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Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture?

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RETHINKING MALTESE LEGAL HYBRIDITY: A CHIMERIC ILLUSION OR A HEALTHY GRAFTED EUROPEAN LAW MIXTURE?

Kevin Aquilina*

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ABSTRACT

Although Maltese Law is traditionally classified as a mixed system of Civil Law and Common Law, this paper suggests that it is more appropriate to do away with this designation, which is not entirely exact, and instead call it what it really is, namely, a 'European' legal system.

The paper proposes a typology of the Maltese legal system divided into nine distinct phases which contain traces of Civil Law,

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Common Law, Customary Law, Canon Law, Maltese Autochthonous Law, European Union Law, Regional Law (Mediterranean Law and, in its widest sense, European Law), Public International Law and elements of foreign national law. To a very large extent, all these traces are European in origin even if tinged with Mediterranean and International Law.

The historical evolution of Maltese Law in the nine distinct phases demonstrates that the nature of the Maltese legal system has shifted over time. For instance, when Malta was administered by the Knights of St. John, it was the Civil Law tradition that dominated the legal system. During the British period, it was Common Law that had the upper hand. Following independence, Maltese Law became more autochthonous whilst after European Union accession the law in Malta has become more European Unionised. All these periods are also interspersed by Public International Law influences.

The nature of Maltese Municipal Law has changed from period to period reflecting the colonizers' laws and, under self-determination, the will of the Maltese, but there has been one common trend throughout the history of the Maltese legal system: it has been heavily dominated by European Law, be it Civil Law, Canon Law, or Common Law. However, this does not mean that Maltese Law is purely European in the wide sense of the term: there are some slight traces of non-European Common Law influences taken from the US, New Zealand and Australia. Nevertheless, that said, the paper concludes that the common denominator and undoubtedly the most predominant in Maltese Law was and remains European Law in the widest sense of the term in all its diversity and richness.

I. INTRODUCTION

Although Maltese Law is classified as a mixed system of Civil Law and Common Law, this paper suggests that it is more appropriate to do away with this categorization, which—in today's fast evolving and dynamic world and in the light of the existence of myriad legal systems each with its own characteristic peculiarities—is no longer precise. If at all, the Maltese mixed legal system should now be reclassified as a Common Law system with

a Civil Law underlying layer. This is because the portion of Maltese Law which is Common Law inspired, by far outnumbers the amount of Maltese Law which is Civil Law inspired. However, these percentages have changed and continue to change over time because the legal system is dynamic rather than immutable. Indeed, with European Union (EU) accession, Maltese Law is now moving in the direction of an EU legal system with underlying layers of Common Law and Civil Law. On the other hand, if one were to burden oneself with the task of classifying the Maltese legal system as it stands in the year 2010, and bearing in mind the historical evolution of Maltese Law, it is more appropriate to classify the Maltese legal system as a European mixed legal system with a plurality of layers composing it.

The paper proposes a typology of the Maltese mixed legal system divided into nine variegated phases which contain layers of Civil Law, Common Law, Customary Law, Canon Law, *lex mercatoria*,¹ Maltese Autochthonous Law, European Union Law, Regional Law (Mediterranean Law and, in its widest sense, European Law), Public International Law and elements of foreign national law—irrespective of whether in the latter case such foreign law is derived from the Civil Law or the Common Law legal systems. In the main, all these layers are European in origin even if tinged to a lesser extent with Mediterranean and International Law. All these layers of chthonic and exogenous elements combine to depict a characteristic dimension to the Europeanised Maltese mixed legal system.

II. THE NATURE OF THE MALTESE MIXED LEGAL SYSTEM

The historical evolution of Maltese Law in nine distinct phases demonstrates that the nature of this legal system has shifted over time: for instance, when Malta was administered by the Order of the Knights Hospitallers of St. John of Jerusalem it was the Civil Law tradition that dominated the legal system; during the

1. Gunther Teubner refers to *lex mercatoria* as “the transnational law of economic transactions ... the most successful example of global law without a state.” Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed. 1997).

British period it was Common Law² that had the upper hand in Public Law with the Civil Law influence starting to decline progressively even in Private Law (mainly in Commercial Law); following independence Maltese Law became more autochthonous whilst after European Union accession it has become more European Unionised. All these periods are also interspersed by Public International Law elements which have contributed immensely to the development of an enriched Maltese mixed legal system.

Colonisation of the Maltese Islands has undoubtedly been the principal contributing factor, prior to independence, to our choice for the adoption of a source of law. History has it that the legal system was imposed by the colonial power³ ruling Malta—be it the Romans, Arabs, Normans, Knights Hospitallers, French or British—as a layer on top of the Maltese indigenous legal system. The nature of our national law has changed from period to period—mainly depending on which foreign power colonized the Maltese Islands—but there has been one intrinsic common trend throughout the chequered history of Malta during these nine historic-legal periods succinctly discussed below: overall Maltese Law has been heavily dominated by European Law, be it Civil Law, Canon Law, Common Law, Law Merchant, Council of Europe Conventions or European Union Law. However, this does not mean that Maltese Law is a purely European legal breed: there are some slight traces of non-European influences as well such as the doctrine of judicial review of legislative acts contained in the Constitution of Malta which is taken from the US, the Ombudsman Act which is modelled on New Zealand Law or article 637 of the Code of Organisation and Civil Procedure which has its source in the Australian Freedom of Information Act, just to cite a few illustrations. Nevertheless, the common denominator and undoubtedly the most predominant feature in Maltese Law, both before and after Independence and European Union accession, was

2. Although Common Law in Malta was English Statutory Law, there were also judgments of British courts that had to be applied in Malta which related to English Statutory Law either extended to Malta or incorporated into Maltese Law as well as the judgments of the Judicial Committee of the Privy Council in the case of appeals to the Judicial Committee originating from Malta.

