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## The Role of Judges in the Development of Mixed Legal Systems: The Case of Malta

Biagio Andò

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# THE ROLE OF JUDGES IN THE DEVELOPMENT OF MIXED LEGAL SYSTEMS: THE CASE OF MALTA

Biagio Andò\*

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## ABSTRACT

Mixed jurisdictions that are a historical by-product of the convergence of common and civil law traditions may give the impression of entities with stable and fixed traits. Upon a closer look however, this impression is found to be inaccurate. An analysis of court judgements is the best way to evaluate how these legal systems develop. This paper focuses on Maltese private law,

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which is firmly rooted in the French legal tradition. Some issues concerning private law will be discussed solely because they are significant examples of the relevance that judgements have for the development of the system, notwithstanding the fact that the doctrine of binding precedent is not followed in Malta. Through an inquiry of specific issues not expressly provided for by the legislature, one can see if the legal system has evolved in a way which is coherent with the models that lie at its foundations or from which, and in what way, it has departed from them. In the case of Malta, foreign influences are incorporated to the extent that they are consistent with the Maltese legal tradition.

### I. INTRODUCTION

In this paper I will discuss how Court decisions may change the law in a mixed jurisdiction such as Malta. After an overview of the legal history of the system, I will address two closely connected points. The first concerns gaps in written law, or *lacunae*, and the ways in which they are filled by judges. The second point concerns how general rules such as the concept of 'good faith' have been used by Courts to rule in situations that are not expressly provided for by law. The difference between the two points is one of degree, as in the first case the rule is created by judges *within a wide space*, whereas in the second there are provisions covering situations which are not expressly mentioned. In the first case, judicial discretion has as its result the introduction of a new rule. This approach allows a more detailed insight into mixed legal systems and allows us to understand the sense in which these jurisdictions can be classified as 'mixed.' In this respect, the formation of the legal system as a mixed one is very important.

From the outset it has to be said that the most significant features of the Maltese system are: 1) the presence of codes; 2) the absence of the doctrine of binding precedent;<sup>1</sup> and 3) the absence of a theoretical approach to law in the sense that a doctrinal

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1. However, many examples can be found in which certain important judgements are followed very closely by Courts in later cases: a clear example of this can be found in the field of tort law, as to the computation of damage, in *Butler v. Christopher Heard* (Court of Appeal, December 22, 1967).

formant nowadays is basically non-existent.<sup>2</sup> The ambit of this study is limited to private law.

## II. THE MALTESE LEGAL SYSTEM AS A MIXED JURISDICTION: A GENERAL OVERVIEW OF THE LEGAL SYSTEM

Malta falls among those systems resulting from the mixture between the civil law family and the common law family, which is a specific mix that is sometimes called 'Anglo-civilian.'<sup>3</sup> An eminent scholar, in fact, has observed that within mixed jurisdictions, these two legal traditions separately affect different areas of law. English law affects public, commercial and procedural law, while civil law affects the field of private law.<sup>4</sup>

These two traditions do not give rise to a 'melted' legal system, as is the normal result among nearly all legal systems, but in fact, each tradition operates within a distinct field of the legal system.

According to one of the most eminent Maltese private lawyers,<sup>5</sup> public law, maritime law and company law are oriented towards English common law whereas private law is based on a continental model. The fact that the models underlying both Maltese private law and public law are different has not been a

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2. A foreign observer may be rather puzzled by the presence of two elements, indicated above as no.1 and 3, that usually do not fit well together. Usually, in codified systems academics serve the function of rationalizing their legal system through the interpretation of written law and by pointing out the flaws of the latter, as well as legal reforms that are necessary. However, in the Maltese legal system academics do not play this role.

3. V.V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (Cambridge University Press, 2001); J. Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 478 (Reimann & Zimmermann, eds., Oxford University Press, 2006).

4. PALMER, *supra* note 3, at 8-9.

5. J.M. GANADO, *BRITISH PUBLIC LAW AND THE CIVIL LAW IN MALTA, CURRENT LEGAL PROBLEMS* 195 (1950) (Maltese law has succeeded in making a happy union between British public law and its own private law, which belongs to the legal system derived from the Roman or the civil law. Even a cursory examination of the Maltese Civil Code reveals its close connection with the Code Napoleon, with the Italian Code and with other codes of Southern European nations. The combination of these two laws has been a feature in Maltese affairs for the last 140 years); *see also*, J.M. Ganado, *Malta: A Microcosm of International Influences*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 225 (Örücü et al. eds., Kluwer Law International, 1996).

significant hurdle for the efficiency of the Maltese legal system, because both traditions are, “built upon an individualistic basis.”<sup>6</sup>

As to maritime law,<sup>7</sup> the British model was adopted during the first period of British rule, initially by establishing a Vice-Admiralty Court presided over by an English judge and, then by adopting the Admiralty Courts Acts of 1840 and 1860, and the Colonial Courts of the Admiralty Act in 1890, all of which clearly influenced by British legislation. The adoption of the English model brought into the Maltese system rules which were completely foreign to its legal tradition. For example, the Merchant Shipping Act of 1973 introduced maritime mortgages in a system which, up to that point, had only recognized hypothecs as the primary type of security interest. This was a particularly relevant change because the hypothec, being a civil law security, favours the debtor by requiring registration through a public notarial deed and does not rise to the level of a possessory right, whereas the mortgage favours the creditor and allows the mortgagee the right to take possession and sell the ship without recourse to the courts.

In the field of carriage of goods by sea, the 1952 Carriage of Goods by Sea Act is a carbon copy of its English counterpart. Furthermore, in the fields of carriage of goods and marine insurance, the Maltese courts also follow English sources of law to solve disputed points of law. However, within these fields, the application of the British model is not pure, and it is also of note that contract of carriage and bills of lading are governed by continental rules.

