiently to the needs and aspirations of the Algerian society.

How this process of Algerianisation is carried out is indeed a vast subject. In the meantime, an approach to the topic under a purely legislative angle will be considered here through the presentation of the new 1975 civil code.

a) An example of Algerianisation: the new civil code

The old civil code being part of the cultural heritage of French law was believed to constitute a potential threat to the integrity of the Algerian identity. After independance, the provisional and conditional continuity of French law was dictated more by immediate need for law and order, than by a real enthusiastic adoption of the Napoleonic code.

It was only ten years later when more urgent national priorities (political, economic, administrative, institutional, etc...) were settled, that it was felt that the time had come for radical revision of the old French law. After five years (1970-1975) of uninterrupted work, an Algerian civil code was promulgated. The new document replaces the old French law which had been imposed on

Algeria for more than 132 years. The code is bilingual, French and Arabic, with the latter as the original version.

It would be appropriate here to consider in some details the formation of the code.

1) the commission

As in Ethiopia and Seychelles, (both having been subject to relatively recent code reformation) a consultative legislative commission composed of prominent jurists was set up in Algeria. Various legal orientations were represented: West European, East European, and naturally Middle Eastern. Such composition is not only indicative of the comparative study which has been done for the purpose, but it also mirrors the heterogenity of the Algerian legal system.[33]

2) The aim of the commission

When eventually the commission undertook the task of codification, a number of preliminary problems arose. Amongst the options open to the legislative commission were:

To allow the existing law to continue by simply "up-dating" the obsolete French law and adapting it to Algerian conditions; to replace the existing French law radically by a swift "returning to the primary sources" (i.e. Islamic law); and lastly to attempt a synthesis of the first and second options, which in this case meant a combination of French modern law and the traditional Islamic law.

After deliberation, the first of the above options considering a wholesale readaption of French law was disgarded at once. The French code civil, although of some prestige, could not be applied to Algeria because (a) it was the product of the development of French law which was not only foreign, but "hostile" to Algeria; (b) it was adapted to an economic and social system which was entirely different from the Algerian. Moreover, for many draftsmen, the adoption of the French law could well mean, or might lead in the future, to the secularisation of the law; an expedition that the commission apparently was not - in its majority - ready to embark on.

As to the second option, i.e. the resurrection of Coranic law, the orthodox religious viewpoint was absolute and unequivocal. The Sharia is the law of Algeria. Western law should come in as second rate and would be restricted only to areas not covered by the Sharia. Western law is the law of the dhimmis (non-believers). It symbolises colonialism, exploitation and injustice. It aims at the degradation of human values and morals. It fights Islam and points at its extinction. And above all, westernlaw is, contrary to Islamic law, a man-made law, subject to the will and fluctuating caprices of human nature. As such, western law cannot aspire to the ideal of justice as can and does the law of God. Because of the sanctity and sovereignty,the rules of the Sharia should in their entirety have absolute and inimitable binding force to the exclusion of man-made law.[34]

The attitude of the supporters of this view, one must say, was also greatly encouraged by the experience of some Islamic countries such as Turkey (1926),[35] Albania (1947),[36] and especially neighbouring Tunisia (1956)[37] where codification on western models was achieved with "disatrous" results.[38]

As to the third option calling for a snythesis of western and Islamic law, the views were simultaneously convergent and divergent. The draftsmen agreed on the principle of a mixture between the various western systems of law and the Islamic Sharia as the basis of their work. But the views were irresolute and divided especially regarding the status the Islamic law should have in the civil code. What seemed to be the general impression of this deliberation was: we accept Islamic law, but with some reservations.

The first group emphasises the national and cultural value of applying Islamic law in Algeria. In this view, the state is Islamic in origins and aspirations. The revival of Islam as recalled in many official documents (Algiers Charter 1964, Constitution 1963, etc) would simply enrich the national and cultural life of the nation. In other words, Islam would be given due respect and full authority but only as a strict religion. According to this view, there is no need to impose through a set of positive rules, religious - therefore metaphysic - laws. An imposed observance of a religion is contrary to the basic individual liberties. To quote J. Madison's view "the

religion of every man must be left to the conviction and consciousness of every man." Unlike the orthodox view, this approach demanded the adoption of a new Algerian code, a secular-civil creation to the extent that conditions permit, based on fundamental principles of the law of Islam. This view, though accepting, in principle, Islamic law, was clearly in defiance of the orthodox stand.

Alongside this religious - secular split, was the second viewpoint which in political terms could be described as the "moderate". This outlook views Islamic law as merely an intellectual source from which inspiration can be drawn in the process of preparing law. This outlook believes that there still is in Islamic legal science, some valuable materials which if utilised would provide a great contribution to the law. Accordingly, every effort should be made to integrate those legal materials as much as possible into the code. Islamic council and various religious institutions on the other hand will be heeded whenever they offer solutions appropriate to modern society. Where, e.g. in a strictly Muslim area certain provisions of the Sharia cannot be fitted into the new code, machinery might well be devised for the issue of an authoritative judicial instruction (Fetwa) on the advice of Muslim jurists.[39] As a member of the council said:"Whenever there was in Islamic law, a provision which we could adapt to the needs of a modern and progressive society, we glady adopted it. But any solution, however well established in the Sharia which

has appeared to us unreasonable or impracticable or even inequitable, we discarded it unhesitatingly and looked for other systems of law for guidance."

Under this approach, Islamic law and principles are likely to constitute one of the various components of Algerian civil law adopted on a rather fragmentary selective and critical basis. It was this latest approach that seemed to have attracted the draftsmen.[40]

The next question probably worth asking is to what extent Islamic law has effectively secured its place in the new civil code. In terms of legislation, are the areas brought in line with the Islam, or at least influenced by Islamic law, extensive enough to enable us to speak of a really mixed civil law? Before answering this question it is necessary to look at another aspect of the code: its socialist aspect.

It should be stated that the foregoing remarks on the apparent conflict between Islamic law and western law were basically of an ideological nature. In this respect, Muslimorthodox systems do not differentiate between capitalist and eastern socialist systems since both are non-Muslim.[41] Both share the same secular conception of the law which Islamic law categorically denies. To ascertain the socialist side of the Algerian civil code can be possible only from a global view of the structure of the code (see the comparative table infra p. 105a). As to the content of the code, it will be observed that, for instance, it has been dismembered as a consequence of existing separate

codes of socialist inspiration. As an example one might cite here the law of ownership (property) of which there is a part included in the civil code and another in the agrarian charter. Another example could be the law of employment, which as a result of a growing socialist sector is divided between the civil code and the socialist charter for public enterprises. Socialist influence is also traceable in a number of individual rules and provisions of the code. Thus the liberal definition of land property becomes severely restricted.[42] There is also a small number of administrative provisions which in a typical civilian code form an independent part of administrative law. These are roughly some of the few elements that compose the socialist side or part of the Algerian civil code.

Now that the tripartite components (western - Islamic, socialist) of the Algerian civil law have been sketched, it may be interesting to single out one institution in which the various concepts originating from the three components interlace and interplay. This should simultaneously demonstrate the process of "Algerianisation" of the law and give the reader an impression of the particular (mixed) flavour of Algerian law.

For this purpose, I have chosen the law of contracts, though there are many other areas which have been "Algerianised" and are also indicative of features of a mixed law. For example, property could have been an interesting attempt, but its approach is closely linked

to tradition and local usages which can be scrutinised only through customary interpretations and abstruse historical developments. Moreover, as mentioned earlier, extra perturbations due to colonialism and recent re-transformations due to socialist expansion make the task even more complex.

I willapproach the subject of contracts under three separate headings, each dealing in turn with a specific component. A fourth heading willbe devoted to the role of the judge in contract matters, a role which because of its peculiarity and originality deserves some attention.

b) A summary of the law of contracts

Knapp says: "La diversite des conceptions du droit civil se reflete surout dans le systeme des contrats."[43] In the new Algerian civil code, contracts form over 62 per cent of the code provisions. To be more accurate, 623 articles out of 1003. In this study it is obviously impossible to give even the most general outline of the principles of the new code on contracts. Only an identification of the component elements together with an account of their structure will be considered.

1) The western element

At first glance, the general rules governing contracts reveal that no particular system of contracts has been adopted in total. Broadly, one might say that the overall structure of the law of contracts is French, while details within that structure are often of various influences. This

is the case if one considers, e.g. the preliminary dispositions (dispositions preliminaires) regarding contracts; one finds that these are conceived very much in the traditional French way. In fact Art.54 to 58 (C.C.A.) have been extracted verbatum from Art. 1101-1106 of the French civil code (hereinafter C.C.F.). However, if one considers the formation of contracts, the variations are striking as the following examples show.

(i) The contractual intention:

The French requirement of genuine intention (intention reelle) seems to have been disregarded (Art.1134 C.C.F.) and the German principle of the declared will (willenserklae) favoured. (Art.145 of the German Civil Code, hereinafter B.G.B.)

(ii) Consent

The old French rule that acceptance must reach the offeree, has been replaced again by the German solution, in the rule that it is sufficient for the contract to be concluded, if the offeree can reasonably assume that the offeror received the acceptance (Arts.146-149 B.G.B.)

(iii) Cause

The French notion of cause reappears in the new Algerian code. Thus, despite all the controversies, this principle has raised in its country of origin, and despite the attitudes (e.g. Seychelles), which tends to disregard cause,[44] the authors of the Algerian code still regard this principle as one of the essentials of a contract. In

this respect Art.1132 (C.C.F.) and Arts.97-98 (C.C.A.) are almost identical.

(iv) Good faith

Here again, there is a considerable influence of the German notion of good faith (Treu und glauben) which is vital as a guiding principle in the process of judicial revision. The new code includes not only good faith but also includes what could be called "mutual and reciprocal trust and confidence" (Art.242 B.G.B.)