3. See Paul S. Berman, *Global Legal Pluralism*, 80 SO. CAL. L. REV. 1155, 1156 (2007).

and remains European Law in the widest sense of the term in all its diversity and richness. Indeed, as this paper argues, the end result of all these historic-legal periods can be summed up in the sense that the Maltese legal system is both a mixed legal system and a European legal system⁴ where, to borrow a phrase from Esin Örüçü, “the ingredients work cumulatively and interactively”⁵ and where originally the implantation of English Law in a Civil Law legal system and subsequently the transposition of European Union Law and the incorporation of International Law in the said legal system has worked out to be beneficial to the Maltese mixed legal system. It has also changed the nature and sources of Maltese Law to make the legal system the mixture that it is today.

III. THE NINE PERIODS OF MALTESE LEGAL HISTORY

I divide the legal history of Malta into nine distinct legal epochs.

Period	Years
1 st : Roman Malta	218BC-870
2 nd : Arab Malta	870-1090
3 rd : Norman Malta	1090-1530
4 th : Hospitallers Malta	1530-1798
5 th : French Malta	1798-1800
6 th : British Malta	1800-1964
7 th : Independent Malta	1964-2004
8 th : European Union Malta	Since 2004
9 th : Codification Revival in Malta	Since 2009

4. V.V. Palmer states that all the great legal systems of the world ‘originate in Europe and within the European Union’. See Vernon V. Palmer, *Two Rival Theories of Mixed Legal Systems*, 2.1 ELECTRONIC J. COMP. L. 4 (2008) available at www.ejcl.org/121/art121-16.pdf (Last visited November 7, 2011).

5. See Esin Örüçü, *What is a Mixed Legal System: Exclusion or Expansion?*, 2.1 ELECTRONIC J. COMP. L. 4 (2008) available at www.ejcl.org/121/aet121-15.pdf (Last visited November 7, 2011).

A. Roman Malta (218 B.C.-870)

The Maltese islands were originally populated by the local Bronze Age population.⁶ They were inhabited for the first time around 5,000 B.C., or even earlier, by farmers originating from Sicily.⁷ They were then occupied by the Phoenicians in 700 B.C., by the Greeks in 500 B.C. and by the Carthaginians in around 480 B.C.⁸ Malta was subsequently occupied by Rome in 218 B.C., at the outset of the Second Punic War, where the Carthaginians were replaced as political masters.⁹ Unfortunately, there is no documentary evidence that during this period Roman Law was the law of Malta. Nonetheless, it seems that the position in Malta was similar to that in Sicily. A Maltese historian states that during those times Malta was subdued by the Romans and was governed by the same laws of Sicily.¹⁰ Cowdy states that “to ingratiate the inhabitants [,] their ancient usages were tolerated, and the Roman Consul, Titus Sempronius, raised the place to the dignity of a municipality.”¹¹

At the initial stage of the Roman occupation there were those who enjoyed Roman citizenship—being either Roman settlers or having acquired Roman citizenship—and the provincial subjects. The former were governed by pure Roman Law, subject to local custom. The latter were subjects *sic et simpliciter* and considered by the Romans as aliens (*peregrini*), had their own laws and customs, and to them “Roman law was primarily inapplicable...

6. ANTHONY BONANNO, *MALTA: PHOENICIAN, PUNIC AND ROMAN* 22 (Midsea Books Ltd., 2005).

7. DAVID H. TRUMP, *MALTA PREHISTORY AND TEMPLES* 55 (Midsea Books Ltd., 2002).

8. Anthony Bonanno, *Malta's Changing Role in Mediterranean Cross-Currents: From Prehistory to Roman Times* in *MALTA: A CASE STUDY IN INTERNATIONAL CROSS-CURRENTS* 1 (S. Fiorini & Victor Mallia-Millanes eds., 1991); BONANNO, *supra* note 6 at 38; PAOLO DEBONO, *SOMMARIO DELLA STORIA DELLA LEGISLAZIONE IN MALTA* 11, 16, 26 (Tipografia del Malta, 1897).

9. See BONANNO, *supra*, note 6 at 131.

10. GIOFRANCESCO ABELA, *DELLE DESCRIZIONE DI MALTA ISOLA NEL MARE SICILIANO, CON LE SUE ANTICHITA ED AL TRE NOTIZIE*, LIB. QUATTRO, 564 (Malta, 1647) (of the same view is Judge Paolo Debono, *supra* note 8, at 36).

11. Samuel Cowdy, *Malta and Its Knights*, 3 *TRANSACTIONS ROYAL HIST. SOC.* 395, 396 (1874).

because it seemed unnatural to apply the private law of one city community to the citizens of another.”¹² Cicero states that the Maltese were given the appellation of *socii* thereby implying that they enjoyed some form of participation in the rights of Roman citizenship.¹³ As a result of the Edict of Caracalla in 212 A.D., Roman citizenship was extended to the bulk of the population of the Roman world:¹⁴ “the Maltese became Roman citizens and, as such, subject to Roman Law.”¹⁵ One author states that “until the seizure of the Island by the Arabs in 870 B.C., Malta must have been governed not only by the old Roman Law and by the law as laid down in the *Corpus Juris* of Justinian but also by the legislation of Justinian’s successors.”¹⁶ Hence this period appears to have been characterised by Roman Law and Maltese native customs because the Romans did not, on conquest, as a policy measure, suppress local customs: “the Romans bore no national or racial feelings towards the Maltese, as they also did not mind their local customs or religious beliefs as long as these did not interfere with loyalty to the authorities.”¹⁷ In the meantime, between 456 and 464 A.D. Malta was occupied by the Vandals and the Goths, before it was taken over again by the eastern part of the Roman Empire and thus came once more under Byzantine rule.¹⁸