Some fields are jointly affected by civil and common law. Within company law, for example, commercial partnerships *en nom collectif* and *en commandite* are based on French and Italian law, while limited liability companies follow English law, except with regard to issues of dissolution and liquidation, in which cases French law is followed.<sup>8</sup>

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6. GANADO, *supra* at note 5, at 201.

7. *Id.* at 223-224.

8. *Id.* at 243-244.

## III. A HISTORICAL SKETCH OF SOURCES OF LAW IN MALTA

Because Malta has become 'mixed,' as previously defined, under British rule, it is necessary to understand how British law was received in Malta and the effects it produced on the pre-existing Maltese legal tradition. It is generally believed that, rather than having been subsumed by British law, the Maltese legal tradition has instead been preserved because of the significant degree of autonomy the Maltese people enjoyed under British rule. The Maltese legal élite has always supported the idea that the Island was neither conquered, nor ceded, nor sold but that it *chose* to be governed by the British Empire.<sup>9</sup>

Before detailing some of the legal changes brought about in Malta by British rule, some brief remarks are necessary to describe the period prior to that time. The Knights of the Gerosolimitan Order, also known as the Knights Hospitaller, had gained control over Malta in 1530, and it was during this period that the first *corpus* of purely Maltese laws was enacted.<sup>10</sup> Before their arrival, Malta was a political appendage of Sicily and the laws enacted by the Sicilian rulers also applied *ipso facto* to Malta. The model of legislation was based on Roman law, and during the period when the Knights were in power, which ended in 1798 with the arrival of the French, the Code of Master de Rohan (1784) was of crucial importance. A distinguished Maltese author has described this code as "a cornerstone of our legal edifice"<sup>11</sup> for various reasons.

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9. This position is clearly developed by P. DE BONO, *STORIA DELLA LEGISLAZIONE IN MALTA* 382-384 (1898). As to court judgments, a clear example of this attitude can be found in *Cassar Desain v. Forbes* (Court of Appeal, January 7, 1935), reported in W.P.H. GULIA, *GOVERNMENTAL LIABILITY IN MALTA* 128 (1974). The political aim lying at the basis of this position was that of obtaining the acknowledgement on behalf of Malta of a status different from that of an ordinary colony. On the contrary, the British government considered Malta a conquered colony or part of the 'settled colonies' as those founded by English people abroad which enjoyed wider autonomy. The British government refused at first to recognize the status of colony *sui generis* to Malta with the 1865 Colonial Laws Validity Act, which ruled the position of the Constitutions of the colonies in the frame of the English legal system. The Maltese position within the British Empire changed after the enactment of the Maltese Constitution of 1921, *see* F. CREMONA, *STORIA DELLA LEGISLAZIONE MALTESE* (1936).

10. *See*, H.W. HARDING, *HISTORY OF ROMAN LAW IN MALTA* (Malta University Press 1950).

11. CREMONA, *supra* note 9, at 75.

First, it is the *summa* of the whole of legislation enacted during the Knight's rule, secondly because it was the basis of modern law developed from the nineteenth century onwards, and finally, because various institutions ruled based on this Code, which has never been repealed, and form part of the laws still in force.

At its foundation, one can find clear indications of the influence of Sicilian law and Roman Law, as indicated in the law of persons, specifically regarding status, family maintenance, dowry, succession, property, the laws of organization, procedure and in the setting up for commercial causes of a special court known as the *Consolato del Mare*.

The influence of Roman law did not end with the Knight's rule, and the civil code still in force today draws from Roman law the fundamental taxonomies on which it is built. It is important to note that in speaking of Roman law, we do not refer only to 'pure' Roman law, but also to Roman law modified by customs, feudal law and, perhaps more importantly, Canon law, a Roman law that can be called *ius commune* because it is common to most of the continental nations.

Roman law has influenced Maltese law in several ways, and not only gave Maltese private law its fundamental taxonomies, but in the past also served another function, that of a supplementary or suppletive law, to which recourse was made in cases not provided for by Maltese law.<sup>12</sup> The Roman law as *ius commune* is recognizable in many rules of the above mentioned *Code de Rohan* dealing with specific proceedings, contracts, dowry and wills. Further, under British Rule there were several cases that were decided according to Roman law principles, most notably the Steven's case (1833)<sup>13</sup> and the *Concorso di creditori della eredità*

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12. On the role of Roman law as *ius commune* in the evolution of Maltese legal system, see HARDING, *supra* note 10, at 55.

13. Steven and Chiappe were indicted for forgery and for the writing of a public notarial act of enrolment and were found guilty by the Court of Special Commission. Stevens then presented a memorial in which he observed that the Court was instituted to hear crimes punishable with death or life imprisonment but which had no jurisdiction in cases where it was found that the offence charged in the indictment against the accused did not merit either of the said higher punishment. The case was remanded to His Majesty's Criminal Court. His Majesty's Government in London, acting on this opinion, released Stevens. Maltese Judges did not concur in this opinion because it was

*di Edward Watson* case (1840).<sup>14</sup> More recently, recourse has been made to Roman law in many other cases.<sup>15</sup> The function of Roman law of regulating *casi omissi* has notably whittled down in modern times. Nowadays, it still retains the function of source of interpretation.<sup>16</sup>

#### IV. THE ADVENT OF BRITISH RULE AND THE PROCESS OF CODIFICATION

This, then, was the existing framework of law at the moment in which the British Empire took control of Malta. The British period in Malta started *de facto* in 1800. However, it began *de iure* only in 1814. Malta, until 1814, had not been formally annexed to the British Empire. A Royal Order of 1801 stated that English laws and courts of judicature had no jurisdiction over Malta, and Maltese law *in primis*, the *Code de Rohan* remaining in force until annexation. Because of this, institutions were not affected. The change of status from Protectorate to Colony was effectuated some months before the Treaty of Paris, on October 5, 1813 through notice given by the British government to the Maltese people. Thomas Maitland was appointed Governor of the Island and legal reforms based on the English common law were introduced concerning the organisation of courts, commercial law, bankruptcy and the registering of vessels.

