

# Pure comparative law and legal science in a mixed legal system\*

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Because of the cultural diversity which underlies the South African legal system much academic effort has been, and still is being, wasted upon our intellectual equivalent of the Anglo-Boer War – known politely but misleadingly as the “purist/pragmatist debate”.<sup>1</sup> This curious academic bloodsport which, it seems, is a sad but common feature of legal systems that have recently been subjected to colonial rule, has provided a forum in which lawyers of various descent have vented their frustration, even irritation, at the fact that our legal system reflects the influence of others beside themselves. The pastime has often prevented us from viewing the overall development of our legal system dispassionately; and much legal scholarship on both sides has been spoiled by emotional jingoism and legal chauvinism. Perhaps we have been too much concerned with how we would *like* to see things, and too little concerned with what we already *have*. This paper is an attempt to redress the balance, to be more constructive. I wish to place more emphasis upon the *richness* of our shared legal tradition, a richness which derives from the fact that it *is* a shared tradition. The type of study which I will advocate is “pure comparative law”, a branch of legal science.

Legal science, or jurisprudence, is the theoretical knowledge of law in all its sophisticated forms, from the a priorist to the empirico-inductivist. As such it embraces, on the one hand, legal philosophy (the abstract and general conceptualisation of law) and, on the other, the sociology of law (which involves the empirical study of law); and it includes a number of sub-disciplines in between, all of which seek to furnish theoretical explanations concerning the nature of law and legal phenomena. Among these sub-

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<sup>1</sup>For a survey, see HR Hahlo & Ellison Kahn *The South African Legal System and its Background* (1968) 578ff; and DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 476ff. More recent literature is canvassed in Adrienne van Blerk's “The Irony of Labels” (1982) 99 *SALJ* 365.

disciplines, and touching upon all areas of legal science, is comparative law – a vitally important and continually increasing branch of legal knowledge. I submit that, because of the unusually cosmopolitan nature of our legal system, we are advantageously placed to contribute to this knowledge.

What I have already said will not be accepted by everyone, including some comparatists; and so this paper will constitute first, a defence of the assertion that comparative law – or “pure comparative law” (to avoid ambiguity) – is a branch of legal science and a substantive discipline in its own right. Secondly, the mixed nature of our legal system and its significance for pure comparative law will be considered. Finally, I will illustrate my argument by way of a few selected examples. Although of primary interest to comparatists and jurists, I would hope that what follows will be of interest to academic lawyers generally.

### What is “pure comparative law”?

In order to provide the necessary context for a defence of “pure comparative law” it would be useful to furnish a brief outline of the development of comparative law.

#### *Historical development*<sup>2</sup>

The application of the comparative *method* – that is, comparing different legal systems, institutions or laws – is nothing new. Aristotle, Francis Bacon and Montesquieu were some of its better known practitioners. But the employment of the comparative method as a *systematic discipline* in the study of law really only commenced in Germany, France and England in the early to mid-nineteenth century, and in South Africa during the 1920's.<sup>3</sup> Of course the use by South African judges and legislators of foreign law as a model for the development of our own law was, of necessity, already well-established by the latter half of the nineteenth century, although it is sometimes suggested that the use of foreign law on a systematic basis was much more fully developed by recent judges such as the late LC Steyn.<sup>4</sup> Courses in comparative law were introduced first at the University of Cape Town, then Potchefstroom University, Unisa, the University of Natal, and, I understand, the University of Pretoria. Perhaps most important of all was the establishment of the Institute of Foreign and Comparative Law at Unisa in 1965 and the launching of the *Comparative and International Law Journal of*

<sup>2</sup>See generally, eg, Walther Hug “The History of Comparative Law” (1932) 45 *Harv L Rev* 1027; HC Gutteridge *Comparative Law: an Introduction to the Comparative Method of Legal Study and Research* (1949) Ch II; Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law: Volume I: The Framework* (trans by Tony Weir 1977) 41–56.

<sup>3</sup>See WJ Hosten “Romeinse Reg, Regsgeskiedenis en Regsvergelyking” (1962) 25 *THRHR* 16, 24–27; DH van Zyl *Beginsels van Regsvergelyking* (1981) 14–16. Mention should also be made of the establishment, at the University of Cape Town, of a chair in comparative law in 1925; and, most important, the work on South African law by that great comparative lawyer Professor RW Lee at Oxford, most of which took place during the first quarter of this century. (See the tribute to him: 1958 *Acta Juridica* 1–6.)

<sup>4</sup>Cf DH van Zyl “LC Steyn en Regsvergelyking” in DJ Joubert (red) *Petere Fontes: L C Steyn – Gedenkbundel* (1980) 1–4; Adrienne E van Blerk *The “Purists” in South African Legal Literature and their Influence on the Judgments in the Appellate Division in Selected Areas* (unpub LL.M thesis, University of Natal: 1981) 81–82.

*Southern Africa* in 1968. Comparative law has now come to be recognised as a subject worthy of study in its own right in South Africa; and in 1981 the first general textbook on the subject written by a South African appeared.<sup>5</sup>

*What is comparative law?*

Comparative law has undergone two main stages of development, and is now entering a third. Influenced by the developments in the biological sciences, linguistics and the new theories of social development during the nineteenth century, comparatists tended to focus, during that time, upon the historical development of legal systems in the belief that there exist certain laws of social development common to all societies. Here the work of Henry Maine, Professor of Historical and Comparative Jurisprudence at Oxford, and John Wigmore in the United States may be recalled. Wigmore called this form of comparative law "comparative nomogenetics".<sup>6</sup> At the same time the period of relative tranquility in Europe towards the end of the nineteenth century inspired the Frenchmen, Lambert and Saleilles, who were motivated by a desire for the world unification of law, to advocate enthusiastically the search for the "common stock of legal solutions" from amongst the legal systems of the civilized world.<sup>7</sup> Thus it was not unnatural that, at the turn of the century, many comparatists saw comparative law as a substantive subject, with a self-contained subject-matter. It was mainly concerned with discovering the patterns of development and concepts which were common to all nations. The English title, "comparative law", and the French, *droit comparé*, seemed perfectly appropriate, and "comparative law" was seen to be a substantive science.