2) The Islamic element

Bearing in mind the mixture of Algerian law, room has also been made for numerous Muslim concepts and principles. But how has Islamic influence penetrated the law of contracts since there is no such theory of contracts scientifically developed in Muslim legal tradition? Perhaps the only Islamic legislative document available at the time of codification was the Ottoman Madjalla.[45] But this could not serve as a useful source for two main reasons: Firstly, it was old fashioned and has never been revised since its promulgation in 1876. Secondly, it concerned mainly the codification of one particular mad'hab (rite) which is the hanafi.[46] As the dominant school in Algeria is the malekite rite, the madjalla was not even considered.[47]

Despite this lack of formal legislative grounds Islamic law can be cautiously discernable in the law of contracts under various forms.

- The active form; where some Islamic concepts and Coranic verses have been converted into articles, provisions and

inserted into the code. Thus, e.g. chapter IV on quasi contracts is nothing more than a translation into legal terms of the negative attitude to the notionof interest on loan (usury) or "riba" as it is called in Arabic.

- The passive form; where many contracts such as loan for consumption, contracts of commission, loans for use and others have systematically been divested of some of their basic features in order to match Coranic prescriptions. An example worth recalling is the notion of usury. (Art.538 C.C.A.) Another example is Art.400 (C.C.A.) which recalls Art.1699 (C.C.F.) but repeals its last part which provides for loan interest in case of a claim of a right subject to litigation.

- In other cases, some contracts have been made illicit for they were in direct conflict with Islamic traditions. Perhaps the commonest examples are the aleatory contracts and especially Art.612 (C.C.A.) relating to those contracts involving betting, gambling and chance.

In addition, Islamic influence can also be detected in a variety of meticulous and sometimes very complex details of some specific contracts. A striking example in this respect, is to be found in the contract of sale (chapter I of title VII). In this contract, the Algerian civil code plainly disgards the French principle in favour of the Islamic solution regarding the transfer of risk on the article purchased; the theory in fact is originally known in the malekite jurisprudence. However, regarding the obligations of the vendor, Islamic law seemed to fall short in providing a satisfactory solution,

and it was apparently in the Swiss civil code that the draftsmen found an answer on this point.

As to the intention to treat, the authors of the code come back again to Islamic jurisprudence by incorporating the theory of the "contractual meeting" (seance contractuelle) originally called "Madjlis El Aqd". In short the theory as described by Bertiloz "concerns the period during which discussions are being held. During such period, if there has been no express withdrawal of an offer, it may be accepted; provided no decline for acceptance has been given."[48] (See Art.64 C.C.A.). This method is also used in the Egyptian code. It has no equal in western legal concepts. The notion of "excuse" (I'fa) is another Islamic innovation which has been introduced into the Algerian code. This notion "permits the contracting parties particularly when the contract is a lease to terminate the contract before the date, if serious or unforeseen circumstances supervene to render execution of the contract unduly onerus." (Art.107 C.C.A.)

3) The socialist element

Lastly, in view of the Marxist doctrine and all inspired legislation introduced as a corollary, one might wonder to what extent contracts have, in the new code, been adapted to suit the new ideological environment.[49] As a general remark, the importance of contracts in the new civil code has slightly decreased with the advent of socialism. The decrease is due to the socialisation of

the greater part of the economy which brings about much more intensive state activity in setting the rules of the law of contracts under a new economic interpretation.[50]

Nationalisation and planning law have reduced the private sector of the Algerian economy to relatively small proportions. The more important transactions involving goods and services are being progressively absorbed by the public (i.e. socialist) sector. The civil code still regulates in detail the individual species of contracts such as sale, exchange, hire, bailment, agency and all contracts between citizens. With regard to such contracts, the code provides that they are governed by the general rules on contracts and the stipulation of the parties (Art.106 C.C.A.). In this respect they are very similar to the contracts known in western liberal countries and have no special (socialist) flavour of any particular interest or attraction.[51]

Besides these individual or private contracts, important developments are taking place outside the civil code as a result of various legislations which enact particular regimes for a certain category of contracts. These contracts may be fully grasped only in relation to economic law and economic policy in general. But as a broad comment, it may be said that these contracts have not yet reached the same functional role as they have in socialist systems, such as East Germany where contracts are seen "as a means of implementing and concretising

state economy" (Zweigert).[52] For, the process of socialisation in Algeria is, as the French jurist Miaille observes, "only at its beginning". Moreover, the civil code rarely refers to these governmental contracts. Reference to them is made only in cases when a specific contract such as insurance (Art.620 C.C.A.) or employment (Art.549 C.C.A.) are simultaneously dealt within and outwith the civil code.

Another influence of socialist law on contracts can be inferred from the particulars of some provisions of the code itself. Freedom of contract is an obvious example. Although the principle has its place in contract law in the new code, it is however, no longer regarded as the main principle governing the law of contracts as it is in western systems. The controversy becomes apparent when freedom of contract is restricted and the content of contracts or certain contractual terms are determined by law (Art.53 C.C.A.) or by state agencies. Thus, by way of example, monopoly enterprises are required to conclude some certain contracts as directed by the central administration, in pursuit of top priority politico-economic goals determined by the government. As in the private contract, in the governmental contract, the notions of interest as well as of profit are strictly prohibited. Coupled with freedom of contract is the obligatory force of the agreement expressed by the principle of specific performance of contractual obligation. This particularly applies to the relationship between the socialist enterprises which are under a legal obligation

to perform the contract "even in case of delay or difficult circumstances."[53]

Finally, in connection with the planned character of economic contracts, a special procedure is applied to the hearing of disputes arising from them. Such disputes are heard by state arbitration, an institution quite common and very well developed in socialist systems.[54]

c) The judge's role in contract:

The Algerian civil code gives the parties a chance to agree on the main points of a contract and the tribunal the competence to complete the secondary provisions according to law, equity and the nature of the transaction. In this respect, Art.65 (C.C.A.) is very significant. It reads as follows: (approximate translation) "When parties have expressed their agreement on all the essential points of a contract and points of detail for subsequent agreement, without stipulating that without such subsequent agreement the contract will be without effect, such contract is deemed concluded. The points of detail will therefore, in case of litigation, be determined by the tribunal in accordance with law, usages, equity and the nature of the contract." The code also gives great importance to the role of the judge who may intervene in the enforcement of the contract as well as its construction and lays great stress on equity. Thus, concerning enforcement for instance, the code states that in accordance with the principle of good faith and after having considered the

interest of both parties, the judge shall have the right to prescribe the manner of performing the contract (Arts.165-166), fix the amount of money for damages (Art.182), or even rescind the contract (Arts.90, 177, 561).

With respect to some contracts e.g. adhesion, the judge can, if the contract contains leonine clauses modify the content or even exempt the adhering party in accordance with the rules of equity (Art.110).

The rules which give the judge general instructions to interpret contracts on misinterpretation of contracts are also worth noting. They can be located in two main clauses: The first of them (Art.107) lays down that contracts are binding not only with respect to what is expressly stipulated in them, but also with all consequences resulting from law, customs and equity. The second clause (Art.111) instructs the court to examine the mutual intention of the parties rather than adhere to the literal meaning of the words. The nature of the contract, usages and behaviour of the parties must also be taken into account. Lastly, the discretion of the judge is frequently underlined in various provisions, where often the code limits itself to statements of general principles which need to be interpreted and adjusted to each particular case. To take an example, the provisions of Art.141 on unjust enrichment or Art.143 on undue payment belong to this category.

To sum up this section, what was the process of

codification in Algeria? To begin with, there was no uniform line of conduct in the sense that there was not any particular system of law which was imitated or taken as a model for Algeria. When working on the scheme of the civil code, the commission faced the semantic task of replacing the often conflicting principles of various inspirations by new and uniform principles fully adapted to the needs and consonant with the custom of modern Algeria.

The goal was to strike a balance between an ideology (socialism), a positive law (western law) and a religion (Islam).

The main problem was to find a middle way between all these three components and at the same time to satisfy the needs of Algerian life and cultural outlook.

The solutions proposed varied from reconciliation between the various western systems, an acclimatization of the socialist ideas to finally an integration of the Islamic principles.

No modern European code was thought adequate for a similar task, for they were all designed for countries with different socio-economic structures and ideological beliefs or orientations that were inapplicable to the Algerian reality.

As to its formal sources, the new Algerian code gives in Art.1 pre-eminence to legislation (la loi) as the sole source of law.[55] Islam ranks second as a subsidiary source. Contrary to many Arab-Islamic countries

such as Egypt, Iraq, Tunisia, Morocco, the Algerian civil code gives much more importance to Islam, whereas in the countries just mentioned, Islam occupies a less important position.[56] After Islam, the code refers to custom and equity as respectively third and fourth subsidiary sources. No reference, however, is made to "doctrine" and "jurisprudence" which are quite common sources (though secondary) in most civil legislations. The reason is simple and logical; for law (la loi) in Algeria is, as explained earlier, an instrument of policy for the rulers; customs and equity only remain important to the extent that they are useful or necessary for interpretation or, when the law refers to themfor that purpose.

With respect to style, the trend is clearly towards detail in statements. There are indeed, extensive provisions on certain types of contracts such as bailments, partnership, etc..., where frequent litigations are likely to arise. But probably the most attractive example where details may be of some academic interest and theoretical debate, is the law of torts. Thus in the new civil code,besides the five famous and unchanged principles of the code Napoleon (Arts.1382 to 1386 C.C.F.), the draftsmen provide for new provisions aimed at throwing more light on the law of torts. Through some 14 additional new articles, the codifiers distinguish between liability: that arising from personal acts (Arts.124-133), that arising from acts of a third party (Arts.134-137) and that arising from inanimate objects or animals (Arts.138-140).

In general, the purpose of these detailed statements was deliberately made to avoid a diversification in the interpretation of the code provisions on this specific point. The main reason is due to the newness of the code, and the desire to ensure a certain uniformity of the law by providing the judge with more guidance whenever necessary. Finally, as may be noticed from the accompanying table, the code is incomplete, as Book One on family has been omitted. For there is no such family law in Algeria yet. This part of the code is still a jurisprudential (case law) area.

