Mediterranean Legal Hybridity: Mixtures and Movements, the Relationship between the Legal and Normative Traditions of the Region; Malta, June 11-12, 2010

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- **A Jurilinguistic Study of the Trilingual Civil Code of Québec**........... Jimena Andino Dorato

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BOOK REVIEW

George Dargo, Jefferson’s Louisiana:
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In the fall of 1976, when he was a fourth-year law student at the Université Jean Moulin in Lyon, the author of this note discovered a course mysteriously called Droit comparé, taught by a tall, lean, and elegant grey-haired German professor, who spoke perfect French and used words and phrases in Greek and Latin, English, German, and Russian, and seemed to know several other languages. He instructed his students on the foundations of comparative law and the history of this discipline, and gave a fascinating introduction to the history and the spirit of English law. The ‘disciple to be’ received this teaching like sand absorbing unexpected rain, as he had been fed all these years with dry legislative positivism. The following semester, he was his student in legal philosophy, and it became clear that the desert would blossom into fertile land. The aspiration to become a scholar of comparative law kept germinating in the mind of a student who just a few months earlier was questioning his aspiration to become a jurist.

A former Lutheran partly of Jewish descent and converted to Roman-Catholicism, the master led his disciple to the Promised Land. The year after, the disciple majored in the D.E.A. de droit comparé (a graduate program in comparative law) of which the master was the director. Despite the latter’s warning that he was a foreigner and an outsider, and therefore not the best leader on the path to a French academic career, the disciple insisted on having him as his Doktor Vater or doctoral supervisor. The master adopted his disciple and the disciple elected his spiritual father. “Law is right reason,” he was fond of saying, and this sounded like a mantra. The ideas of coherence and reasonableness, the ontological connection between law and morals, the legal necessity to objectivize purely subjective relationships and communication, the meta-legal foundation of responsibility and its transcendental connection to freedom, the need to mediate and the unique function of the judge in this respect, the notion that comparative legal studies amount to applied legal philosophy; all these and many other ideas would fuel the disciple’s research and teaching. His constant focus on coherence led the disciple to elect estoppel and the protection of reasonable reliance as the topic of his doctoral dissertation. The nine hours spent in the graduate program discussing Lord Atkin’s neighbor principle in Donoghue v.
Stevenson\textsuperscript{1} would turn the author of this note into a scholar of English law and the law of obligations, among other things.

This personal testimony is a pale reflection of the master and his teaching. Here is a short resume. Born in Berlin, in 1922, son of a Prussian diplomat, Hans-Albrecht Schwarz-Liebermann von Wahlendorf received an aristocratic education. He was homeschooled in the leading European languages and graduated from the Bismarck-Gymnasium. He escaped the Nazi persecutions, and studied Russian and philosophy. Immediately after World War II he joined the Christian Democratic Union (CDU), and studied law in Tubingen where he got his doctorate. He did academic work at the Hague Academy of International Law, at the University of Cambridge (he later sent me to Sydney Sussex College, his home in Cambridge, where I met my wife, who is from Swabian Southern Germany, like his mother), and at several law schools in the United States, including the University of Michigan. From 1952 onwards, he worked at European integration projects at the German Ministry of Foreign Affairs, in close cooperation with Heinrich von Brentano, Walther Hallstein, and later joining future Chancellor Kurt Georg Kiesinger and Chancellor Konrad Adenauer’s efforts on international and security issues. He contributed to the drafting of the first European treaties. In 1957, he became NATO’s Associate Director for political affairs. After having lectured all around the world (1960-1961), he was made Director for research and university cooperation for the Council of Europe (Strasbourg, 1962-1967).

A man of action, he remained a scholar. In 1968, he was made an Associate Professor at the University of Nice, and in 1974, he joined the law faculty of Université Jean Moulin in Lyon, where he was made full professor, teaching comparative law and legal philosophy. He left Lyon with the title of Professor Emeritus in 1982 and also gave up his position as Associate Director (de facto director) of the Lyon Institute of Comparative Law, in which I would succeed him in 1985. Back in Germany, he resumed with his political life in Hamburg, and also sat on the board of the Max Planck Institute for Foreign and International Law (Hamburg, 1984-1992). He was very active in Germany’s foreign policy all these years, with important missions in the Soviet bloc, whilst working to convince German students of the necessity of deploying Pershing missiles in West Germany, to oppose the SS-20 missiles deployed in countries of the Warsaw Pact, and ultimately end the Cold War. He travelled extensively during the chancellorship of Helmut Kohl, the German federal government

\textsuperscript{1} Donoghue v. Stevenson [1932] A.C. 562 (H.L.).
sending him to the United States, Russia, India, Japan, South East Asia, Australia, and New Zealand. He was President of the Robert Schuman Institute for Europe (1984-1994) and was made Honorary Director of the Édouard Lambert Institute of Comparative Law (Lyon, 2001).

In 1989, he moved to Rheinbreitbach, near Bonn, where my family and I visited him several times. He was a man of great cordiality and aristocratic courtesy, expressing all thoughts, simple or complex, in subtle language and long-winded sentences. His diction was slow, with sentences ending softly, in what he described as Berlin laziness. In 1955, he married Denise Kerdilès, from France (he described her as rocher de Bretagne, Lumière du Ciel), who left this world two years before him. She used to receive us with grace and simplicity, in this aristocratic mansion adorned with art you usually see only in the finest museums. He was also a poet and a painter. He gradually lost the support of both legs in the final years, and no longer left his bedroom upstairs, where I saw him on my last visit. His intellect was intact, and I never saw a man so prepared to appear in front of his Creator. He died peacefully at home on August 6, 2011, four days after his 89th birthday.

Hans-Albrecht Schwarz-Liebermann von Wahlendorf published extensively between the early 1950s and 1990s, in German, in French, and also in English. His publications in German discuss NATO, Germany’s foreign politics, and include significant works in International Law. Publications in English are not many, but combine scholarship in international and comparative law. During his years in Nice, he published two


3. HANS-ALBRECHT SCHWARZ-LIEBERMANN VON WAHLENDORF, VORMUNDSCHAFT UND TREUHAND DES RÖMISCHEN UND ENGLISCHEN PRIVATRECHTS IN IHRER ANWENDBARKEIT AUF VÖLKERRECHTLICHER EBENE-EINE STUDIE ZUR STRUKTURPROBLEMATIK DES VÖLKERRECHTS (Tübingen, J.C.B. Mohr 1951); MÖGELITZ, MÖDTE, UND STIMMABWÄGUNG-EINE STUDIE ZUR ENTWICKLUNG VÖLKERVERFASSUNGSPROJEKTS (Tübingen, J.C.B. Mohr 1953); STRUKTUR UND FUNKTION DER SÖHNLICHEN ZWEITEN KAMMER - EINE STUDIE ZUM PROBLEM DER GEWALTENTeilung (Tübingen, J.C.B. Mohr 1958).

fundamental books in French on legal philosophy, to be followed by remarkable volumes published in the prestigious Bibliothèque de philosophie du droit, at the Librairie générale de droit et de jurisprudence. Droit comparé - Théorie générale et principes and Introduction à l’esprit et à l’histoire du droit anglais are gems, awaiting to be reprinted. Positions internationales de la Russie soviétique shows his familiarity with the Russian language, Russian culture and literature (large excerpts are cited, translated by the author), and unique expertise in Russian foreign policy over many centuries, describing Moscow as the third Rome. It must be read again, more than twenty years after the ending of the Soviet Empire. Three other books, written during the Lyon years, convey the author’s faith in the development of Europe and are worth being read in this period of doubt as to the political future of the European continent.

I cannot but cite Regards et réflexions, published in 1987. Not only does it reveal the author’s philosophical thoughts and spiritual depth—he was a man of faith—but it gives a poetical glimpse of a magnificent soul that rejected the collective monstrosity of the past century and generated powerful moral and legal thoughts as to the only way to resurrect human dignity and ensure its protection in the centuries to come.

These bibliographical notes are by no means exhaustive and omit a number of significant articles, monographs, and

5. HANS-ALBRECHT SCHWARZ-LIEBERMANN VON WAHLEN DORF, FONDEMENTS ET PRINCIPES D’UN ORDRE JURIDIQUE NAISSANT—ESSAI DE PHILOSOPHIE EMPIRIQUE DU DROIT (Paris, La Haye, Mouton 1971); REFLEXIONS SUR LA NATURE DES CHOSES ET LA LOGIQUE DU DROIT, supra note 2.

6. HANS-ALBRECHT SCHWARZ-LIEBERMANN VON WAHLEN DORF, ÉLÉMENTS D’UNE INTRODUCTION À LA PHILOSOPHIE DU DROIT (1976); LES DIMENSIONS DU DROIT (1978); IDÉALITÉ ET RÉALITÉ DU DROIT–LES DIMENSIONS DU RAISONNEMENT JUDICIAIRE (1980); POLITIQUE, DROIT, RAISON–RECUEIL D’ÉTUDES (1982).


9. HANS-ALBRECHT SCHWARZ-LIEBERMANN VON WAHLEN DORF, DÉMOCRATIE EUROPÉENNE (Lyon, L’Hermès 1977); QUELLE EUROPE? MÉDI TATIONS D’UN CHRÉTIEN DÉMOCRATE (Lyon, L’Hermès 1979); RÉSISTEZ! UN MANIFESTE POUR L’EUROPE (Paris, La pensée universelle 1983).

speeches. They are an invitation to discover or rediscover an immense legal mind who transcends the limits of legal thinking and questions who we are, confronting us on every page with our limited and unlimited dimension. He is not honored here for his reverence for the civil law: though educated in the law at one of the hubs of the Pandectist School and more familiar than many with the dynamism of Roman law, he rather preferred the English common law and its focus on the judge. 11 Without his seminal influence, however, the Journal of Civil Law Studies would not exist and may not have been conceived as a forum for comparative legal studies.

Olivier Moréteau

11. See his comments on Right Reason, Case v. Code, in POLITIQUE, DROIT, RAISON, supra note 6, at Part II.
“You’re right . . . We’re Mediterranean. I’ve never been to Greece or Italy, but I’m sure I’d be at home there as soon as I landed.” He would, too, I thought. New Orleans resembles Genoa or Marseilles, or Beirut or the Egyptian Alexandria more than it does New York, although all seaports resemble one another more than they can resemble any place in the interior. Like Havana and Port-au-Prince, New Orleans is within the orbit of a Hellenistic world that never touched the North Atlantic. The Mediterranean, Caribbean, and Gulf of Mexico form a homogeneous, though interrupted, sea.1

Juris Diversitas was founded informally at the periphery of the Second International Congress of the World Society of Mixed Jurisdiction Jurists (Edinburgh, 2007). We had two related aims. The first was to expand comparative scholarship to cover not only the explicit Western legal hybrids referred to as the ‘classical mixed jurisdictions’, but both more exotic legal hybrids and legal/normative hybrids more generally. The second, related aim is the encouragement of interdisciplinary dialogue between comparatists and others. For a few years, our ‘members’—from Cyprus, France, Italy, Louisiana, Quebec, etc—formed little more than an online discussion group. We expanded very slowly, by invitation. In 2009, following a chance remark at a conference dinner in Ireland about the need to find funding to pursue our themes, we were given the opportunity to co-organise, with the Swiss Institute of Comparative Law, a symposium on comparative law and hybrid traditions. That symposium was held in September 2009. A formal Executive Committee was established at the same time.2 In early 2010, we created a blog to alert both members and

2. The Executive Committee includes President Seán Patrick Donlan (Limerick) and Vice-Presidents Ignazio Castellucci (Trento and Macau) and Olivier Moréteau (Louisiana State). More recently, Lukas Heckerdorn-Urschler
others about related events, materials, and associations.³ Our logo is, appropriately, a bowl of gumbo. At the same time, we established a distinguished Advisory Board.⁴ Subsequently, a collection of articles inspired by our Swiss symposium was published in 2010.⁵

A few years earlier, I had the good fortune to visit the University of Malta in 2008. I was eager to learn more about Malta’s mixity, a combination of Anglo-British and Italo-continental laws (as well as other modern European laws) that was little-known beyond its shores. In my lectures and research there, I paid special attention to whether the jurisdiction fit the ‘third legal family’ model that Vernon Palmer—founder and President of the World Society of Mixed Jurisdiction Jurists—proposed in his Mixed Jurisdictions Worldwide: the Third Legal Family (2001).⁶ In this research, Dr. David Zammit, Head of the University of Malta’s Department of Civil Law, was my ally.⁷ A lawyer and legal anthropologist, he became a member of Juris Diversitas. He also saw the possibility of combining the study of ‘legal hybridity’ and ‘normative hybridity.’ Legal hybridity includes explicit mixed systems. Recognizing, however, that all traditions are mixes, it extends to both covert hybrids and more complex, diffuse influences on the law. Normative hybridity combines the mix of these diverse state laws and other, informal ‘unofficial’ norms. Dr. Zammit and I subsequently co-taught a class on Comparative Law

(Swiss Institute of Comparative Law) has become our Treasurer and Salvatore Mancuso (Macau), our Secretary.


⁴.  Including Patrick Glenn (McGill), Marco Guadagni (Trieste), Roderick Macdonald (McGill), Werner Menski (SOAS, London), Esin Orucu (Emeritus, Glasgow), Vernon Palmer (Tulane), Rodolfo Sacco (Emeritus, Turin), Boaventura de Sousa Santos (Coimbra, Wisconsin, and Warwick), William Twining (Emeritus, University College London and Miami), and Jacques Vanderlinden (Emeritus, Free University of Brussels and Moncton).

⁵.  COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS (Eleanor Cashain-Ritaine, Sean Patrick Donlan, and Martin Sychold eds., Shultheiss for the Institute Suisse de droit compare, 2010).

⁶.  Professor Palmer has, however, since begun a second edition. Malta will be included.

⁷.  With the addition of Biagio Ando (Catania), we eventually completed A Happy Union: Malta’s Legal Hybridity 27 TUL. EUR. & CIV. L.F. (forthcoming 2012).
and Legal Pluralism. We also began to discuss the possibility of hosting a *Juris Diversitas* event on these themes.

With the help of Dr. Zammit and Dr. Simon Merceica, Head of the Mediterranean Institute at the University of Malta, a second symposium was organized to take place in Malta in June 2010. That event focused on the legal and normative traditions of the Mediterranean. It was hosted by the Department of Civil Law of the Faculty of Law of the University of Malta and the Mediterranean Institute. Professor Olivier Moréteau (Louisiana State University) delivered our plenary presentation. We also launched, thanks to Professor Palmer, the ‘Mediterranean Hybridity Project’ of *Juris Diversitas*. That Project also owes much to conversations with Dr. Zammit. It is the subject of my paper included in this issue. As a native Louisianan and a graduate of the Paul M. Hebert Law Center, I am pleased, too, to be publishing the articles inspired by the Maltese symposium in the *Journal of Civil Law Studies*. Contributors include jurists from Malta and beyond, including the current Dean of the Faculty of Laws of the University of Malta. The Executive of *Juris Diversitas* is grateful for the efforts of Dr. Merceica and all those who helped to organize and administer the symposium. We are grateful, too, to Professors Moréteau and Palmer. Finally, a special and personal thanks is due from me to Dr. Zammit for his organizational efforts and, still more, for his vision.8

*Juris Diversitas* has not rested, of course. After meeting in Malta, we organized a follow-up workshop on our Mediterranean Project. That meeting was held, appropriately, at the University of Catania in October 2010. We held our 2011 Annual General Meeting at the Third International Congress of the World Society of Mixed Jurisdiction Jurists in Jerusalem (Israel), continuing our close association with that organization. More recently, we co-organized, again with the Swiss Institute of Comparative Law, a conference on The Concept of Law in Comparative Context:

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8. Note that the Protection Project at The Johns Hopkins University School of Advanced International Studies has organized, in cooperation with the World Society of Mixed Jurisdiction Jurists and the Tulane University Law School Eason Weinmann Center for Comparative Law, an international conference on Mixed Legal Systems, East and West: Newest Trends and Developments. The conference will be held in Malta on 14-15 May 2012.
Comparative Law, Legal Philosophy and the Social Sciences. In addition to a plenary address by Werner Menski (SOAS), contributors included, among others, Mauro Bussani (Trieste), Baudouin Dupret (CNRS), Andrew Halpin (Singapore), Emmanuel Melissaris (LSE), David Nelken (Cardiff and Macerata), and Mark van Hoecke (Ghent). That conference was held in October 2011 and will result in another collection in 2012. A future conference is also being organized with Professor Dupret and the Centre Jacques-Berque (Rabat, Morocco). Scheduled for June 2012, it will focus on ‘Doing Justice: Official and Unofficial “Legalities” in Practice’. I also look forward, one day, to bringing our members to Louisiana. They’ve heard a lot about the gumbo.

Dr. Seán Patrick Donlan*

* Lecturer, University of Limerick (Ireland). President, Juris Diversitas; Vice-President, Irish Society of Comparative Law; Secretary General, World Society of Mixed Jurisdiction Jurists; Secretary General, European Society for Comparative Legal History; Honorary Member, International Academy of Comparative Law.
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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,
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;\(^1\) and 3) the absence of a theoretical approach to law in the sense that a doctrinal

\(^1\) 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. 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.’ 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.