During the first half of this century, however, many comparative lawyers (most notably Sir Frederick Pollock, HC Gutteridge and his one-time student, René David) came to regard these titles as misnomers because, so they argued, "comparative law" was no more than a *method* to be employed for diverse purposes in the study of law. They observed that the German name for the subject, "*rechtsvergleichung*" – and, by implication, its

<sup>5</sup>DH van Zyl *Beginsels van Regsvergelyking* (1981).

<sup>6</sup>JH Wigmore *A Panorama of the World's Legal Systems* (in three volumes: 1936) Ch XVII esp at 1121. Maine's principal work was *Ancient Law* (1885). Cf also A Kocourek & JH Wigmore (compilers) *Formative Influences of Legal Development* (1918, rep 1979). Although the theory of universal patterns of social development in its more extravagant form has long been discredited, a similar but more sophisticated approach to comparative law finds a strong modern adherent in the person of Alan Watson: see especially his *Legal Transplants* (1974) Ch 1, and "Comparative Law and Legal Change" (1978) 37 *Cambridge LJ* 312, 317–321. Taken on its own (Marxist) terms, an outstanding work on comparative law which seeks to extrapolate theories of legal development is that by Gy Eörsi *Comparative Civil (Private) Law: Law Types, Law Groups, The Roads of Legal Development* (1979).

<sup>7</sup>Ég Zweigert & Kötz *op cit* (n 2) 2–3. The more sophisticated modern counterpart is the famous 'common core' research undertaken at Cornell under the leadership of Rudolf Schlesinger: see RB Schlesinger "The Common Core of Legal Systems – An Emerging Subject of Comparative Study" in Kurt Nadelmann, Arthur T von Mehren & John N Hazard (eds) *XXth Century Comparative and Conflicts Law – Legal Essays in Honour of Hessel E Yntema* (1961) 65, his *Comparative Law* 4ed (1980) 36ff, and the references there cited.

Afrikaans counterpart, “regsvergelyking”<sup>8</sup> – was more apt, since it indicated that comparative law was an activity and not a substantive discipline in its own right. As Gutteridge argued, unlike “family law” or “maritime law”, “not only are there no ‘comparative’ rules of law but there are no transactions or relationships which can be described as comparative”.<sup>9</sup> Echoing Gutteridge, the great comparative lawyer, Sir Otto Kahn-Freund, commenced his inaugural lecture as Professor of Comparative Law at Oxford by saying:<sup>10</sup>

“A professor of comparative law enjoys privileges which should make him an object of envy among his colleagues, and he bears burdens which should evoke their sympathy. The trouble is that the subject which he professes has by common consent the somewhat unusual characteristic that it does not exist.”

“Comparative law” was, on this view, no more than a *means* to an end; and it was therefore the *purposes* for which the comparative method was to be employed that should form the basis of any definition of comparative law insofar as it existed as a “subject”.<sup>11</sup> Thus the emphasis was transferred to the *uses* to which the comparative method could be put in law. This tendency was not entirely unconnected with the fact that the new discipline had to demonstrate its “practical utility” in order to justify its entry into an already overcrowded law school curriculum. The result is that most introductory textbooks on comparative law commence with a careful recitation of all the uses to which comparative law might be put,<sup>12</sup> as if their authors were petrified (probably with great justification) that if the reader were not enticed by the lure of material reward, preferably money, the books would not be read at all. By focussing on these “uses” or “purposes”, comparative lawyers divided their activities into categories which were given labels almost as silly as the names given to the months of the year in Revolutionary France. They were: “descriptive comparative law”<sup>13</sup> or “comparative nomoscopy”,<sup>14</sup> which signified the mere description of foreign law; “applied comparative law”,<sup>15</sup> or “comparative legislation”<sup>16</sup> – the use of foreign

<sup>8</sup>Cf Van Zyl *op cit* (n 5) 4.

<sup>9</sup>Gutteridge *op cit* (n 2) 1.

<sup>10</sup>“Comparative Law as an Academic Subject” (1966) 82 *LQR* 40, 40–41. Cf Professor JF Garner’s confident assertion: “Comparative law is, of course, not a subject but a method”, in his “The Use of the Comparative Method in University Courses in Law” (1971) 11 *JSPFL* 134, 134.

<sup>11</sup>Gutteridge *op cit* (n 2) 5.

<sup>12</sup>For all these uses, see eg M Rotondi (ed) *Aims and Methods of Comparative Law* (1973); WJ Kamba “Comparative Law: A Theoretical Framework” (1974) 23 *ICLQ* 485, 490–505; G Winterton “Comparative Law Teaching” (1975) 23 *Am J Comp Law* 69, 97–116; Zweigert & Kötz *op cit* (n 2) 10–23; René David & John EC Brierly *Major Legal Systems in the World Today* 2ed (1978) 3–10; Van Zyl *op cit* (n 5) 17–34.

<sup>13</sup>See Édouard Lambert *Encyclopaedia of the Social Sciences Vol 3* (1930) sv “Comparative Law” 126. Gutteridge (*op cit* (n 2) 8–9) was prepared to recognise this branch of comparative law only if it went beyond mere description and the furnishing of information; and today most comparative lawyers do not recognise the mere study of foreign law as a part of comparative law proper: eg Watson *Legal Transplants* 4.

<sup>14</sup>Wigmore *op cit* (n 6) 1120.

<sup>15</sup>Gutteridge *op cit* (n 2) 9.

<sup>16</sup>Cf Gutteridge *id* at 2, 7. Lambert (*op cit* (n 13)) uses the term to refer to what was called “comparative jurisprudence”, or “abstract or speculative comparative law” (see below

law for the purpose of reforming one's own law; "comparative nomothetics",<sup>17</sup> which was primarily concerned with evaluating foreign law; "comparative history of law"<sup>18</sup> or "comparative nomogenetics"<sup>19</sup> – concerned with tracing the evolution of legal rules and institutions; and "abstract or speculative comparative law"<sup>20</sup> or "comparative jurisprudence"<sup>21</sup> – in which the comparative method was designed to assist legal philosophers and sociologists. Of these branches, only the last was recognised as having any substantive content at all, and even this recognition was tinged with great scepticism. So the leading textbook on comparative law, Gutteridge's, was and purported to be no more than a book about the correct employment of and advantages to be gained by the comparative *method*.<sup>22</sup> "Comparative law" – possessed of a number of sub-branches bearing pseudo-scientific titles, studied by a growing number of jurists and considered to be of increasing importance – was, then, a mislabelled subject whose very existence was denied by its own adherents! Surely the most interesting exercise in ruthless intellectual self-denial we have witnessed?