As a symbolic gesture of national achievement, the civil code became effective on 5 July 1975 to coincide with the commemoration of the 13th anniversary of the independence of Algeria.

FRENCH CIVIL CODE	ALGERIAN CIVIL CODE	POLISH CIVIL CODE
PRELIMINARY TITLE of the publication, effects and application of laws in general	BOOK ONE General dispositions - effects and application of laws - of physical and moral persons	I General part
BOOK ONE of persons Title V to IX - Family	BOOK TWO of obligations and contracts	II Property and other real rights
BOOK TWO of property and different kinds of ownership	BOOK THREE of main real rights - Property	III obligations - - contracts
BOOK THREE of the different ways of acquiring property - successions - contracts or obligations	BOOK FOUR real accessory rights or real sureties	IV successions

Conclusion to Part Two

Throughout its application, Zweigert's theory of the style has proved one thing: that Algerian law is a composite legal system. This heterogenity of the system appears to be, in its ensemble, the product of three factors; one traditional, the second historic and the third revolutionary. The weight of the first factor is shown by the fact that Algerian cultural origins are principally Arab-Islamic. The second factor is due to 132 years of French colonial era dominated by incessant attempts to "civilize" the country through imposed rules and various alien socio-legal institutions. The third factor is composed of two elements: one ideological, and the other tactical. The first element is reflected in a new conceptual approach to law (le droit) on a "restricted" Marxist-Leninist interpretation, viz by fusing law with politics. The second element makes use of this socialist ideology as a strategy for economic development, i.e. socialism is not an end, but a means or a technique to achieve socio-economic mutations.

If it is not premature to speak of an Algerian law, this may only be possible, at the present time, by a consideration of the law of Algeria as a coherent and uniform unit rather than as a fractional or fragmentary law. In this connection, considerable efforts are being made, notably by the supreme court, towards the development of a national and uniform law, principally in the fields of land law and family law. Difficulties encountered

in these efforts may be explained easily. They are occasioned by the task of reconciling ideas of a traditional behaviour with new approaches to modern life. In some branches of the law there hasbeen a response to local needs, albeit too often taking the form of piece-meal amendments of French legislation. However, in a general manner, in the application of the common law a tendancy seems to have increasingly manifested itself in going back to the original sources. Without any doubt Islamic law is more than ever before a well established part of the corpus juris of modern Algeria; insofar as it still forms the essence of the personal and familial law of the citizens. To eliminate it would be as impossible as to eliminate Roman law from the fabric of Scots law. There exists however various problems rendering the application of Islamic law difficult and thus disturbing the equilibrium of the state and religion. To cite but one example here, in matters of marriage, the government still recognises as valid a nikkah (Arabic word for marriage) which is performed before a Cadi, but not his divorce. In respect of many other matters especially those regarding women's rights (e.g. succession) and their situation in familial as well as the societal context have up to now attracted very little attention, since (this opinion being widely held in Algeria,) any improvement (a la Francaise) of the situation of the women in Algeria, will inevitably meet opposition from strict Muslim conservatives. This no doubt explains why Algeria still has no comprehensive family code. The heated debates which started ten years ago seem endless; project

after project, the draftsmen are still incapable of arriving at a satisfactory and original family code. Yet, reconciliation of various concepts (i.e. Islamic plus others) has apparently beenpositive in similar sensitive areas such as contract, ownership, etc..., but seems to be inapplicable in this particular area of family law. Here concessions appear hard to create and compromises are unlikely to succeed.

On the opposite side of Islam stand western and socialist laws, which in a purely Islamic view have the same position. From an ideological standpoint this forms a veritable concert of contradictory and sometimes irreconcilable opinions. The situation thus created appears as follows: On the one hand Islam opposes both socialist and western laws. On the other hand these two systems (i.e. western capitalist and socialist laws), have quite different stands which distinguish sharply their legal style. As it may be remarked, the ideological element in the legal system of Algeria is of primordial significance for an understanding of the system. In my opinion, Zweigert is right to emphasize this element particularly "in the case of the religious legal systems and of the socialist systems". For the legal ideologies of these systems are completely dissimilar and mutually incompatible which, like oil and water, will not mix. And it is because of this that the present legal system of Algeria apparently suffers serious shortcomings.

Today, if we ask which of the two or three components prevails in mixed Algeria which has unified its law

we may consider the question under various angles. With regard to the sources of law, in Algerian law, legislation occupies the formal place, as the ultimate origin of the whole legal system, and all others are mainly secondary or subsidiary sources. However, when we look at the form in which this legislation is caste, though it may be true to say that the form of legislation is French, the content is certainly not, for, the efforts to imbue Algerian law with the conception and rule of Islamic law, along with a total Arabisation of law and justice, are slowly and gradually leading to a corresponding decline in the impact of French law.

As far as socialist laws are concerned, the process of incorporation into the socialist camp has passed through the usual stages, viz, industrial nationalisation, agrarian reform, state monopolisation of various economic activities such as commerce, banking, insurance, etc... However, and in order to accommodate all these new measures to Algerian mentality the epithete "specific" was added to the term socialism, meaning thus, that Algerian socialism has not been imported or copied on a particular model, but is entirely proper, adaptable and applicable to Algerian environment.

Finally, in Algeria which is changing politically, socially and economically with the apparent intention of remaining in a state of constant fervent revolution, it

may not prove possible to give a stabilized picture of the Algerian law or reach any convincing identification of the legal system. If there is ever a body of law which can realistically be called Algerian law, it can, in my opinion, only be achieved by first, an elimination of the conceptual conflict between the various legal ideologies, and second by a systematic combination of the basic principles of these ideologies in a new and hybrid legal context.

General Conclusion

The intermingling of various laws within a definite legal system confronts us with the questions dialectically related to the content and form of the new law thus formulated. From earlier times Louisiana, Scotland, Sri-Lanka and others have had the problem of competition within their legal systems of two distinct, sometimes conflicting living laws which largely accounts today for what they are. In these and all similar systems which have experienced the blessing of the civil and common law traditions, there have indeed been difficulties, but not so grave as to obstruct a complete marriage of the two traditions as discussed in the first part of this essay. On the contrary, much has been written about their potential quality as models for regional or even universal laws that the International Community should seriously contemplate.

However, the time has passed when it could be thought that the civil and common law were the only legal traditions which have interracted; such has been exemplified by the Algerian approach in the second part. By analysing a mixed system in the non-traditional group of mixed jurisdictions it can be seen that the Algerian example can be utilised primarily to introduce a new perspective to the immitigation of mixed jurisdictions and to give this a new and wider sense.

Like Algeria, the vast majority of the countries which have recently recovered their independence, are manifesting the double desire of modernisation on the European models and a kind of "originality" characterised by a sudden "U-turn" to the traditional sources (i.e. customary and/or religious laws).

In line with this policy, these countries resort to a complete re-thinking of their legal system by introducing new laws and by revising existing legislation to make it accord with the social reality of the country. In terms of legal comparison, as Rene David observes, these countries are unlikely to adhere fully to any particular legal family; yet in these cases European concepts combine with a strong religious or an established customary law in such a way that it is possible to consider these systems as mixed systems.

With these basic attitudes outlined, a few points continue to demand particular attention.
FIRSTLY, in every mixed jurisdiction, the main lack seems to be the same: a reconciliation of the various laws. Generally such reconciliation is easily found in instances where the legal components exhibit similar features which may facilitate a certain rapprochement between the different legal traditions. For example, in the civil-common law orbit, both traditions seem to have been kept away as far as possible from extrinsic factors such as religion and to some extent politics. On the other hand, important affinities, such as cultural,

ideological may also play a substantial part in building the bridge between the two traditions.

From a technical point of view, problems of reconciliation appear more clearly at the academic level, to be more precise, they occur when the legislator is called upon to legislate in a specific area where a duality of law is eventually contemplated. Here, differences and variations in concepts, methods, interpretation or even terminology may reduce the legislator's work to some measure of attainable optimum, mostly consisting of spot compromises.

SECONDLY, an appreciation of the full value of one of the legal components in a legal system lies not only in its rules or its juristic approach, but in its essence and specific thoughts and ideology, and the weight of its influence on individuals. In a mixed system this observation is equally valid for each and all of the legal components which form the texture of the system. And here arises the problem of the compatibility of the laws: in order to be effective a mixed jurisdiction must be fairly "balanced". Unlike reconciliation, the question of compatibility appears rather within the abstract domaine of the ideology; viz, when the two legal traditions prove to be pursuing different or even opposite goals. Since each ideology is materialized throughout a set of legal norms; the ideological conflict thus becomes apparent from the very moment these norms are formulated, as they do not express in practice, the same act or rule of conduct.

THIRDLY and lastly, in the classical combination of the civil and common law, the motivations behind such a combination seem to be essentially "legal" such as the need to establish a coherent legal system; an attitude which appears rather "static" as far as law (le droit) in general is concerned. Whereas in the newly evolved mixed patterns the motivations for the mixture seem to be more "dynamic", since the various laws are used mainly as a means of achieving political and/or economic goals. But in both situations there is a certain reliance on a variety of legal components. The mixed jurisdictions claim to be somewhere at the cross-roads vis a vis these components. To paraphrase Lord Cooper, this would be like being on a fence, with the conspicuous advantage of both sides; but as warns the noted Scots scholar - a seat on a fence may not be a secure seat.

NOTES

PART ONE

Chapter One

1. K. Zweigert and H. Kotz, An Introduction to Comparative Law, Vol.I, the Framework (N.H. Amsterdam - Oxford 1977) p.57 (Hereafter cited as K.Zweigert). According to David, "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 laws". See R.David and J. Brierley, Major Legal Systems in the World Today (London 2nd Ed. 1978), p.19 (Hereafter cited as R. David, Major legal systems...)