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, 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

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.


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 (Örűcü 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.”

As to maritime law, 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.

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.9

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.10 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”11 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. Ph. 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. 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) 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). More recently, recourse has been made to Roman law in many other cases. 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.

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

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. 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 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\(^\text{19}\) 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.\(^\text{20}\) 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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\(^\text{19}\) Apart from the French Code, other codes were consulted such as the civil Codes of Austria, Parma, Two Sicilies, Canton of Ticino, and Albertino.  

\(^\text{20}\) HARDING, *supra* note 10, at 40.
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. 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.

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.

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.24 However, under a general rule stated in art. 1031, “every person . . . shall be liable for the damage which occurs through his fault.”25 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.26 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


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. 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. 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. When this has not occurred individuals cannot

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
of Malta, 2010).

28. For a clear analysis of the two approaches see, T. Mallia, Pre-

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.\textsuperscript{30}

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,\textsuperscript{31} 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.\textsuperscript{32} 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 \textit{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

\textsuperscript{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, \textit{supra} note 28, at 27.

\textsuperscript{31} Mallia explains clearly this approach:

\begin{quote}
[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.
\end{quote}

\textit{Id.} at 26.

\textsuperscript{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. 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. 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 Giufridda pro et noe v. Onor. Dott.Giorgio Borg Olivier et*, 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*, 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).
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 were 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*, 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*, 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,\(^{39}\) 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,\(^{40}\) 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.\(^{41}\)

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

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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 al. 42 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.” 43

**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.
principle in general. 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*, 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 tas-societa, 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*, 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).


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*, 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, so section 3 of the Commercial Code cannot be applied to the contract of insurance in general. 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, the concept of error, 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

50. Zammit v. Micallef (Commercial Court, January 31, 1952); Tanti v. O.F. Gollecher (Civil Court, April 30, 2002).
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.\(^\text{52}\) 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 par.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.\(^\text{53}\) But upon a more careful reading of these provisions, one

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

\(\text{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' suprini 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.54 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, 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 opinioni abbracciate ne' Suprini 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.\textsuperscript{55}

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.

\textsuperscript{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.
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,
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, 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

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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 Law\(^2\) 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 power\(^3\) 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

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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.

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 system where, to borrow a phrase from Esin Örücü, “the ingredients work cumulatively and interactively” 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.

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

The Maltese islands were originally populated by the local Bronze Age population. They were inhabited for the first time around 5,000 B.C., or even earlier, by farmers originating from Sicily. 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. 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. 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. 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.”

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…
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
of Arab rule for it started as a Semitic language 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. 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. 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. 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. 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.” Although Roman Law reigned supreme in Malta, Maritime Law was governed by maritime usages. 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-ASSESJU 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).
22. Attard, supra note 17, at 41.
23. Id. at 43-47.
25. Harding, supra note 13, at 27.
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 Malta32 of 1697) and local customs (codified also in the Code de Rohan)33 with the sole—though extremely important—

28. Id. at 227.
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. 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. 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.” 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. 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. 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 quan ipse habet transferre potest—no one can transfer to another a greater right than he himself possesses.

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’ Decizjonijiet Tal-Qratijiet Superjuji 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 codes\textsuperscript{39} 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.\textsuperscript{40}
Hence, the French period, extremely short when compared to the
rest, bore no fruit of its own.

\textbf{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 \textit{Nobile Giuseppe di Marchesi De Piro v. Monsignor
Don Salvatore Grech Delicata}:\textsuperscript{41}

\textit{Durante le ostilità tra il Governo Provvisorio, stabi-
litio 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.}\textsuperscript{42}

\textsuperscript{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).

\textsuperscript{40}. For a narrative of the historical evolution of these five codes, see. H. I.
Lee, \textit{British Policy Towards the Religion, Ancient Laws and Customs in Malta,
Part II. The Revision of the Codes of Law}, 4 \textit{Melita Historica} 1 (1964).

\textsuperscript{41}. \textit{Patrick Staines, Essays on Governing Malta 1800–1813} 77
(Publishers Enterprises Group Ltd., 2008).

\textsuperscript{42}. \textit{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’ 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, 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:  

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

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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.  

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.  

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.  

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. 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

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 Code and the Code of Organisation and Civil Procedure 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.

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. Some of these laws currently have or have had their counterparts in various Commonwealth countries.

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


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

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56. *Id.* at 195.
Commissioners who were entrusted with the formulation of the Code took on board amendments proposed by Jameson.\(^5\)

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.\(^6\)

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.\(^6\)

\textbf{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.\(^6\)

\footnotesize
\(^5\) See supra note 48, letter dated 10 May 1851.
\(^6\) 28 & 29 Vict., c. 63.
\(^6\) 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. 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.

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.

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, 1981 which in turn transposes the EEC Television without Frontiers Directive. Of course, there are some glaring exceptions in this period where English Law is not followed such as the Condominium Act which is to a large extent modelled on the condominium provisions of the Italian Civil Code with minor


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.’


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.\textsuperscript{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.\textsuperscript{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;\textsuperscript{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

\textsuperscript{69} Canadian Environmental Protection Act 1988, R.S. c.16, 4th Supplement.

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

\textsuperscript{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. 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. Malta adopted a national programme for the adoption of the **acquis** whilst the European Commission drew up a report updating its opinion on Malta’s application for membership of the European Union and regular reports on Malta’s progress towards accession. All these brought about a

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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 (Xuereb ed., European Documentation and Research Centre, University of Malta, 2009).


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.\textsuperscript{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 \textit{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 \textit{European Union Act}, is an adaptation of the English European Communities Act 1972\textsuperscript{78} 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).\textsuperscript{79} Article 5(1)\textsuperscript{80} of the European Union Act makes provision to this effect and so does article 5(3)\textsuperscript{81} of the same enactment.

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

\textsuperscript{78} European Communities Act 1972, c.68 (UK).


\textsuperscript{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.

\textsuperscript{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. 11114 was presented by the Deputy Prime Minister on October 21, 2009. Its text is available, in Maltese, [http://parliament.gov.mt/motion11114%20](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

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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.

FROM CAPITULATIONS TO UNEQUAL TREATIES:
THE MATTER OF AN EXTRATERRITORIAL
JURISDICTION IN THE OTTOMAN EMPIRE

Eliana Augusti*

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ABSTRACT

In the nineteenth century, justice in the Ottoman Empire appeared to international jurists deeply corrupted and far from the Western model. European consular jurisdictions, as in the past, solved this embarrassment in the prevalent and private interest of Western States in order to control the Mediterranean area. This perpetrated abjuration to recognize an autonomous and sovereign Ottoman administration of justice in civil or criminal cases in which foreigners were involved continued, in spite of the fact that the Porte provided excellent examples of intersection, reception and appropriation of foreign models to construct a new legal system, and to transform society. This process of “westernization”

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or “modernization” formally started in 1839, by the Hatt Hümayûn of Gülkhâne. In order to halt the contradictions derived from the coexistence of the last (French and English) treaties of commerce of 1838 and their confirmation of privileges and consular jurisdiction with the driven effort of Ottoman juridical reforms of Tanzimât period, in 1840 in both Turkey and Egypt, mixed traders councils composed of local and foreign traders were established. In 1840 the “commercial board” was born in Turkey and, in 1848, European Powers holding capitulary privileges negotiated the formal recognition of mixed tribunals (which were regulated in 1873 and formally inaugurated in 1875). This embarrassing situation was getting worse and accumulating contradictions when in 1856, at the Congress of Paris, the Ottoman Empire was “admitted to participate in the advantages of European Public Law and system” (art. 7 of the Treaty). Thanks to those words, the logical preamble of consular jurisdictions and their extraterritoriality (mitigated by the “monstrous” compromise of mixed tribunals), formally failed. There was a need to investigate and redefine the paradigmatic declensions of sovereignty in the relations between European Powers and the Ottoman Empire during the nineteenth century.

I. A SOVEREIGNTY IN ABYANCE: PREMISE

Between the seventeenth and eighteenth century, sovereignty was perceived as a mutually recognized right of the states to exercise exclusive authority over particular territories. This was the Westphalian model, successively qualified by the jurists as the “ideal type” of sovereignty. It suggested the respect of the other state’s sole authority in domestic affairs, the control over the flow of goods and bodies within each state’s borders, and the establishment of relations as among equal states in the international system. It would be the reference paradigm for the later principle of non-intervention.

However, as Stephen Krasner underlined in 1999, this model often worked as an “organized hypocrisy,” when there was no accurate correspondence to many of the entities that have been
regarded as states.\footnote{STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 69 (Princeton University Press, Princeton, 1999).} In several cases, states’ sovereignty had been compromised by contracts and conventions, impositions and interventions. This was particularly clear, and paradoxically palpable, for the Sublime Porte: in the nineteenth century there was something invalidating and compromising the declension of the “ideal type” of the Ottoman sovereignty.\footnote{See id. at 20; Aida A. Hozic, The Paradox of Sovereignty in the Balkans, in THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS 245 (Douglas Howland & Luise S. White eds., Indiana University Press, Bloomington, 2009) (on the Westphalian sovereignty); Amin Saikal, Westphalian and Islamic Concepts of Sovereignty in the Middle East, in RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA 75 et seq. (Trudy Jacobsen et al. eds., Ashgate Publishing Limited, Aldershot 2008) (about the difference between the Westphalian meaning of the concept and the complex Islamic understanding of the phenomenon of “sovereignty”).}

Antoine Pillet, in 1899, summarized his general perceptions on this topic in an interesting, and as yet not very well-known, essay on Les Droits Fondamentaux des États dans l’ordre des rapports internationaux. The work opened with a precise statement which showed traces of James Lorimer’s attitude:\footnote{JAMES LORIMER, I THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 101 (W. Blackwood & Sons, Edinburgh and London 1883).}

> Il semble que . . . une question préalable s’impose d’abord à l’examen: les États ont-ils, dans leur rapports fondamentaux, des droits qui existent par eux-mêmes, . . . des droits qui résultent . . . de la seule coexistence d’États civilisés (car nous ne nous occuperons que de ceux-là) . . . ?

Only civilized states were owners of fundamental rights, and parts of the family of nations. In particular, about the “droit d’égalité,” Pillet added:

> Les États ne sont pas égaux entre eux . . . D’abord, il n’existe aucune égalité de droits entre les États civilisés et les États non civilisés ou moins civilisés. Les premiers se gèrent constamment dans leurs rapports avec les seconds comme des supérieurs chargés de la mission de les faire entrer de gré ou de
States are not equal. Civilization is the measure of this non-equality. There are civilized and uncivilized states: the gap of civilization conditions the real nature of their relations based on a true dimension of non-equality. Civilized states have rights of direction, control and administration over uncivilized states: this is their mission in order to lead the latter to civilization.

This idea, shared also by John Westlake and Thomas Joseph Lawrence, clashed with the regulative ideal of an inclusive political pluralism of the international society and built, instead, its assumptions on a hierarchical ordering of it. The constitution of the different legal status of an “uncivilized state,” in fact, definitely solved the conflict between formal juridical equality of sovereign states and persistent power inequalities, also legitimating the unequal juridical language of the relations among them. The “uncivilization” caused a deminutio of sovereignty for the uncivilized states and, consequently, permitted (in front of a silent international law) the interference of civilized states in their domestic and foreign affairs. Evidently, this was not a reciprocal and consensual process. The so-called “development” of the international law of the twentieth century removed the

subordination of sovereignty and the absence of reciprocity as marking dimensions of that non-equality, and only underlined this aspect of the duress of the relations. Consequently, in line with nineteenth century European colonial politics, an automatic equation of colonial projects with the formal assumption of sovereignty by European Powers over non-European territories and peoples began to work.

Next to the deficit of civilization, as Aida Hozic has recently noticed, one of the reasons for the paradox of a “non-sovereign sovereignty” of the Ottoman Empire in its unequal relations with European Powers in the nineteenth century was that it had been frequently violated in the name of the sovereignty itself. Carl Schmitt said that the sovereign was the one who decided on the exception. According to Giorgio Agamben and his suggestions on the logical antinomies of sovereignty, the sovereign’s ability to suspend laws created those “juridically empty” states of exception. The states of exception had two essential criteria of individualization: the absolute necessity and the temporary state. Since there were two levels of sovereignty—one, artificial and anomalous, of the civilized states over the “uncivilized” Ottoman Empire, and the other, original and inadequate, of the Ottoman Empire itself over its own territory—two suspensions of the Ottoman order were possible.

First, the Ottoman Empire, as a “geographical exception” of a Christian and civilized Europe, underwent a deminutio majestatis which determined a corresponding sovereign extension (garentia) of European Powers’ sovereignty on it. The absolute necessity was to grant peaceful trade and judicial protection for the Western

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peoples in transit or resident in the Ottoman territories; the temporary state of this necessity was determined by the Porte’s process of gradual appropriation of international rules and its adequacy to the Western standard of civilization. The presence of both criteria provoked a suspension of the Ottoman juridical order: those “juridically empty” states of exception were resolved by European intervention and consular jurisdiction.

In the second place, the absolute necessity to manage the matter of Christian subjects and foreigners, resident or in transit on its territories, and the temporariness of the gradual process of their assimilation, led the Ottoman Empire itself to act on its residual sovereignty and to operate a suspension of its juridical order. By a “truce,” such as a temporary suspension of the political system towards the idolaters, the Ottoman sultans could grant Christians all the benefits of dialogue. This was the meaning of the old system of capitulations, of which the unequal treaties of the nineteenth century were the direct legacy.

In my opinion, this dualistic representation is the final aspect of an Ottoman “fantastic” sovereignty that needs to be investigated in relation with the jurisdiction problem: how was Ottoman sovereignty still held believable in face of the flagrant violations of its norms and in face of the logical antinomies of its constitutive principles operated by capitulations and unequal treaties? How was it possible to reconcile this state of subordination with the activation of the formal procedures for admission and participation of the Ottoman Empire to the European Concert of the nineteenth century? And what was the role of international law?

13. This was a temporariness induced by the encouraged notion that only by emulating Western modes of governance polities on the periphery might be admitted into the family of nations. Cf. Edward Said, Orientalismo. L’immagine europea dell’Oriente 78 et seq. (Stefano Galli ed., Feltrinelli, Milano, 2006).


15. Hozic, supra note 2, at 248.
II. DIALOGUE BY CAPITULATIONS

“As a corollary of the principle of sovereignty, states are deemed to have jurisdiction over their own territory.”16 “Extraterritorial jurisdiction is a provisional system which should be abandoned as and when the conditions justifying its adoption and application have ceased to exist.”17 In these two passages, Aida Hozic and Alexander Wood Renton, in different times and places, locate all the elements of the matter of extraterritorial jurisdiction in the Ottoman Empire in the nineteenth century (sovereignty, jurisdiction, territory). The two criteria of extraterritoriality (temporariness and necessity) implicitly appear as states of exception.

In the nineteenth century international trade was the ancillary route towards the consolidation of old, and the construction of new, international relationships among states in the Mediterranean area. On the one side European, and Christian, Powers; on the other side the inevitable Muslim interlocutor, the Ottoman Empire and its differences. The foreign merchants had uncertain status within the Ottoman dominions where strategic Mediterranean places were. To move in this area under suitable conditions and security guarantees, European Powers needed common useful provisions. This jus commune of the Mediterranean-trade-foreigner was first based on the old regime of capitulations. Since the sixteenth century, Western states obtained these unilateral concession acts, by which privileges were recognized, from sultans.18 Normally, capitulations included a grant of immunity from the local jurisdiction and subjection to one’s consular jurisdiction as long as the foreign—and above all Christian–merchants lived in small communities in the ports (the so-called “farms”)19 and made proper provisions for the regulation

16. Hozic, supra note 2, at 255.
19. Normalmente erano designate le città e i porti, dove i cristiani potevano impiantare le loro fattorie e risiedere per ragioni di commercio. Queste fattorie erano zone o quartieri distinti dalla città, talora chiusi, dove si trovavano le abitazioni degli
of their affairs. 20 As George Williams Keeton noticed in 1948, the feature of “unilateralism” of conceded privileges was not surprising: when, in fact, the first capitulations were granted by the Porte, the possibility of Turkish Muslim traders visiting or residing in European countries did not seem to have been considered. There was thus no real need of reciprocal recognitions. The state of things seemed to change in 1740, when France attained the attachment of capitulary privileges in an international treaty, also signed by the sultan. In this way, and for the first time, France turned the concessions into a contract binding in a synallagmatic way the Porte to it. 21 Then, thanks to an extensive clause, the so called most-favourite-nation clause, not only France, but all European nations could enjoy contractual (and sanctioned) benefits of the imported capitulary text.

Far from being contrary to other bilateral treaties or grants of European international law, capitulations hence became and remained until the twentieth century a common and normal incident of commerce with countries of non-Christian and non-European civilization. 22 European Powers accepted and consolidated capitulary exceptional regimes as functional to their aims, because they obtained the juridical guarantees for their citizens; capitulations protected their merchants, trade, contracts and cases; they established in the strategic specific places of Mediterranean Western presence and controlled, from a privileged inner position, their Muslim interlocutor. But even if capitulations

stranieri ed erano costruiti i loro stabilimenti commerciali, magazzini, con chiesa, cimitero e il consolato. Ogni Nazione aveva la sua fattoria, e questa era una specie di Stato nello Stato, quindi ognuno nel proprio recinto godeva la più ampia libertà di culto, di commercio, di giurisdizione.