Since the main focus of this article is the development of Maltese private law under British rule, due care has been paid to

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contrary . . . to the common (civil) or Justinian laws by which in cases not provided for by the municipal enactments the decisions of criminal cases in these Islands are to be regulated . . . and in fact, as has always been, and is now the practice constantly observed from time immemorial in all the Tribunals of Malta and Gozo, which of itself would constitute in these islands a law of custom (common law) which is no less binding than the written law.

14. In this case, the interest was declared usurious, and Roman legislation (Lex 27 Cod.de Usuris) suspending the interest 'ultra duplum' was found to be still in force in Malta.

15. See, *Dr. Messina v. Galea*, (1881); *D'Agata vs. Drago*, (1884); *De Piro v. Delicata*, (1885); *Zammit v. Scicluna* (1864); *Concorso dei creditori del Conte Manduca* (1897).

16. HARDING, *supra* note 10, at 73.



the process of codification, given the importance that codes, and especially the civil code, had in the evolution of the Maltese legal system.

The process that led to codification is rather long and complex.<sup>17</sup> It begins with the mission given by King George IV to the British lawyer John Richardson in 1824 to enquire into the administration of the law in Malta. This report was aimed at determining which reforms oriented towards common law were possible in Malta.

In 1831, King William IV appointed a Commission made up of four British and three Maltese jurists for the drafting of civil, commercial, and criminal codes and of codes of civil and criminal procedure. Each code had to be drafted in Italian and to conform to the most accredited foreign codes. In 1831, the Commission was repealed and replaced by a different Commission. However, in 1843, that Commission was officially dissolved without having done anything significant. Another Commission was formed which was composed only of Maltese jurists, because the presence of British jurists made it difficult for the new laws to be modelled on continental legislation. This Commission also failed, and it was not until after 1850 that the process of codification of law came to be realized, finally to be accomplished in 1873.

The British Government gave to the Crown Advocate Sir Adriano Dingli<sup>18</sup> the task of codifying Maltese law, and this article focuses particularly on the Civil Code. Dingli was a profound scholar of both Roman law and continental law, having spent a long period in Bologna and Heidelberg. He chose to proceed gradually by single ordinances, which afterwards were consolidated within Ordinance VII 1868 relating to things, promulgated on February 11, 1870, and in Ordinance I of 1873 relating to persons, promulgated on January 22, 1874. These two Ordinances cover the whole field of private law, with the exception of citizenship and intellectual property rights which were governed by English law, and marriage, which is governed by Canon law.

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17. For an interesting account on this topic, *see*, G. BONELLO, 5 HISTORIES OF MALTA: REFLECTIONS AND REJECTIONS 190 (2004).

18. For a portrait of Dingli, *see* J.M. Ganado, *Sir Adrian Dingli*, 1 L.J. 9 (1943).

The backbone of Dingli's Civil Code is the *Code Napoléon*, which was not only the most important model among those employed for outlining its framework<sup>19</sup> but also a highly significant source of law. In this regard, specific institutions and rules were introduced into Maltese law through the influence of French law, such as indivisible obligations, the relevance *ipso iure* of legal compensation, the diligence of *bonus pater familias* as an objective standard, the principle *possession vaut titre* and so on.

Furthermore, there has also been, as previously observed, a remarkably widespread influence of Roman law covering the law of property and succession, except in some parts of the Code dealing with the acquisition of ownership of movable property, the transfer of ownership following agreements and the effect of partition.<sup>20</sup> Dingli made detailed notes regarding the foreign sources of law he looked at. This manuscript gives precious insight into Dingli's methodology since it allows an understanding of the conceptual background of the Civil Code. Some provisions were completely new while others are deeply rooted in Maltese legal customs.

From that time, the Maltese Code has remained one of the most faithful codes to the original Code Napoleon when compared with the civil codes of other civil law systems which have undergone revision. In fact, the Maltese Code has remained fairly stable.

#### V. *LACUNAE* AND JUDGE-MADE LAW

To have a more accurate idea of the way in which the Maltese legal system has been influenced and developed through case law, one has to examine some instances in which judges have filled a gap in the law. The examples I will consider in the following pages are related to the law of obligations and to rights over things or *iura in re*. I will start from the field of property and then briefly consider an example in tort law, that of moral

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19. Apart from the French Code, other codes were consulted such as the civil Codes of Austria, Parma, Two Sicilies, Canton of Ticino, and Albertino.

20. HARDING, *supra* note 10, at 40.

damages.<sup>21</sup> I will finally turn to the issue of pre-contractual liability. While the first two are examples of how courts deal with *lacunae* because a statutory norm is absent and therefore a rule is introduced through case law in the legal system, the latter is a different example of how judges deal with general rules and address cases that are not expressly provided for by written law.

As to the law of obligations, *actio publiciana* will be considered. In the field of *iura in re*, the main division is that between ownership and possession. The different protection afforded by the Maltese Civil Code to owners and possessors is the by-product of the sharp distinction between the two positions based on substantive grounds. This distinction, deeply rooted in the civil law tradition, is predicated on the fact that the owner has *a right over the thing*, whereas the possessor, who is not also owner, exercises *a power de facto over it*. This difference also generates separate remedies.