2. Not all contemporary comparatists share the same opinion: J.D.M. Derett, An Introduction to Legal Systems (London, 1968) p.1. A. Watson, Legal Transplants (Edinburgh, 1974) pp.22-26. G.Glos Comparative Law (Colorado, USA, 1979), p.727 still held the classical partition of the world between the Civil and Common law traditions.

3. Amongst the various criteria so far advocated, the most common seem to be: Race (Saucer Hall), Language (Eismen), Culture (Schnitzer); see in General on Classification: Arminjon - Nold - Wolff, 1, traite de Droit Compare (Paris, 1950) pp.42-47. Also more recently R. David, Major Legal Systems, op.cit. pp.17-29 and K. Zweigert op.cit.pp.57ff.

4. R. David, Major Legal Systems... op.cit. p.17.

5. A. Watson, op.cit. pp.65, 103.

6. Generally on this subject see 6, Annales de la Faculte de Droit d'Istanbul. (Istanbul 1956) and more particularly articles by M. Rheinstein, F. Ayiter, H. Timur, J. Hazard, K. Lipstein. See also A.C. Papachristos, La Reception des Droits Prives Etrangers Comme Phenomene de Sociology juridique (Paris, 1975). R. Schlesinger, Comparative Law. Cases, Text and Materials (The Foundation Press Inc. 1959) pp.190-198 and A.Watson op.cit.pp.21-56.

7. Types of Reception, 6, Annales...op.cit. p.31.

8. les traits caracteristiques de ce type de Reception se resument d'une part a la "reactivation" d'un systeme juridique qui a deja joue son role historique, d'autre part a son emergence au dessus des droits existants de nature et de structure differentes. A C Papachristos op.cit.ppl0ff.

9. M. Rheinstein defines resurrection as follows: "A legal phenomenon of a past age...is re-adopted at a later time..." op.cit. p.26.

10. See G. Michaelides Novaros, La Reception ou Droit Civil Byzantin en Grece (Athenes,1970).

11. For an account on the history of Roman Law in Germany see e.g. J. Dawson, The Oracles of the Law, (Michigan Law School, Ed. 1968) pp.148-242 and 432ff.

12. This seems to be the outcome of a 3 day international seminar on the application of the Sharia held in Islamabad on October 9-11, 1969. A full report can be found in the weekly "Pakistan News", Monday 4 November 1979, published in UK.

13. e.g. Laws No.2330, 4727 and 5524 corresponding to the dates of 26/10/1933, 30/4/1945 and 7/2/1950 have introduced major reforms in the law of illegitimacy. (Reported by H V Velidedeoglu in 6, Annales d'Istanbul, op.cit. p.112) Moreover since 1951 the Turkish ministry of justice has installed a commission "avec le tache de faire une revision du code civil pour elaborer un avant projet sur les reformes a introduire vu la nature sociale du pays" See same work p.123. This view could be challenged.

14. on the referendum of Art.2, constitution (1971). See le Monde (Paris) Monday 5 May 1980.

15. Excerpts from the 1st Constitution of the Islamic Republic of Iran (Referendum of February 10-11, 1979)

Principle 4 : All civil, penal, financial, economic, administrative, cultural, military, political etc... laws and regulations should be based on Islamic rules and standards.

Principle 162: The head of the supreme court and the Attorney General must be religious jurists (Mujtahid).

Principle 163: Qualifications of the judge will be determined by law according to the standards of religious jurisprudence.

Principle 170: The judges of the court are dutybound to refrain from executing governmental decisions that are contrary to Islamic law and regulations.

16. The Islamic movement of renaissance seems extended well beyond its natural borders. Thus in a recent conference of the western Muslim community held in London, suggestions were put forward by the attending bodies to their respective governments to introduce Islamic legislation beside the national law. In

Britain, Parliament has opposed such proposals. See Times (London) Monday 14 April,1980.

17. M. Alliot, Les Resistances traditionnelles au Droit Moderne, in Etudes Africaines et Malgaches (1965); A.N. Allott, The Unification of Laws in Africa, 16, Am.J.Comp.L. (1968) pp.51-87.

18. ibid. Also P. Gonidec, Les Droits Africains. Evolution et Sources (Paris 1968); J. Derett, op.cit. pp.131-156; P. Arminjon, les systemes juridiques complexes et les conflits de lois de jurisdictions aux quels ils donnent lieu, 74, Academie de Dr.Int. Recueil des Cours 1949, pp.79-189.

19. The manner in which parts of the Roman Law were adopted in Scotland is described by D.L. Carey Miller as follows: "Scotland of course differs in so far as Romanistic concepts were "injected" directly into the native legal system, not "transplanted" as in the case of Roman Dutch Law in South Africa, as part of a ready made civilian system... Roman Law in Scotland... was never adopted wholesale or in "complexu" but rather in a piecemeal fashion depending on the appetite of the native system (via the influence of Scots lawyers who had studied abroad) D.L.C. Miller, The use of Roman Law in Scotland: A Reply J.R. (1975) p.68.

20. ibid. See also Lord Cooper, Selected Papers 1922-1954 (London, 1957) D.M. Walker, Principles of Scottish Private Law, 2 Vol, Oxford 1970. id, The Scottish Legal System (4th Ed. Edinburgh 1976). For further materials see particularly, Scottish Law Review (1885-1963) The Scots Law Times (S.L.T.) (1893 ——) and The Juridical Review (1889 ——).

21. D.M. Walker, The Scottish Legal System, Op.Cit.p.161.

22. Y. Noda, Introduction Au Droit Japonais (Paris, Dalloz 1966).

23. ibid; R.S. Charles, Modern Japanese Law as an instrument of comparison, 19, Am.J.Comp.L. 1971 pp.665-691.

24. The article reads: "No extraordinary tribunal shall be established; nor shall any organ or agency be given final judicial power".

25. This is partly true since continental style administrative courts were abolished and their function of judicial review of administrative acts transferred to the regular law courts". See R. Schlesinger, op.cit. pp.192f. esp. Note.14.

Besides Continental European and American law the Japanese legal system also contains a 3rd basic element; "the Japanese legal consciousness". This is a combination of native attitudes, traditions and social

norms which have a considerable impact on the Japanese law and legal reality. See Y.Nodu op.cit.

26. This is not the opinion that one may get from the Addis Abeba conference, c.f. "Proceedings of the Conference on Legal Education in Africa". Addis Abeba, Ethiopia, October 20-24 1968.

27. R. David, A Civil Code For Ethiopia: A Consideration on the Cofification of the Civil Law in African countries, 37, Tul.L.Rev. 1965 pp.187-204.

28. ibid. Also J.H. Beckstrom, Transplantation of Legal Systems. An Earlier Report on the Reception of Western Law in Ethiopia, 21, Am.J.Comp.L. 1973 pp.557-583.

29. This point has been meticulously elaborated upon by Dr. A.E. Orucu (lecturer at Glasgow University) in a paper "Methods of Law Reform" presented to the U.K. National Committee of Comparative Law Colloquium, (Warwick, England) September 1979.

30. Whereas Resurrection and importation are often quoted as "Voluntary Reception", c.f. M.Rheinstein, op.cit. p.34; A. Watson, op.cit. p.21-30.

31. Supra p. 146 Note No.2.

32. These are few of the modes of acquisition of a territory which are recognised by Public International Law.

33. R. Schlesinger, op.cit. p.190f.

34. A.C. Papachristos, op.cit. ch.1, part 2.

35. Case No.681, Reported in IX Revue de Legislation et de Jurisprudence (Algiers 1868).

36. In this particular context, as an example one may cite the province of Quebec which was ceded by France to Great Britain by the treaty of Paris 1763; or the conquest of South Africa by the British Empire at the beginning of the XIX century.

37. Above note.

38. For a brief account of the historical evolution of the Louisiana's legal system the following articles are of valuable interest:
J.H. Tucker, J.R. Source books of Louisiana law, 6, Tul.L.Rev. (1932) pp.280-300; 7 id (1932) pp.82-95; 8 id (1934) pp.396-405. See also articles listed in the bibliography herein.

39. T.W. Tucker, Interpretation of the Louisiana Civil Codes, 1808-1840, LL.M.Thesis, Glasgow University 1972, id. Sources of Louisiana's Law of persons:

Blackstone, Domat and the French codes, 44 Tul.L. Rev. 1970, pp.264-295

40. On this point see e.g. I.C.Gower, Independent Africa (London, Oxford, 1967) esp. Ch.1,2.

41. e.g. Consider the political evolution of Syria (a country quite well known for her frequent coups d'etat) in relation with her legal evolution.

42. J. Hazard, Communists and their Laws. A Search for the Common Core of the Legal Systems of the Marxian Socialist States (London 1969) esp. Preface p.XI.

43. R. David, Major Legal Systems... op.cit.pp.477f. For further details read P.M. Chen, Law and Justice. The Legal System in China. 2400 BC to 1960 AD (New York, 1972)

44. J. Hazard. Communists and their Laws...op.cit. pp.481-518.

45. Since 1960. See ibid. esp. pp.483-487 and 515ff. id, Soviet Models for Africa in Melanges Kubali (Istanbul 1974) pp.689-700; id. Mali's Socialism and the Soviet Legal Model, 71, Yale L.J. (1968) p.28.

46. e.g. China. P.M. Chen op.cit. pp.105-141 and 167-183.

47. The recent political changes of regime in the new governments of Zimbabwe (ex. Rhodesia) and Liberia may well produce common law - socialist types of mixed jurisdictions.

48. A. Watson op.cit. p.19f.

49. Sociology of Law: Penguin Modern Sociology Readings (Aubert Wilhelm Editor 1969). See also L.M. Friedman Law and Society (New York 1977), L.C. Green, Law and Society (Peyden 1975) and H. Levy Bruhl, Sociologie du droit, (Paris, PUF "Que-said-je", 3rd ed. 1967)

50. e.g. Greece under Kapodistrias (1821), Iran under Khomeyni (1979)

51. A.C. Papachristos op.cit. pp.15-20.

52. This is borne out by the explosion of sex outside marriage, by the exponential rise in divorce and desertion rates, in broken homes, in abortions and illigitimate births, in an excess of alcoholism and in juvenile delinquency and by the plight of the aged. See K. Ahmad, Family Life in Islam (Delhi, 1974).