FRANCESCO FERRARA, MANUALE DI DIRITTO CONSOLARE 17-18 (Cedam, Padova, 1936).


were an irremissible instrument for praxis and commercial intents, they were a taboo for European scholarship, which remained silent and did not give space to an in-depth study on them, their regime, and on the connected subject of consular jurisdiction, where the cases regulated by capitulations also fell.

The complex task to reconstruct and understand was left to nineteenth and twentieth century scholarship, which inserted these evaluations into the more complex phase of the building of International Law as a discipline. It had to find an answer to the origin, the need to maintain and the impossibility to abolish this privileged system of provisions for foreigners (merchants or not), called capitulations, still in force in the Muslim lands. I want to propose and briefly analyze three argumentative criteria used by scholars, and their correlative contradictions: a) immiscibility/personality; b) extraterritoriality; c) nationality.

III. UNDERSTAND AND LEGITIMIZE: THE IMMISCIBILITY, EXTRATERRITORIALITY AND NATIONALITY CRITERIA

As natural consequence of the so-called principle of immiscibility or of the personality of law,23 Western and non-Muslims foreigners were considered “outsiders” of Shir’a, in which only the believers could participate.24 In a Christian state, i.e., in a state belonging to the European civilization, a foreign resident, merchant or not, was subject to local courts like the indigenous peoples (with only the exception of diplomats): there was a kind of jus commune on the ground of which the foreigner was like a subditus temporarius and, for this reason, he was put on the same level as a state citizen to exercise his civil rights and enjoy his administrative protection. He was excluded only from the enjoyment of political rights and duties. Instead, in the Ottoman dominions, by capitulations, he possessed a privileged status. He


had to comply with his own national laws, he was exempt from the jurisdiction of the Ottoman courts and he referred to his own consular one; he was, in other words, treated differently from Ottoman subjects. This fact was not, at the time these “agreements” were made, deemed to be in any way derogatory to the sovereignty and dignity of the sultans. Sovereignty and jurisdiction were at that time generally regarded—in Europe scarcely less than in the Levant—as personal rather than territorial; and, particularly in view of the Islamic doctrine of the immiscibility of Moslem and Christian communities and the radical divergence between the legal system of the Ottoman Empire and the Western Powers, it was considered to be the most natural and proper arrangement for foreigners in the Ottoman territories to be subject exclusively to the laws and jurisdiction of their own sovereigns, acting through their ministers and consuls.

The capitulary “gracious” system was thus definitely a substantial part of the public law of the Ottoman Empire, because it was applied to all foreigners in the country and also regulated Ottomans’ contacts with foreigners within the Empire. It was also confirmed as an atypical part of the positive law of Western states: the sultans awarded capitulations only on the applicants’ explicit promise to keep peaceful relations with them, and on the understanding that any violation of the promise might lead to a unilateral revocation of the privileges.

When from this original position Western juridical tradition started moving towards a state dimension of law and a territorial dimension of sovereignty, however, it became more complex to justify and legalize the need to maintain these personal privileged agreements, resorting to confessional (and in this sense, personal) argumentations. From the fracture produced by the Protestant Reform and the Westphalia Acts, confessional aspects had been

27. Id. at 7.
put out of the international discourse: international law was among sovereign states; each state was sovereign on its own territory; states recognized themselves and each other as sovereign states on their territories. Common religion was not anymore a remarkable and conditioning connotation of international relations among states and, for this reason, it was replaced by a more convincing paradigm of a shared civilization. The Muslim principle of immiscibility and of the personality of law did not work well anymore, but contradictions remained.

Even if the open transition in seventeenth-nineteenth centuries from the Jus Publicum Europaeum to international law had started changing the way in which the international relations among proclaimed non-confessional states had to be defined, and even if the growth of commercial demand looked for new criteria to be regulated, in the nineteenth century religion still influenced the European approach to Muslim states, and all the doubts about their “un-civilized” systems of justice remained. The Ottoman system, in particular, appeared deeply corrupted and far from the Western model. Its theocratic system negatively conditioned European perception of the Porte, and let one conclude for an auto-exclusion, an auto “mise au ban de la civilisation” of the Empire.

The rights of presence, control, police, inspection and

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CARLO GHIRARDINI, LA SOVRANITÀ TERRITORIALE NEL DIRITTO INTERNAZIONALE 53 (P. Fezzi & C. Cremona, 1913).
31. Le bon sens suggère tout d’abord la supposition que sans doute en Turquie la magistrature n’offre point les garanties d’intégrité, d’impartialité et de lumière qui pour tout individu éloigné de son pays sont la première sauvegarde de sa liberté, de sa fortune, de son honneur et de sa vie.
Édouard Engelhardt, La Turquie et les Principautés Danubiennes, 13 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 535 (1881).
32. Id. at 537.
administrative intervention of the consuls’ jurisdictional power as provided by conventions and used in the Christian countries, could not assure a “distribution tolérable de la justice.”33 For this reason, despite the general rule of a “pouvoir judiciaire des consuls nécessairement restreint, par le principe de la souveraineté territoriale, aux droits résultant des stipulations conventionnelles ou de l’usage consacré,” in the Ottoman territories the consulars’ power became something more: they could solve the embarrassment of the inadequate justice system in the prevalent and private interest of Western states.34 The foreign consuls had jurisdiction over cases between their nationals as capitulations consecrated in the past “dans des termes si catégoriques que le gouvernement ottoman n’a jamais essayé de la contester.” It was a datum de facto and de jure. Article 26 of the French Capitulation of 1740 said: “S’il arrive quelque contestation entre les Français, leurs ambassadeurs et leurs consuls en prendront connaissance et en décideront, selon leurs us et coutumes, sans que personne puisse s’y opposer.”35 The incompetence of the Ottoman tribunals for civil or criminal disputes between foreigners of the same nationality was absolute, i.e., independent from the will of the parties; it was, André Mandelstam underlined, “d’ordre public.”36 The common and shared Western policy was confirmed: no renunciation of the old privileges was planned; consular jurisdiction had to keep working.

Facing the raising of territorial sovereignty, the old principle of personality seemed to transmit in a principle of extraterritoriality. In the rhetorical construction of international law, the consulates became “closed political centers” on foreign territory, just like states within the state. This exceptional regime was supported by the old ratio to find guarantees for foreigners where they were lacking. According to the principle of

33.  Id. at 535.
34.  William Beach Lawrence, Étude sur la juridiction consulaire, 13 Revue de Droit International et de Législation Comparée 45 (1881).
36.  MANDELSTAM, supra note 35, at 218.
extraterritoriality: first, foreigners enjoyed extraterritoriality in the sense that even if they were on the Ottoman territory, they were by fictio out of it, i.e., extra territorium; second, they were considered as in their country, even if in fact they were not. In the twentieth century, this conception was deeply criticized when, among many exceptions, scholars noticed that the foreigner remained subject to the local laws anyway. In spite of extraterritoriality, the privileged condition of a foreigner (and consular jurisdiction) was qualified as an exceptional status by which he remained under the territorial power of the residency state, but free from its coercive power. This was possible thanks to an express waiver of the state territorial sovereignty on him, and the consequent concession to the foreign national state to continue personal sovereignty over him. In this sense, as someone said, already at the end of the nineteenth century, capitulations appeared as “negative servitudes” which connected the exceptional condition of foreigner from the old system of the personality of law, to the new one of nationality. “Les Capitulations et traités conclus avec la Turquie, le Japon, la Chine, la Perse et autres États asiatiques, consacrent ou établissent des servitudes négatives, lorsqu’ils disposent que les nationaux européens y seront soumis, non pas à la justice locale, mais à leurs propres consuls qui leur font l’application des lois de leur patrie.” In the Ottoman Empire, like in other non-Christian states, the principle of extraterritoriality was known and could work, granting to foreigner ministers and consuls a more or less extended civil and criminal jurisdiction. This grant did not undermine Ottoman foreign independence, but, as William Beach Lawrence stressed, “déroge à la règle universellement établie parmi les nations civilisées que les lois de police et de sûreté obligent tous ceux qui

37. About the relations between consular and local tribunals in the Ottoman Empire cf. FRANCESCO PAOLO CONTUZZI, 2 TRATTATO TEORICO-PRATICO DI DIRITTO CONSOLARE E DIPLOMATICO NEI RAFFRONTI COI CODICI (CIVILE, COMMERCIALE, PENALE E GIUDIZIARIO) E CON LE CONVENZIONI INTERNAZIONALI IN VIGORE 701 (Utet, Torino, 1911).
38. FERRARA, supra note 19, at 232.
39. PRADIER-FODÉRÉ, supra note 21, at 682.
It was confirmed as an international exception limited to the Oriental case.

The phenomenon of foreigners’ privileges in the Levant could be justified by international law with a third argumentative solution, too. As noted earlier, foreigners (and consuls) were privileged people subject to the territorial power of the state where they resided, but released from its coercive force.41 This was possible because the Oriental state had waived its right of territorial sovereignty over them, allowing by capitulations or commercial treaties that personal sovereignty of foreigners’ national state went on. According to this conceptualization, there was no need to simulate that the foreigner was where he was not, but that there was a national state which “followed” its citizens wherever they went, wherever he was (we can hear the echo of Pasquale Stanislao Mancini and of the principle of nationality).42

The logical preamble to strengthen the suspension of Ottoman juridical order towards European citizens, the filter to move from the territoriality to nationality criteria was, once again, “civilization.”

IV. FROM CAPITULATIONS TO UNEQUAL TREATIES: THE LITERARY PLACES OF THE EXCEPTION

The basic principles of new international relations concerned the right of nations to independence, self-determination and equality. The latter, especially, was of particular importance to modern International Law: all states had “the same right to participate in the process of formulation of international law.”43 The states had to be entitled to take part in the drafting and conclusion of agreements that were of interest to them. This concept of equality was, of course, inferred from the idea of

40. LAWRENCE, ÉTUDES SUR LA JURIDICTION CONSULAIRE EN PAYS CHRÉTIENS ET EN PAYS NON CHRÉTIENS ET SUR L’EXTRADITION 105 (F.A. Brockhaus, Leipzig, 1880).
41. FERRARA, supra note 19, at 231-232.
42. Nuzzo, Da Mazzini a Mancini: il principio di nazionalità tra politica e diritto, 14 GIORNALE DI STORIA COSTITUZIONALE 174-180 (2007).
sovereignty. For sovereignty implied, *inter alia*, not equality of power, but legal equality, such as—as Ingrid Detter pointed out in 1966—that “states shall have had the same capacity to exercise their rights and to assume obligations.”\(^{44}\) In this respect, one did not always individuate the equality of states. There might a time that a state might find itself compelled into treaties with more dominating states, treaties which only favor the stronger of the parties, treaties which even sometimes are in conflict with the long-term national interest of the weaker state. Such treaties were often referred to as being “unequal.”\(^{45}\) This qualification of inequality was not accepted with favor by International Law, and this, as Matthew Craven has underlined, is for two reasons: the first was that the question of inequality in the context of treaty-making appeared incoherent. If on the one hand, in fact, every treaty could be a manifestation of inequality (in terms of a substantive lack of equilibrium in the respective burdens and benefits, and in terms of an unequal bargaining power of the contracting parties), on the other, a presumption of equality might exist, since equal “contractual” capacity of the parties was there.\(^{46}\) The second reason was the passive and acquiescent assumption in the rhetorical construction of the International Law of the nineteenth century of the unequal relations between European Powers and non-European territories and peoples in the gradual process of empire building. Until that moment, the international relations among states were not equal, because of the effect of non-renounceable “colonial power” suggestions.\(^{47}\) It was a society where many subjects were under the colonial protected nations systems, or they were formally independent, but substantially suffering the consequences of unequal treaties with the imperial

\(^{44}\) *Id.* At 1070.

\(^{45}\) *Id.* According to Richard Horowitz, “Unequal treaties formed the international legal mechanism for defining semi-colonial relationships.” They were unequal in several senses: “they were forced at gunpoint; they expressed the economic and political interests of [European Powers]; the key provisions, including extraterritoriality and restrictions on tariffs on foreign trade” and, they “were not reciprocal.” Richard S. Horowitz, *International Law and State: Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century*, 15 J. WORLD HIST. 455 (2004).

\(^{46}\) Craven, *supra* note 8, at 337-338.

\(^{47}\) In this way also GUSTAVO GOZZI, DIRITTI E CIVILTÀ. STORIA E FILOSOFIA DEL DIRITTO INTERNAZIONALE 139 (Il Mulino, Bologna (2010)).
powers. It was an “unequal” society.\textsuperscript{48} Therefore, with the logical preamble that those treaties might be the best juridical literary place to regulate and safeguard the lives of nationals in countries lacking common standards of civilization, the more civilized states, as Pillet said, transferred the old capitulations’ text into these special agreements on jurisdiction in countries where institutions were “inferior” or “different” from the civilization of most European and American States.\textsuperscript{49} These ideas were reflected, in particular, in a series of agreements of an overtly non-reciprocal nature between the Great Powers and the “less civilized” Ottoman Empire. Confirmed as a state in an “Oriental sense,”\textsuperscript{50} it was not allowed to participate in the European Concert and to share a common juridical conscience, but thanks to private treaties it could dialogue with Western Powers.\textsuperscript{51} Where there was no common language, there was still the language of the strongest state, \textit{i.e.}, the language of its policy, economy and moral obligations.\textsuperscript{52} Transferring the capitulations’ text into these treaties, \textit{status quo} did not change and all the old conceded immunities, now guaranteed by enforceability of bilateralism, ended in the exception. Although capitulations were, as concession acts of the sultan’s liberality, always potentially revocable and, for this reason, uncovered,\textsuperscript{53} the system of agreement by unequal treaties

\begin{itemize}
\item \textsuperscript{48} Onuma Yasuaki, \textit{When was the Law of International Society Born?--An Inquiry of the History of International Law from an Intercivilizational Perspective}, 2 J. Hist. Int’l L. 64 (2000).
\item \textsuperscript{49} Detter, supra note 43, at 1075-1076.
\item \textsuperscript{50} AUGUST WILHELM HEFFTER, \textit{LE DROIT INTERNATIONAL DE L’EUROPE}, (fr. trans., Cotillon et fils, Paris, 1873), distinguished between Oriental and European State: “l’état oriental est celui de la résignation et du servage, dans le quel le despotisme ou l’oligocratie s’est alliée à la hiérarchie.” \textit{Id.} at 38.
\item \textsuperscript{51} This in accordance with the doctrinal shared principle by which: Le droit des gens . . . il ne s’applique dans toute sa plénitude et avec l’entièr réciprocité qui est de sa nature qu’entre ces mêmes peuples [chrétiens]. Il est du reste aisé de comprendre qu’entre nations reconnaissant des dogmes religieux identiques ou sensiblement analogues, il se forme des idées communes de justice qui rendent possible la reconnaissance d’un ensemble de droits et de devoirs mutuels.
\item \textsuperscript{52} Nuzzo, supra note 28, at 1335.
\item \textsuperscript{53} Gustave Rolin-Jaequemyns, \textit{Le droit international et la phase actuelle de la Question d’Orient}, 7 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 304 (1875).
\end{itemize}
would have guaranteed the contracting parties the enforceability of its terms and, in default of their execution, the application of a penalty to the transgressor. They were treaties of commerce and establishment, the treaties by which European Powers completed their good opportunity to improve the mechanism.

Related to the Ottoman Empire, the different way of Westerners to stuff the category of “sovereignty” with fluid contents clearly supplied a concrete need: their consciousness to work with something different persisted and legitimated the choice of suspension of a legal international order, to guarantee the best condition for foreigners residing or traveling in a territory which was outside the borders of the European juridical space.

V. OTTOMAN EMPIRE:
THE ELUSIVE SOVEREIGNTY AND THE GREAT EXPECTATIONS

Turan Kayaoğlu, in a provocative way, recently wrote of the “Ottoman Empire’s elusive dream of sovereignty.”54 The perpetrated abjuration to recognize a real sovereign role of the Porte within the family of nations and an autonomous and sovereign Ottoman administration of justice in civil or criminal cases in which foreigners were involved, justified this “elusive” dimension of the dream. This was particularly difficult to support in consideration of the excellent examples of intersection and reception of foreign law with the construction of new legal systems and transformations of society that the Ottoman Empire realized in the nineteenth century.55 I allude to the period of reforms, “modernization,” and “westernization” of the Ottoman legal order (Tanzimât period), conventionally started in 1839 by the Hatt Hümayûn of Gülkhânê, the year after the signing of the unequal French and English treaties of commerce of 1838 (which confirmed foreigners’ privileges and consular jurisdiction).