B. Arab Malta (870-1090)

As to the Arab occupation of Malta, once again little is known. That said, the Maltese language spoken today is a product

12. JAMES BRYCE, *THE ANCIENT ROMAN EMPIRE AND THE BRITISH EMPIRE, IN INDIA: THE DIFFUSION OF ROMAN AND ENGLISH LAW THROUGHOUT THE WORLD: TWO HISTORICAL STUDIES* 84 (Oxford University Press, 1914). V.V. Palmer argues that even Roman Law was a mixed system of law: the *ius civile* and the *ius gentium*. See Palmer, *supra* note 4, at 19-21.

13. HUGH W. HARDING, *HISTORY OF ROMAN LAW IN MALTA* 7 (Progress Press 1950).

14. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 65 (Clarendon Press 1962).

15. Joseph M. Ganado, *Malta: A Microcosm of International Influences*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 225 (Örücü et al. eds., 1996).

16. See HARDING, *supra* note 13, at 11.

17. JOSEPH ATTARD, *MALTA: A HISTORY OF TWO MILLENIA* 23 (Progress Press 2002).

18. *Id.* at 24; DEBONO, *supra* note 8.

of Arab rule for it started as a Semitic language¹⁹ before being exposed to Romance influence. Due to their geographical proximity, Malta and Sicily shared historical paths, and when Malta was liberated from the Arabs by the Normans, the latter also freed Sicily. Ever since the Normans conquered Sicily, the situation in Malta was similar to that of Sicily.²⁰ The Arab period started on 29 August 870. During these times, Malta was administered by an Emir, and Muslim Law and customs were applied in Malta.²¹ The Maltese consequently lost the self-government they enjoyed under Rome.

C. Norman Malta (1090-1530)

In 1090, Count Roger the Norman conquered Malta, which subsequently became part of Sicily. In 1266, Charles of Anjou became King of Sicily, and the Maltese Islands passed under French Angevine rule.²² In 1283, the Spanish Aragonese captured Malta, and the Maltese were given their own Parliament, the Università, which gave autonomy to Malta even if the Maltese Islands continued to be given in fief.²³ The laws enacted for Sicily applied to Malta. During this period there was also the influence of Canon Law on Roman Law. Schupfer maintains that: “although most of the laws of this period were inspired by the general conceptions of Roman Law, many modifications were introduced by custom as well as under the influence of the Church in order to meet the great social changes of the time.”²⁴ Although Roman Law reigned supreme in Malta, Maritime Law was governed by maritime usages.²⁵ Hence this period is characterised by Roman Law, the influences of Canon Law thereon, international maritime usages and Maltese local customs.

19. A. P. VELLA, 1 STORJA TA' MALTA: MILL-PRE-ISTORJA SA L-ASSEDJU 64, 69 (Klabb Kotba Maltin, 1974); LAWRENCE CACHIA, ILSNA SEMITICI 34 (Veritas Press, 2004).

20. HERBERT GANADO, 1 MY CENTURY 141 (Trans. and adapted Refalo, 2004).

21. DEBONO, *supra* note 8, at 94, 96, 99. ATTARD, *supra* note 17, at 29.

22. ATTARD, *supra* note 17, at 41.

23. *Id.* at 43-47.

24. FRANCESCO SCHUPFER, MANUALE DI STORIA DEL DIRITTO ITALIANO: LE FONTI, LEGGI E SCIENZA (153rd ed., E. Loescher & Co. 1904).

25. HARDING, *supra* note 13, at 27.

D. Hospitallers Malta (1530-1798)

It is in the fourth period of legislative history that Maltese Law starts to develop as a law in its own right and not as a law of another country—Sicily—which was applied to it as a natural adjunct.²⁶ This notwithstanding, Roman Law still continued to prevail as the Order of St. John of Jerusalem adopted it for the laws it made for the Maltese Islands: “The legislation enacted by the Knights in Malta had the hallmark of European, mostly Italian, influence and was of quite a varied nature.”²⁷ The 1681 *Prammatiche*—a compilation of laws introduced by Grandmaster Gregorio Carafa—was the first homogenous set of laws promulgated by the Knights.²⁸ The *Code de Rohan*,²⁹ the last piece of legislation made by the Order, is modelled on Roman Law and “partakes of all the merits and demerits of its great original. With the exception of some modifications and additions rendered necessary by local circumstances, we may consider it as a compilation of the same Law by which the greater part of the Continent of Europe continues to be governed.”³⁰ Harding considers this 1784 Code to be “nothing else than a consolidation, with some amendments, of the previous legislation of the Order” with “positive signs of Roman Law influence.”³¹ Hence the first period, as the second period, continues to be influenced by Roman Law, Canon Law, maritime usages (now codified in the *Consolato del Mare di Malta*³² of 1697) and local customs (codified also in the *Code de Rohan*)³³ with the sole—though extremely important—

26. The first code of laws enacted by the Order of St. John is the Maltese *Statuti e Ordinamenti* of 1533. See W. D. Barz, *The Maltese Statuti e Ordinamenti of 1533*, 15 ID-DRITT L.J., 5 (1990).

27. Ganado, *supra* note 15, at 226.

28. *Id.* at 227.

29. Mark A. Sammut, *The Place of the Codice Municipale di Malta in European Legal History*, 20 ID-DRITT L.J., 330 (2009).