53. It was not usual for comparatists to speak about these extra-legal factors (?) But modern trends are showing a move in quite an opposite direction, as R. David warns:

"One must not however underestimate the risk implied by the diversity of economic structures and political regimes..." Major Legal Systems... op.cit. p.68.

54. ibid. But more convincing J. Hazard, Communists and their laws, op.cit. p.482ff.

55. K. Zweigert, op.cit. pp.260-273 and 293-300.

56. T.B. Smith, the preservation of the civilian tradition in "mixed jurisdictions" in civil law in the Modern World (Yiannopoulos Ed. Louisiana, 1965) pp.14-16. Generally speaking, the implications which language may have for the formulation and interpretation of the law are quite well known. See 50 Tul.L.Rev. 1976 pp.474-494. Apparently Ceylon and Ethiopia are also facing language difficulties as they try to reconvert their legal systems (originally in English) into their own native language.

57. H.R. Hahlo and Ellison Kahn, The Union of South Africa, The British Commonwealth Series, the Development of its Laws and Constitution (London 1969) Vol.5. Particularly pp.441, 502 and 572.

58. A.G. Chloros, Codification in a Mixed Jurisdiction, The Civil and Commercial Law of Seychelles. Introduction and Texts. (N.H. Amsterdam - Oxford 1977) pp.76-79.

59. The term Jurisdiction in a narrow sense also means "the extent of the power which a court may exercise".

60. H.J. Abraham, The Judicial Process (New York, 2nd edition, 1976) p.19. R. Schlesinger op.cit. p.154.

61. See articles by J.Y. Brinton, Closing of the Mixed Courts of Egypt, 44, Am.J.Int.L. (1956) pp.303-312 and Y. Linaut de Bellefont, La suppression des jurisdictions de statut personnel en Egypte. 9, R.I.D.C. (1957) p.412ff.

62. At present all these countries (and few others) have a dual system of courts. But it is not certain whether this is only a temporary situation i.e. transitory towards a unification of the judiciary, or adversly, a situation which is intentionally called upon to develop. This is why for an up-to-date information it will be advisable to consult regular periodicals such as for instance, Journal of African Law (Edited in U.K. since 1957 by the London School of Oriental Studies).

63. An invaluable guide in the 1955 colloquium of Istanbul published in 6, Les Annales de la Faculte de Droit d' Istanbul, 1956.

64. ibid. See also E. Guttman, The Reception of the Common Law in the Sudan, 6 Int.Comp. L.Q. (1957) pp.401-417.

65. e.g. UNIDROIT, UNCITRAL

66. R. Schlesinger, op.cit. p.154.

67. There is however examples of traces of Roman law to be found in the English Common Law, these are rather insignificant elements but may be a point to mention. See V.W. Buckland and A.D. McNair, Roman Law and Common Law: A Comparison in Outline (2nd ed. Cambridge, 1965)

68. There is the legislation of the E.E.C. and the decision of the Community's Court of Justice which are part of the law of England. Where U.K. law has been unified with foreign law under international convention such as the carriage of goods by sea, the decision of foreign courts must be noted. Examples of such cases could be found in the Common Market Law Reports (U.K. 1962 ——)

69. See Supra.p.146 Notes No.2,3.

70. A. Malmstrom, The System of legal systems. Notes on a problem of Classification in Comparative Law, 13, Scand.Stud.Law 1969, p.145ff. "Both", writes G.Glos "The Civil Law and the Common Law spring from a common source, the Legal thought of European Nations. They followed... op.cit.p.728.

71. E.L. Johnson, An Introduction to the Soviet Legal System, London, 1969 p.5.

72. Roman Law and Common Law: A comparison... op.cit. - "It may be a paradox, but it seems to be the truth that there is more affinity between the common lawyer than there is between the Roman Jurist and his modern civilian successor."

73. Lord Cooper, Essays on Scots Law, Selected papers op.cit. p.201

74. op.cit. p.243. This concerns only the law of the white minority which constitutes a blend of Roman Dutch Law and English Common law. The legal system of the black population is different. See the Official Year Book of the Republic of South Africa, 1979, pp.298-308. See also S. Suttner, Legal Pluralism in South Africa. A Reappraisal of Policy 19, Int.Comp. L.Q. (1970) pp.134-153.

75. The opinion has been expressed that Louisiana is becoming a Common law jurisdiction, Pound, Ireland, Louisiana's legal system reappraised, 11, Tul.L.Rev. (1937) pp.585-596. This view has been vigorously

repudiated, Dainow, Pagget, Herbert and McMalon, A Reappraisal Appraised, 12, Tul.L.Rev. (1937) p.113.

76. For a description of the Scandinavian legal systems see generally, the Scandinavian Studies in Law (1957 ——→).

77. A.G. Chloros, Codification op.cit. Chs.IV, VI and VIII.

78. For a survey of the Legal System of Sri-Lanka see I. Jennings and W. Tambiah, The Dominion of Ceylon, The British and Commonwealth Series, the Development of its Laws and Constitution. (London 1952)(Vol.7 thereafter cited as Tambiah)

79. ibid, pp.91-175.

Chapter Two

1. Again, here the assistance of legal sociologists such as Levy Bruhl, Hall, Friedmann is quite appreciable.

2. On the different meanings of this word see S.A. Bayitch Codification in Moderne Times, in Civil Law in the Modern World. (Yiannopoulos ed. Louisiana 1965)pp.157ff and more specially pp.162-167.

3. A French Civil Code was already in force in the island since April 1st 1808.

4. The main source of this section is A.G. Chloros Codification in a Mixed Jurisdiction... op.cit. The book is forwarded by an integral reproduction of the new civil code of Seychelles, making it thus more valuable.

5. S.A. Bayitch, op.cit. p.169.

6. ibid. See also H.C. Gutteridge, Comparative Law, Cambridge, (U.P. 1946) pp.75-77.

7. Bayitch gives the following answer "In legal systems where there is a substantive difference between ordinary statutory law and codified law, the question arises whether to enact legislation in the form of simple statutes or in the form of code. ...In legal systems where the difference is but one of terminology, with "code" as well as "statute" in fact meaning legislative action but statutory law, the question becomes whether

to regulate by statute or not at all". op.cit. pp.169ff.

8. e.g. compare the old and new civil codes on specific areas such as family law, fiduciary relationships and domicile.

9. Actually a stand which has been repeatedly condemned by the Private International Law Committee. e.g. see R.H. Graveson, Conflict of Laws (7th ed. London, 1974)

10. ibid. p.189.

11. Compare the concepts of Domicile and Residence in France, England and Seychelles with the Resolution of the Council of Europe, Annexe 72, rule I.

12. See A.G. Chloros, Codification op.cit. p.28, notes 3.

13. However, it is amazing that in the same code reference to the term Crown is being made in various article provisions and notably Art.713 which reads: "ownerless property shall belong to the Crown". By being an independent Republic headed by a president (See new constitution amended and revised by the 1979 constitution) there is no apparent justification for the use of the term Crown in the politico-administrative structure of Seychelles. The appropriate word I think would be "the state".

14. See Article by A.G. Chloros, The Projected reform of the Civil Law of the Seycehlles. An experiment in Franco/British Codification, 48, Tul.L.Rev. 1974. pp.815-845.

15. A lot of ink has flown away on the matter whether or not to codify Scots law. But all attempts have remained dead letter. See an interesting debate by eminent Scots jurists such as Reid, Duncan... in the local newspaper "Glasgow Herald" (April 1960). See also Professor Walker's view on codification in The Scottish Legal System, op.cit. pp.514f.

16. "Scotland, as the late Lord Cooper discerned, might have codified Private Law on the basis of the institutional works at the beginning of the XIX century, but even had the right man been available for the task, Parliament at Westminster would have never fostered the project". Reported by T.B. Smith, The Preservation of the Civilian tradition in "Mixed Jurisdictions" in Civil Law in the modern world. op.cit. p.24 see id The maintenance of civil law in "Mixed Jurisdictions" in Studies Critical and Comparative, Ch.IX. To test the validity of such willingness today, I had the opportunity of carrying a mini survey on the subject amongst few law lecturers in Glasgow University. To the question "Is it possible and desirable to codify Scots law?" here are some of the answers (most of which are in fact questions):

- Why should we codify?
- Which area is to be codified?
- Time is not ripe yet.

17. 77. So.Afr. L.J. 432 (1960) Duncan once expressed the same reaction regarding an eventual codification of Scots law. "And that would be a tragedy". However in South Africa too there have been exponents to codification. e.g. The main reason why Justice J. Wessels suggested to codify South African law was that he feared that "the Roman-Dutch law might otherwise become absorbed by the English law". See Hahlo: The Union of South Africa, op.cit. p.41-50.

18. ibid. pp.691 -693.

19. S.A. Bayitch, op.cit. p.169

20. e.g. Yugoslavia; see J. Vilus, A Projected Civil Code for Yugoslavia, 19, Int.Comp.L.Q. (1970) pp.333-338.

21. Such as E.L. Johnson; J. Hazard; V. Knapp etc.

22. S.A. Bayitch, op.cit. p.182.

23. Bulgaria has only a partial civil code yet; whereas in Albania and Yugoslavia drafting is still in progress. K. Zweigert op.cit. p.313.

24. e.g. The Madjelle; S.S. Onar, La Codification d'une Partie du Droit Musulman dans l'Empire Ottoman (le Madjelle) (Istanbul 1955) Also published in 4-5 Annales.. d'Istanbul 1955. J.N.D. Anderson, Modern Trends in Islam; Legal Reform and Modernisation in the Middle East, 20 Int.Comp. L.Q. (1971) p.1-21; and G. Crespi Reghizzi, le Droit Islamique et son socialisation dans les pays en voie de developement, Rapport Generaux au IX Congres Int.de Dr.Comp. (Teheran Sept.27 Oct. 4 1974) pp.3-30.