But the debate between those who argued that comparative law was a science and those who asserted that it was only a method was, like so many academic disagreements, based upon mutual misunderstandings. The two views, far from being contradictory, were really compatible<sup>23</sup> – so long as each side's perspective was taken into account. During the process of the debate, however, the stridency of the "methodists" did much harm to the image of comparative law as a substantive, scientific discipline and it has not received the attention it has deserved; at least until recently. It is this aspect to which I now turn.

#### "Pure" comparative law

Comparative law, contrary to the view of the "methodists", *does* exist, not as an inappropriate title for a form of activity, but as a steadily expanding body of substantive knowledge quite independent from the uses to which this knowledge might be put or the method by which the knowledge is compiled. It exists as a pure discipline worthy of scholarly academic pursuit; and, to emphasise the point, I have borrowed the adjective used by Ernst Rabel<sup>24</sup> and have called the subject "pure comparative law".

Let me justify these assertions.

It seems to me that the "methodists" and the "scientists" really shared

at nn 20–21).

<sup>17</sup>Wigmore *op cit* (n 6) 1120.

<sup>18</sup>Lambert *op cit* (n 13) 127.

<sup>19</sup>Wigmore *op cit* (n 6) 1121.

<sup>20</sup>Gutteridge *op cit* (n 2) 9–10.

<sup>21</sup>Lambert *op cit* (n 13) 127.

<sup>22</sup>Gutteridge *op cit* (n 2).

<sup>23</sup>Borislav T Blagojevic "Le Droit Comparé – Méthode ou Science" (1953) 5 *Revue de Droit International et de Droit Comparé* 649.

<sup>24</sup>Rabel drew a distinction between "pure comparative law" ("*Reine Rechtsvergleichung*") and the use of the results ("*die Wertung*"); see M Schmitthoff "The Science of Comparative Law" (1939–41) 7 *Cambridge LJ* 94, 96; Gutteridge *op cit* (n 2) 9–10.

different points of reference, even though the former appreciated implicitly what the latter were prepared to recognise explicitly. When speaking of "rules" and "laws", the methodists had in mind normative "rules" or "laws" – the things we lawyers are brought up on. The scientists, on the other hand, were more concerned with descriptive rules or the laws of human behaviour. They perceived law primarily as a social phenomenon, and the relationship between law and society to be governed by "rules" or "laws" which transcend any one particular legal system. Perhaps lingering on was something of the distinction in perspective between the "lawyer" and the "jurist", the former regarding the latter, especially in England, with great scepticism and even derision.<sup>25</sup> There is a delightful article in an old issue of the *Journal of the Society of Public Teachers of Law*, entitled "How to Become a Jurist",<sup>26</sup> which illustrates this. In it the President of the Society poked fun at the pretensions of those who style themselves "jurists". Jargon, other worldliness and eccentricity were deemed essential for the rôle. And comparative lawyers, I am afraid, like to regard themselves as jurists.

Given their different conception of "laws" and "rules", it is not surprising that the methodists were able to make fun of the scientists. They argued, as you will recall, that because there were no such things as "comparative transactions" or "comparative rules of law", there could be no subject accurately called "comparative law"; and in doing so they had in mind *normative* rules. Of course the argument is perfectly correct; but the "scientists" never confined themselves to normative rules. The "rules" they sought were *descriptive* and explanatory ones. Hence to criticise them on the basis used by the "methodists" was absurd. There are no "comparative plants" either, yet comparative biology constitutes an important body of scientific knowledge as does comparative anatomy, comparative philology and comparative religion. Indeed, the sort of substantive knowledge generated by the comparative method is so substantial in some of these disciplines that the adjective "comparative" has been dispensed with and the comparative method is simply taken for granted as an indispensable method of inquiry. Nor is the matter altered by the fact that the comparative method produces results which are found to be of great and varied practical use: no one would suggest that applied physics precludes the existence of pure physics.<sup>27</sup>

<sup>25</sup>Cf WJ Wagner "Research in Comparative Law: Some Theoretical Implications" in RA Newman (ed) *Essays in Jurisprudence in Honour of Roscoe Pound* (1962, rep 1973) 511, 513–4.

<sup>26</sup>Anonymous (1963) 2 *JSPTL* 129.

<sup>27</sup>These points are much more powerfully and elegantly made by Jerome Hall *Comparative Law and Social Theory* (1963) 12ff. Cf also Max Rheinstein "Comparative Law – its Functions, Methods and Uses" (1968) 22 *Arkansas L Rev* 415 (reprinted in *Rotondi op cit* (n 12) 545, 554): "But what are we to do with the results of our [comparative] endeavours? Of what use are they, if any?"

Being a professor, I would state first the usefulness our insights have in and by themselves. They are answers, mostly tentative ones, to man's insatiable quest for knowing his world. They are as valuable or as useless as the insights obtained in such sciences as comparative religion, comparative linguistics, biology or physics. They simply satisfy our curiosity."

Understood from their own perspective, then, a definition of comparative law in terms of its method and its usefulness is as useless to the "scientist" of comparative law as is a definition of Christianity which says that it is something people go to church for in order to be saved; or a definition of physics which says it is the systematic use of electron microscopes and cathode ray tubes in order to make electric razors. Such definitions take for granted the thing they set out to define.

In fact, the "methodists" give the game away whenever they advocate the use of the comparative method at all. For one might immediately ask, "why the comparative method?"; "what does it tell us that other methods do not?" The answer becomes apparent when we consider what occurs as a result of comparison. At its crudest level – hardly comparison at all but rather a peek at foreign institutions – the researcher simply collects *ideas*. More often than not these ideas play the rôle of stimulating partial or complete imitation (or rejection) in the process of law reform or doctrinal criticism. It is at this level that so much that passes under the label of "comparative law" remains. There is nothing necessarily wrong with this, since it seems that *ideas* play the dominant rôle in the process of law reform,<sup>28</sup> but it is small wonder, therefore, that the substantive content of comparative law is so often missed.