*Actio publiciana*, which is not provided for by the Civil Code, but admitted by judges, removes the requirement that the owner demonstrates the proof of his right, and therefore blurs the difference between owner and possessor.

Judge-made law also has added to the actions provided by the Civil Code for the protection of 'proprietary rights' in this remedy. Only *actio rei vindicatoria* is ruled as a petitory action protecting the right of ownership. It must be kept in mind that an action with the same name has been acknowledged in Roman law since 67 B.C. An *actio in rem* given by the judge was the *actio praetoria* to the buyer of a *res Mancipi*, when the thing was transferred not through *mancipatio*, which is the correct mode of transferring those things, but through *traditio* which was used for less valuable goods. Through *actio publiciana*, Roman law protected the buyer from third parties claiming a right which may be deemed incompatible, as if he had acquired the thing through *mancipatio*. It is uncertain if, and to what extent, Maltese *actio publiciana* is similar to the Roman law remedy with the same name. It is still debatable whether in Maltese law this action consists of a mitigation of the rigorous proof of ownership that

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21. For a detailed treatment of this topic see the paper by Claude Micallef-Grimaud in this same volume of the J. CIV. L. STUD.

must be given by those claiming to be the owners for the upholding of *actio rei vindicatoria*, or whether it is a completely autonomous action from the *actio reivindicatoria*.

The first alternative would allow the plaintiff, who claims to be the owner and who has acted with *reivindicatoria*, to change his previous claim and act with *actio publiciana*, when not able to prove his title of ownership by simply proving that his title is better than that of the defendant under the so called theory of better title.<sup>22</sup> Under the second option, the plaintiff could directly resort to *actio publiciana* without being compelled to act first with *rei vindicatoria*. However, it is difficult to find cases in which judges are favourable to this second option.<sup>23</sup>

It is worth citing two recent judgements discussing *actio publiciana* where favour was shown for the first option. In *Frank Pace et v. Kummissarju ta'L-Artijiet* (First Hall Civil Court, February 19, 2004), the main issue discussed before the Court was who had title to the land. A part of the land was occupied by a company and another part by a public road. The plaintiff was neither able to prove his title, nor that his title was better than others claimants. His claim was consequently rejected both under the label of *actio reivindicatoria* and under that of *actio publiciana*. In *Jane Spiteri v. Nicholas u Maria Concetta konjugi Camilleri* (First Hall Civil Court, November 20, 2006), there was uncertainty about a portion of the property because the plaintiff and the defendants had both bought property from the same seller. The seller sold to the plaintiff in 1983 and the defendants bought in 1985. The seller's contract of sale with the plaintiff, contained a declaration regarding the part of property that was being challenged, that it "is part of the roof of the property sold by me." This, however, for the Court was not sufficient for the plaintiff to exercise *actio rei vindicatoria*. The Court accepted his plea on the different grounds of *actio publiciana* because the title of the plaintiff was better than that of the defendant.

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22. It can be open to doubt if this theory as applied by Maltese courts can be traced back to Roman law or rather it is influenced by common law doctrines acknowledging the 'better title' rule.

23. P. Bezzina, *The Actio Publiciana* (LL.D. thesis, University of Malta, 2007).

The following example, taken from the field of tort law, concerns a rule created by Maltese judges, notwithstanding the absence of a true gap, concerning the relevance at law of moral damages. In the Maltese Civil Code, there is not an express provision concerning the issue of recoverability for moral damages.<sup>24</sup> However, under a general rule stated in art. 1031, “every person . . . shall be liable for the damage which occurs through his fault.”<sup>25</sup> This provision does not limit the recoverability of damages to a specific kind of harm, and could be considered good grounds for an award of moral damages. To the contrary, however, Maltese judges make recourse to art. 1045, entitled “Measure of damages,” subsection 1, provides that:

The damage which is to be made good by the person responsible . . . shall consist in the *actual loss* which the act shall have directly caused to the injured party, in the *expenses* which the latter may have been compelled to incur in consequence of the damage, in the *loss of actual wages or other earnings* and in the *loss of future earnings* arising from any permanent incapacity, total or partial, which the act may have caused.

This grounds a restrictive rule of recoverability of moral damages.<sup>26</sup> I will not attempt to delve into the rationale of this restrictive rule that does not have support either in the literal provisions on tort or in the French civil code used as a model for the drafting of tort rules.

The interesting point is that while *both* instances are rules made by Courts, in the latter, judges limit their rulings to the

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24. R. Borg, *Moral Damage: A Comparative Study* (LL.D. thesis, University of Malta, 2008); C. Micallef-Grimaud, *The Rationale for Excluding Moral Damages from the Maltese Civil Code: A Historical and Legal Investigation* (LL.D thesis, University of Malta, 2008).

25. Art.1032 states that “a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence and attention of a bonus pater familias.”

26. In the Maltese legislation, however, specific instances of recovery of moral damage can be found in the Consumers Affairs Act, in the Press Act, in the Promise of marriage law and in the Enforcement of intellectual property rights (regulation) Act. A judge-made rule of recovery of this kind of damages exists in human rights cases.

restrictive rule concerning moral damages. They disguise the fact that they have created new law and present it as the result of the direct application of art. 1045.

## VI. GOOD FAITH IN CASE-LAW

Under this paragraph some issues will be analysed relating to the concept of good faith, which is widely debated among scholars of the main legal systems of the western tradition. These issues are interesting examples of how Maltese judges address situations not expressly provided by the legislature through the broad interpretation of existing provisions.