25. J. Abraham. op.cit.

26. This term is mostly used in the American terminology see A.C. Papachristos. op.cit. p.110; Levy Bruhl, op.cit. p.117.

27. A.C. Papachristos, op.cit. p.111, L.C. Green, op.cit. p.81.

28. Supra p. 151 Note No.62.

29. e.g. In Nigeria, the Sharia courts not only exist but are also empowered to determine certain classes of cases in accordance with Moslem Law, where all the parties to the proceedings (whether or not they are Moslem) have by written hand requested to determine that case in accordance with Moslem Law. See A. O-Bilade, the Nigerian legal system (London, 1979) p.165.

30. K. Zweigert, op.cit. p.238:-
"The principle (In direct rule) had two particular consequences: ...Customary Laws...remained in force (and) the courts (which) applied the customary law were left unaffected.

31. Such judicial dualism existed well before 1825 in England between the Common Law and Equity Courts. See most of the books on the History of English Law.

32. e.g. The Republic of Somalia whose law is a combination of British and former Italian laws heavily impregnated by a strong customary and Islamic law, has also a unified court system. See P.Contini, Integration of Legal Systems in the Somali Republic, 16 Int.Comp.L.Q. (1967) pp.1088-1105.

33. Tambia op.cit. Part II. A good illustration on the unification of courts is the Libyan experience. See article by A. Quassem, A Judicial Experiment in Libya: Unification of Civil and Sharia Courts, 3 Int.& Comp. L.Q. 1954, pp.134ff.

34. Hereinafter, when the term jurisprudence is enclosed between citation marks; it should be understood in the civilian sense, meaning essentially court decisions; and not legal philosophy or philosophy of law as it is in Common law systems.

35. S.A. Bayitch, op.cit. pp.177ff, but F.H. Lawson sees "no profound difference between codified and uncodified systems as such. A common lawyer looks at the civil law (University of Michigan Law School (1953) p.52.)

36. J. Merryman. The Civil Law Tradition. An Introduction to the Legal Systemsof Western Europe and Latin-America. (California 1969) p.39.

37. ibid. However it is modern thinking in England and U.S.A. that judges should become partners with the legislative.

38. ibid. Also R.David, French law; its structure sources and methodology. Translated by Michael Kindred (Louisiana 1972) pp.39-46.

39. Jurisprudential literature on this subject is voluminous. For general reference, L.L. Fuller, Anatomy of the Law (London 1968) pp.43-120, G.W. Paton, A Text Book of Jurisprudence (4th Ed. Oxford, 1972) H. Silving, Sources of Law (New York, 1968). M.Miaille (ex lecturer at Algier's Law Institute) uses this theory to analyse the legal system of Algeria, See his Introduction Critique au Droit (Paris, 1978) pp.226-239.

40. D.M. Walker, The Scottish Legal System, op.cit. p.344

41. See supra p. 153 Notes 5, 6,7. Generally the difference between Continental and Common Law code is that the Continental code (e.g. France) operates as a sort of innovation - a point of departure for a new development of judicial rules, whereas a Common law code is more "conservative" and does not abolish prior laws (e.g. the Restatements in U.S.A.)

42. M. Barham, A Renaissance of Civilian Tradition in Louisiana, in J. Dainow, the role of judicial decisions and doctrine in Civil Law and in Mixed Jurisdictions (Louisiana, 1974) pp.69-90.

43. id. Methodology, op.cit. pp.490ff; J.W. Sanders, The judge: the extent and limit of his role in a civil law jurisdiction, 50, Tul.L.Rev. (1976) pp.511-516.

44. ibid. A. Tate, the role of the judge in Mixed Jurisdictions: The Louisiana experience, in Dainow, the Role of Judicial Decisions...op.cit. pp.23-27.

45. French law...op.cit. p.54. See also O. Kahn-Freund, A Source Book on French Law: System, methods, outlines of contract, by O.Kahn-Freund, C. Levy and B. Rudden. (Oxford, 1973) Text in French with English commentary.

46. 33, Tul.L.Rev. (1959) p.574.

47. Consider e.g. Wagner v Kenner, 2 Rob LA, 120 (1824). As reported by R. Schlesinger op.cit. pp.154-155.

48. According to D.L. Carey Miller, there are two distinct situations in which a Scottish Court could legitimately resort to consideration of the Roman law. First in those areas of Scots law in which Roman law is influencial (?) and second, by way of possible comparative material..." see J.R. (1975) Op.Cit. p.64.

49. See particularly supra p.150 Notes No.42-44.

50. Art.4 Seychelles Constitution (1979) states that "the sources (of law) shall be the civil code. "The object is clearly to prevent the court from using precedents - at least those prior to the code. However, consider Art.5 according to which "judicial decision shall not be absolutely binding upon a court, but shall enjoy a high persuasive authority..." In Seychelles as Chloros observes, it seems that the code saved,"in extremis" Seychelles Law from being completely absorbed into the Common Law. A.G. Chloros, Codification op.cit. p.12.

51. Taillon v Donalson, SCR 257 (1953) Reported by L. Lalande in 33, Can.Bar.Rev. (1955) pp.950; 1104.

52. 5 Mart (OS) 105,L.A. (1817). Reported by M. Barham, Methodology op.cit. p.478. For a relatively recent case, see the decision of the Supreme Court of Louisiana in Minyard v. Curtis Products Inc. 251 LA (1967). A full discussion of the case is found in A. Tate, The Louisiana Action for Unjust Enrichment, 50, Tul.L.Rev. (1976) pp.893ff.

53. Consider the delightful case of Stevenson v Donaghue SC.HL. (1932)

54. Moreau v Duncan, I Mart (OS) 99 LA (1810) as reported by M. Barham, Methodology op.cit. p.479.

55. I Mart (OS) 269 LA (1811) ibid p.479.

56. Many legal theoricians agree on this point: See particularly J. Stone, Social Dimension of Law and Justice (London, 1966) p.527. Also Cohen and Cohen, Reading in Jurisprudence and legal philosophy (New York, 1953) esp. ch.XIII.

57. K. Boris, Trends in Comparative legal Research, 24, Am.J.Comp.L. (1976) Note 1 at p.100.

58. This point has already been discussed above. See particularly Sect.B. ch.I. For further readings see J. Merrymann, Op.Cit. pp.1-6 and R. Schlesinger Op.Cit. pp.190ff1.

59. Tambiah, op.cit. p.173.

60. ibid. However as this book dates back to 1952; the accuracy of the information reported in this essay has been confirmed by Mr.Z, the Education Officer in the Sri-Lanka consulate in London.

61. The deficiency of material on the legal system of Sri-Lanka and especially her judiciary makes the availability of illustrations (cases) difficult.

62. See e.g. S. Basnayak, Possession in a Mixed Jurisdiction; the Sri-Lanka Experience, 24, Int.& Comp. L.Q. (1975) p.61-85

63. Tambiah, op.cit. pp.173-175.

64. An attempt is made here to select few of the very numerous articles on the Trust in Louisiana; much of which are found in Tulane Law Review. - J.M. Wisdom, Progress of Codification of Trusts,14, Tul.L.Rev. (1940) F.F. Stone; Trusts in Louisiana. - 1, Int. & Comp. L.Q. (1952); L. Oppenheim, A New Trust Code for Louisiana. Some steps towards its achievement, 37, Tul.L.Rev. (1963) id, A New Trust Code for Louisiana Act. of 1964, 39, Tul.L.Rev. (1964); id, the 1968 Amendments to the Trust Code of 1964, 43, Tul.L.Rev. (1969)

65. Indeed this section should be read with Section A, Ch.I, dealing with legislative problems.

66. The idea that the English concept of Trust may cross the frontiers of the civil law jurisdictions is an exciting one. It has been said that "If the Civilians desire to pre-ambulate on the outer fringe of the Anglo-Saxon Trust they may please themselves" Guarrigues, Law of Trusts, 21, Am.J.Comp.L. (1953) pp.22-35; Also, F.F. Stone, Trust in Louisiana, Op.Cit. pp.368-378.

67. P. Hefti; Trusts and their treatments in the Civil Law, 5, Am.J.Comp.L. (1956) p.553:- "it is impossible to create trust under civil law".

68. ibid. However P. Lepaulle doctrinizes that "in the Civil Law there are a number of substitutes, which properly used, accomplish all of the objects of a trust". In Traite Theorique et pratique des Trusts en Droit Interne, en Droit Fiscal et en Droit International (Paris, 1932). id, Civil Law substitute for Trusts, 36, Yale L.J. (1927) p.1126.

69. R. Schlesinger, op.cit. p.409.

70. P. Hefti, Op.Cit. pp.549ff.

71. R.G. Patton, Trust Systems in the Western Hemisphere, 19, Tul.L.Rev. (1946) pp.542-546.

72. Such as The Louisiana Law Institute, The Trust advisory Committee, The Reporter of the Trust Review Project, Louisiana Revised Statutes...

73. See Articles by L. Oppenheim (one of the principal architects of the recent codifications of the Trust in Louisiana) in 37, Tul.L.Rev. (1962) p.169, id, 39 (1965) p.187; id, 43, (1969) p.34.

74. F.G. Laverty, Some differences between the Common Law and that of the Province of Quebec, 9, Can.Bar.Rev. (1931) p.13.

75. op.cit. p.576.

76. A.G. Chloros, Codification...op.cit. pp.12, 77f.

77. ibid. esp. Notes No. 109, p.92:- "Trusts do not exist in Seychelles".

78. e.g. Scotland, Louisiana.

79. Recent suggestions have been put forward in the United States in order to blend the Common Law American Institution of the Escrow Agent with that of the Civilian notary public. See an interesting article by D. Burke and J. Fox: The Notaire in North America: A short study of the adaptation of a Civil Law Institution, 50, Tul.L.Rev. (1976) pp.318-415.