30. REPORT OF THE ROYAL COMMISSION (National Archives, Kew Garden, London, Colonial Office 1812).

31. HARDING, *supra* note 13, at 31.

32. This was modelled, as it clearly stated, on the *Consolato del Mare* of Messina, Sicily. Ganado states that, “a provision was retained in the sense that in the absence of an express provision of the law, the *Consolato del Mare* of Messina was to be followed.” GANADO, *supra* note 15, at 227.

33. Named after the Grandmaster of the Order of St. John, Emmanuel de Rohan.

difference that the fourth period brings with it the advent of Maltese Law, and Malta is no longer dependant on Sicily for its law-making.

E. French Malta (1798-1800)

Not much legislative activity took place when Napoleon Bonaparte occupied Malta.³⁴ This is because the French stayed in Malta for a very short period—from 11 June 1798 to 2 September 1800. Furthermore, in this period the French had very few days of peace while being confronted by an insurgency led by the Maltese and later, with the assistance of the British, aimed at ousting them from Malta.³⁵ The French authorities, on 2 September 1798, ordered that in so far as the maritime and commercial tribunal (the *Consolato del Mare*) was concerned, “lawyers were forbidden to appear before it or to submit written pleadings since such persons complicated even the simplest point of law.”³⁶ Hence, although there has been a fifth period, as a matter of fact it was only in the initial part of the French conquest of the archipelago that the French had the time to address lawmaking issues.³⁷ Nevertheless, these laws were considered to be null and void in view of the fact that the French occupying government did not enjoy legislative authority once it was a *de facto* government.³⁸ The French, as the new occupying power, could not exercise a right greater than that bestowed on the Knights of St. John: *nemo plus iuris quam ipse habet transferre potest*—no one can transfer to another a greater right than he himself possesses.

34. Dennis Castillo, “. . . *The Knights Cannot Be Admitted:*” *Maltese Nationalism, The Knights of St. John, And The French Occupation of 1798-1800*, 79 (3) CATH. HIST. REV. 434 (July 1993). For references to laws made under the French occupation, *See id.* at 443-445.

35. G. V. ELLUL, *THE FRENCH INVASION OF MALTA: AN UNPUBLISHED ACCOUNT I* (1978).

36. CARMEL TESTA, *THE FRENCH IN MALTA 1798-1800* 142 (Midsea Books Ltd. 1997).

37. For Napoleon Bonaparte’s first Instructions regarding Malta’s government on 13 June 1798, *see* MALTESE POLITICAL DEVELOPMENTS 1798-1964: A DOCUMENTARY HISTORY 9 (Frendo ed., Interprint Ltd., 1993). For French Law making in Malta, *See* TESTA, *supra* note 36, at 141.

38. 10 KOLLEZZJONI TA’ DECIZJONJIET TAL-QRATI SUPERJURI TA’ (Collection of the Decisions of the Superior Courts of Malta) 663 at 669 (Court of Appeal, 7 January 1885).

Indeed, although Malta's five codes³⁹ are influenced by the Civil Law system, it was certainly not under the French period that we got our codes. Ironically enough it had to be under British rule—which still had to follow the French occupation of Malta—that the five Civil Law inspired Maltese codes were promulgated by a British colonial ruler who represented Common Law in its purity and who had ousted from Malta Napoleon's forces thereby bringing on an end the direct penetration of French Law in Malta.⁴⁰ Hence, the French period, extremely short when compared to the rest, bore no fruit of its own.

F. British Malta (1800-1964)

Following the French occupation of Malta and their expulsion, the Maltese returned to the legal system extant before the French invasion. Sir Adriano Dingli, the Chief Justice of Malta, states so in *Nobile Giuseppe di Marchesi De Piro v. Monsignor Don Salvatore Grech Delicata*:⁴¹

*Durante le ostilità tra il Governo Provvisorio, stabilito della popolazione Maltese, e la guarnigione Francese, si osservarono le antiche leggi . . . come se nessun cambiamento fosse stato fatto dal Governo creato dal Generale Bonaparte, e dopo la capitolazione del 1800 quelle leggi ripresero l'antico rigore, sin anche nella Valletta, senza alcun atto espressamente revocatorio delle disposizioni date dal Governo del Generale Bonaparte, e come se questo avessero mai avuto luogo.*⁴²

39. These are the Criminal Code (Chapter 9 of the Laws of Malta), the Code of Police Laws (Chapter 10 of the Laws of Malta), the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta), the Commercial Code (Chapter 13 of the Laws of Malta) and the Civil Code (Chapter 16 of the Laws of Malta).

40. For a narrative of the historical evolution of these five codes, see, H. I. Lee, *British Policy Towards the Religion, Ancient Laws and Customs in Malta, Part II. The Revision of the Codes of Law*, 4 MELITA HISTORICA 1 (1964).

41. PATRICK STAINES, *ESSAYS ON GOVERNING MALTA 1800–1813* 77 (Publishers Enterprises Group Ltd., 2008).

42. See *supra* note 35.

It is this sixth period of Maltese legislative history that introduced Malta to English Law. This is indeed the period of reception of English Statutory Law into Maltese Law. It is also during this period that Malta began to shed its pure Civil Law system in order to commence its movement towards a mixed legal system of Civil Law and Common Law influences. The Civil Law origins of the Maltese legal system became—to quote Moréteau—‘contaminated’,⁴³ or, rather better, enriched, by English Statutory Law (the latter forming part of the Common Law legal system). At the end of this period, not only was Common Law received into Maltese Law but it even gained supremacy over the Civil Law influences on Maltese Law because: (a) the sources used for new Maltese Law—apart from the exceptional case of the said Codes—was no longer Civil Law but English Law; (b) the Civil Law influence over Maltese Law remained static and stopped developing; and (c) although by ‘Maltese Law’ I understand both Civil Law and Public Law,⁴⁴ it was Common Law that was to have the predominant influence over Civil Law during this sixth phase of the legal history of Malta. In addition, when the influence was not Common Law it was Chthonic Law inspired, and Civil Law was substantially abandoned as a source for new Maltese Law. Hence, the supremacy of Common Law during this period—and subsequent periods as well—over Civil Law not only in Maltese Public Law (where Common Law reigned supreme) but also in the evolution of Maltese Private Law especially in the realm of Commercial Law, in particular, Company Law, Maritime Law, Insurance Law and Banking Law not to mention also Private International Law.