### *A. The Controversial Issue of Pre-Contractual Liability*

Pre-contractual liability is not expressly provided for and its existence is still highly controversial.<sup>27</sup> It is interesting, therefore, to see how Maltese judges cope with the issue of awarding damages for damaging conduct occurring during the negotiations stage. The most frequent case dealt with by Courts under the label of pre-contractual liability is that of the abrupt interruption of negotiations. Maltese judgements have adopted two opposite approaches to this issue.<sup>28</sup> In some cases, courts show their disfavour of pre-contractual liability in the light of the doctrine of the freedom of will, according to which before the conclusion of contract no obligation can arise on behalf of the parties to a negotiation. Damages can be claimed only if a contract is concluded.<sup>29</sup> When this has not occurred individuals cannot

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27. See Alfred Attard v. Paolo Xuereb (First Hall Civil Court, October 13, 2003); V.J. Bisazza, *Precontractual Responsibility* (LL.D. thesis, University of Malta, 1971); G. Xuereb, *A Comparative Study of the Theory of Precontractual Responsibility* IX ID DRITT L.J. 806 (1978); J. Scicluna, *Pre-Contractual Liability: Comparative Perspectives* (LL.D. thesis, University of Malta, 2003); and S. Vassallo, *The Principle of Good Faith in the Negotiation and Performance of Contracts: A Comparative Perspective* (LL.D. thesis, University of Malta, 2010).

28. For a clear analysis of the two approaches see, T. Mallia, *Pre-contractual Liability in Malta*, in *LAW & PRACTICE* 25 (2000).

29. "An obligation can only arise with the free and definite consent of the individual and if the said individual did not so express his consent, he was not bound." *Id.* at 26.

claim damages against the party who had interrupted negotiations, because otherwise no one would negotiate for the fear of being held liable for damages.<sup>30</sup>

In other cases, judges have found for the victim of pre-contractual unfairness. These judgments are usually justified in one of three ways. First, they may argue for the existence of pre-contractual agreements,<sup>31</sup> in the sense that although a final agreement has not been reached yet, negotiations are so advanced that a sort of intermediate agreement has been reached. Therefore, the interruption of negotiations constitutes a breach of a contractual duty. This approach, rather than expressly and directly acknowledging pre-contractual liability as such, allows recoverability for pre-contractual damages by treating them as contractual damages. Alternately, they make recourse to tort law, qualifying unfair conduct held during negotiations as an abuse of rights, which is expressly provided for by art. 1030.<sup>32</sup> This latter provision states that “any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damages which may result therefrom.” Reasoning *a contrario*, the owner of a right is liable when he exceeds the boundaries of the right, and in these cases, pre-contractual liability arises because the party who acts in bad faith infringes upon the other party's

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30. This is the rationale underlying *Carmel Cassar v. Thomas Colin Ernest Campbell Preston noe et* (Commercial Court, November 1, 1971); *Carmelina Busuttil pro et noe et v. Salvatore Muscat noe et*, (First Hall Civil Court, October 28, 1998); this case is mentioned in *Mallia, supra* note 28, at 27.

31. *Mallia* explains clearly this approach:

[A] new general principle was introduced in the law. Not only should contracting parties perform their obligations in good faith, but the protection of the other party's legitimate expectations became paramount. Thus, an agreement could be inferred from deeds and attitudes, independently if consent, if the other party legitimately and in good faith interprets those deeds and actions as meaning an agreement has been reached.

*Id.* at 26.

32. This provision is drafted in a very general way. Its ambit of application has been defined through case law. It was used in the field of the property to fix boundaries between neighbours, in the field of abuse of power by public authorities and also as limitation on the exercise of a contractual right, in the field of human rights. For an example of the application of this doctrine to the field of pre-contractual liability, see *Bezzina noe vs Direttur tal-Kuntratti* (First Hall Civil Court, October 12, 2006; confirmed on Appeal, June 26, 2009), that awards damages to the victim to the extent of negative interests.

legitimate expectations. The tort approach is the approach that had gained widespread success in several European countries during the twentieth century.<sup>33</sup> Finally, the courts extend the ambit of the provision of art. 993 of the Civil Code, which states that contracts must be carried out in good faith up to the stage of negotiations. Several judgements support this view.<sup>34</sup> The best way to understand the different approaches to pre-contractual liability is through examining case law, and the cases that follow are among the most significant in this field. In *Dr. Biagio Giuffrida pro et noe v. Onor. Dott. Giorgio Borg Olivier et*,<sup>35</sup> the Maltese government and a private individual entered into negotiations concerning two different contracts, the first being a contract of emphyteusis and the second a contract of financial grant for the construction of a hotel. The government put an abrupt end to negotiations. The other party, therefore, requested a judicial declaration that the revocation was ineffective and specific performance of the contracts mentioned above, but did not ask for pre-contractual damages. Although the Court stated that agreement on the essential elements of the contract had not been reached, it stated the general principle that an unjust or capricious revocation makes its author liable for damages incurred by the counterparty in the measure of 'negative interest.' So in this case, the Court implicitly admitted pre-contractual liability and used a well-known German theory to quantify damages suffered by the plaintiff although it did not qualify this form of liability expressly as pre-contractual. The reason which led the Court to find in favour of the Government is that pre-contractual liability was not claimed by the plaintiff and the contracts were not concluded with the defendant.

In *Pullen v. Matysik*,<sup>36</sup> the plaintiffs entered into negotiations with defendants for the concession of the Hilton

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33. Maltese courts have imposed particularly higher degrees of proof than those required in other national Courts working in other European systems, J.M. GANADO, AN INTRODUCTION TO MALTESE FINANCIAL SERVICES LAW 49 (2009).