80. The historical reasons which account for the relatively low status of Notaires in Common Law Jurisdictions is briefly discussed by Holdsworth in History of English Law (London, 1945) p.114ff.

81. It should be noted however that comprehensive trust statutes do in fact exist in many civilian legislations such as Mexico, Venezuela and Liechtenstein. See R. Schlesinger op.cit. p.191.

82. The Scottish Law Commission in their report on antenatal injuries state that "it would not be in Scots Law contrary to principle to extend a doctrine derived from Roman Law to fill a gap in authority". See The Scottish Law Commission Report on Liability for Antenatal Injury (1974) p.8. This statement accords entirely with the view of the established approach of Scots Law to civilian material.

83. D.M. Walker, The Scottish legal system, op.cit. pp.54, 160f.

84. D.L. Carey Miller, op.cit. p.64, shares the same view as D.M. Walker (83 above) on this point.

85. "For unless our law continues to grow in accordance with that (Roman) tradition, it will run a grave risk of becoming a debated imitation of the Law of England". Lord Norman of Aberdour in 1937 foreword to J. Spincer Muirhead, Roman Law, Smith, Studies Critical and Comparative (Edinburgh, 1962).

86. I owe this expression to J.M. Reid who used it when speaking about Scots Law...

87. "La decision finale ne soit pas celle de juges "trained in the civil law", mais soit derivee d'un droit etranger. L. Lalande of the Montreal Bar commenting on the Donalson case, supra Note 51, ch.2, Part I.

PART TWO

Chapter One

1. op.cit. p.5.
The reason why references to mixed jurisdictions cover only Civil Law and Common Law traditions, in my view, flows from the emergence of new legal families which have so far been either under-estimated or unduly ignored. Socialist laws is one legal family that has been for long overlooked. (Supra p. 13 Also R. David, Major legal systems...op.cit. p.144) and was finally admitted as a distinct legal family only at the end of the World War II when Marxist ideology spread over

Eastern Europe and Asia (R.Schlesinger op.cit. p.190f. For further details E.L. Johnson, An Introduction to the Soviet legal system (London 1969)).

Islamic law is another legal family which unlike socialist laws has not been yet universally acknowledged as a distinct legal system in the technical sense of the meaning. So far, only few divisions or classifications of the world's legal families include a separate Islamic legal family such as Levy Ullmann's division. R. David did however include an Islamic legal family at one time (traite Elementaire de Droit Compare, une Introduction a l'etude de droit etrangers et a la Methode Comparative (Paris, 1950) p.222) but he subsequently modified his position and treated Islamic law along with Hindu law, the law of the Far East and Africa as a "closely knit" group of religious and traditional systems. (See Les grands systems de Droit Contemporaris 6th Ed; Dalloz, Paris, 1974 pp.18ff).
This attitude, as Professor David notices, "proceeds from a rather naive sense of western superiority...and does not acknowledge an observable reality in the modern world" (Major legal systems...op.cit. p.26).
Practically since the second half of this century which saw a considerable process of decolonization everywhere in the Muslim world, Islamic law has emerged as a highly developed and technical system with a marked characteristic which distinguish it from other legal systems.
At present the importance of Islamic law in Comparative studies and its place amongst the great legal systems of the world is not well established - as it should be - but signs of recognition by such eminent western jurists as Lambert, Del Vecchio, Wigmore, Zweigert and David, may well reveal promising for the future of Islamic law. This point of detail on the ius of Islam was in a way necessary to help us to embark more confidently on the second part dealing with the Law of Algeria.

2. op.cit. pp.57f.

3. These are (in a loose order)
   1 - Historical background and development.
   2 - Predominant and characteristic mode of thought in legal matters.
   3 - The distinctive institutions.
   4 - The kind of legal sources acknowledged and the way they are handled.
   5 - The ideology.

4. For a criticism of the theory see a short article (Book Review) by H. Silberberg, in 21, Am.J.Comp.L. (1973) pp.772-782.

5. R. David in his treatise Major legal systems refers to what he calls "elements constants" (op.cit. pp.17-20) However, it does not seem to me that there is a substantial difference between Zweigert's style and David's constant elements.

6. As reported by H. Silberberg op.cit. p.776.

7. ibid.

8. K. Zweigert op.cit. pp.123-132 and 337-351.

9. In any case it means that this criterion is not applicable or has lesser significance in the Algerian legal system. I avoided or deliberately omitted to treat this criterion separately mainly for reasons of convenience.

10. For the history of Algeria in general see: J.P. Charnay, La vie Musulmane en Algerie d'apres la jurisprudence de la premiere moitie du XX siecle (Paris 1965).

11. Indeed, the law of this community is substantially different from Islamic law and sometimes conflicts with it.

12. Example of "Loi Speciale":
In France, the year 1955 marks an important date in the legal history of the French legal system of land ownership known as "le regime de la publicite fonciere". These transformations did not have any repercussion or effect on the law of land ownership which was then in application in the Colony (Algeria), which she too had been subject to modification but on a completely different scheme. See 71, Revue Algerienne Tunisienne, et Marocaine de legislation et de Jurisprudence. (1955).

13. P. Gonidec, les Droits Africains, Evolution et Sources, (Paris, 1968) p.227f

14. In general c.f. M. Bedjaoui, International Encyclopedia of Comparative Law (1974) vol.II, National Reports, pp.17ff.

15. Article 2 of the law No.62-157 of 31.12.62, original citation:-
"Tous les textes et les dispositions portant atteinte a la Souverainete Nationale on d'inspiration colonialiste ou descriminatoire a l'exercise normal des libertes democratiques sont consideres comme nuls et non avenus".

16. Muslim Sects, schools or rites.
There are five major schools within the Muslim Community They are different in the sense that they each constitute a particular interpretation of Islamic law. Differences between them exist in many points of details, but on matters of principle, their resemblance is most striking. These schools (or Madahib in Arabic) are:
The Hanafi School, The Malikit School, the Shafii School, the Hanbali School and the Shiite School. All five schools have a certain number of followers which are very unevenly spread within the Muslim world.
See J. Schacht, An Introduction to Islamic Law (London 1964) and N.J. Coulson, A History of Islamic Law (London 1964).

17. This is an approximate translation as the code is promulgated only in Arabic and French, the two languages used in Algeria.

18. See supra p.150Note No.52.

19. e.g. Shiites v Sunnites (see note 17 above)

20. e.g. The Jews who insisted that their legal relationships should be governed by Jewish Law, which was another different system of law.

21. But well before, in 1862, the famous "Violette's Project" has already intended to give native Algerians full political rights without requiring from them French citizenship.

22. These are:
(i) Penal Code (Ordinance 66-158 of 8 June 1966)
(ii) Code of Penal Procedure (Ordinance 66-155 of 8 June 1966).
(iii) Code of Civil Procedure (Ordinance 66-154 of 8 June 1966).
(iv) Commercial Code (Ordinance 75-59 of 26 September 1975).
(v) Civil Code (Ordinance 75-165 of June 1975)

23. Such as:
Decree 63-95 of 22 March 1963 on the creation and organisation of industrial, mining and craft enterprise and the use of vacant agricultural land.

24. As example one might cite: The Self Management system (Autogestion) known in Yugoslavia and the Russian Sovkhoz and Kolkhoz types of farm collectivizations.

25. For a brief historic evolution see Szladits, Structure and Divisions of the Law: The Civil Law System in International Encyclopedia of Comparative Law (1974) Vol.II, ch.2.

26. A. Mahiou, Le Contentieux Administratif en Algerie, IX, Rev.Alg. (1972) pp.571-623.

27. See ibid, esp cases reported.

28. This seems to be the opinion of Yves Lejeune in his article "La phase non-contentieuse du litige administratif", XIV, Rev.Alg. (1977) p.135-153.

29. A. Khurdish, op.cit, ch.IV.

30. According to G. Bousquet: "De meme qu il n'ya pas de vente sans prix il n'ya pas de marriage sans dot". Precis Elementaire de Droit Musulman (Malekite et Algerien), (Paris, 1935) p.137.

31. Such as:"Marry of the women, who seem good to you, two or three or four" (Coran IV, 3).

32. This phenomenon is more crucial amongst emigrant families and especially their children. G. Manco, in his book, "les travailleurs etrangers en France" (Paris, 1973) cross examines this phenomenon.

33. A perusal of the Islamic law of inheritance is very instructive in this respect. For instance, the share of a daughter is one half of the share of a son and this means there is apparent inequality, but, argue Muslim scholars, when this is considered in the context of the economic roles and responsibilities of men and women its justification becomes manifest. Due to these differences of roles and contributions, shares have then beenkept different. See Abdul A'la Mawdudi, Purdah and the status of women in Islam (Lahore, Islamic Publications L.t.d. 1973).

34. See Text in Journal Officiel de la Republique. Algerienne (J.O.R.A.) No.2 of 13 July 1957, p.778.

35. Three (amongst others) basic differences in Algerian Law of Adoption are:
1st The Adopter cannot give his name to the Adopted.
2nd The Adopted has no legal right to inherit from the Adopter.
3rd There is no strict legal obligation between the Adopter and the Adopted.

36. Consider e.g. the French decree of 1st October 1854 which stipulates, I quote: "les Musulmans d'Algerie sont libres de contracter sous l'empire de la loi Francaise, l'expression de leur volonte, une simple declaration de leur part dans l'acte suffit pour cela et entraine l'application de cette loi.

37. op.cit. p.21.

38. Briefly the waqf is an institution under which immoveables are rendered inalienable and the income of the property is to be used either for the owner's descendants or for purpose of public utility e.g. Education, social services, charity, etc...