When the British arrived in Malta, Patrick Staines stated that in 1801 Captain Alexander Ball observed the state of Maltese Law to be as follows:⁴⁵

In Malta they have their Civil Law, Statute Law, Common Law and Canon Law. To this last they adhere in all their Ecclesiastical concerns. The usages of the

43. For a discussion of contamination, See Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9 (2010).

44. Indeed, the tendency in the past in the writings of comparativists was to exclude Public Law influences from their studies and focus mainly on Private Law.

45. *Id.* at 91.

country constitute their Common Law; and the Ordinances of the Grand Masters their Statute Law. But the Roman Law is the rule of their procedure in all Civil and Criminal cases. All their Statute or Municipal laws are comprised in one folio volume, and form a clear and well digested system.⁴⁶

Codification was already a characteristic trait of Maltese legislation under the period of the Order of St. John. But there is of course nothing strange in this once till that time Maltese Law was a purely Civil Law system, codification being a characteristic trait of Civil Law.⁴⁷

In addition, it is at the beginning of this period that the Maltese drew up their Declaration of Rights of 15 June 1802, an attempt at promulgating Autochthonous Law.⁴⁸

The British period begins, strangely enough, with the strengthening of Civil Law influences on Maltese Law rather than with the imposition of Common Law thereon. The five Codes mentioned above are all modelled to a very large extent on the Civil Law tradition.⁴⁹ However, there are instances in these Codes where an English Law factor can be found. Hence, Common Law inroads are observable in the Civil Law inspired Codes. For

46. Ball's dispatch of 6th March 1801, National Archives, Kew Gardens, London, War Office (WO) file 1/291.

47. See, e.g., M. L. Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (2001); J. H. Drake, *The Justinian Codification Commission of 528 A.D.*, 27 2 MICH. L. REV. 125 (1928); Rev. A. Keogh, S.J., *The Codification of the Canon Law*, 10 J. OF COMP. LEG. & INT. L. 14 (1928).

48. The text of the Declaration is printed in Frendo, *supra* note 37, at 55-56. See also, K. Aquilina, *The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal*, in 1 SERVING THE RULE OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR DAVID JOSEPH ATTARD 225, 226 (Martinez Gutierrez ed, Mare Nostrum Publications 2009); J.J. Cremona, *From the Declaration of Rights to Independence and The French Declaration of Rights and its Maltese Derivative*, in 1 SELECTED PAPERS 1946-1989 76, 264 respectively (Publishers Enterprises Group Limited 1990); G. Bonello, *The "Declaration of Rights" 1802 and William Eton*, in "INSERVI" HIDMA POLITIKA 1969-2009: GABRA TA' KITBIET F'GIEH EDDIE FENECH ADAMI 293 (Schiavone and Callus eds., Publikazzjonijiet Indipendenza 2009); Staines, *supra* note 41, at 135.

49. Codification is a characteristic trait of Roman Law and the Civil Law system. Italy, France, Germany, Austria and Switzerland, just to mention a few examples of Civil Law jurisdictions, adopted a system of codification for their civil laws.

instance, the Scotsman Andrew Jameson had made significant comments on the draft versions of the Criminal Code⁵⁰ and the Code of Organisation and Civil Procedure⁵¹ which were based on English Law and which were incorporated into these Codes. Albert Ganado sums up the making of the Criminal Code in 1854 as follows:

The Code of 1854 combined the advanced philosophical thought of European legislation with the best liberal principles British law could offer, both applied in keeping with Maltese customs and traditions. It is important to note that the accusatorial system was adopted for the institution of proceedings.⁵²

The Criminal Code has been supplemented, during the British period, by various other criminal laws which are still on the statute book and which reflect English Law.⁵³ Some of these laws currently have or have had their counterparts in various Commonwealth countries.⁵⁴

The legal system's mixture of our Commercial Code is illustrated as follows:

When the draft Commercial Code was presented in 1853 it was quite clear that the French Code had been followed. The Secretary of State disapproved the second book of the Code . . . The first, third and

50. ANDREW JAMESON, REPORT ON THE PROPOSED CODE OF CRIMINAL LAWS FOR THE ISLAND OF MALTA (Government Press, Malta, 1844) and D. Gourlay, *Andrew Jameson and the Origins of the Criminal Code of Malta*, 15 MELITA HISTORICA 109 (2009); MINUTES OF THE COUNCIL OF GOVERNMENT OF MALTA 29 DECEMBER 1835 TO 13 AUGUST 1849, xxxvi, lxii, (Malta University Press 2009).

51. ANDREW JAMESON, OBSERVATIONS ON THE PROPOSED CODE OF LAWS OF ORGANIZATION AND CIVIL PROCEDURE FOR THE ISLAND OF MALTA (Edinburgh, 26 December 1850) (National Archives, Kew Gardens, London, Colonial Office, file 163/38).