34. GANADO *supra* note 33 at 50, quotes a number of judgments which are on this position: *Debattista v. J.K. Properties Ltd* (Court of Appeal, December 7, 2005); *Baldacchino v. Chairman of Enemalta* (First Hall Civil Court, October 11, 2006); *Scicluna Enterprises (Gozo) Ltd v. Enemalta Corporation* (Court of Appeal, May 2, 2007).

35. Court of Appeal, March 3, 1967.

36. Commercial Court, October 20, 1969.



Boutique of the Malta Hilton. All the essential elements of the agreement were fixed but the final contract was never sent and the contractual relationship with the previous concessionaires was not terminated. The Court found the defendants liable under the heading of liability in tort, holding that the defendants had acted abusively. This conduct on the part of the defendant, “amounts to ‘culpa’ in terms of art.1074 of the Civil Code which in turn renders them liable because there was, “at least negligence or imprudence on this part . . . when [t]he[y] assured the plaintiffs that they would unfailingly have the boutique, when in fact they w[ere] not in a position to give it to them.” As to damages, they were restricted to the actual losses suffered by the plaintiffs and consisted of expenses incurred and depreciation of materials, but did not include lost profits.

In *Elia Grixti v. Mark Grech*,<sup>37</sup> the plaintiff stated that he had agreed to look for an apartment for the defendant, an estate agent, and on finding such an apartment, he was to inform the defendant so that the latter would purchase it. Sometime after having informed the defendant that he had found the apartment, the plaintiff found out that, following a conversation between the parties, the defendant had bought the apartment directly from the owner. Thus, the plaintiff sued him on the grounds that the defendant disrupted the transaction that he was about to enter into with him. The Court, while stating that the remedy of damages is generally awarded for pre-contractual liability when the party withdraws capriciously or in bad faith, or the negotiations are in such an advanced stage because there is agreement on the essential elements of the bargain to create a legitimate expectation on the conclusion of the contract, dismissed the action of the plaintiff because none of the requisites for the action were met.

In *Caroline Ebejer v. Joseph Frendo*,<sup>38</sup> there was a promise for the sale of land for which the buyer had given a deposit. The seller *mala fide* was silent regarding the fact that he was only the co-owner of the land and that therefore he could not transfer the ownership of the land without the consent of the other owner. The Court excluded the possibility of a transfer of the ownership, but

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37. First Hall Civil Court, April 3, 1998.

38. Court of Appeal, April 18, 2002.

found for pre-contractual liability by the seller, if not expressly qualified in this way, on the grounds of the abuse of rights. Liability was therefore based on tort law rules.

In *Café Bar (Malta) Limited v. Alfred Caruana*,<sup>39</sup> a company sought to employ a person, but before formal employment, sent him to Holland to follow a training course. When the worker came back to Malta he decided to return to his previous employer. In this case, the contract of employment had not been concluded. The company sued him for damages resulting from travel expenses, which occurred before the contract of employment was concluded, thus suggesting a theory of pre-contractual liability. The First Hall of the Civil Court and the Court of Appeal, however, dealt with the issue on the ground of contractual liability stating that a sort of agreement, different from the contract of employment and concerning only the training course in Holland, had been concluded and found for the liability of the private party by awarding damages to the company for a partial amount of the expenses incurred by the latter. Although a final contract of employment had not been signed, a legitimate expectation had been created towards the conclusion of contract. The Court did not make express reference to pre-contractual liability, nor there was any reference to good faith.

In *Attard v. Xuereb*,<sup>40</sup> the parties had agreed between themselves to assign the property of the defendant on a contract of lease to the plaintiff for use as a confectionery shop. All elements having been defined, the contract had only to be signed. The plaintiff took several people to see the tenement in order to carry out works on it and applied for planning permission. The defendant, after having refused to give the keys to the plaintiff saying that the contract was not still concluded, entered into an agreement with third parties notwithstanding the fact that the date for the final contract with the plaintiff had been fixed.<sup>41</sup>

The plaintiff claimed damages for expenses incurred during negotiations. The Court stated that for pre-contractual liability to

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39. Court of Appeal, May 24, 2002.

40. First Hall Civil Court, October 13, 2003.

41. It has to be clarified whether a previous date had been fixed, but the contract could not be concluded because the plaintiff's wife, whose signature was necessary, was not present.

be established, the negotiations had to be terminated in order for one of the parties to have acted with *dolus*. Damages would be limited to necessary expenses incurred during negotiations and would not include loss of future earnings. Although the Court stated that the termination of negotiations was unjustified, it did not award damages because the expenses incurred by the plaintiff were not necessary.

*Baldacchino noe v. Chairman tal-Korporazjoni Enemalta et.*,<sup>42</sup> concerned a call for tender for the supply of sulphuric acid. The plaintiff received two offers and after notification that their offer was declined, the company instituted a court action. The Court admitted damages, holding that it is possible to award damages prior to the creation of a contractual relationship, basing its reasoning on good faith as a standard of conduct at the pre-contractual stage as well as in the conclusion of contract.

Presently, none of these approaches regarding the issue of pre-contractual liability has widespread prevalence, and the approach based on the theory of will has not yet been definitely abandoned. However, what can be said is that allowing an action for pre-contractual damages produces a restriction on the freedom of the will of the individual, in as much as one can be held bound towards another person when not tied by a contract, if the latter has been damaged by having relied in good faith on the conduct of the other party. This shift from the theory of will to the theory of reliance has been explained in this way, “people began to abuse of the will theory and juggle their consent to the detriment of the lone individual consumer, who was easily led astray and had little protection from the law.”<sup>43</sup>

### *B. Good Faith in the Performance of Contracts as a Tool of Redressing Contractual Obligations*

The third approach followed by Courts regarding the recoverability of pre-contractual damages based on the concept of good faith can be seen as evidence of the continued favor for this

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42. First Hall Civil Court, October 11, 2006.