Serious comparative law commences at a more sophisticated level, that of *comparison* itself. "What does he know of England who only England knows?" asked Kipling,<sup>29</sup> and Mathew Arnold "used to say that one who knew only his Bible knew not his Bible."<sup>30</sup> The process of comparison is such a fundamental part of our cognitive development that it is difficult to conceive of any form of general knowledge without it.<sup>31</sup> From the day we are born we compare; we learn what is distinctive about an orange by looking at what is not an orange, what is a boy by looking at what is a girl (*vive la différence!*). *Anything* can be compared except those things that are identical. This also applies to legal systems, institutions, doctrines and rules. Here the "methodists" reveal their preoccupation with "practical" results, such as law reform, by their emphasis on "comparability" – that certain legal systems and rules are not comparable with others.<sup>32</sup> It used to be

<sup>28</sup>Cf below at nn 60–61.

<sup>29</sup>Quoted by Richard HS Tur "The Dialectic of General Jurisprudence and Comparative Law" 1977 *Juridical Review* 238, 247.

<sup>30</sup>Quoted by Roscoe Pound "What May We Expect from Comparative Law?" (1936) 22 *Am Bar Assoc J* 56, 60. Cf Wagner *op cit* (n 25) 512.

<sup>31</sup>See especially Hall *op cit* (n 27) 20; and cf RH Graveson "Philosophy and Function in Comparative Law" (1958) 7 *ICLQ* 649, 652: "I believe that comparison is one of the most important paths taken by the human mind toward general understanding. In fact I venture to say that comparison is a process of human thought that no one can ever escape except in the narrow sphere of pure instinct, and one may indeed perceive the function of comparison even in the field of instinct."

<sup>32</sup>On comparability, see eg Schmitthoff *op cit* (n 24) 96; DA Loeber "Rechtsvergleichung zwischen Länder mit verschiedener Wirtschaftsordnung" 1961 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 201; Stefan M Grzybowski "Le But des Recherches et les Méthodes des Travaux sur le Droit Comparé" in Rotondi *op cit* (n 12) 317, 331–332; Viktor Knapp "Quelques Problèmes Méthodologiques dans la

suggested that socialist law could not be compared with capitalist law because of their mutually incompatible economic bases. But this is only true if we are concerned with comparison for the purpose of legal transplantation. If we want to understand the rôle played by economic substructures, for example, then comparison between the two makes perfectly good sense, although the results will be of greater interest to the jurist than the lawyer.<sup>33</sup>

What, then, is the body of knowledge which is generated by the application of the comparative method? This depends upon the degree of sophistication of the method employed.<sup>34</sup> At its simplest level – that of the *description* of differences and similarities – we merely acquire greater understanding of the characteristic features of particular rules or institutions. But, as the method becomes more sophisticated – for example, where the socio-economic structures, historical background and cultural patterns which underly the rules or institutions are taken into account, or where more flexible criteria of comparison are adopted – the comparative method begins to produce explanatory principles, even rules, based on interrelated variables; explanations which become progressively more scientific and predictive in nature.<sup>35</sup>

Pure comparative law can never, though, become as rigorously disciplined a science as the physical sciences. In the first place, it cannot attain the same degree of objectivity. The complex pattern according to which human institutions including legal institutions evolve renders a study of their unique historical development essential for proper understanding. In this respect, the biological sciences provide a closer analogy.<sup>36</sup> In the second place, the same degree of predictive certainty is unlikely. The physical sciences seek to establish universal rules on the basis of the relationship between very few variables; and these can be established under controlled conditions and through experimentation. On the other hand, pure comparative law, like all social sciences, has to deal with very complex phenomena: humans and human institutions. Wide religious, cultural and social diversities, not to mention the influence of particular individuals, produce distinctive legal

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Science du Droit Comparé” in Rotondi *op cit* 425, 429–430; Zweigert & Kötz *op cit* (n 2) 25–33; Micheal Bogdan “Different Economic Systems and Comparative Law” (1978) 2 *Comparative Law Yearbook* 89, 93–99; and Van Zyl *op cit* (n 5) 39.

<sup>33</sup>Although the continuing socialization of law has rendered even Soviet law useful for Western law reformers: see e.g. Zsolt Szirmai “The Use of Soviet Civil Law for the Western Lawmaker” in Rotondi *op cit* (n 12) 657. An outstanding example of the derivation of social theory by means of the comparison of widely divergent societies and their legal systems (ancient feudal China, feudal, post feudal and modern Europe and Nazi Germany) is Roberto Mangabeira Unger’s *Law in Modern Society* (1976).

<sup>34</sup>The literature on method is vast: see e.g. Gutteridge *op cit* (n 2) *passim*; Rotondi *op cit* (n 12) *passim*; Imre Zajtay “Aims and Methods of Comparative Law” (trans by WJ Hosten) (1974) 7 *CILSA* 321; Zweigert & Kötz *op cit* (n 2) 23–41; and Van Zyl *op cit* (n 5) 35–43.

<sup>35</sup>See especially John Henry Merryman “Comparative Law and Scientific Explanation” in J Hazard & W Wagner (eds) *Law in the United States of America in Social and Technological Revolution* (1974) 82 (reprinted in John Henry Merryman & David S Clark *Comparative Law: Western European and Latin American Legal Systems* (1978) 24).

<sup>36</sup>See generally Hall *op cit* (n 27) Ch 2.



systems, each of which must be understood on their own, even if some or all manifest similar traits. Thus *Verstehen*, the sort of knowledge more closely associated with art and history, the knowledge of the particular as opposed to knowledge of the general, is important to the understanding of law and legal institutions; and although legal sociology might strive toward a universalist knowledge of law, as does legal philosophy in a different sense, pure comparative law is forever bound to a limbo between the general and the particular.<sup>37</sup>

Furthermore, pure comparative law is distinctive among the branches of legal science in that it is sustained primarily by the *comparative method*,<sup>38</sup> whereas other branches may place greater emphasis upon the many other methods of cognition which exist, such as empirical induction or a priorist speculation. Thus although comparative law is sometimes identified with legal sociology,<sup>39</sup> it is really more confined. Naturally it does, however, support the other branches of legal science and is itself supported by them.<sup>40</sup>

It is this conception of comparative law, rather than the use of foreign law simply for stimulating law reform, that I believe to be of special interest in a mixed legal system.