39. Decree No. 6395 of 23 March 1963.

40. See H. Gourdon, Le Regime de Ordonnance en Algerie 1965-1975, in XIV, Rev.Alg. (1977) p.43

41. M. Miaille, op.cit. p.254f.

42. Amongst the most important documents are: The Project of the Soumam (May 1956), the Programme of Tripoli (May 1962), the 1st Constitution (Sept.1963) and the Algiers Charter (April 1964)

43. See however, M. Mahieddine, Les dispositions du droit Musulman dans le droit publique Algerien (D.E.A. thesis Oran, 1976) pp. 45-70. Also K. Mustapha op.cit.

44. ibid, p.47.

45. The oath reads as follows:-
Je Jure par Dieu tout puissant de glorifier la religion Musulmanne et respecter le caractere irreversible du choix du Socialisme (Note the emphasize on both Religion and Socialism).

46. e.g. Those of the Ministry of National Defence.

47. Law of Nationality of 1963 (No.63-96)

48. Here is an extract from the Commission's deliberations on the Fetwa:-
"After a thorough study of the question concerning the legal validity of the interests produced by the new form of government transactions, herein referred to as "bons d'equipements", and by reference to the sources of Islamic law, the Commission has unanimously agreed on to pass the Fetwa. This principle recognises that usury operations are fundamentally illicite... Nevertheless, considering the national economic interest of such operations, resort to them will be made as long as this national interest still remains..." See full report in the National Newspaper "El Moudjahid" of 4th August 1971.

49. Full text in Journal Officiel (J.O.R.A.) of 30th November 1971. Also published in a separate code under the title of "La Charte de la Revolution Agraire" (National Edition, Algiers, 1971).

50. ibid. Arts. 65 - 67

51. ibid. Arts. 28 - 59

52. ibid. Arts. 97 - 102

53. H. Gourdon op.cit. pp.43f. Amongst the 13 members of the commission only 2 are magistrates (i.e. lawyers)

54. ibid. The functioning of these Commissions is unknown as there has been no publication of their work so far.

55. Note at the same time what could be one of the "hot" points where traditionalism and modernism conflict.

56. H. Gourion, op.cit. pp.41f.

57. Ordinnance 71/74 of 11 November 1971. Also published separately as "Charte et code de la gestion socialiste des Entreprises" (National Editions, Algiers, 1971).

58. Instead, small private enterprises are encouraged and guaranteed full protection by the State, cf. Art.16 Constitution
"La propriete privee, notamment dans l'activite economique... est garantie dans le cadre de la loi.

59. M. Mahieddine, op.cit. p.63.

60. For an interesting reading on Islam and Economics see the remarkable work of B. Rodiason: Islam et Capitalisme. (Paris, 1966).

61. cf. The controversial verse (IX,6) "And we created amongst you classes so to differentiate you".

62. Kara Mustapha, op.cit. p.72.

63. The debate Islam/Socialism is found in the whole of the Arab world.
However, each Arab country sees the issue differently and has its own views and conclusion on the matter.
In fact, what makes the debate so "hot" is the apparent non-conformity of the ideology of socialism with the principles of Islamic Sharia, a view which some Arab countries uphold (such as Saoudi Arabia) and some disapprove of (such as Lybia, Algeria). See J. Schacht op.cit. and N.J. Coulson. op.cit.

64. This Article re-emphasises the provisions of the previous Articles 1 and 2 (same constitution) and once again shows how strong is the determination in Algeria to build in an Islamic-socialist state.

Chapter Two

1. M. Miaille, op.cit. pp.234ff.

2. This seems to be Miaille's mistake, ibid esp. at pp.235, 236.

3. On the Algerian judiciary see J. Lapanne, Organisation et procedure judiciaire (Alger, 1972).

4. Art. 6 Const (Approximate translation):-

   The Supreme Court constitutes in all branches of the law, the regulatory organ of court and tribunal activities. It ensures the unification of jurisprudence and contributes to respect for the law.

   Similar provision is to be found also in the status of the Supreme Court of Morocco in the Law of the Dahir of the 27th September, 1956.

5. For a discussion of Art.5 see particularly J. Lapanne op.cit. pp.73, 87, 88.

6. It is deplorable that cases are not reported currently. The only few cases one may come across are those cited by individual researchers, generally assistants (tutors), lecturers etc...at the law faculties. But to get the information even they must apply to the Ministry of Justice for special authorisation to give them access to the archives where usually the cases are kept.

7. Pourvoi No.910 as reported by G. Badr, La Relance du Droit Islamique dans la Jurisprudence Algerienne depuis 1962,22 Rev.Int.Dr.Comp. (1970) p.48.(Cited as Badr

8. Art. 794 (C.C.A.) defines the "Chefaa" as the faculty to substitute the purchaser in a sale of an immoveable. The nearest English translation (or equivalent) of the Chefaa would in my understanding, be "pre-emption".

9. "Les biens Francises" are immoveables acquired by European settlers, but which do not fall under the rules of the Islamic Sharia law.

10. Pourvoi No.1058 as reported by G. Badr op.cit.p.49

11. Pourvoi No.1682, ibid.

12. The Islamic modes of proof are quite original. See C. Raymond op.cit.pp.104-106.

13. As reported by M. Mahieddine op.cit.p.32.

14. G. Badr, op.cit. p.45.

15. In fact three,if we consider the French judiciary as a dual system. The structure of the Algerian will be then: the ordinary courts topped by the court de cassation, the administrative court topped by the Consiel d'etat; and the Islamic courts topped by the Chambre de Revision Musulmane.

16. See note supra. No. 36 p.164

17. But it has never ruled against a well-established French rule. Ch.Rev. Algiers 10 July 1950.

18. Until 1966; after that date all the judicial personnel has been "Algerianised" see ordinance 66-133 of 2 June 1966.

19. A comprehensive list by chronological order of the various decrees and ordinances relating to the judiciary can be found at the end of Lapanne's book, (See bibliography). Particularly important is the decree 65-279 of 17.12.65

20. For more details see particularly J. Lapanne op.cit.

21. For someone familiar with the French judiciary the Algerian judiciary is no more and no less than a "cliche" of the French system.

22. This judicial personnel was introduced in Algeria during the Ottoman occupation; therefore well before the French conquest in 1830.

23. The Institution of "avoue" has been abolished in Algeria since 1966 (Decree 66-166 of 8 June 1966, Art.1. In France both institutions (avoue and avocat) have been fused since 31 December 1971.

24. Major legal systems...op.cit.p.205.

25. op.cit. p.129

26. op.cit. pp.81-86.

27. See Kara Mustapha op.cit. pp.21-95.

28. R. David, Major legal systems...op.cit. Part II esp. Title III.

29. Kara Mustapha, op.cit.pp. 41-46, 52-54 and especially p.96.

30. Art.173 Constitution:-
"The judge must contribute to the defence and safeguard of the Socialist Revolution".

31. H. Gourdon, op.cit.pp.41ff.

32. Kara Mustapha, op.cit. p.96.

33. Cf, G. Badr, The New Egyptian Civil Code and the Unification of the Laws of the Arab World, 30, Tul. L.Rev. 1956 pp.299-314.

34. On the importance of Islam in law making see in general J.D.N. Anderson, Islamic Law in the Modern World (London, 1951).

35. For Turkey, on this particular point see the pros. and cons. in 6, Annales...op.cit. See however, Dr A E Orucu, op.cit. and more specially Note.17.

36. B.M. Persson-Bleguad, Legislation et changement sociale. Conditions et limitations, in Sociologie de droit et de la justice. (Coll.Int. Bruxelles, 9-12 April 1969), pp. 162-170.

37. J.N. Anderson, Islamic Law...op.cit.pp.38ff, Coulson op.cit. p.182.

38. Perhaps this is why Zweigert wrote:-
"It would be an error to suppose that Islamic countries are tending towards a complete westernisation" op.cit. p.37. "Even Turkey, although it wishes to become a secular state does not intend to carry its revolution

to the point of proscribing all things Muslim". R. David, Major legal systems...op.cit. p.446.

39. See supra Note 48 (Ch.1, Part II)

40. S.E. Tarazi, la solution des problemes de statut personnel dans le droit des pays Arabes et Africains, Acad.Dr.Int. Recueil des Cours (1978),Vol 1 pp.442-446.

41. cf. G. Crespi Reghizzi, Le Droit Islamique et sa socialisation dans les pays en voie de development in Rapports Generaux an IX Congres Int.de Dr.Comp. (Tehran 27 September - 4 October 1974)pp.1ff.

42. e.g. Compare Art.674 (C.C.A.) and 544 (C.C.F.).

43. V. Knaff, La Codification du Droit Civil dans les pays Europeens. Rev.Int.Dr.Comp. (1979) p.740.

44. Chloros discussed objectively the reasons why the draftsmen in the Seychelles departed from the notion of cause. See his book, Cofification...op.cit. pp.103f. For further readings on the Doctrine of Cause see Planiol and Rupert, traite pratique de droit Civil Francais (2nd Ed. 1954), vol.VI.

45. S.S. Onar, La Codification d'une partie du Droit Musulman dans l'empire Ottoman (Le Medjelle),(Istanbul 1955).

46. ibid. p.92.

47. Suppra Note 15 (Ch.1. Part II.)

48. A. Bertiloz, le Code Civil et les Contrats Internationaux (Paris, 1979).

49. See Viallard, La formation du contrat (Cours polycopie Oran,1977)

50 See Zweigert, op.cit. pp.337-352 when he discusses contracts in a planned economy.

51. ibid. Also same Author Vol.II, The Institutions of Private Law, pp.1-207.

52. ibid, Vol.I, p.338.

53. ibid.

54. A passing survey of the various forms of arbitration in a socialist state can be found in R. David, Major legal systems...op.cit.pp.232ff. See also V. Knaff "State Arbitration in Socialist Countries" (1973) Int. Encyclopedia of Comp.L. Vol.16, Ch.13.

55. supra note 17 (Ch.1. Part II).

56. S.E. Tarazi, op.cit. pp.347, 446; G. Badr, op.cit.pp.43ff.

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