43. Mallia, *supra* note 28, at 26.

principle in general.<sup>44</sup> Pre-contractual liability is not the only example in which judges make use of this principle, and it has been recently considered in various situations, including being used as a tool to redress the obligations taken by parties through contract. This would seemingly lead to lack of good faith not only in the case of fraud, but also in the case of inequitable behaviour. In *Pace v. Micallef*,<sup>45</sup> the issue was the exorbitant measure of a penalty clause and whether judges could reduce it. The Court found on the basis of the principle of good faith in that the penalty was disproportionate to the delays of which one of the defendants was charged and reduced the amount notwithstanding the lack of an express provision. The clause of good faith would impose an evaluation of the behaviour of the parties in the light of what is thought to be fair according to social standards, *normi stabiliti tassocjeta*, and to legal logic, *logika guridika*. In this case, good faith was used by Courts to reduce the entity of the burden lying on the defendant arising from the contract.

In *Psaila v. Spiteri*,<sup>46</sup> the concept of good faith was used in a commercial partnership formed for the sale of beer and other products by Simonds Farsons Cisk Ltd. The defendant, the administrator of the commercial partnership, without the knowledge of the other partner, concurrently accepted agency for Coca Cola. The Court found that, without excluding the defendant's liberty to commit to other commercial practices, it was the nature of the contract between plaintiff and defendant to forbid

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44. According to Teubner, good faith displays three functions: 1) expansion and establishment of contractual duties such as the duties of performance, of information and of protection; 2) limitation of contractual rights. This function is deeply entrenched within the doctrine of abuse of rights; 3) transformation of contracts, when there are supervening events producing imbalance of the equivalence, or frustration of contractual purpose. The legal transplant of the clause of good faith from civil law to common law systems is not easy because the principle is linked in continental countries to processes of economic production based on cooperation that are totally different from those featuring in common law countries based on market competition. The transplant would have as a result not the enhancement of cooperation but simply an increase of the judiciary intervention in the sphere of individuals. See G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law ends up in New Divergences*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 244 (F. Snyder ed., Hart, 2000).

45. Court of Appeal, June 15, 2001.

46. Court of Appeal, Commercial, February 12, 1965.

other commercial activities that could damage the partnership. Damages were awarded, but loss of profits was not included.

Good faith has also been used by Maltese Courts as a tool to pierce the veil of separate corporate personality when a juridical personality is used with the aim of committing abuses or committing illegal acts. In *Avukat Dr.Herrera et v. Tabone et noe*,<sup>47</sup> the defendants attempted to hide behind a company in order to evade contractual obligations. This was considered an infringement of the principle that all contracts must be performed in good faith. In this case the defendant formed a company simply to evade the obligations taken towards the plaintiff not to employ employees from the plaintiff's company. The Court of Appeal found for the plaintiff and ordered the payment of the penalty contained in the clause which was breached. In absence of legal provisions, good faith can also serve as a source for ruling on the duties and rights of the parties to a contract.

These concepts are also applied to contracts of insurance. Although the Maltese insurance business is a highly regulated area of trade, the law regulating insurance contracts inhabits a legal vacuum. There is only one law concerning marine insurance enacted in 1858 and later inserted into the commercial code, but in any case, the Maltese commercial code cannot be considered the source for the general regulation of contracts of insurance. In fact, whereas the Maltese Civil Code is the general law applying in all cases unless expressly excluded by a specific law, the Commercial Code is specific law that is limited in its scope to regulating "objective acts of trade" and situations involving traders acting in the pursuit of their business. The acts of insurance are not considered by Courts to be acts of trade,<sup>48</sup> so section 3 of the Commercial Code cannot be applied to the contract of insurance in general.<sup>49</sup> Trade practices cannot be considered the source of law regulating the contract, so insurance contracts theoretically should fall under the Civil Code, which does not include express

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47. Court of Appeal, January 22, 1992.

48. To this regard, *see* *Frendo Azopardi v Colborne England* (Commercial Court, October 2, 1907).

49. The Commercial code provides that "in commercial matters, the commercial law shall apply. Provided that where no provision is made in such law, the usages of trade or, in the absence of such usages, the civil law shall apply."

provisions on that matter. Therefore, the source to deal with the contracts of insurance has to be found elsewhere.

Courts have filled this gap by referring primarily to English jurisprudence. From this case law, Maltese Courts have drawn the doctrine of utmost good faith, and although English law exerts a considerable influence on Maltese law, the latter is not a carbon copy of the former. It must be stressed that, since the general principles of Maltese private law have to be found in the civil code, the doctrine of utmost good faith in Maltese law should be interpreted in the light of the civil code. So although Maltese law understands the duty of utmost good faith, this duty is rationalised from the perspective of vitiation of consent, of error and fraud.

Furthermore, Maltese insurance law departs from English law under various aspects such as the materiality of the information,<sup>50</sup> the concept of error,<sup>51</sup> the extent of fraud and the requirements of diligence and inducement. From the combination of these doctrines, both parties, not only the insured, would be subject to heavy contractual duties concerning the disclosure of all the information regarding the subject matter of the contract but in practice the party on which the burden rests in a more significant way is the insured. The example of the contract of insurance is an interesting example both because it shows the importance of good faith but also because it reveals Maltese judicial attitudes regarding the use and adaptation of foreign models to the Maltese legal environment.