52. A. Ganado, *The Maltese Criminal Code of 1854–2*, in THE SUNDAY TIMES OF MALTA, December 14, 2003 at 55.

53. See The Official Secrets Act–Chapter 50; Public Meetings Ordinance–Chapter 68; Seditious Propaganda (Prohibition) Ordinance–Chapter 71; Conduct Certificates Ordinance–Chapter 77.

54. Typical examples are the Official Secrets Act and the Seditious Propaganda (Prohibition) Ordinance.

fourth books were enacted in 1857 while several ordinances on maritime law were promulgated in 1858. These ordinances were in harmony with British principles and they were therefore acceptable to the Secretary of State.⁵⁵

Writing in 1950, Ganado holds that, “the strong links which Malta has had with the European Continent for many centuries have resulted in the retention of the Roman civil law system; and, on the other hand, the British Administration since 1814 has introduced principles of British public law.”⁵⁶ In fact, our courts maintained that “the public law of Britain is the Public Law of Malta where the latter has a *lacuna*.”⁵⁷ But the judgment which set out this principle was delivered when Malta was still a colony of the United Kingdom.⁵⁸ On becoming independent Malta was no longer bound *stricto jure* by that principle. That said, however, British Public Law is still relevant to Maltese Law in so far as it is the source of Maltese Public Law, foremost amongst which is our written Westminster Constitution. Therefore, it is not that easy to sever ties with English Public Law even after independence not only in so far as Maltese legislation enacted during colonial times is concerned and which still forms part of Maltese Public Law but also in so far as new developments taking place in English Public Law are concerned, which also serve as a source for the development of Maltese Public Law. For instance, in 2010, the office of Parliamentary Assistant was created in Malta along the lines of the equivalent English concept.

Even the Code of Organisation and Civil Procedure is influenced by Common Law. Once again this is through the contribution of Andrew Jameson who provided significant comments to the final redaction of this Code. The five Maltese

55. J. M. Gando, *British Public Law and the Civil Law in Malta*, 3 C. L. P. 195 (1950).

56. *Id.* at 195.

57. W. PH. GULIA, *GOVERNMENTAL LIABILITY IN MALTA* 15 (Malta University Press, 1974).

58. *Marquis James Cassar Desain v. James Louis Forbes*, C.B.E., nomine, His Majesty's Court of Appeal, 7 January 1935.

Commissioners who were entrusted with the formulation of the Code took on board amendments proposed by Jameson.⁵⁹

Not only was English Law incorporated directly into Maltese Law during this period but certain English Law was extended to Malta through an express provision to that effect by an enactment of the United Kingdom. The UK Colonial Laws Validity Act, 1865, explicitly provided so in section 1. Section 2 thereof then provided that:

Any Colonial Law which is or shall be in any respect repugnant to the Provisions of an Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.⁶⁰

So even United Kingdom Acts of Parliament were part and parcel of Maltese Law, that is, those Acts of Parliament which were so extended by the United Kingdom Parliament to Malta in addition, of course, to the laws made by the Maltese legislature. In the latter case, there were instances in Malta where there existed two concurrent legislatures under a dyarchical system of government: the Maltese Imperial Legislature and the Maltese Legislature.⁶¹

G. Independent Malta (1964-2004)

This period starts with the independence of Malta gained on 21 September 1964. Malta became independent through an Act of the British parliament—the Malta Independence Act of 1964.⁶²

59. *See supra* note 48, letter dated 10 May 1851.

60. 28 & 29 Vict., c. 63.

61. DOMINIC FENECH, RESPONSIBILITY AND POWER IN INTER-WAR MALTA, BOOK ONE: ENDEMIC DEMOCRACY (1919–1930) 51, 327 (Publishers Enterprising Group Limited, 2005).

62. All the constitutions, which Malta had during the British period, were English Law influenced. For a discussion of these constitutions see J.J. CREMONA, MALTA AND BRITAIN: THE EARLY CONSTITUTIONS (Publishers

The Constitution of Malta, Malta's highest law of the archipelago, was granted to the Maltese through an Order-in-Council made by the Queen of Great Britain under the said 1964 enactment.⁶³ The Maltese Constitution is a Westminster Constitution although it has transplanted the American Constitution's doctrine of judicial review of the acts of the legislature whereby the Constitutional Court can declare an act of parliament null and void if it contravenes the Constitution of Malta.⁶⁴

The vast majority of the laws enacted during this sixth period of Maltese legislative history are English Law inspired. In this respect, legal coloniality (that is, the enduring vestiges of English Law colonialism in post-colonial Malta) is preserved.⁶⁵ European Community Law begins to raise its head in our statute book but this has happened indirectly, in so far as the United Kingdom had transposed European Community Law in its national law and such transposed law formed an English statutory source of law to the Maltese mixed legal system. For instance, our Broadcasting Act 1991 is modelled on the British Broadcasting Act, 1981⁶⁶ which in turn transposes the EEC Television without Frontiers Directive.⁶⁷ Of course, there are some glaring exceptions in this period where English Law is not followed such as the Condominium Act⁶⁸ which is to a large extent modelled on the condominium provisions of the Italian Civil Code with minor

Enterprises Group, 1996); J.J. CREMONA, *THE MALTESE CONSTITUTION AND CONSTITUTIONAL HISTORY SINCE 1813* (Publishers Enterprises Group, 1994).

63. See J.J. CREMONA, *Recollections of Constitution-Making* in *supra* note 48, at 270.

64. Article 6 of the Constitution of Malta provides that: ' . . . if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

65. For an explanation of the concept of coloniality, see Kjell Å. Mod er, *Mixed Legal Systems and Coloniality: Parts of the Construct of a Global Legal Culture*, 1 at 5-6, available at www.ivr2003.net/idc/literature/kam01.pdf (Last visited November 7, 2011).