Some signs of Western distrust towards Ottoman justice were already present in 1820. Before the establishment of the consular tribunals, in fact, under a “convention verbale” among the

55. Hill, supra note 24, at 288.
powers, a Mixed Judicial Committee (Commission Judiciaire Mixte) was instituted to try the civil disputes between foreigners of different nationalities. This was not a permanent committee, but it met every time a dispute arose. It was organized and convened by the Mission of the defendant which designated two judges. The third was appointed by the claimant. The decisions of the committee were not immediately enforceable, but needed the homologation of the consular tribunal of the defendant. This mixed system worked until 1864, when the Court of Appeal of Aix, in Provence, undermined its authority. The pronunciation, using the article 52 of the 1740’s Capitulation and the reason of the absence of a written text to prove the real existence of the convention of 1820, declared that there was no obligation for the French to submit to the jurisdiction of the Mixed Committee. Then, there had been a misinterpretation of article 52 and its juridical value: it did not officially organize any ambassadors’ jurisdiction to try the disputes between foreigners of different nationalities. Therefore, the Court pronunciation of 1864 gave a death blow to the Mixed Committees in favour of the consular tribunals.56

On the other hand, the reform period of the Empire could not be so seriously considered if in 1840 the commercial board of mixed traders councils was established in Turkey, and in 1848 European Powers holding capitulary privileges negotiated the formal recognition of them, composed of foreign, Muslim Ottoman, and non-Muslim Ottoman citizens.57 After the introduction of the French Commercial Code as Ottoman Code of Commerce (1850), in 1873, at the Conference of Constantinople, the Règlement d’Organisation Judiciaire was adopted and mixed tribunals found their own Charter of regulation within the Empire:58 they would be formally inaugurated in 1875, on June 28.

56. MANDELSTAM, supra note 35, at 230-231.
57. About the institution of the tribunals cf. the references in Roma, 10.07.1890, Letter of the Italian Minister of Foreign Affairs to the Ambassador in Constantinople, n. 24390: Nel 1848 la Porta istituì i Tribunali. Archivio Storico Diplomatico del Ministero degli Affari Esteri (ASDMAE), 63, b. 15 (1886-1894), f. 1, Questioni relative all’Amministrazione della giustizia in Turchia (abolizione dei tribunal commerciali provinciali). According to Hill, the establishment of the tribunals was in 1847. Hill, supra note 24, at 299.
58. Renton, supra note 17, at 215.
According to Esin Örücü, “sometimes ‘mixedness’ can be the manifestation of a transition, sometimes it can be the final outcome of the process. ‘Mixedness’ is usually a result of historical accident and accidents can lead to unexpected outcomes along unexpected paths.”59 In the Ottoman case, this vocation to a mixed solution seemed to be more the final outcome than the transition moment of the process, especially if one considers the compromise dimension of mixed tribunals’ establishment, and the transitional value of the umpteenth occurrence of the disturbed relations among European Powers and the Porte in the nineteenth century. I allude to the Congress of Paris of 1856: at the end of the Crimean War, in order to establish new conditions of peace in the Balkan area, the homonymous Treaty admitted the Ottoman Empire to participate in the advantages of European Public Law (art. 7).60 Even if functional to European aims, the situation became embarrassing, as well as unusual and humiliating, for the Porte.61 Thanks to that stipulation, the logical preamble of the unequal treaties and the theoretical framework to justify the maintenance of capitulary privileges and consular jurisdictions formally seemed to fail: it was inconceivable to preserve such a


Art. 7. Sa Majesté le roi de Sardaigne, Sa Majesté l’Empereur d’Autriche, Sa Majesté l’Empereur des Français, Sa Majesté la Reine du Royaume-Uni de la Grande Bretagne et l’Irlande, Sa Majesté le Roi de Prusse et Sa Majesté l’Empereur de toutes les Russies déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens. Leurs Majestés s’engagent, chacune de son côté, à respecter l’indépendance et l’intégrité territoriale de l’Empire Ottoman, garantissent, en commun, la stricte observation de cet engagement, et considéreront, en conséquence, tout acte de nature à y porter atteinte, comme une question d’intérêt général.

Id.

strong discriminating marker among proclaimed allies. During the Congress session of March 25, 1856, Alî Paşa, the plenipotentiary of the sultan, expressly denounced this discrepancy and asked for the abolition of capitulations and its corollaries which stood, he said, in the way of the renewal of the Ottoman state. For the first time, all the various forms of Western juridical (and judicial) immunities started to appear as an unjust ostracism by, and an unjust interference of, Western Powers. The negotiating parties showed their solidarity, but the question stayed unanswered and they did not mention the subject in the Treaty. The natural incoherence of the formally declared admission of the Ottoman Empire to the International Society started revealing itself. It was clear that article 7 could not work—as some scholar noticed—as a turning point for international relations between Europe and the Ottoman Empire. On the other hand, if we consider

62. “Even though a significant portion of the Empire was based in Europe, it cannot be said to have been of Europe.” Thomas Naff, The Ottoman Empire and the European States System, in The Expansion of International Society 143 (Hedley Bull & Adam Watson eds., Clarendon Press, Oxford, 1984).

63. According to this perspective, the Ottoman power itself, at the end of the nineteenth century, started to promote the abolition of capitulations. Engelhardt, supra note 31, at 75-76. In Paris Ali Paşa said:

Les privilèges acquis, par les capitulations, aux Européens, nuisent à leur propre sécurité et au développement de leurs transactions, en limitant l’intervention de l’administration locale ; que la juridiction, dont les agents étrangers couvrent leurs nationaux, constitue une multiplicité de gouvernements dans le gouvernement et, par conséquent, un obstacle infranchissable à toutes les améliorations.

France:

Reconnais que les capitulations répondent à une situation à laquelle le traité de paix tendra nécessairement à mettre fin, et que les privilèges, qu’elles stipulent pour les personnes, circonscrivent l’autorité de la Porte dans des limites regrettables ; qu’il y a lieu d’aviser à des tempéraments propres à tout concilier ; mais qu’il n’est pas moins important de les proportionner aux réformes que la Turquie introduit dans son administration de manière à combiner les garanties nécessaires aux étrangers avec celles qui naîtront des mesures dont la Porte poursuis l’application.

That contest was not suitable to discuss and resolve the matter of capitulations. The contribution at the congress was considered as a “voeu” to deliberate in another place, very probable in Constantinople, about capitulations. In the meantime, they remained in effect. Protocole n. XIV, Séance du 25 mars 1856, in Traité de Paix signé à Paris le 30 mars 1856, at 102-104.
literally the passage of the “admission” in the text of the Treaty, the reference was only to an “admission to the advantages,” not also to a mutual recognition and a concrete participation of the Porte to the European System.64

After Paris, the discussion on capitulations was postponed until a future date, when a multilateral conference on extraterritoriality would be held in Constantinople. The conference never took place.

The indifference of the European Powers to capitulations points to both their imperialistic aims, and their persistence in the consideration of residing Western co-nationals and non-Muslim protégés as a kind of fifth column within the Levant. All the forms of European interference with the domestic policy of the sultan appeared, instead, as a kind of “peaceful penetration” and contradictions remained.65 That admission of the Ottoman Empire into European international society appeared to be necessary but “premature,” because “it had not yet attained the standard of ‘civilization’ that would allow Europeans to accept Ottoman jurisdiction over Western foreigners.”66 For this reason capitulations might remain. So, article 7 of the Treaty of Paris could be read as a “precautionary rule” to an ambitious but young international law. Therefore, the misunderstandings remained strong due to the risk of interpretations that could read too much into the text. An example in this sense was the declaration of Keçecizade Mehmet Fuat Paşa (Grand Vizier and Minister of Foreign Affairs during the Tanzimât period) who, in 1858, noted:

La Porte élève la juste prétention de voir cesser de fait un ostracisme qui a cessé de droit depuis le congrès de Paris, et elle se croit pleinement

64.  Cf. Augusti, The Ottoman Empire at the Congress of Paris, between new Declensions and old Prejudices, in CROSSING LEGAL CULTURES 503-517 (Laura Beck Varela et al. eds., 3 Jahrbuch Junge Rechtsgeschichte, M. Meidenbauer, München, 2009).


66.  KAYAOĞLU, supra note 54, at 111-112.
authorized to protest against the maintenance of privileges which deprive her of the essential advantages of modern public law that she has been called to participate in virtue of the treaty of March 30, 1856.\footnote{67}

Scholarly scrutiny was obviously needed. At that time, the most important academic organ of international law was the \textit{Institut de droit international}. On September 10, 1887, during the plenary session, the objective was communicated: the composition of a new commission with the task of “Rechercher les réformes désirables dans les institutions judiciaires actuellement en vigueur dans le pays d’Orient.”\footnote{68} It took office in the Lausanne session of 1889. De Blumerincq, Carathéodory Efendi, Engelhardt, Féraud-Giraud, Ferguson, De Labra, De Martens, Perels, Renault, Rolin-Jaqueremyns, Torres-Campos, Traver Twiss were the jurists responsible to investigate about the matter.\footnote{69}

As long as the jurists tried to organize international law in this manner, capitulations, unequal treaties, consuls and mixed courts were confirmed and appeared the irremissible instruments in the hands of Europe to force the Ottoman Empire to its decline, depriving from the inside the last shape of its sovereignty. This happened in 1878, when all the exceptional system of immunities by capitulations and unequal treaties was once and for all expressly confirmed by another Treaty.\footnote{70} Minds would not change for

\footnote{67. \textit{ANONYMOUS}, \textit{La Turquie devant l’Europe} 23 (E. Dentu, Paris, 1858).}


\footnote{69. \textit{ANNAIRE DE L’INSTITUT DE DROIT INTERNATIONAL, DIXIÈME ANNÉE} 1888-1889 15 (1889).

\footnote{70. Art. 8, \textit{Traité signé à Berlin, le 13 juillet 1878, entre la France, l’Allemagne, l’Autriche-Hongrie, la Grande-Bretagne, l’Italie, la Russie et la Turquie}, in \textit{A. De Clercq, XII RECUEIL DES TRAITÉS DE LA FRANCE} 321 (A. Durand & Pedone-Lauriel, Paris 1880). The article was proposed at the preliminary session of June 24, 1878, by the Italian minister Luigi Corti, on
seventy years. After the memorandum of September 9, 1914, by which the Ottomans stressed to European Powers the incompatibility of extraterritoriality with territorial jurisdiction and national sovereignty (with a further enumeration of injustices and humiliations suffered), and the rejection of Austria and Germany of an Ottoman unilateral abolition of extraterritoriality, the Treaty of general relations concluded at Lausanne (August 6, 1923) designed to re-establish the consular and commercial relations of the Contracting Parties, and to regulate the conditions of the intercourse and residence of the nationals of each of them on the territory of the other “in accordance with principles of international law, and on the basis of reciprocity.” In conformity with the avowed object of the Treaty, the Contracting Parties, in art. 2, declared the capitulations concerning the régime of foreigners in Turkey, together with the economic and financial system resulting from the capitulations, “to be completely abrogated;” and in art. 30 they agreed that “from the coming into force of the new treaty the treaties formerly concluded between [Contracting Parties] and the Ottoman Empire shall absolutely and finally cease to be effective.”

At Lausanne, as Kayaoğlu has underlined, “Turkish dreams of putting Western citizens and commercial interest under its jurisdiction materialized.” In reality, this was only the start of another phase of declensions and perturbations of the Ottoman “hanging” sovereignty.

behalof the French, Italian and Austro-Hungarian plenipotentiaries. The first draft provided: “Les immunités et privilèges des sujets étrangers ainsi que la juridiction et le droit de protection consulaires, tels qu’ils ont été établis par le Capitulations et usages, resteront en pleine vigueur,” Protocole n. 5 (Séance du 24 juin 1878), in id. at 202. In the same session, Benjamin Disraeli, Lord of Beaconsfield, the British Prime Minister, stressed how inappropriate it was to spend that time in the capitulations’ discourse, still under review: “il ne faudra pas les sauvegarder si elles sont inutiles; il y aurait lieu, sans doute, de leur donner une force additionnelle dans le cas contraire; mais l’impression de S. Exc. est qu’elles sont destinées a disparaître.” In reality, capitulations were preserved, and not only as a reference in the treaty, but in the law-relations with the countries of Christendom until 1923. Protocole n. 5 (Séance du 24 juin 1878), in id. at 214.

71. TURLINGTON, supra note 23, at 326.
72. KAYAOĞLU, supra note 54, at 134.
JUDICIAL TRAINING IN TURKEY IN LIGHT OF CONSTITUTIONAL TRADITIONS AND EUROPEANIZATION

Simone Benvenuti*

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ABSTRACT

In recent years, the strengthening in Turkish constitutional culture of the rule of law and pluralism appeared as a further breach of the Kemalist ideology of “sacralization” of the State. Nevertheless, the principle of statehood, characterizing the Republic of Turkey since its creation in 1923 and now affirmed in art. 1 of the Constitution still influences Turkish institutions. With regard to judicial system, while Euro-driven reforms and the application of the conditionality principle led to its modernization, the Constitution sketches an organization based on both

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institutional dependence and corporatism. These features are reflected also in judicial education, notwithstanding the establishment of a judicial academy in 2003 and the reform of training catalogues.

Referring to legal and political science literature, as well as to documents and reports of the Council of Europe and of the European Union, this paper examines through the lens of training policies the evolution of Turkish judicial culture in relation to independence and pluralism, sketching a first hypothesis on the effectiveness of judicial training reforms in the perspective of European enlargement. Taking into account three typical elements of any judicial training system—institutions, contents and methods—it highlights the difficulties encountered in reforming judicial training. In particular, it argues that the resistance to open up the judicial elite to social pluralism in order to allow the judiciary to act as an interface with civil society is due to the peculiarities of the Turkish socio-political system (i.e. a non-homogeneous society and the need of “lay” guardians of the Republic). As a consequence, European influence is still limited to the introduction of specific training catalogues, such as human rights and EU law, but (still) do not really affect the institutional framework, nor adapts judicial training contents and methods to social and political pluralism.

I. INTRODUCTION

This paper focuses on the changes in the Turkish judicial training system in the context of the European convergence, which has also involved other major legal reforms or projects such as the harmonization packages adopted between 2002 and 2004 and the Judicial Reform Strategy Action Plan launched by the Turkish Government in 2009. The recent evolution of Turkish judicial training is strictly related to the Europeanization of the national legal system since the Helsinki European Council held in December 1999, recognizing Turkey as an EU candidate country. Thus, a joint programme between the Council of Europe and the European Union on “Modernization of the Judiciary and Penal
Reform” has been implemented from 2004 to 2007. Among its specific objectives, the programme included the “Training of judicial staff strengthened according to European standards and practices.” Furthermore, Turkish judges and prosecutors participated in specific programmes aimed at providing training in sensitive areas. In this paper, I investigate the relation between changes in judicial training and the judicial culture, arguing that the Turkish-European convergence in the field of judicial training is generating changes in specific areas of legal knowledge and allowing a transnational diffusion of rules, but does not deeply affect the judicial mentality nor involve the contaminations of judicial cultures.

For this purpose, I will briefly outline some distinctive features of the Turkish judiciary, and then analyze closer the judicial training system. As a preliminary remark, it is necessary to stress that I limit my discussion to the ordinary courts and judges, without considering administrative courts, military courts and the Constitutional Court. However, these different judicial branches are partly interconnected and are characterized by a partially common training.

II. DISTINCTIVE FEATURES OF THE TURKISH JUDICIARY

The Turkish constitutional system is founded on Kemalism, as ideology marked by the unity of the State. As a consequence, Turkish constitutionalism is rooted in the (partial) opposition between government (hükümet) and State (devlet), that is between institutions endowed with representative legitimization—Grand National Assembly in primis—and State structures and elites—


2. Judicial culture is intended here as legal and political culture of judges and prosecutors. I refer to the definition given by Tamara Capeta of legal culture as “the prevailing opinion in a society on the purpose of the law and the role of different institutions within the legal order” in relation to judges and prosecutors. Tamara Capeta, COURTS AND LEGAL CULTURE AND EU ENLARGEMENT, 1 CROATIAN Y.B. OF EUR. L. AND POL’Y 10 (University of Zagreb, 2005). Political culture is the general political principles to which judges refer as well as the opinion on the relations between political institutions.
among which the judicial body and mainly its hierarchy have a relevant place—led by the military and playing the role of “guardians” of the Republic. Three distinctive features of the Turkish judiciary are strictly connected with the inclusion of the judiciary among the State elites. The first is the centrality of the judiciary within the legal and the constitutional system (i). The second is its political insulation and corporatism (ii). The third, which has a substantive character, pertains to the specific legal and political cultures marking the judiciary (iii). On the basis of these three features, the Turkish politico-legal system outlines a “strong” and highly hierarchical judiciary, as a result of an historical hybridism blending a traditionally relevant judicial role in the legal and the constitutional system and a French-derived judicial organization, characterized by hierarchy and corporatism. In this framework, “statist” ideology is a crucial factor in shaping the Turkish judiciary.