### Mixed legal systems and pure comparative law

A good working definition of a mixed legal system is that by Joseph McKnight who described them as "those [systems] having substantive attributes (and those of method) derived from two or more systems generally

<sup>37</sup>Hall (*id* 33) defines comparative law thus: "Comparative law is a composite of social knowledge of positive law distinguished by the fact that, in its general aspect, it is intermediate between the knowledge of particular laws and legal institutions, on the one side, and the universal knowledge of them at the other extreme." See also his "Comparative Law as Basic Research" (1980) 4 *Hastings Int'l and Comp L Rev* 189, 199-200, where the knowledge generated by comparative law is described as "intermediate" or "taxonomic"; and Imre Szabó "Theoretical Questions of Comparative Law" in I Szabó & Z Péteri *A Socialist Approach to Comparative Law* (1977) 9, 23, where comparative law is described as "transitory or intermediary science" in the sense that it provides only an incomplete theory of law. Cf Max Rheinstein "Teaching Tools in Comparative Law" (1952) 1 *Am J Comp L* 95, 98-99.

<sup>38</sup>Szabó *op cit* (n 37) 27-29.

<sup>39</sup>Eg Rheinstein *op cit* (n 37) 98: "... when its cultivator tries to observe, describe, classify, and investigate in their relations among themselves and to other phenomena, the phenomena of law. Comparative law in that sense is the observational and exactitude-seeking science of law in general...". It is not really possible to draw a satisfactory distinction between comparative law and legal sociology, mainly because the *comparative method* is so predominant a means of cognition that legal sociology itself relies heavily upon it. Much depends upon one's point of focus. Cf, generally, Hall *op cit* (n 27) Ch 2; Radomir D Lukic "Les Méthodes Sociologiques en Droit Comparé" in Rotondi *op cit* (n 12) 453; Stefan Rozmaryn "Les Grandes Controverses du Droit Comparé" in Rotondi *op cit* 577, 590-591; Konrad Zweigert "The Sociological Dimension of Comparative Law" (1976) 14 *Law and State* 44; David & Brierly *op cit* (n 12) 12-13; Zweigert & Kötz *op cit* (n 2) 9-10.

<sup>40</sup>For sociological jurisprudence, the comparative method produces information in an analogous manner to that of the process known as "*recoupment*" which is useful where it is not possible to test hypothesis by experimentation: see Pierre Lepaule "The Function of Comparative Law with a Critique of Sociological Jurisprudence" (1921-2) 35 *Harv L Rev* 838, especially 831ff: "*Recoupment* is the method of verifying an hypo-

recognised as independent of others".<sup>41</sup> Although one still hears our legal system described as "Roman-Dutch", it is surely clear to all those who view the system as a whole that this label is an anachronism, remaining literally valid at the most formal level only, and then probably only with regard to private law.<sup>42</sup> Our modern "Roman-Dutch" law is really a blend of institutions, procedures, concepts, doctrines and rules inherited from Holland and England or developed locally, added to which is a significant element of indigenous law. Our system as a whole is therefore well and truly "mixed", and as such joins the many other mixed or "hybrid" legal systems such as those of Scotland, Sri Lanka, Quebec and Louisiana.<sup>43</sup> In fact the attempt to classify the numerous mixed legal systems, and the very fact that they have to be treated as "exceptions" in terms of the orthodox methods of classifying legal systems, contributes much to the growing "theory" of legal families which has become popular among comparatists in recent years,<sup>44</sup> and they demonstrate that there is no single set of criteria upon which to found the classification. The failure of existing classifications to account for the significant number of "mixed" exceptions forces the proponents of these classificatory systems to recognise their own particular premises and shortcomings. Indeed, if consideration is given not only to the mixed nature of our private law but also to our public law, our political and racial legislation, and to the coexistence of a significant body of indigenous customary law alongside the main body of our law, I believe that close analysis of our legal system as a coherent whole will confirm a belief among some comparative lawyers that a more useful basis of classification of legal families is the socio-economic structure underlying legal systems, and not the superficial characteristics of the particular legal systems themselves.<sup>45</sup>

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thesis by successive observation of the same phenomenon from different angles." On the relationship between comparative law, sociological jurisprudence and legal philosophy, see Hall *op cit* (n 27) *passim*; CM Campbell "Comparative Law: its Current Definition" 1966 *Juridical Review* 150, 168; and Tur *op cit* (n 29).

<sup>41</sup>"Some Historical Observations on Mixed Systems of Law" 1977 *Juridical Review* 177.

<sup>42</sup>Professor Hosten argues persuasively that, in the area of classical private law at least, the Roman-Dutch concepts and principles of classification are sufficiently fundamental to warrant the label "Roman-Dutch" and its retention: WJ Hosten "The Permanence of Roman Law Concepts in South African Law" (1969) 2 *CILSA* 192.

<sup>43</sup>See e.g. Hahlo & Kahn *op cit* (n 1) 578-596; Van Zyl *op cit* (n 5) 284-296; AJGM Sanders "The Characteristic Features of South African Law" (1981) 14 *CILSA* 328. On the extent of the influence of English law, in particular, on South African law, see B Beinart "The English Legal Contribution in South Africa: the Interaction of Civil and Common Law" 1981 *Acta Juridica* 7. For an excellent survey of *mixed* legal systems in general, see Schlesinger *Comparative Law* 306-321.

<sup>44</sup>Imre Zajtay "Réflexions sur l'évolution du Droit Comparé" in H Bernstein, Ulrich Drobnig & Hein Kötz (eds) *Festschrift für Konrad Zweigert zum 70 Geburtstag* (1981) 595, 600. For general discussions reflecting the various approaches to the classification of legal families, see e.g. Ake Malmström "The System of Legal Systems" (1969) 13 *Scandinavian Studies in Law* 127; Zweigert & Kötz *op cit* (n 2) 57-67; Eörsi *op cit* (n 6) 31-61; Schlesinger *op cit* (n 43) 303-328; Folke Schmidt "The Need for a Multi-Axial Method in Comparative Law" in Bernstein *et al op cit* 525.