66. Broadcasting Act, 1981 c.68 (UK).

67. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 1989 O.J. (L 298) 23.

68. Condominium Act, 201, c.398 (Malta); See, Stefan Z. Azzopardi, *The Scope of the Condominium Act*, 3 L. & PRAC. 24 (Chamber of Advocates Malta, December 2001).

adaptations to the local scenario; the Ombudsman Act which is modelled on New Zealand Law; and article 637 of the Code of Organisation and Civil Procedure which lists the cases where the court cannot have access to government documents which has its inspiration in the Australian Freedom of Information Act. However the latter two examples fall within the Common Law family of legal systems. Otherwise there is considerable Municipal Law incorporating International Law but very few traces of Continental Law influences. The Environment Protection Act, 1991 (now repealed since 2001) had traces of Canadian Law.⁶⁹ Hence, elements of Commonwealth countries' national laws (England included) are an influencing factor on the development of Maltese Law during the seventh period of legal history. This is the period of the consolidation of Comparative Law when studies are conducted when drafting Maltese legislation by looking not only at English Law but at the laws of other Commonwealth Common Law jurisdictions. It also constitutes the beginning of the introduction of European Community Law in Malta.⁷⁰

During this period, the five Codes were amended substantially. The Commercial Code has lost various provisions to special commercial laws; the Code of Police Laws is practically in the process of repeal;⁷¹ the Criminal Code has been considerably amended to take on board international crimes not hitherto contemplated and to update Maltese criminal procedure in the light of recent English criminal laws; whilst the Code of Organisation and Civil Procedure has been amended to give effect to various autochthonous provisions. Perhaps it is only the Civil Code which remains the bastion of the Civil Law influence on Maltese Law and which has withstood the Common Law assault during the passage of time even though a handful of English Law provisions have managed to seep into this Code. Such is the case with the Code's substituted provisions on adoption introduced in 1962. Were it not

69. Canadian Environmental Protection Act 1988, R.S. c.16, 4th Supplement.

70. The comparative process in Maltese Law was embarked upon when the Five Codes were being drawn up.

71. See VANNI BRUNO & MARILU GATT, REPORT ON THE CODE OF POLICE LAWS (Justice Unit, Ministry of Justice and Home Affairs, Malta, presented to the House of Representatives Select Committee on the Re-Codification of Laws during its sitting of 7 April 2010).

for the British stewardship of the Islands, the five Codes would not have been polluted by what was hitherto an alien legal system to Maltese Law–Common Law. But, on the other hand, were it not for the British occupation of Malta, these codes would not have, in all probability, been promulgated at all.

H. European Unionised Malta (Since 2004)

The seventh period of Maltese legal history starts on 1 May 2004 when Malta acceded to the European Union.⁷² Although following independence, Malta continued to rely as a source of its legislation on English Statutory Law, which did transpose European Community Law in its legislation from 1 January 1973 onwards. It was only after European Union accession that Malta was legally bound to receive all the EU *acquis communautaire* into its fold. This was a lengthy and complex process that required all the Laws of Malta to be revisited to be brought in unison with European Union Law.⁷³ Malta adopted a national programme for the adoption of the *acquis*⁷⁴ whilst the European Commission drew up a report updating its opinion on Malta's application for membership of the European Union⁷⁵ and regular reports on Malta's progress towards accession.⁷⁶ All these brought about a

72. The *iter* of European Union accession is illustrated by Richard C. Caruana, *Id-dhul ta' Malta fl-Unjoni Ewropea*, in SCHIAVIONE & CALLUS, *supra* note 45, at 515-546.

73. David Fabri, *Transposition Tables, Toil and Tears ... True Tales from the Accession*, in MALTA IN THE EUROPEAN UNION: FIVE YEARS ON AND LOOKING TO THE FUTURE 85 (Xuerab ed., European Documentation and Research Centre, University of Malta, 2009).

74. MINISTRY OF FOREIGN AFFAIRS, MALTA: NATIONAL PROGRAMME FOR THE ADOPTION OF THE ACQUIS (Ministry of Foreign Affairs, Valletta, January 2002).

75. EUROPEAN COMMISSION, REPORT UPDATING THE COMMISSION OPINION ON MALTA'S APPLICATION FOR MEMBERSHIP (European Commission, Brussels, 17.02.1999 COM 69 final).

76. In all there were four regular reports. These were as follows: (a) 1999 Regular Report From the Commission on Malta's Progress Towards Accession (European Commission, Brussels, 13 October 1999); (b) 2000 Regular Report from the Commission on Malta's Progress Towards Accession (European Commission, Brussels, 8 November 2000); (c) 2001 Regular Report on Malta's Progress Towards Accession (European Commission, Brussels 13 November 2001, SEC(2001) 1751; (d) 2002 Regular Report on Malta's Progress Towards Accession (European Commission, Brussels, 9 October 2002), Com(2002) 700 final. The European Commission also produced a Comprehensive Monitoring

drastic upheaval in Maltese Law during the first four years of this century as it also did, for instance, to English Law both at the time of UK accession to the EEC and subsequently as well.⁷⁷

Since EU accession, quite a substantial chunk of Maltese Law is European Union Law. In the transposition of EU directives Malta usually transposes the *acquis* literally with very few rewording or adaptation. Regulations and Council Decisions apply to Malta without the need of actual transposition into Maltese Law: they are directly applicable and automatically received into Maltese Law. The *European Union Act*, is an adaptation of the English European Communities Act 1972⁷⁸ to the case of Malta. EU Law is also supplemented by judge-made rules of the Court of Justice of the European Union and the Court of First Instance (re-designated by the Lisbon Treaty of 13 December 2007 as the General Court).⁷⁹ Article 5(1)⁸⁰ of the European Union Act makes provision to this effect and so does article 5(3)⁸¹ of the same enactment.