A. Centrality of the Judiciary

The importance of the Turkish judiciary, which is the result of a gradual evolution and, in a measure, of a certain “casualness” on which any legal system is often grounded, can be pointed out from different perspectives. With regard to the legal tradition, the Turkish legal system stems from Western continental legal systems founded on the predominance of statutory law and codification, since the adoption of the Swiss civil code and the Italian criminal code, while in the administrative field the French influence has prevailed;³ in this context, the hierarchy of the sources of law lies in the civil law tradition. However, the Turkish civil code includes an “important revolutionary principle,” drawn from the Swiss civil code, which expressly authorizes the judge to act as a law-maker when any interpretative method is ineffective.⁴ On this basis, Turkish judges expressed a certain judicial activism, complying with the model of the “interstitial legislator,” where judicial

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⁴. Id.
activity does not differ qualitatively from that of the legislator.\footnote{5}
Secondly, the Turkish legal system accepts exceptionally the principle of \textit{stare decisis}, binding lower courts as well as each single division of the Supreme Court of Appeals, whereas the decision is taken by the General Assembly of the Court.\footnote{6}

From a constitutional point of view, the centrality of the judiciary is rooted in the Constitution of 1961 and then renewed to some extent by the Constitution of 1982. While the first establishes the principle of the rule of law, formally considering the judiciary as a guardian of the Republic, the second assigns the judiciary an active role, aimed at regulating “the political arena and [at] facilitat[ing] the transformation of the society through state action.”\footnote{7} This particular position of the judiciary, which is typical in authoritarian military regimes,\footnote{8} can be also explained through the will of “political elites whose hegemonic interests are threatened by popular politicians to delegate some of their power to constitutionally empowered judicial institutions in order to preserve their privileges.”\footnote{9} However, since 1982, this position is closely linked with the will of the military elite to carry out a programme of transformation of society, and the proper role of the judiciary is “not to oppose the executive but to support it in the performance of its constitutional duties.”\footnote{10}

\footnote{5}JOHN BELL, \textsc{Policy Arguments in Judicial Decisions} 17 (Oxford University Press, 1983). Meaningfully, the Constitution of 1961, which introduces the incidental review, also allows the courts to directly interpret the Constitution in the absence of a decision of the Constitutional court within three months from its submission, \textsc{Constitution of the Turkish Republic} Art. 151. The 1982 Constitution bans this practice, establishing that the lower courts have to decide in conformity with the existing interpretation.

\footnote{6}See supra text accompanying note 3.


\footnote{10}Shambayati & Kirdiş, \textit{supra} note 7, at 775.
At this stage the issue of the specific legal and political culture of Turkish judges arises. However, I want first to briefly point out the second distinctive feature—or bulk of features—consisting of the political insulation, corporatism and “hierarchization” of the judiciary. Indeed, insulation and corporatism are the core of the notion of the independence of courts in Turkish constitutionalism.

Insulation is first of all declined in terms of neutralization of the judicial function, which permeates several constitutional provisions: as examples, I can recall the prohibition for judges and prosecutors of becoming members of political parties (art. 68, fifth paragraph); the conformity of the judicial activity to the Constitution and the law (art. 138, first paragraph); the prohibition of any direct or indirect influence on the exercise of the judicial function (art. 138, second and third paragraphs); the possibility of conducting all or part of the hearings in closed session “in cases where absolutely required for reasons of public morality or public security” (art. 141, first paragraph); and the election of the members of the Supreme Court of Appeals by secret ballot (art. 154, second paragraph). On the other hand, corporatism and “hierarchization” shape the institutional organization and the status of judges and prosecutors, which is built on the French-derived bureaucratic organization.

The connection with the extrajudicial—political—sphere is realized through the President of the Republic and the Ministry of Justice, while the recently adopted constitutional reform of the Supreme Council of Judges and Prosecutors (HSYK), which encountered the opposition of the higher judges, has broadened the links with external institutions. Therefore, the former appoints the

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11. Meaningfully, the Turkish legal system does not envisage the jury, as a means to “introduce” society within the judicial system, and has excluded until recent times the possibility for judges and prosecutors to create judicial associations.

12. CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (Cheryl A. Thomas ed., Oxford University Press, 2002). The Turkish judicial organization is based on four different ranks, while the career processes are broadly determined by magistrates’ superiors.
Chief Public Prosecutor and the Deputy Chief Public Prosecutor among the members of the Supreme Court of Appeals (art. 154, first paragraph); the Ministry of Justice, to which judges and public prosecutors are attached “where their administrative functions are concerned” (art. 140, sixth paragraph), authorizes inquiries and investigations by judiciary inspectors or senior judges or prosecutors (art. 144) and presides over the Supreme Council of Judges and Prosecutors (art. 159, second paragraph).

C. Judicial Culture

The third feature is the legal and political cultures of Turkish judges, bringing up three points. The first relates to the guardianship role carried on by the judiciary as a part of a group of elites and to the above-mentioned importance of the judiciary within the Constitution of 1961 and 1982. These characteristics are linked to the safeguard (either active or passive) of the integrity of the Kemalist Republic against any religious, ethnic or social enemy. In this regard, it is common to speak in terms of “strategic alliance between the judiciary and the military,” while some authors consider that “the case of Turkey offers a fascinating study of a judiciary used in the service of the executive [military] branch.” The existence of a so-called Republican Alliance including—besides the military and the judiciary—other sectors of the society and the State such as the Universities and the Republican People’s Party (CHP) is generally accepted, even though this picture is not completely sharp, as there have been

13. Before the above-mentioned reform, the President of the Republic also appointed the five members of the HSYK, on the basis of lists established by the Supreme Court of Appeals and the Council of State.

14. Other non-constitutional provisions give the Ministry of Justice an important influence on the judiciary. As an example, a ministerial commission controls the admission to the Justice Academy through an oral exam.

15. This principle “entails that a group of elites governs by reason of its unique knowledge, wisdom, and virtue.” Teczür, supra note 9, at 307.

16. Id. at 309.


divergences to some extent between the military and the judiciary during the 1960’s and 70’s.  

The second point is the specific “statist” ideology of the judiciary, as can be inferred both from the jurisprudence of the last decade in some sensitive areas, such as freedom of expression and freedom of association or in cases involving members of the military, and from the surveys conducted on judicial culture. The specific “statist” ideology of the judiciary, as can be inferred both from the jurisprudence of the last decade in some sensitive areas, such as freedom of expression and freedom of association or in cases involving members of the military, and from the surveys conducted on judicial culture.  

Case law analysis and studies on judicial culture show that judicial ideology is grounded on the defense of state interests (secularism, integrity of the state, etc.), rather than on the inclusion of social and political pluralism. Actually, a certain opening-up can be found in courts’ decisions relating to human rights, showing a fracture between sections of the lower judiciary and the high judiciary. In this regard, the Şemdinli case is exemplar. Nevertheless, this opening-up does not change the general tendencies, and it has been further observed that “the nature of

19. Shambayati & Kirdis, supra note 7, at 773.
20. Daniella Kuzmanovic, Finally Insights into the Judicial Culture in Turkey, available at http://cuminet.blogs.ku.dk (Last visited October 24, 2011) (referring to two in-depth studies published in May 2009 by the Turkish Economic and Social Studies Foundation (TESEV)).
21. Tezcür holds that:
   this [jurisprudence] is rather a collective expression of professional commitments and ethics of the judges and prosecutors. Since the 1980s, the state security forces executed people under the pretext of war on terror and were acquitted in the courts. This generated a trauma within the judiciary. Now the judges are claiming, ‘Do not execute people on behalf of the state and demand our complicity. This time, we will not comply.’
   Tezcür, supra note 9, at 328.
22. I refer to the bombing of a Kurdish bookshop in November 2005 by noncommissioned officers of the army and an ex-PKK militant working for the army, who were carrying out one of their “routine” counterinsurgency operations. The accused were convicted by the Criminal Court of Van, but the Supreme Court of Appeals revoked the verdict and transferred the case to a military court. Id. at 318.
23. In 2005, the European Commission observed: There are signs that the judiciary is increasingly integrating the new provisions. Several court judgments have been issued suggesting a positive development in areas such as freedom of expression, freedom of religion, and the fight against torture and ill-treatment and honour crimes. This trend also applies to the decisions of the Council of State. On the other hand, courts have issued judgments in the opposite direction in the area of freedom of expression, including against journalists.
the alliance between the TSK [Army] and the higher courts became more pronounced after the Justice and Development Party . . . came to power in 2002."

Thirdly, consistently with the adherence of Turkish judge to the model of the interstitial legislator, judicial discretion tends to be very broad in order to implement the Kemalist principles, thanks also to constitutional and legal provisions. The broad attitude of the Constitutional Court in defining, for example in relation to the Kurdish issue, the boundaries between what is cultural (i.e. nonpolitical) and what is political can be extended to

European Comm’n, Turkey 2005 Progress Report 17, Sept. 11, 2005, available at http://www.unhcr.org/refworld/docid/43956b6d4.html (Last visited November 24, 2011). In an advisory report on the functioning of Turkish judicial system, it has been noted that, “of course, it is one thing for judges and public prosecutors to say that they apply the ECHR in their decisions and for them to cite a selection of their judgments by way of example but that does not necessarily reflect the general situation or mean that the predominant mentality of the judiciary has changed.” European Comm’n, The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit 132, July 1119, 2004 (prepared by Paul Richmond & Kjell Björnberg); see also European Comm’n, The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit, Sept. 29–Oct. 10, 2003 (prepared by Paul Richmond & Kjell Björnberg).

24. Tezcür, supra note 9, at 309 (observing that changes in lower court’s jurisprudence can be the result of the influence of a plurality of actors—government, public opinion, and civil organizations—rather than of a more supportive attitude towards human rights).

25. Even if the 2001 constitutional changes limited the grounds of admissibility of the limitation of fundamental rights and freedoms, by eliminating a series of general clauses included in article 13 (“public order,” “general peace,” “public interest,” “public morality,” etc.), and introduced the principle of proportionality, such clauses reappeared in other articles concerning specific rights and freedoms (for example, art. 22 on freedom of communication) and judges have the last word in evaluating proportionality.

26. Shambayati & Kirdiş, supra note 7, at 776. It is worth noting that even judges and prosecutors who question the traditional pro-military predominance use the same political arguments. Thus, in relation to the Şemdinli incident, the prosecutor, indicting the trio who bombed the bookstore on charges of disrupting the unity of the state and undermining the integrity of the country (Article 302 of the Turkish Penal Code), made reference to political arguments, such as the fact that “the employment of illegal means in the war on terror undercut public confidence in the state and contributed to the goals of the PKK by undermining state authority, creating disorder, and crystallizing divisive ethnic identities,” or that, considering the conflict between elected politicians and appointed bureaucrats, “the elements in the TSK pursued a deliberate ‘strategy of tension’ to preserve their prerogatives and block the reformist agenda of the AKP government.” It has been observed that this public
ordinary courts. In this regard, the example of article 301 of the new Penal Code introduced in 2005 and successively modified in 2008 is meaningful.\textsuperscript{27} Despite a considerable decrease in prosecutor “had good connections with the government.” Tezcür, \textit{supra} note 9, at 320.

\textsuperscript{27} The modified text of the Penal Code reads:

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be sentenced a penalty of imprisonment for a term of six months to three years. 2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organizations, shall be sentenced to a penalty of imprisonment for a term of six months to two years. 3. Where denigrating of Turkishness is committed by a Turkish citizen in another country, the penalty to be imposed shall be increased by one third. 4. Expressions of thought intended to criticize shall not constitute a crime.” The last paragraph is the most relevant innovation of the reform. According to Algan, “this statement had also been drafted to bring to law enforcement personnel’s attention that ‘denigration’ should be demarcated from free expression.” Seen from this angle, it was an open warning directed to the public attorneys and to the judges.

Büllent Algan, \textit{The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey}, 9 GER. L. REV 2081, 2241 (2008). Further on, the word “\textit{asağılamak}” (to denigrate) replaces other terms meaning “to insult” (\textit{tahkir}) and “to deride” (\textit{tezyif}), used in the former version of article 159. For some authors, the old terms are more precise. The article has been modified again in 2008 in order to bring it in line with European standards:

Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State 1. A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced a penalty of imprisonment for a term of six months and two years. 2. A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph. 3. Expressions of thought intended to criticize shall not constitute a crime. 4. The prosecution under this article shall be subject to the approval of the Minister of Justice.

The introduction of the last paragraph is explained by the will to discourage any arbitrary use of the article by prosecutors. \textit{Id.} at 2238.

In the 2005 Regular Progress Report, the European Commission stated that: the abovementioned Article 301 cases raise serious concerns about the capacity of certain judges and prosecutors to make decisions in accordance with Article 10 ECHR and the relevant case law of the ECtHR. If the code continues to be interpreted in a restrictive manner, then it may need to be
indictments or convictions based on this article,\textsuperscript{28} which has been often used “as a political weapon of the judiciary against freedom of expression”\textsuperscript{29} thanks to the extremely general character of its provisions, judges and prosecutors showed a certain degree of resistance to normative changes through making reference to other unchanged provisions;\textsuperscript{30} in some cases they even continued to behave as if the provisions were unchanged. Thus, in 2006 the General Assemblies of the Civil and Criminal Divisions of the Supreme Court of Appeals established highly restrictive jurisprudence on article 301.\textsuperscript{31} This decision highlighted the autonomy of the judiciary with respect to the legislative branch.

In conclusion, despite the breaches in their jurisprudence, courts—and the Supreme Court \textit{in primis}—hold a strongly conservative attitude in the most sensitive political cases, and judges and prosecutors still have broad discretionary power to limit fundamental rights and freedoms, while often using policy arguments in their decisions.\textsuperscript{32}

amended in order to safeguard freedom of expression in Turkey. In this context court proceedings based on Article 301 will be closely monitored.


\textit{Id.} at 17.

\textit{Algan supra} note 27, at 2240, n.17.


\textit{As an example, in October 2005 the Council of State rendered a decision sentencing a teacher wearing the headscarf on the way from home to}
III. JUDICIAL TRAINING

The conservative attitude of judges and prosecutors and the peculiarity of their legal reasoning questions the characteristics of judicial training, which plays an essential role in knowledge, practices and behavior transmission and socialization. As the judicial culture raises the issue of the proper implementation of the recent Euro-driven reforms, the European Commission has underlined the

[i]mportance [of] sustained efforts . . . with respect to training judges [and] prosecutors,” as well as the fact that judges and prosecutors “are reminded by the responsible authorities about their duties and obligations to respect the relevant provisions stemming from International and European conventions in the area of human rights and fundamental freedoms, as required under Article 90 of the Turkish Constitution.33

The Turkish judicial training system falls within the typical continental model, hinging at the same time, at least since 1982, on

school, while the law prohibited wearing headscarf only in public places (in this case, the school). Hootan Shambayati, Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 286, 297 (Tom Ginsburg & Tamir Moustafa eds., Cambridge University Press, 2008).


International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

the above-mentioned “civilizing mission” of the judiciary. Therefore, the judicial training system resulted in a hybridism between the French (bureaucratic) idea of the judge as a “law technician” and the specifically Turkish tradition of the judge as “ideology guardian.” This system, allowing internal hierarchical and non-dialogical reproduction-transmission of knowledge and connection with the executive, was consistent with the “top-down attempt to enforce the ideas . . . and to inculcate the resulting cultural values and norms, that the military regime believed should direct state institutions as well as the individual lives of citizens.”34

At the same time, such a hierarchical training system was an instrument to indirectly control the lower courts, because, as has been observed, “while the military may have strong informal influence over the high judiciary, the military’s ability to control the behavior of the lower court judges cannot be assumed.”35 It seems that the even consistent changes in the Turkish judicial training system have not radically modified this picture. This is clear if we look at the different elements constituting the notion of “judicial training system,” i.e. the structures making up the training process (i) and the training contents and methods (ii).

A. Justice Academy

Before the creation in 1987 of a School for Candidate Judges and Public Prosecutors under the control of the Minister of Justice, the training process was essentially managed on the one hand by the academic institutions,36 on the other by the judiciary itself. In this framework, courts constituted the main agents of

34. “The goal was to create a Liberal Turkish state and society along a French historical model of Liberalism.” Patricia J. Woods & Lisa Hilbink, Comparative Sources of Judicial Empowerment: Ideas and Interests, 62 POL. RES. Q. 745, 748 (2009).
35. Tezcür, supra note 9, at 311. It is worth noting that in France the creation of a judicial school after the Second World War was supported by lower judges and the Union fédérale de la magistrature (UFM), while the older judges “optaient plutôt pour la simple reproduction sans école et, plus globalement, les magistrats placés en haut de la hiérarchie judiciaire, à la Cour de cassation, en tenaient pour le statu quo.” JEAN-PIERRE ROYER, HISTOIRE DE LA JUSTICE EN FRANCE, 876 (3d ed., Presses Universitaires de France, 2001).
36. These are under the supervision of the military through the Higher Education Board (Yükseköğretim Kurulu, YÖK).
socialization. The creation of the School during the liberal period of Turgut Özal slightly weakened the internal influence, because the training catalogues were under the control of the Education Department of the Ministry of Justice and the School as a whole was subordinated to the Ministry of Justice. Nevertheless, judges and prosecutors undertook two-thirds of the two-year period of vocational training in general courts and in the Supreme Court of Appeals (or the Council of State), which, therefore, still determined the form of the training.