<sup>45</sup>See Hall *op cit* (n 27) 93-104; and cf Eörsi *loc cit* (n 44). In dealing with mixed systems, close attention would have to be paid to the way in which the mixes have taken place, at the level of institutions, doctrine, individual rules themselves, or whole sub-systems of law: cf McKnight *op cit* (n 41) 179-182; and, of course, a careful distinction must

The significance of mixed or hybrid legal systems for the study of comparative law has frequently been noted by comparative lawyers.<sup>46</sup> I remember vividly the remark made to me by a professor in comparative law when I was about to return from my studies in England. He knew I shared his interest in comparative law, and he said: "You are returning to South Africa. How fortunate you are to be able to work in a mixed legal system!" Specialist publications on mixed legal systems have begun to appear;<sup>47</sup> and, although lately hampered by the vicissitudes of politics, the close affinity between Scottish and South African law has given rise to a number of studies comparing these two systems with particular reference to the mixed nature of their laws.<sup>48</sup> Emphasis has, however, usually been placed upon the mixed nature of these systems either for the purpose of identifying "impurities" for eradication,<sup>49</sup> or as interesting exceptions to the categories of law "families". My interest, following that of Professor Alan Watson – who, incidentally, is a strong advocate of comparative law as a substantive, academic discipline<sup>50</sup> – is rather with the contribution to the theory of law which the remarkable process of mixing of laws might provide. What is particularly significant for comparative law about the fact that a legal system is a mixed one is that, whereas the potential relationship between two separate legal systems must, for as long as they remain separate, always be a matter for speculation and tentative conjecture, in a mixed legal system two separate legal systems *are* related; their blending has already occurred. Thus we are able, through the luxurious certitude of observation, to examine *how* the blend occurred, *why* it did so, and what *effect* it has had upon the legal system itself and those regulated by it. These are questions which are all particularly important for the theoretical understanding of law as a social phenomena.<sup>51</sup> And to produce satisfactory results, the comparative method is of paramount importance since a sound knowledge of the donor systems is

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be drawn between legal dualism or pluralism (where laws of different origin operate side by side), and *mixed* laws (where the different laws have been blended together): cf MB Hooker *Legal Pluralism: An Introduction to Colonial and Neo Colonial Laws* (1975).

<sup>46</sup>Eg FH Lawson "The Field of Comparative Law" (1949) 61 *Juridical Review* 16, 25 (reprinted in FH Lawson *Selected Essays, Vol II: The Comparison* (1977) 2, 10–11) where it is pointed out that the ardent unificationist, Lévy-Ullmann, regarded mixed legal systems "as the most likely focus around which a future uniform law of the world might group itself"; RW Parsons "Modern South African Law as a Field of Comparative Study" (1951–3) 2 *Un of Western Australia LJ* 56; Kamba *op cit* (n 12) 499; Watson *Legal Transplants passim*.

<sup>47</sup>Eg Joseph Dainow (ed) *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (1974); AG Chloros *Codification in a Mixed Jurisdiction* (1977).

<sup>48</sup>Eg TB Smith "The Common Law Cuckoo: Problems of 'Mixed' Legal Systems with Special Reference to Restrictive Interpretations in the Scots Law of Obligations" 1956 *Butterworths SA Law Rev* 147 and "Scots Law and Roman-Dutch Law: A Shared Tradition" 1959 *Acta Juridica* 36 (reprinted in TB Smith *Studies Critical and Comparative* (1962), at 89 and 46 respectively); and Watson *op cit* (n 46) *passim*, especially Chs 7 and 13. The other obvious example is, of course, Sri Lanka: see eg LJM Cooray "The Reception of Roman-Dutch law in Sri Lanka" (1974) 7 *CILSA* 295.

<sup>49</sup>This is particularly evident in the work of Professor Smith (see note 48). Cf also the review of his *British Justice: The Scottish Contribution* in (1963) 7 *JSPTL* 137.

<sup>50</sup>See his *Legal Transplants* Ch 1; and "Comparative Law and Legal Change" (1978) 37 *Cambridge LJ* 313, 316–321.

<sup>51</sup>Cf Richard L Abel "Comparative Law and Social Theory" (1978) 26 *Am J Comp L* 219.

required in order to properly comprehend the metamorphosis which the transplanted laws undergo during the blending process. Now it is true that, being a *human* phenomena, some evaluation of the desirability of the way in which the law has been received and developed is impossible to avoid; but to my mind a good deal more objectivity and dispassionate analysis than has been exhibited in the past is required if we are to develop legal theory in a scholarly fashion.

### Some illustrations of pure comparative law in a mixed jurisdiction

I shall conclude by illustrating my argument with a few examples of pure comparative law as it could be developed in South Africa. Apart from their potential contribution to the theory of legal families already mentioned, it seems to me that mixed legal systems offer a unique opportunity for testing a number of hypotheses concerning the *theory of legal development* – a major concern of pure comparative law.<sup>52</sup> I have chosen three theoretical issues: the compatibility of Roman-Dutch and English law; the transplantability of legal rules or institutions; and the adaptability of fundamental legal institutions.

#### *The compatibility of English and Roman-Dutch law*

That mixed legal systems exist at all is remarkable, since it illustrates the adaptability of law to the environments in which it has to exist. The easy reception of English as well as Roman-Dutch law in South Africa has sometimes been ascribed to the mutual compatibility of so many English and Roman-Dutch rules, principles and doctrines. On the other hand, it has frequently been argued that, for the future development of our law, resort should be had to “those systems of the West European continent which, though codified, have their roots in the same historical soil as our law”;<sup>53</sup> and this advice has certainly been followed in a number of recent decisions by our Appellate Division, especially in criminal law.<sup>54</sup> But, while it is wise to heed the warnings issued against too readily assuming that English and Roman-Dutch law are similar,<sup>55</sup> is the basis of the assumption that we should automatically look to modern West European law itself sound? I do not think that one can give an unqualified answer either way, but one thing cannot be ignored and that is the fact that the symbiotic absorption of Roman-Dutch and English law seems to indicate something of their similarity. Has it ever been considered that Roman-Dutch law might actually be *closer* to English law than to modern West European law? Startling though this proposition might sound, there is considerable support for it in

<sup>52</sup>The two most interesting works in this regard are Alan Watson's *Legal Transplants*; and Gy Eörsi's *Comparative Civil (Private) Law*, the latter constituting a much more substantial work than the former. Note also the trenchant criticisms of Watson's method as expressed in a book review of another of Watson's publications (*Society and Legal Change* (1977)) by Richard L Abel: “Law as Lag: Inertia as a Social Theory of Law” (1982) 80 *Michigan L. Rev* 785.

<sup>53</sup>*Maisel v Van Naeren* 1960 4 SA 836 (C) at 847. See also the references cited in Hahlo & Kahn *op cit* (n 1) 591 at n 33.