Report of the European Commission on the State or Preparedness of EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (European Commission, Brussels, 5 November 2003) Com (2003) 675 final; and the Comprehensive Monitoring Report on Malta's Preparation for Membership (European Commission, Brussels, 5 November 2003).

77. In the UK, the continental principle of good faith irritated the system in which it was introduced. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences* 61 M. L. R. 11 (1998).

78. European Communities Act 1972, c.68 (UK).

79. Koen Lenaets & Kathleen Gutman, "*Federal Common Law*" in *the European Union: A Comparative Perspective from the United States*, 54:1 AM. J. COM. L. 1 (2006).

80. Article 5(1) reads:

For the purposes of any proceedings before any court or other adjudicating authority, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising therefrom or thereunder, shall be treated as a question of law and if not referred to the Court of Justice of the European Communities, be for determination as such in accordance with the principles laid down by, and any relevant decision of, the Court of Justice of the European Communities or any court attached thereto.

81. Article 5(3) reads:

Evidence of any instrument issued by an institution of the European Union, including any judgment or order of the Court

I. Towards a Revival of Codification? (Since 2009)

The ninth period of Maltese legal history starts with the presentation by the Hon. Dr. Tonio Borg, Deputy Prime Minister and Minister of Foreign Affairs, of a motion requesting the House of Representatives to appoint two Select Committees, one of which concerned the Re-Codification and Consolidation of Laws.⁸² The Select Committee on Re-Codification and Consolidation of Laws was appointed on 14 December 2009 by the House. The Deputy Prime Minister's motion noted that through the passage of time, the amount of legislation grew considerably and covered various diverse subjects. Hence the Statute Book required carrying out a process of re-codification and consolidation in view of the fact that the laws over time were not always inserted in their logical and natural place but were spread over all the Statute Book. The laws also needed simplification both as to content and appearance. Hence he requested the House to approve the appointment of such a Select Committee with the following terms of reference:

- (a) that anachronistic laws and irrelevant laws be repealed;
- (b) that, as far as possible, civil, criminal and commercial laws are codified in one law so that these laws form part of the Civil Code, the Criminal Code and the Commercial Code;
- (c) that laws on the same subject matter be consolidated into one law.

The Select Committee is still in its initial stages but, if it carries out its terms of reference as mandated by the House of

of Justice of the European Union or any court attached thereto, or of any document in the custody of an institution of the European Union, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution; and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.

82. Motion No. 11.114 was presented by the Deputy Prime Minister on October 21, 2009. Its text is available, in Maltese, <http://parliament.gov.mt/motion11114%20> (Last visited November 7, 2011).

Representatives, it will end up codifying and consolidating Maltese Law (both Civil Law and Common Law inspired) into a simple, readily accessible, clear, uniform, consistent and certain legislation. All such Codes will end up a fusion of diverse layers composing the Maltese legal system working harmoniously side by side.

IV. CONCLUSION

Legal systems change over time. This applies to Maltese Law which started as a pure Civil Law system but has ended up as a mixed legal system. Indeed, whilst it kept its Civil Law characteristics it moved on to absorb English Law, more statutory law than anything else, but still Common Law. So the Maltese legal system became a composite or hybrid legal system. Different colonial powers brought with them their own legal system which left their trail in Malta. As it happened in the case of Malta, there has been a “historic superimposition of a common law framework on a pre-existing layer of civil law.”⁸³ This could not have been otherwise bearing in mind that the Civil Law tradition pre-dated the Common Law tradition and the Roman Empire had lost its domination over legal systems to the benefit of the British Empire.⁸⁴ Nevertheless, the superimposition of Common Law in Malta has moved to dominance.

When Malta gained independence it not only began to enact its own Autochthonous Law but became influenced by Public International Law and European Law whilst still continuing to be inspired by English Law, what has been referred to above as ‘coloniality.’⁸⁵ New elements entered into the Maltese legal system

83. Vernon V. Palmer, *Introduction to the Mixed Jurisdictions*, in *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 8, 10 (Palmer ed., Cambridge University Press, 2001).

84. Common Law traces its origins principally to the Norman Conquest in 1066. Roman Law dates back to the Twelve Tables c. 451 B.C.

85. Whilst Jonathan M. Miller identifies four typologies why legal transplants occur (these are: the cost saving transplant; the externally-dictated transplant; the entrepreneurial transplant; and the legitimacy-generating transplant), he does not identify coloniality as a fifth typology of legal transplants which, although it can be subsumed under one or more of the typologies identified should perhaps be included as a category in its own right due to its overarching influence it has had on national legal systems over time.

which has now shifted from a hybrid system in the sense of a mixed eclectic model between the Civil Law and Common Law into a mixed system since it is encompassing other legal systems such as the EU and international ones and it is applying them all in unison as though they were one.

Maltese Law has managed, during these periods, to adapt itself to the legal systems of its diverse colonizers and, more recently, to that of the European Union and Public International Law. Such adaptation does not seem to have brought about any specific difficulties. Foreign law was healthily grafted onto Maltese Law in a harmonious way to such extent that Maltese Law ended up being a combination of diverse sources of law, the most predominant being Civil Law, including Canon Law, in the early stages, followed by common law from 1800 onwards, to Maltese Autochthonous Law and, very recently, to European Law. Public International Law remains a common ingredient to all these periods. It is therefore all these layers of law which make the Maltese legal system a hybrid one, that is, a healthy grafted European mixed legal system.

See Jonathan M. Miller, A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 51:4 AM. J. COMP. L. 843 (2003).