The creation of the Justice Academy in 2003—in view of the gradual compliance of the Turkish legal system to the European standards—did not bring about major substantial changes, apart from opting for a multi-professional training institution. On the one hand, dependence from the Ministry of justice has been confirmed, notwithstanding the mixed composition of the General Assembly of the Academy (which somehow minimizes the presence of representatives of the judiciary). This entailed some criticism by the highest

37. The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit, supra note 33, at 44.

38. The Academy is also in charge of the training of administrative and military judges, lawyers, notaries. Regarding judges and prosecutors, the initial training path varies depending on the judicial career (ordinary, administrative, military).

39. The President of the Justice Academy is appointed by the Ministry of Justice from among three candidates proposed by the Board of Directors. The Board of Directors consists of a President, the General Director for Personnel from the Ministry of Justice and five members elected by the General Assembly. The General Assembly is composed of 27 members, eleven of whom depend on the executive power. Of the remainder, five are members of the judiciary, five are academics from the universities, four are representatives of the Academy staff and two represent the other legal professions. In addition, three members appointed by the Ministry of Justice constitute the Board of Auditors. The Presidency of the Centre for the Training of Candidate Judges and Public Prosecutors, which is incorporated within the Academy once established, are appointed by the Ministry of Justice on proposal of the President of the Academy who, in turn, is appointed by the Ministry. See, The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit, supra note 33, at 45. The Ministry of Justice also influences recruitment. Graduates seeking entry to the judicial profession as either judges or prosecutors first take a written examination administered by the School Selection and Placement Centre, which administers all examinations for entry to higher education institutes in Turkey. Candidates who pass the written examination are interviewed by a panel composed of representatives of the Ministry of Justice, and successful candidates are admitted to the Judicial Academy for two years of
representatives of the judiciary against the law founding the Academy, as well as by important members of the Union of Turkish Bar Associations and of the Istanbul Bar Association. On the other hand, two-thirds of the training period continued to be held within the courts, including the Supreme Court of Appeals.

Therefore, notwithstanding the existence of an institution external to the judiciary, the current system reiterates forms of internal hierarchical dependence and knowledge reproduction. On the contrary, Turkey did not accept the suggestion of extending—following the practice in the French training system—practical experience to extrajudicial institutions, such as bar associations or enterprises, as measures allowing the opening-up of the judiciary towards the civil society. In the same sense, the suggestion rising from the Council of Europe to include representatives of other legal professions and members of civil society in the teaching staff, which is now composed mainly of academicians and members of the higher courts, is not followed. In conclusion, referring to the Justice Academy as an autonomous institution—as the Turkish training. The oral examination enables the Ministry of Justice to exercise considerable influence over the recruitment of candidate judges and prosecutors.

Id. at 19.

40. Id. at 27.

41. The training period for future ordinary judges lasts two years and includes two main phases. In the first, candidates follow a four-month preparatory training programme within the Academy and an eight-month stage within the so-called internship courts or prosecutor offices or ministerial departments. The second phase is characterized by a specific training (judge/prosecutor), also including a four-month training programme and an eight-month stage within different courts (including the Supreme Court of Appeals).

42. HAROLD ÉPINEUSE, ÉVALUATION DE LA FORMATION DES MAGISTRATS EN FRANCE ET EN EUROPE. BILAN ET PERSPECTIVES 20 (Institut des hautes études sur la justice, 2008).

43. CoE Lisbon Network, Questionnaire "A" on the structural and functional features of training institutions of judges and prosecutors. Turkey, available at www.coe.int/t/dghl/cooperation/lisbonnetwork/questionnaires/Turkey-reply-A.pdf (Last visited December 13, 2011). Furthermore, faced with the necessity of integrating the judicial body in order to fulfill the many vacant posts, a law allowing for practicing lawyers to become judges or prosecutors was rejected. The many vacant posts have been filled every year through standard recruitment procedures, The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit, supra note 33, at 58.
Minister of Justice does—without taking into account the reality of the different internal and external influences on the training process could be misleading.

B. Training Contents and Methods

Concerning training contents and methods, three preliminary observations have to be made pertaining to the general situation of legal education in Turkey. The first is the lack of satisfactory legal education within universities, which has been highlighted by different reports as well as by judges themselves, and the persistence of outdated teaching methods in initial training. The second is that training contents and methods owe much to the Roman law tradition, where the center of interest is not the student, but the law, and legal education aims at presenting a coherent system covered by general political principles which will enable the judge to understand and apply the law. This is common to other systems, like the Italian system, where, starting with university studies, teaching is essentially technical and theoretical and law and politics are seen as two completely distinct areas. The third is that education and training are ideologically-oriented. Indeed, the military kept always in mind the importance of

44. See European Comm’n for the Efficiency of Justice, Scheme for Evaluating Judicial Systems 2007 (March 9, 2008) (prepared by Mert Harun & Turker Gökçen).
45. As the former President of the Supreme Court of Appeals stated, one of the most important conditions of improving the quality and reducing errors is to employ well-educated and competent jurists who are able to make sound interpretations and correct conclusions. Unfortunately, the ever-increasing Faculties of Law, which are only so in name, are rapidly corrupting law education. Unless radical measures are taken, this corruption will increase. Professional ethics and the objectivity of judges are only possible through quality education.
46. This applies also to the legal education in Law faculties. See Elliot E. Cheatham, Legal Education in Turkey: Some Thoughts on Education for Foreign Students, 2 J. LEGAL ED. 21, 23 (1949).
47. Shambayati, supra note 32, at 286.
training and, to mention some examples, it organized “special briefings for judges and prosecutors in 1997 to ensure that they shared the priorities of the TSK [the military] in its fight against the ‘internal enemies’ (i.e. Islamic political actors),” while law school curricula included until recently a course on the history and purposes of the revolutionary reforms in the fourth year. Yet, one could refer to the narrow notion of impartiality of judges that was outlined on occasion of the opening ceremony of the Justice Academy’s 2007-2008 academic year by the Chief Justice of the Supreme Court of Appeals, for whom judges must be partial to protect and sustain the Republic.

Avoiding any review of the courses held at the Justice Academy, I would like to point out one essential facet of the current situation, questioning if recent reforms have brought (or have the potential to bring) any change in Turkish judicial culture. I think the response should be twofold. It is unquestionable that the Ministry of Justice has suitably updated training catalogues in more sensitive areas in accordance with the convergence with European standards. The update concerned mainly EU law and human rights through ECHR provisions and ECtHR case law, consisting also in specific programmes aimed at training judges and public prosecutors as trainers. The overall impact of these

48. As highlighted by the creation in 1982 of the Higher Education Board and the statement that “it is natural that developments pertaining to the national education system, which is of vital importance for Turkey, are followed by the General Staff.” Id. at 289.

49. Tezcür, supra note 9, at 308. The briefing routine procedure involved also other component parts of the state and social structures, HAMİT BOZARSLAN, HISTOIRE DE LA TURQUIE CONTEMPORAINE 88 (La Découverte, 2006).

50. Cheatham, supra note 46, at 22.

51. Chief Justice of the Supreme Court of Appeals stated

The main component of judgeship is impartiality. However, you will be partial in your decisions to protect and sustain the Republic of Turkey. If we are here today, it is because of the rights secured by our Republic. You should, and have to, know that the Republic form of government is the most appropriate regime suitable for human dignity and honor. You will be partial to claiming ownership of a democratic and secular system and the rule of law; you will be partial to owning our crescent and star flag, and to raising the flag even higher. You do not have the luxury of being impartial to these issues.

measures was deemed largely satisfactory by several lawyers’ associations, and it is also indirectly confirmed by some analysis of the courts’ jurisprudence. Certain attention was given to judicial ethics in relation to corruption phenomena, and foreign languages, although some concerns have been expressed on the quality and the extension of the relative courses. Specific ongoing training courses focused on law reforms, falling within ordinary legal adjournment. Moreover, several judges participated in exchange programmes, allowing the potential opening of the judicial body. In this regard, European convergence has then given noticeable results.

Nevertheless, there is ground for more critical remarks in relation to other disciplinary areas. The training catalogues for the pre-service training are essentially oriented towards traditional law subjects and technical issues, with scarce or no attention to social sciences and comparative law as well as on subjects and learning methods aimed at developing a critical attitude in the judge, allowing the introjection of a culture of independence and pluralism and the making of what has been called a “thinking judge,” able to participate in European constitutional discourse.53 In a word, no attention is given to what the European Judicial Training Network calls “Society Issues,” a catalogue including courses such as “The judge’s role and self-image today,” “The judge as arbiter of value,” “On the independence of the judiciary— A European comparison,” and so on. Therefore, a better balance should be established between strictly technical issues and societal, constitutional and comparative subjects—more in general, what is

53. Capeta, supra note 2, at 53, for which constitutional discourse “requires not only mechanical application of the principles learned, but also a critical assessment of them, either in relation to the internal legal order or as part of the European legal order.” Within the pre-service curriculum for ordinary judges there are six training catalogues. Two training catalogues concerns respectively “Professional Culture” and “General Culture and Personal Development;” the first one includes essentially technical subjects, while the second, which has a residual character, includes essentially courses related to personal abilities rather than general culture. A further catalogue focus on “Courses and Hobbies,” which includes, among others, courses on “Applied Turkish music,” “Folkloric dances,” “Traditional Turkish handicrafts” and “Foreign language.”
indicated as “complex curricula.” 54 Further on, one could question the inclusion in Turkish training catalogues of subjects concerning Turkish national culture and the still scarce attention to foreign languages and other cultures.

Lastly, training methods also reflect a traditional approach, similar to legal university education, where teaching methods are based on “lecturer centered system-conferencing courses” of a theoretical character, consisting mainly in memorizing legal principles and rules. 55 Thus, not much attention is yet paid to suggestions coming from the European Commission on the need to integrate lectures and seminars with “methods allowing broader dissemination of the results of training.” 56 While this problem is more serious concerning university legal education rather than judicial vocational training, nonetheless it still exists.

In conclusion, we can look at the French judicial training system, which is generally used as a reference model for candidate countries, in particular in relation to training catalogues. The French system responds to three main objectives: acquisition of technical competence; understanding the social and economic milieu in which judges operate; and developing critical reflection

54. “The types of judicial education programmes that fall under “complex curricula” include those that suggest judges explore different dimensions to their role or explore their attitudes, values and beliefs. Judges’ learning style preferences generally mean these types of courses are more difficult to implement. Most judges’ learning preferences are for concise, logical analysis, abstract ideas, technical tasks and practical solutions. In contrast, complex curricula programmes (such as those designed to explore diversity or the social and cultural context to litigation) often do not fit these learning preferences,” Daniela Piana, Cheryl Thomas, Harold Epineuse, Carlo Guarneri, Judicial Training & Education Assessment Tool. Meeting the Changing Training Needs of Judges in Europe, JUDICIAL STUDIES ALLIANCE 14 (2007).


56. Communication from the Commission to the European Parliament and the Council on judicial training in the European Union, COM/2006/0356 final, section 25, where it is added: “Moreover, the introduction of a multidisciplinary element in compliance with national traditions should facilitate exchanges of views and experience between, for example, judges, prosecutors, lawyers and police officers.”
on the judicial function. As I have briefly pointed out, the improvement of the Turkish judicial training system is essentially oriented towards the first objective.

IV. CONCLUSION

As we have seen, changes in the Turkish judicial training system do not achieve a shift from a traditionally bureaucratic conception of judicial education to a pluralist one, where the “law is defined not by the letter of the law, but by its meaning,” drawing from interaction between multiple actors. European influence is limited to the introduction of training catalogues connected with contingent needs, such as human rights and EU law, but (still) does not affect the institutional framework, nor does it adapt judicial training contents and methods to social and political pluralism.

This situation has tangible effects on judicial culture. The above-mentioned analysis of courts’ jurisprudence and surveys of judicial ideology seem to confirm a certain resistance in opening-up the judicial elite to social pluralism in order to allow the judiciary to act as an interface with civil society, due to the peculiarities of the Turkish socio-political system. The result is a


58. Sinisa Rodin, Discourse and Authority in European and Post-Communist Legal Culture, 1 CROATIAN YEARBOOK OF EUROPEAN L. AND POL’Y 3 (University of Zagreb, 2005).

59. An indirect confirmation comes from the observation that Turkey is not an active player in international networks permitting broader socialization and the opening-up of the judiciary. B. van Delden, Effectiveness of the Judicial System. Report of a peer based assessment mission to Turkey, November 17-21, 2008 (European Commission, 2008). This seems to confirm what has been observed by Daniela Piana in relation to Central and Eastern European recent accession Countries, i.e. that the adoption of any judicial training reform is highly dependent from the national actors which are involved. D. Piana, Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU, FRENCH POL. 5, 33-65 (2007). In fact, judicial training reforms in Turkey were essentially conducted by the Government through its Ministry of Justice and the High Judiciary, with scarce participation of lower court judges and judicial association, whose constitution has been authorized only in 2006.
judge who is still separate from society. The issue has been recently raised by Osman Can, co-chairman of the “Judges and Prosecutors Association for Democracy and Freedom.” According to Can, the Turkish judiciary should have a mental transformation, which passes also through an appropriate consideration of training needs. Thus, he suggests that “members of the judiciary should know about comparative political history and about non-democratic movements and their implications for the world and also for Turkey.” The lack of a comprehensive training strategy aimed at effectively shaping independent judges through the ability to reason, taking into account normative and extra-normative elements, is also reflected in the type of legal argumentation used, characterized as authoritarian rather than authoritative legal discourse: thus, courts often refer to ECHR provisions or ECtHR case law simply as a mere support of their decision rather than as a reasoning instrument, excluding any constructive disagreement. In this regard, it has been observed that “Turkish courts very often pretend to consider the case law of the European Court of Human Rights, but then conclude that national laws and their interpretation

60. Interesting evidence is given by a columnist of the English language newspaper Today’s Zaman:
   Even for practical family matters, they [the judges] treated the people opposite them as just a part of problem. In the case in which I was a witness, after answering the judge’s questions, I tried to raise some points which had not occurred to him to ask and which were very important to the subject; however, he silenced me. In all three cases, instead of my own sentences, the judges asked the record keepers to write whatever they dictated on my behalf . . . I have heard several times that when candidates are chosen to be future judges, they are told they should keep their distance from ordinary people. They are asked not to go to places everybody goes—they should not carry shopping bags, and they should not bargain when they buy apples. Of course, not only are they learning some manners, they are taught that they are the defenders of the republic, especially secularism.
   Ayse Karabat, A Face Like a Court(room) Wall, in TODAY’S ZAMAN, Feb. 21, 2010.
of the present case is in full conformity with them.’’ That means a rhetorical use of ECHR provisions and ECtHR case law.

The Turkish-European convergence, which I have considered through the lens of judicial training, is then generating changes in specific areas of legal knowledge, not in judicial mentality. This observation confirms what has been noted by some authors in relation to the Centre and East European former candidate and candidate Countries, concerning the ability of judges not only to refer in their decision to European law, but also to fully participate in the “constitutional discourse.” For these authors, European convergence brings about the former, but not the latter. As a consequence, major changes in legal education are needed and, “provided this transformation does not remain merely formal, but also brings changes in the curricula, syllabuses and methods of legal education, future . . . judges will be prepared to participate in European constitutional discourse.”

Regarding training structures, the path that has been sketched through the creation of the Justice Academy consists to a certain extent of the shift from judicial influence to the ministerial influence. Rather, a settling of the internal balance of the judicial training system involving a breach of the vertical/hierarchical logic, that is typical of any bureaucratic organization, would be more suitable. This new milieu could profit from the greater reactivity to opening-up towards civil society of the lower courts.

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63. “In plain words, Turkish Courts should bring their understanding of freedom of expression in line with that of the European Court of Human Rights. Otherwise, no amendment of law will contribute to the protection of that freedom. The solution to the problem mainly depends on a change in mentality, not in the law.” B. Algan, supra note 27, at 2250.

64. Capeta, supra note 2, at 53. The task is not at all easy, by reason of the high number of judges and prosecutors—more than 9000—for a country of more than 75 million of inhabitants.
I. INTRODUCTION

Claims for personal injuries are becoming very common, especially in countries within the European Union. The amounts of claims being made are exceptionally high. Having said this, in
order to understand the basis of the Maltese Legal system, it is imperative to go through the English case decisions to discover patterns in the reasoning by which damages are awarded under the English system of tort. The starting point will be in the 1960s, when the English courts had a different approach to this issue. The paper will then move on to discuss the innovations that were subsequently introduced into the English system up to recent times, the Maltese legal system of awarding damages and a comparative study between the two legal systems. In order to do so, the author intends to elucidate the different heads of damages for personal injury, clarify the heads of damages under English law which cover similar grounds or overlap with *lucrum cessans*, and will go through each and one of them in order to come up with a definition.

II. DIFFERENT HEADS OF DAMAGES FOR PERSONAL INJURY

A tortfeasor has the duty to compensate the victim for the losses he has suffered. In tort law, the most important factor is *restitutio in integrum* and thus the attempt to put the victim in the same position as he was before the accident occurred. Of course the *restitutio in integrum* as stated by Munkman\(^1\) applies only in cases where the original position can be restored. If such is not possible, a fair compensation equivalent in money, is to be awarded for the damage sustained. In fact Lord Morris in the case *Parry v. Cleaver* stated that: “to compensate in money for pain and for physical consequences is invariably difficult . . . no other process can be devised than that of making a monetary assessment.”\(^2\)

In *Lim Poh Choo v. Camden and Islington Area Health Authority*, Lord Scarman said, “the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong.”\(^3\)

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The key issue in tort has thus always been compensation but in order to understand better such vital factor, it is necessary to explain the different heads of damages that exist under the Common Law system when dealing with personal injury.