<sup>54</sup>Cf Van Blerk *op cit* (n 4) 82.

<sup>55</sup>Eg *Preller v Jordaan* 1956 1 SA 483 (A) at 504; *Trust Bank van Afrika Bpk v Eksteen* 1954 3 SA 402 (A) at 410–411.

Marxist comparative analysis. In terms of this analysis both English and Roman-Dutch law are classified together, and separated from contemporary European law. They are treated as products of "early" capitalist revolutions in which class-compromises were reached which did not remove all the vestiges or values of feudalism and which did not fully incorporate the methods and values of rationalism. These were only adopted later during the radical bourgeois revolutions from whence emerged the codified law of modern France, the Netherlands and many other countries.<sup>56</sup> According to this same analysis, modern West German law is even more remote, being the product of a so-called "retarded bourgeois revolution" which produced even greater divergencies from the Romano-Germanic, Roman-Dutch law.<sup>57</sup>

It may turn out that such an hypothesis may be too facile. Still, it seems sufficiently plausible to me to warrant much closer attention.

### *The transplantability of laws*

Legal transplantation for the purposes of law reform has become very popular worldwide, and in the process a number of hypotheses concerning the *transplantability* of laws have been proposed. Recently an apparent difference of opinion emerged between Alan Watson, the Scottish comparatist, and the late Sir Otto Kahn-Freund. The latter asserted that borrowing from foreign law for the purpose of law reform was less likely to be successful in the domain of public law than in private law.<sup>58</sup> The reason for this, he said, was that the institutions of public law and the administration of justice were reflections of the political heart – in particular the distribution of political power – of the donor country; and that whereas geographical, cultural and religious factors – which had been important in Montesquieu's time – were now receding obstacles to legal transplantation, political factors were, to an ever increasing extent, now the ones which divided nations. By way of illustration he cited the unsuccessful attempt to import American labour law into Britain, the unsuccessful advocacy of the system of French administrative courts for England and the failure of the British jury system on the Continent as illustrations of unsuccessful public law transplants. On the other hand, he cited the widespread reform of divorce law according to similar patterns, despite religious objections, as an example of the diminishing influence of religious and cultural factors. His conclusion, therefore, was:<sup>59</sup>

"Anyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share?"

This seemed to contradict the views already expressed by Watson,<sup>60</sup> and,

<sup>56</sup>Eörsi *op cit* (n 46) 111–156.

<sup>57</sup>*Id* 156ff.

<sup>58</sup>"On Uses and Misuses of Comparative Law" (1974) 37 *Modern L Rev.* 1.

<sup>59</sup>*Id* 12.

<sup>60</sup>*Legal Transplants*, esp ch 16.

in a rejoinder,<sup>61</sup> Watson denied that any knowledge of the power structure of the donor country was necessary, although it might help. According to him, all that was necessary was the borrowed *idea*, together with a knowledge of one's *own* country's power structure. Obviously the difference in opinion could be crucial in determining the method to be adopted, for example, by law reform commissions searching for foreign ideas.

When we turn to South Africa to examine the strength of these hypotheses, the balance, I think, lies on the side of Alan Watson, although it may be that in some respects both Watson and Kahn-Freund are arguing at cross-purposes.<sup>62</sup> And the institutions which I have in mind for testing their respective hypotheses are our constitution (imported from England but soon to be substantially reformed), our divorce law (radically reformed in 1979), and our civil and criminal procedure (the product of a massive transplantation from England and grafted onto the Roman-Dutch substantive law). In a sense, our entire mixed system is a challenge to these hypotheses and a field for developing new ones.<sup>63</sup>

### *The adaptability of fundamental institutions*

One subject on which South African academic lawyers (and even future judges of appeal) become very angry is the law of trusts.<sup>64</sup> Perhaps this is because, as an aspect of English private law which receives great attention from foreign lawyers, it also generates great resentment? For my own part, I find the law of trusts a fascinating field for comparative law because it raises two vital theoretical questions: namely, just how basic are allegedly "basic" institutions; and if they are basic, does that mean they are incompatible with alien legal systems? These questions are not only of theoretical concern; they are of immediate importance for the task of legal unification and transplantation. The rôle to be played by the trust in modern European law is an obvious example.<sup>65</sup>

In England the trust has been called the "most characteristic product of English legal genius";<sup>66</sup> and Lord Denning described it as "one of the most fruitful trees in the orchard of English law".<sup>67</sup> On the other hand, a distinguished professor of comparative law at London has suggested that

<sup>61</sup>"Legal Transplants and Law Reform" (1976) 92 *LQR* 79. Cf also Max Rheinstein *International Encyclopaedia of the Social Sciences* Vols 9 & 10 sv "Comparative Law and Legal Systems" 209, where it is suggested that, if anything, public law is less "system-bound" than private law. See also the opening remarks in John H Beckstrom's "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia" (1973) 21 *Am J Comp L* 557.

<sup>62</sup>For an attempt to show that their views are reconcilable, at least in part, see Eric Stein "Uses, Misuses - and Nonuses of Comparative Law" (1977) 72 *Northwestern UL Rev* 198.

<sup>63</sup>More hypotheses are proposed by Watson in his *Legal Transplants* Ch 16 and his "Comparative Law and Legal Change" (1978) 37 *Cambridge LJ* 313, 321ff.

<sup>64</sup>See eg the references cited in Professor HJ Erasmus's book review: (1977) 40 *THRHR* 107, 107-8.

<sup>65</sup>See eg AG Chloros "Principle, Reason and Policy in the Development of European Law" (1968) 17 *ICLQ* 849, 872ff.

<sup>66</sup>Zweigert & Kötz *op cit* (n 2) 275 (quoting Keeton).

<sup>67</sup>Lord Denning *The Due Process of Law* (1980) 235.

the institution has now fulfilled its purpose and "ought to be placed upon semi-retirement like a much decorated general".<sup>68</sup> Being the product of the historical distinction between legal and equitable jurisdiction in England, it is treated as a fundamental institution of English law which illustrates the unique features of the common law.<sup>69</sup> The flexibility of the concept and its distinction between legal and equitable ownership seem strange to a continental lawyer. Maitland reports that Gierke once remarked to him that he did not understand the trust, that it was a concept quite beyond the framework of European legal thought.<sup>70</sup> All this would seem to imply that the trust is a unique institution tied to the common law.