## VII. CONCLUSION

At this point, some conclusions can be made. In Malta, the important role of 'system-builder' is played by judges, notwithstanding the absence of a doctrine of binding precedent. As to whether or not private law presently follows continental law, the short examination of the evolution of some areas of private law has shown that it has not necessarily changed away from its continental foundation. The way in which judges deal with the issues outlined

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50. *Zammit v. Micallef* (Commercial Court, January 31, 1952); *Tanti v. O.F. Gollcher* (Civil Court, April 30, 2002).

51. *Briffa v. Camilleri* (Court of Appeal, February 9, 2001).

above reveals that they do not necessarily follow continental law, exclusively, but rather are pragmatic. It is possible to find references to civilian theories, but also to original solutions that are deeply rooted in the Maltese legal tradition.

Maltese judges do not necessarily address private law issues by making recourse to the same legal traditions which guide the legal field to which the issue is related. Furthermore, foreign law that has been accepted as a source of Maltese private law does not always repeal Maltese common law.

One of the most eminent law scholars of the end of the nineteenth century, Judge Paolo De Bono in his work on the history of Maltese legislation, observed that the rule of *Code de Rohan* concerning a situation which cannot be resolved with regard to local laws so must be determined by application of common law, was never repealed as to private law and therefore has to be applied. Also, customs fall within the “local laws,” and are interpreted in their widest meaning. They are acknowledged by Roman and Sicilian law, and are also nowadays legally binding.<sup>52</sup> This passage has been quoted by later jurists many times and has exerted considerable influence on them. In support of the aforesaid, De Bono referred to parr.37, capo VIII, and 27, Capo IX, Libro I of *Code de Rohan*, ruling respectively the ‘Supremo Magistrato di Giustizia’ and the President of the latter in which reference was made to what he considered as Maltese sources of law.<sup>53</sup> But upon a more careful reading of these provisions, one

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52. DE BONO, *supra* note 9, at 383. The original text in Italian reads:  
Il precetto del codice de Rohan, che qualora una controversia non possa essere decisa con una disposizione delle leggi municipali, si deve avere riguardo alle leggi comuni, non fu mai per le materie civili abrogata, e tuttora si applica. Sotto la espressione leggi municipali, presa nella sua ampia significazione, viene anche la consuetudine, la quale, riconosciuta dal diritto romano e dal diritto siculo, continua pure oggidì ad essere ritenuta come una norma giuridica.

53. Par. XXVII states that the President of the Supremo Magistrato di Giustizia “userà ogni diligenza, perché fia a tutti con prontezza e celerità possibile amministrata la giustizia, a tenore del prescritto in questa nuova Compilazione di Prammatiche, ed in loro difetto da quello che preferivano le leggi dette comuni; ed in affari marittimi, dagli usi e stabilimenti del Consolato generale del mare, e ne' casi controversi dalle opinioni de' Supremi e più accreditati Tribunali.” In English this passage reads: “Will take every care so that the administration of justice will be as most effective as possible, in accordance to this legislation, and in the case of lack of an express provision,

discovers that, when these provisions make reference to *leggi municipali*, that is Maltese written law pre-existing to the enactment to the *Code de Rohan*, *leggi comuni*, common laws and as *extrema ratio* to *opinioni abbracciate ne' supremi e più accreditati Tribunali* or judgements of foreign courts, they probably do so with a different aim from that of the eminent Maltese author. These provisions intend to avoid, or rather, to reduce, the risk of an arbitrary, capricious and inefficient exercise of the power of administering justice, so that the references are aimed at individuating some binding criteria for judges. However, De Bono goes much further by giving to the provisions, and especially to the *leggi municipali*, a wider meaning which is relevant not only for judgements but, more generally, for the entire legal system. The aim of De Bono is to create a bar to legal developments driven by foreign influences which are not coherent with the fundamental principles rooted in Maltese legal history.

The key to understanding De Bono's book is most probably evidenced by the emphasis put on the degree of resistance by the Maltese legal tradition to foreign influences. This is due to the fact that the Maltese system has kept its own identity, notwithstanding the fact that subsequent foreign powers have gained control of Malta in the past.<sup>54</sup> We can say then that his 'history,' far from being merely a neutral account of the legal changes that have affected the Island, has a 'political' background. When he speaks about French domination, he explains the reasons for its failure, and bases his contention on the fact that the French people wanted to impose their law through strength by challenging the role played by the Church and through the introduction of reforms that,

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according to common law in shipping business, from the usage of the Consolato generale del mare and in controversial cases from the opinions of the Supreme and most authoritative Courts;" par.XXXVII states that the judges of the Tribunale Collegiato "né potranno servirsi di veruna potestà arbitraria, quante volte non sarà regolata da quello che si dispone dalle leggi municipali, ed in loro difetto dalle leggi comuni, e ne'casi controversi e dubbi dalle oppinioni abbracciate ne' Supremi e più accreditati tribunal." In English this passage reads: "Cannot administer justice arbitrarily when their power is not ruled by the laws of the Island, and in case of the absence of common law, and in controversial cases from the opinions of the Supreme and the most authoritative Courts."

54. The same aim inspired the work of A. MICALLEF, NOTES TO CODE DE ROHAN (1843).



although advanced for the time in which they were proposed, were not in harmony with Maltese society.<sup>55</sup>

In my opinion, Maltese judges also have this attitude. In some cases, as previously discussed, foreign law has been followed, while in others, an original solution has been adopted. Even when reference is made to foreign models, this has not produced an all-encompassing acceptance of the same models. Judges have acted to make the external sources consistent with the local legal framework. This could be a clear sign of a rooted attitude tending towards the preservation of the legal tradition of the island.

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55. It could seem paradoxical that while French domination was rejected, French legal culture was absorbed. The Civil Code is the most evident proof of this.