In the case *West v. Shephard*, Lord Morris said, “in the process of assessing damages judges endeavour to take into account all the relevant changes in a claimant’s circumstances which have been caused by the tortfeasor. These are often conveniently described as ‘heads of damages.’”

Reference to these heads of damages has been made over the years by several judges. One is to note, however, that this reference is different from saying that the heads of damages are to be interpreted in a restrictive manner and as exhausting the field.

In fact, a case in point is Judge Cockburn, who in *Phillips v. London & South Western Railroad Co.*, a case which dates back to 1879, refers to some of these heads of damages. He mentions “the bodily injury sustained,” “the pain undergone,” “the effect on the health of the sufferer” and the “pecuniary loss sustained.”

Before delving further in the details of the heads of damages, it is appropriate to define ‘damages.’ Lord Blackburn in the *Livingstone v. Rawyards Coal Co.* case of 1880 defines damages as:

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

So damages are primarily considered to be the means used to put the plaintiff in the same position as if the tort has not been committed. Therefore, the end goal of the court is to reinstate the plaintiff to his previous position as much as possible. In order to do this, the court has to consider the whole case and it is thus more convenient for the judge to consider the whole case under separate heads of damages.

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The main ways of classifying damages in English Law are in terms of whether they compensate for Pecuniary and Non-Pecuniary loss and also in terms of whether they constitute General or Special damages. Thus the principal ways of categorizing damages in English law are either in terms of the pecuniary nature of the loss or the lack of such pecuniary nature or in terms of how specific or general these damages are. It should be clear, however, that these are mutually exclusive ways of classifying the same spectrum of damages. Therefore, all damages can be classified as either pecuniary or not and all damages can be classified according to whether they are general or specific.

A. Pecuniary Damages

In *Fair v. London and North Western Rly Co.*, Judge Cockburn had already referred to the distinction between pecuniary and non-pecuniary loss. He stated that when taking into consideration pecuniary loss, one is to take into account both the incapacity to earn a future improved income and also the present loss.

In the leading book *The Quantum of Damages: Personal Injury Claims*, pecuniary damages are described as being those damages which are capable of being calculated in terms of money. This category is then further divided in sub-categories listing the various types of pecuniary damages. The first sub-category which the author lists is *expenses*. So all the expenses incurred by the victim such as medical expenses, cost of fares to and from hospital, additional domestic help and the rest can all be reduced to cash and are thus pecuniary damages.

Another sub-category is that of *loss of earning or other profits*. This sub-category deals with all that loss of earning or profit which the plaintiff, has lost due to the accident from the day of the injury to the date of the trial.

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The sub-category of *handicap in the labour market* may seem quite similar to the latter sub-category but in reality, when scrutinized further, it is not. This deals with the disadvantage the plaintiff will have when compared with his colleagues in the labour market due to the injuries suffered. So, even if a person is still capable of performing his normal duties as before, he could still be disadvantaged if he is less capable of doing other kinds of jobs. As Kemp and Kemp ⁹ say, if an employer needs one of the employees to be redundant, naturally he will lay off the man least capable, hence probably that person who has been incapacitated to a certain extent. Such loss thus falls under pecuniary damages.

The fact of being disadvantaged in the labour market was given more prominence as time went by, in the case *Smith v. Manchester* ¹⁰ where the Court held that an additional award could be made for the fact that the plaintiff was in risk that between the date of the trial and the end of the working life he would have to search for another job. This award is thus granted as a compensation for the “weakening of the claimant competitive position in the open labour market.”

These awards are known as Smith v. Manchester awards. In order to be granted, the injuries suffered must be such that the consequent disability will put the plaintiff at a disadvantage with others when seeking alternative employment. Two very important factors that must subsist in order to grant this award are: (a) there must be a real or substantial risk that the claimant is in risk of losing his current employment during his working life and (b) that the claimant is at a disadvantage in obtaining alternative work as a direct consequence of the injuries suffered.

In circumstances like these, even though the loss is a pecuniary one, a mathematical calculation might not lead to justice and thus the courts award an extra sum which is calculated upon rough estimates in order to compensate for the future disadvantage which will be suffered by the claimant. An important factor to keep

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⁹. *Id.* at 8.

¹⁰. The claimant slipped and fractured an elbow. As a result, she had to remain on light duties. She was found to be at a great risk of losing her employment before retirement age. The trial judge awarded her £300 while on appeal a sum of £1,000 was awarded. *Smith v. Manchester*, [1974] K.I.R. 1.
in mind is that these awards may not be given if the plaintiff’s condition has stabilised by the time of the trial. When assessing such an award, the four factors which are taken into consideration are the net annual income of the plaintiff, the length of the remaining working life, the intensity of the risk of him being put back on the labour market, and the effect of the disability on his working capacity. Usually the courts do not award damages under this heading which amount to more than five years loss of the present net annual wage of the plaintiff.

Kemp and Kemp also include under pecuniary damages those material losses which go beyond the loss of earnings. So if a person loses his fringe benefits, he is entitled to be awarded as damages the pecuniary equivalent of those material benefits which were lost up to the date of the trial.

McGregor defines pecuniary loss as being all financial and material loss incurred by the plaintiff. He further clarifies these financial losses by giving the examples of loss of business profits or expenses of medical treatment. McGregor continues his definition by saying that such loss “is capable of being arithmetically calculated in money even though the calculation must sometimes be a rough one where there are difficulties of proof.”

Nick Parker writes that:

Pecuniary damages reimburse the expenses incurred due to the accident. For example, the injury may have resulted in the person missing work which in turn will result in a loss of earnings or profits. The injury may have also required the plaintiff to spend money prior to trial for such things as parking and mileage charges for going to see a doctor, or for prescriptions and medical costs not covered by health care.

11. HARVEY McGR EGOR, McGR EG OR ON DAMAGES 8 (Sweet and Maxwell, London 1997).
The Law Commission’s Report on Personal Injury Litigation—Assessment of Damages specifically defines pecuniary damages as, “loss in money or money’s worth, whether by parting with what one has or by not getting what one might get, except that it includes matters for which damages are available under section 4 or 5 of this act.”

Schedule 1, Part I and II, it lists all those losses which fall under pecuniary loss. Part I deals with such loss before the judgment.

1. Expenses incurred before judgment.
2. Loss of earning or profits suffered before judgment.
3. Loss of income (other than earnings or profits) suffered before judgment.
4. Matters for which damages are available under section 4 of this act.

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14. Article 4 (1) states:
   In an action for damages for personal injuries damages may be awarded in respect of a) any reasonable expenses gratuitously incurred by any other person in rendering or causing to be rendered to the injured person any necessary services, as if those expenses had been recoverable by him from the injured person; and b) the reasonable value of any necessary services gratuitously rendered to the injured person by any other person, as if their reasonable value had been so recoverable by him.

Article 5(1) states:
In an action for damages for personal injuries damages may, subject to subsection (2) below, be awarded in respect of the reasonable value of any personal services which as a result of the injuries the injured person has been or will or probably will be unable to render to a dependant, being services which the injured person used to render gratuitously to that dependant before suffering the injuries and which but for the injuries he would probably have continued to render gratuitously to him.

5(2) Subsection (1) above applies only to personal services of a kind that can ordinarily be obtained by paying a reasonable amount for them (for example services of a kind that might be rendered by a housekeeper, nurse, secretary or domestic servant whether full-time or part-time, or services involving the provision of transport.) Id.
5. The reasonable value of any services to which section 5(1) applies, being services which would probably have been rendered before judgment.
6. Pecuniary loss suffered before judgment, not falling within another paragraph of this Part of this Schedule.

Part II, then deals with future pecuniary loss.

7. Future expenses.
8. Future loss of earnings or profits.
9. Future loss of income (other than earnings or profits).
10. The reasonable value of any services to which section 5(1) of this Act applies being services which would probably have been rendered after judgment.
11. Future pecuniary loss not falling within any other paragraph of this Part of this Schedule.

Both Kemp and Kemp and the Law Commission define closely what this head of damage means but delve also into all the possible losses which fall under such head.

Having outlined the meaning of pecuniary damages, one can now move on to the other head of damage known as non-pecuniary damages.

B. Non-Pecuniary Damages

Kemp and Kemp, define non-pecuniary loss as “those losses which are impossible to assess by arithmetical calculation.” Having said this, they then proceed to sub-categorize this head of damage.\(^\text{15}\) As a first sub-category, one finds pain, suffering, and shock. The authors here explain that pain and suffering do not necessarily have the same meaning, even though the phrase “pain and suffering” has almost become a term of art.” Since for example as in the case Forrest v. Sharp\(^\text{16}\) damages may be awarded simply for the mental suffering of the victim and not for the pain. In the mentioned case, the plaintiff went through mental suffering

\(^{15}\) Kemp et al., supra note 8, at 11-13.
because he knew that his life expectancy has been significantly reduced and that he must spend the remaining days in misery.

Shock is a separate factor which must, however, still be taken into account when dealing with pain and suffering

Apart from pain and suffering, Kemp and Kemp deal also with loss of amenities of life. They classify this as a sub-category of non-pecuniary damages. For them this head includes, “Everything which reduces the plaintiff’s enjoyment of life considered apart from any material or pecuniary loss which may be attendant upon the loss of amenity.”

In the case Manley v. Rugby Portland Cement Co. Ltd., Lord Justice Birkett defined loss of amenities in this way, “the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed and will never again go upon his walking excursions—things of that kind—loss of amenities.”

So loss of amenities is anything which reduces the enjoyment of one’s life. Lord Morris and Lord Tucker state that damages under this category may not be reduced in cases where the plaintiff loses consciousness and is thus unaware of the pleasure lost.

As another sub-category of non-pecuniary damages, one finds also loss of expectation of life which is quite close to the category of loss of amenities. In cases of loss of expectation of life, damages are awarded in respect of the happiness which the plaintiff might have lost due to the fact that his life span has been reduced as a consequence of the accident. In its decision, in the case Benhan v. Gambling the court held that damages awarded under this category should be moderate.

17. Kemp et al., supra note 8, at 12.
20. An interesting point to make at this stage is that in 1971 Judge Crichton halved the award of damages under the head of “expectation of life” on the simple reason that the deceased was a habitual criminal and according to Judge Crichton the “life of a criminal is an unhappy one.” This undoubtedly is far from being fair. The fact that a person has had trouble with his criminal record does not in any way mean that he does not enjoy his life. Since life is what we make it, everyone enjoys his life in a different and separate way.
A minor sub-category is that of inconvenience and discomfort. In such case, if the plaintiff suffers incidental inconvenience or discomfort, both of which are non-pecuniary damages, he must be compensated.

As a last sub-category Kemp and Kemp introduce exemplary and aggravated damages. As admitted by them, the distinction between the two is not very clear. Exemplary damages are there to punish the defendant for outrageous or scandalous conduct. Aggravated damages, on the other hand tend to compensate the plaintiff for aggravated harm done to him, such as injury to his feelings.

The Law Commission describes non-pecuniary damages in quite a similar way as Kemp and Kemp.\textsuperscript{21} The Report in Part III states that:

Non-Pecuniary Loss means pain and suffering, loss of amenities, and any other matters not falling within Part I or Part II of this Schedule. Okrent and Buckley define non-pecuniary damages as losses (such as pain and humiliation) which have no particular objective dollar amount that can be placed on them.\textsuperscript{22} Andoh and Marsh on the other hand describe it as “pain and suffering (including mental distress), loss of amenity and the injury itself.”\textsuperscript{23}

While all the definitions revolve around the concept of pain, once again Kemp and Kemp manage to give an all rounded definition of non-pecuniary damages by going into other aspects of damages which do not strictly speaking, fall under the realm of pain but which nonetheless are still to be considered as non-pecuniary damages.

\textsuperscript{21} Kemp et al., supra note 8, at 11-13.


\textsuperscript{23} Benjamin Andoh & Stephen Marsh, Civil Remedies 140 (Dartmouth, England 1997).
C. General and Special Damages

Having dealt in quite some depth with the difference between pecuniary and non-pecuniary damages, it is essential, at this point to go into the disparities that lie between the other principal ways of classifying damages, in terms of General or Special Damages.

Law.com defines “general damages” as:

Monetary recovery (money won) in a lawsuit for injuries suffered (such as pain, suffering, inability to perform certain functions) or breach of contract for which there is *no exact dollar value which can be calculated* (emphasis added). They are distinguished from special damages, which are for specific costs, from punitive (exemplary) damages for punishment, and to set an example when malice, intent or gross negligence was a factor.\(^{24}\)

While on the other hand, “special damages” are defined as:

Damages claimed and/or awarded in a lawsuit which were out-of-pocket costs directly as the result of the breach of contract, negligence or other wrongful act by the defendant. Special damages can include medical bills, repairs and replacement of property, loss of wages and other damages which are not speculative or subjective. They are distinguished from general damages, in which there is no evidence of a specific dollar figure.\(^{25}\)

Atiyah identifies as the distinction between the two classes the fact that some damages are precisely measurable and quantifiable whilst others are not. He describes “special damages” as being those damages which are confined to out of pocket expenses incurred before the trial and to loss of earnings incurred before the


On the other hand “general damages” are “damages for loss of earnings likely to be incurred in the future, plus damages for pain and suffering, whether incurred before or after the trial, together with damages for other immeasurable, such as loss of amenities, “loss of expectation of life,” disabilities and disfigurements.”

Lord Donaldson states that general damages are made up of two elements: a subjective one being the pain and suffering and an objective one being the loss of amenity. He observes that this head incorporates both physical and psychiatric injury in respect of past, present and future loss.

Williams and Hepple say that special damage is that damage which must be specifically claimed in the statement of claim, while there is no need for one to make any specific monetary claim as regards general damage. They explain that:

Pain and suffering are not special damage because their translation into money terms is arbitrary, but if the plaintiff had his clothes ruined in the accident, and incurred hospital expenses, and loss of wages, the value of the clothes and other monetary loss up to the date of the trial would be special damage upon which he would have to put a figure.

In contrast a general damage is that damage which cannot be accurately quantifiable in money terms. In such case no exact figure needs to be claimed on the pleadings because the court makes its assessment and awards the amount of damages which it deems fit.

General damage, on the other hand, is damage not accurately quantifiable in money terms for which damages can be awarded even in the absence of any specific monetary claim in the plaintiff’s statement of claim.

27. In the foreword to the first edition of the Judicial Studies Board Guidelines.
29. Id.
Osborne goes yet into a further difference between the two heads.\textsuperscript{30} He describes general damages as “compensatory amounts which have to be assessed by the court of trial.” In contrast, “special damages are the specific amounts which represent provable actual financial loss to the claimant.”\textsuperscript{31} Like other authors, he stresses that it is only actual loss incurred between the accident and the trial that can be recovered as special damages. Actual loss which occurs after the trial, even though the amounts of expenses are precisely known, cannot be classified under the head of special damages. He in fact describes in detail what constitutes special damages in this way:

a) provable loss or earnings until trial;
b) damage to clothing, repairs to vehicles, hire of alternative transport;
c) extra travel costs occasioned by the accident, e.g., by the claimant having frequently to visit hospitals as an outpatient, or by relatives having to visit him in hospital;
d) private medical or nursing treatment.

D. Distinguishing between the Two Classifications

As one can see, English law divides compensable loss conveniently under heads of damages. The factor that determines whether a loss should be listed under one head of damage and not under another is essentially how general or special that loss is and whether it is quantifiable in monetary terms. In order for a claim to fall under the head of special damage, the loss claimed must have taken place up to the time of the trial and it must be quantifiable in monetary terms. So one can very well state that all special damages are pecuniary damages since they can be fully compensated in monetary terms.

The situation is somewhat more complex when dealing with general damages, since not all the losses that fall within this classification can be easily compensated in monetary terms. In fact

\textsuperscript{31} Id.
the only loss that can be quantified in monetary terms is loss of future earnings; this in fact is classified also as a pecuniary loss. The head of general damages includes also non-pecuniary losses such as pain and suffering and loss of amenities which undoubtedly can never be exactly quantifiable in monetary terms.

Thus even though one can state that all special damages are pecuniary damages, to state that all pecuniary damages are special damages would be incorrect, since there are certain pecuniary damages which are classified as general damages. To understand how each compensable loss is classified, one is to keep in mind that the same compensable loss is classified twice, (1) under the general or special head of damage and (2) under the pecuniary or non-pecuniary loss. By way of an example, the weakening of a plaintiff’s position in the labour market falls under the head of general damages since it is a loss which will occur after the judgment but it is also a pecuniary loss since it can be quantifiable (even if not exactly through a mathematical calculation) in monetary terms.

As Lord Donaldson said, “Paradoxical as it may seem one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering or loss of the amenities of life.”32 Whilst no two cases are ever precisely the same, justice requires that there be consistency between awards.