Functionally speaking, this is, of course, absurd. No civilized society could operate properly without legal institutions which perform the functions served by the trust. There are a number of analogues to be found, for example, during the various stages of Roman law, in Germanic, Roman-Dutch and modern European law.<sup>71</sup> What is really remarkable about the trust is that it constitutes an *exception* to the general style of the common law in that it is a unified, highly flexible concept. There does not seem to be a clear, single analogy in modern European law or even Roman-Dutch law.<sup>72</sup> Ironically, the conceptual formulation of ownership in the modern European codes constitutes a factor which to some extent *inhibits* reception of the trust idea as a single institution;<sup>73</sup> and this would seem to lend some force to the suggestion I raised earlier that modern European law might not be quite so compatible with our law as many seem to think.

In South Africa a battle has raged over the true nature of our trust. Whatever the motives of those who on both sides would seek to claim it as their own, such chauvinism should certainly not be a part of scholarly comparative law. Our law of trusts<sup>74</sup> has grown in a bed of Roman-Dutch law; but in its formative stages of development, like it or not, it was nurtured by judges who borrowed heavily, if not the details, then the ideas<sup>75</sup>

<sup>68</sup>Chloros *op cit* (n 65) 872.

<sup>69</sup>Zweigert & Kötz (*op cit* (n 2) 274-284) and David & Brierly (*op cit* (n 12) 322-327) each use the example of the trust to illustrate their discussions of the peculiar characteristics of English law.

<sup>70</sup>See Zweigert & Kötz *op cit* (n 2) 275.

<sup>71</sup>See eg Joaquin Garrigues "Law of Trusts" (1953) 2 *Am J Comp L* 25; Vera Bolgár "Why no Trusts in the Civil Law?" (1953) 2 *Am J Comp L* 304; and especially William F Fratcher *International Encyclopaedia of Comparative Law* Vol VI Ch 11 "Trust" 84ff.

<sup>72</sup>As the late Professor Beinart's extensive review of the trust in Roman and Roman-Dutch law reveals: see B Beinart "Trusts in Roman and Roman-Dutch Law" (1980) 1 *Journal of Legal History* 6.

<sup>73</sup>Cf Bolgár *op cit* (n 71) 210ff; cf Fratcher *op cit* (n 71) 87-88.

<sup>74</sup>See esp HR Hahlo "The Trust in South African Law" (1960) 2 *Inter-American L Rev* 229, reprinted in (1961) 78 *SALJ* 195; Beinart *op cit* (n 72); and Tony Honoré *The South African Law of Trusts* 2ed (1976).

<sup>75</sup>Beinart puts it thus: ". . . the actual number of rules taken over from the English law has not been very great. The rules and practices of the English law served mainly as valuable models, and as guides, as an indirect source, and sometimes acted as a spur to build up a functioning and effective trust institution in South Africa" (*op cit* (n 72) 44); "The English law has served as a model and acted as a spur to the courts and to the legislature to refurbish Roman and Roman-Dutch juridical institutions which some-

of English law; and it was first used by South Africans of British descent.<sup>76</sup> Now, however, it has evolved into an institution which is unique, "a mixture of English, Roman-Dutch and indigenous South African rules . . . It is, source-wise, *ius tripartitum* but, in its end product, *ius civile*".<sup>77</sup> It differs in many respects from its common law counterpart.<sup>78</sup>

What is of interest, therefore, is the fact that the trust *can* be adopted and harmonised with civilian law; and this must surely be of great concern, not only to comparatists but also to legal unificationists.<sup>79</sup> Here, too, there seems to be fascinating parallels in Scots law<sup>80</sup> and other mixed jurisdictions, such as Quebec<sup>81</sup> and Louisiana.<sup>82</sup> These are, to me, much more academically interesting questions than what our law of trusts *ought* to be. That can safely be left to the Law Reform Commission and those lawyers interested in law reform first and foremost.

### Concluding remarks

The questions raised in these three examples go directly to the heart of legal theory. Answering the sort of questions they raise must surely be a dominant concern of legal science, and, especially, pure comparative law. Our legal system is simply bursting with further blends in need of exploration by means of a similar approach, if only we would desist from proselytism. Perhaps it could be said that the sort of comparative law which I have advocated is only concerned with the past, with what *has* happened in our legal system, whereas the purist/pragmatist debate is at least concerned with the *future*, the direction which our law should take. Sometimes, however, it is necessary to look back dispassionately in order to move forward. We have a fine tradition of legal scholarship and interest in comparative law; and many different ideological and doctrinal perspectives concerning the nature of law. Our courts are beginning to demonstrate an exciting trend towards theoretical analysis. These factors, coupled with the mixed nature of our legal system, create an ideal climate for the cultivation of pure comparative law.

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times were not as pervasive in their operation as their English law counterparts, and which may otherwise have remained dormant or unextended in South Africa" (*op cit* (n 43) 29–30).

<sup>76</sup>Cf Honoré *op cit* (n 74) 11; Beinart *op cit* (n 72) 8–10.

<sup>77</sup>Honoré *op cit* (n 74) 13–14.

<sup>78</sup>See especially Hahlo *op cit* (n 74) *passim*; Tony Honoré *op cit* (n 74) 12–13 and *passim*; Beinart *op cit* (n 72) 44, and *op cit* (n 43) 21–30.

<sup>79</sup>Cf Beinart *op cit* (n 72) 44. An excellent study which heads in this direction is Alexander McCall-Smith's "Comparative Aspects of the Rights of the Beneficiary in the South African Trust" (1972) 5 *CILSA* 188.

<sup>80</sup>See eg TB Smith "Trusts and Fiduciary Relationships in the Law of Scotland" in Smith *op cit* (n 48) 198; and cf McCall-Smith *op cit* (n 79) 204ff; Fratcher *op cit* (n 71) 93–94.

<sup>81</sup>See eg Fratcher *op cit* (n 71) 94–96; Yves Caron "The Trust in Quebec" (1980) 25 *McGill LJ* 421.

<sup>82</sup>See eg Fratcher *op cit* (n 71) 98–99; Gerald Le Van "Louisiana Counterparts to Legal and Equitable Title" (1981) 41 *Louisiana L Rev* 1177. For an interesting general article on the trust as it has been adapted outside of England, see KW Ryan "The Reception of the Trust" (1961) 10 *ICLQ* 265.