It is therefore also interesting now to go through the procedure as applied under the Maltese legal system when it comes to compensating personal injuries and the way damages for *lucrum cessans* are calculated.

Maltese law divides compensable damages under two headings, mainly *lucrum cessans* and *damnum emergens* so when awarding damages, the Maltese courts must clearly show which damages are being awarded for *lucrum cessans* and which are for *damnum emergens*.

*Lucrum cessans* is a civilian term derived from Roman law, where it meant ‘loss of profit’ and corresponds to the Italian “*lucro
“cessante” which indicates an economic loss. Zimmermann refers to the *Principles of European Tort Law* and describes *lucrum cessans* as damage which: “includes future loss of income, and the impairment of the victim’s earning capacity, even if such impairment is not accompanied by any actual loss of income.”

In contrast *damnum emergens* is defined as direct consequential loss due to the defendant’s action, and is therefore described as an actual loss.

### III. The Historical Development of the Maltese Civil Code Provisions

Since 1868, laws have tried to cater to the problematic issue of compensating tort damages. Section 751 of Ordinance VII of 1868 originally dealt with *damnum emergens*, whilst Section 752 dealt with *lucrum cessans* and stated:

> Il danno pero’ che dev’essere risarcito da colui il quale lo abbia dolosmente recato si estende, oltre le perdite e le spese menzionate nell’articolo precedente, al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo stato. La corte fissera per la perdita di tale guadagno, secondo le circostanze una somma non eccedente cento sterline.

The amounts of *lucrum cessans* damages which could be awarded during this period were very limited and were based on the intention of the wrong doer. It was only when damage (which apparently could have been limited to economic loss) was caused intentionally, that the judgment could compensate the victim also for future loss of earnings. Moreover, the ceiling for compensation for such damage was set at £100.

With time this law had to be amended in order to respond to new exigencies. The adjustment took quite a long time, and it was only in 1938 that the law was amended and Sections 751 and 752 were repealed. Through Ordinance No. III of 1938, which was

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34. Ordinance VII of 1868 (Malta).
promulgated and came into force on February 4, 1938, several amendments were made. Not only were damnum emergens and lucrum cessans grouped within the same article, but the £100 limit on the compensable damages for all those cases which were caused intentionally and which involved compensation of lucrum cessans was removed. It is therefore worth noting that the amount of such damages became unlimited. On the other hand, in cases where culpa was involved and the damage was not caused maliciously, the award could not be greater than £1,200. The code now linked the compensation of lost earnings directly to whether a permanent incapacity, whether total or partial, was caused.

Consequently, the law started providing compensation for lost earnings both in cases of intentional and culpable infliction of damage, whilst before it only catered to the former case.

The situation changed radically in 1962, when Ordinance XXI finally removed the upper limit on compensation that had been restricting the judges since 1868. This change was decisive in that it gave judges a very wide discretion when awarding damages for lucrum cessans. Although the law was still limited by the need to show that loss was “arising from any permanent incapacity” all the distinctions that the different laws had made between negligence and wilfulness were at last completely removed and judges were now free to decide on a particular amount notwithstanding the state of mind of the defendant when the accident was caused. It goes without saying, that this increase in the discretion of the judges brought about a certain degree of uncertainty and it was clear that there could be a significant discrepancy between damages awarded for the same disability by different judges as compensation in lucrum cessans.

Notwithstanding the fact that the provisions of the Maltese Civil Code are primarily inspired by continental law, Maltese law quantifies lucrum cessans according to a formula which adopted most of its key components from common law.

IV. LUCRUM CESSANS AND GENERAL DAMAGES

Lucrum cessans deals with the loss of earnings due to permanent disability deriving from an accident. The English category which is closest to lucrum cessans is general damages.
The latter includes damages for loss of future earnings just like *lucrum cessans* under the Maltese Law. However, this category is much wider than *lucrum cessans* since it includes other headings such as pain and suffering, loss of amenities and loss of expectation of life amongst others. Unfortunately these are not catered to under the *lucrum cessans* as applied by Maltese law.

An authoritative comparison between the heads of compensable damages under English and Maltese law was made in 1967 by the House of Lords in *Boys v. Chaplin*. In this case, the plaintiff was injured through the defendant’s negligence when his car hit the motorcycle of the former. Both the plaintiff and the defendant were British servicemen, stationed in Malta. According to the House of Lords, the difference between Maltese and English law was the fact that the Maltese system granted damages only in cases of special damages and certain future financial loss. The English system on the other hand, apart from special damages, awarded also damages for pain, suffering, loss of amenities and problematical future financial loss.

_A. Calculating the Award: The Multiplier_

It is now appropriate to move on to the way calculations are made and how the final award is arrived at. The multiplier system used by the Maltese courts is very similar but not identical to that implemented by the English courts.

Firstly the weekly wage of the victim is calculated and adjusted for inflation. This is then multiplied by fifty-two in order to obtain the annual wage. Once the wage is calculated, the result is multiplied once again, this time by the percentage of permanent disability caused by the accident. Such disability is assessed by a medical expert. In the leading judgment *Butler v Heard*, it was stated that the incapacity that must be taken into consideration is that incapacity which would have an effect on the victim’s ability

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to make profit, and not just any incapacity. The Court quoted the Italian Court of Cassation which explains this concept very clearly by saying:

Si deve effettuare non gia’ con criterio astratto su un determinato adumo teorico offerto dalla perizia, ma presumendo la misura dell’influenza dell’evento sulla consistenza patrimoniale del danneggiato, nel senso che vi e’ stato per tale fatto una diminuzione del suo patrimonio. 37

In the way calculation is made under the Maltese system, one can see the fusion between the calculation as applied by the Common Law system and the element of riduzione della capacità lavorativa as applied by continental law.

Once this calculation is completed, the result obtained is multiplied by the number of years which the Court thinks the victim would have continued to work had he not been injured. This is known as the “multiplier.”

During the late 1960s, when the Maltese courts first made reference to the way damages were calculated under the English system, the Maltese system was very similar to the English one as regards to the multiplier. In Butler vs Heard, 38 the multiplier was calculated at fifteen and later on it rarely exceeded twenty years in length, just like in the English system. However as years went by, Maltese courts started moving away from the upper limit of twenty years and stated that courts should not be bound by this limit because the population’s life expectancy had changed since the Butler case in 1967. Any ceilings created were purely subjective and based on an opinion of a particular individual. Therefore, it was decided that there should be no limit as regards to the multiplier but that this should be applied in proportion to the case in hand in order to make sure that justice is done. Notwithstanding the fact that some judges were against this increase in the multiplier, facts show that in quite a good number of cases, high multipliers started to be adopted depending on the case in hand.

37. No reference as regards to the particular judgment is made in the case.
Id.
38. Id.
B. The Rudiments of the Multiplier in Malta and in England

When it comes to calculating the multiplier, the Maltese judge has a wide discretion and can apply different multipliers depending on the circumstances of each case. There are no set of guidelines which the courts are bound to follow and the multiplier adopted is very subjective. The choice of the multiplier is at the mercy of the judge. This means, that one can be faced with a situation where different multipliers are adopted in two analogous cases, for the simple reason that the case is decided by different judges.

With the widespread use of the Ogden Tables\textsuperscript{39} (actuarial tables in England), the abovementioned discrepancies rarely occur. Thanks to these tables, it is often possible to calculate the exact multiplier which the court will apply in a particular case. Whilst in Malta each judge can base the multiplier upon different elements, in England the multiplier must be based on the age and the gender of the plaintiff, whether the plaintiff was employed at the time of the accident or otherwise, whether he or she suffered from any disability, or their level of education.

If a judge in England chooses to adopt the Ogden Tables system to calculate the multiplier, there will be limited room for the courts’ interpretation, unlike with the system used in Malta. Several factors are taken into consideration before arriving at a multiplier. Through the use of this system, it is impossible to claim that the multiplier applied was an arbitrary one. The same unfortunately cannot be said in regards to the Maltese system since there are fewer guiding principles to refer to.

C. Date of Trial versus Date of Accident

In the Maltese system, the multiplier is calculated from the date of the infliction of damage, both in cases of personal injury and in cases of death. By contrast, in the English system the multiplier is calculated from the date of the judgment onwards in

\textsuperscript{39} Government’s Actuary Department, \textit{Compensation for Injury and Death (Ogden Tables)}, available at \url{http://www.gad.gov.uk/services/Other%20Services/Compensation_for_injury_and_death.html} (Last visited November 8, 2011).
cases of personal injury, whilst in cases where unlawful death ensues the multiplier is calculated as from the date of the infliction of damage.

Having a multiplier which is calculated from the date of the infliction of damage is of greater benefit to the victim since this will mean that the multiplier is greater than it would have been had it been calculated from the date of the judgment onwards. The only problem with the Maltese system is that it creates possible confusion between the damages awarded for *damnum emergens* and those for *lucrum cessans*. If damages for future loss of earnings are also given from the date of the infliction of damage, one would be faced with double compensation. Thus during the period between the infliction of damage and the judgment a person is entitled to both *lucrum cessans* and *damnum emergens*. Under the English system actual damages are awarded for the period between the date when the damage is inflicted to the date of the judgment, whilst in cases of personal injury compensation for future loss is given from the date of the judgment. Such a system eliminates the risk of double compensation.

**D. Calculating Disability**

When calculating disability, Maltese courts generally base their judgment on the decisions of the experts. The medical expert must first decide whether there is a disability and if so, what is the percentage of disability in regard to the plaintiff’s working capacity. In cases where a permanent disability is adjudged by different experts with a different percentage of disability, the court usually takes an average of these percentages. In cases where the plaintiff suffers from different types of disabilities, the court usually decides on each disability and adds up all the percentages in order to arrive at a global percentage. The effect of such disability should not be calculated according to the repercussions the disability has on the functioning of the body in general but on the repercussions it has on the working life of the plaintiff. In Malta, various court judgments have concluded that loss of future earnings covers compensation for a reduction in plaintiff’s ability to work in general. This means that a disability is not only calculated in cases where the disability will impede the plaintiff to
continue in his job and earn a living but even if he keeps his job or is promoted. Having said that, the courts, do insist on tailoring the degree of incapacity to the particular occupation, social status, and education of the victim.

Disability under the Ogden Tables is considered as a contingency other than mortality. The tables take into consideration the fact that the plaintiff is now disabled and the award is calculated around this detail. For the Ogden Tables, there is no need for a qualification of degree or type of disability. Anything which is impeding the plaintiff from earning a future income is calculated as a disability.

Unlike the Maltese system, the multiplier method in England caters simply to loss of earnings and not for loss of ability to work in the abstract. In England, in order for a person to be awarded damages for disabilities which hinder the ability to work in general, one must then refer to the Smith v. Manchester awards. These awards are given in circumstances where a mathematical calculation is not possible and where there is a weakening of the claimant’s competitive position in the open labour market.

On a closer look, one can see that the same factors which are taken into consideration when calculating the duration of the multiplier in England are taken into consideration when calculating the percentage of disability in Malta.

Another distinctive element under the Maltese system is the fact that in Malta an unemployed person will still be able to get an award under the multiplication system; this in England is not possible since no loss of income is involved and therefore the Ogden Tables cannot be applied. Such persons under the English system will either get a Smith v. Manchester award or otherwise will have to opt for an award for loss of amenities.

As one can see, the Maltese focus on establishing the degree of disability has resulted in an all-encompassing technique which aims to calculate by the same variable both future loss of income for the specific plaintiff and his/her loss of capacity to work in general.
E. Lump Sum Payments and Alternative Methods

Awards for cases of *lucrum cessans* in tort take the form of a lump sum payment both in the English system as well as in the Maltese system. This brings along with it several problems, since the judge must predict the future, and this can never be done flawlessly. In England, the courts can give interim awards and also provisional awards (which can then be varied subsequently), but in Malta the award is rigorously given as a lump sum payment.

F. Lump Sum Deductions

Both the Maltese system and the English system apply a deduction in order to cater to the fact that the victim or the heirs are acquiring a large sum of money which can be invested. In Malta this is known as Lump Sum deduction. However, in the Common Law system, the deduction is taken into consideration when calculating the multiplier. The courts assume that the lump sum will be invested and yield an interest, so a rate of return is taken into consideration in the Ogden Tables.

G. Compensation Proposals

Fresh government proposals to amend compensation law were launched in June this year, aimed at establishing new guidelines and increasing awards. The main amendments currently discussed are the permanent disability capping, which will be increased to €600,000, and the introduction of non-pecuniary damages (damages for pain and suffering or moral damages) which will, however, be capped at €250,000.

The proposal also establishes guidelines for compensation awarded for specific disabilities, such as loss of limbs and organs, with a long and very detailed schedule that caters to different types of disabilities.

V. CONCLUSION

As one can see, despite the fact that the provisions of the Maltese Civil Code in relation to responsibility are still
predominantly influenced by continental law, the calculation of damages is mostly influenced by common law. The mode of calculating damages and the provisions of the Maltese Civil Code will shift further towards the system employed by the Common Law system if such legal amendments were to be approved in Parliament. However, notwithstanding this, the strong fusion of sources will always subsist in the Maltese legal system and it is this which ultimately helps the Maltese system in maintaining its individual and unique structure.
THE MEDITERRANEAN HYBRIDITY PROJECT: CROSSING THE BOUNDARIES OF LAW AND CULTURE

Seán Patrick Donlan*

There is no state in which a government would be possible for any length of time which relies solely on the law.

Eugen Ehrlich†

The Mediterranean is not even a single sea . . .

Fernand Braudel‡

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I. INTRODUCTION

Neither the hybridity nor the diffusion of laws is new.\(^1\) Within Europe, law predated the state and the creation of genuinely national laws; a legal ‘system’ centered on the modern nation-state, and the elimination of competing jurisdictions and marginalization of non-legal norms was a very long historical process. Especially before the nineteenth century, there were multiple contemporaneous legal orders co-existing in the same geographical space and at the same time. Modern national traditions are unique hybrids rooted in diverse customary or folk-laws, summary and discretionary jurisdictions, local and particular *iura propria*, the Romano-canonical ‘learned laws’ or *ius commune*, and other trans-territorial *iura communia* (including feudal law and the *lex mercatoria*). Over time, these various bodies of law were linked to public institutions and increasingly meaningful and centralized powers of enforcement. They only slowly came under the control of early modern states to form modern legal traditions, contributing much to the substance and subsequent success of common laws.

This legal hybridity was paralleled by additional normative hybridity. Indeed, the boundaries between such official and unofficial legalities were porous. The ‘law’ blurred seamlessly into the less formally institutionalized, but meaningful, normative pluralism from which more formal legal rules often emerged and with which they would continue to compete. As Marc Galanter has put it:

> One of the striking features of the modern world has been the emergence of those institutional-intellectual complexes that we identify as national legal systems. Such a system consists of

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institutions, connected to the state, guided by and propounding a body of normative learning, purporting to encompass and control all the other institutions in the society and to subject them to a regime of general rules. These complexes consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status.²

Similar patterns of hybridity occurred with the diffusion of European law, often though colonialism, around the world.³ Both in the West and beyond, however, the displacement and reduction of non-state norms has not made them unimportant.

The extraordinary legal and normative hybridity (hereinafter ‘hybridity’) of the Mediterranean region was produced in a complex history of conquest, colonization, and social and legal diffusion across shifting and porous political boundaries.⁴ Studies of this hybridity and diffusion have been isolated, sporadic, and too often framed within narrow jurisdictional and disciplinary constraints. The objective of the Mediterranean Hybridity Project is, through a collaborative international and interdisciplinary network of experts, (i) to produce a published comparative or cross-cultural collection on the subject and, if possible, (ii) to generate additional projects related to our theme. Encompassing both state laws and other social norms, the outcome will be more accurate, useful, and accessible accounts of Mediterranean legalities. Our project might produce an analytical model more useful than existing taxonomies and methods for new research in the region, in Europe, and around the world.

³. Indeed, ‘[s]cholars who study the one could learn from those who study the other, and vice versa.’ Dirk Heirbaut, Europe and the People without Legal History: On the Need for a General History of Non-European Law, 68 LEGAL HIST. REV. 269, 277 (2008).
⁴. “If a system is attached to two families . . . the question is one of genealogy, and thus of historical research first of all.” Maurice Tancelin, How Can a Legal System be a Mixed System?, in Frederick Parker Walton, The Scope and Interpretation of the Civil Code of Lower Canada 3 (Wilson & Lafleur, 1980) (1907).
This brief paper outlines the initial general approach to the project and related issues. It reflects its progress as of summer 2011. In the second section, the general outlines of the project will be laid out based on a Roundtable held in Catania in late October 2010. The remaining sections will reflect my thinking on the subject rather than that of the project Committee or participants. The concepts of ‘hybridity’ and ‘diffusion,’ as used in my research, will be discussed in more detail in the second section. The third section will discuss legal hybridity, especially mixed systems; the fourth section will briefly discuss normative hybridity and the relationship between comparativists and social scientists. While my interpretation of these topics was not imposed on those participating in the project, it was influential. The paper is meant both to suggest how the project is conceived and how it might develop. It suggests a shared, basic vocabulary for the project and notes some of the conceptual resources available in comparative law and in the social sciences. Specific information on the Mediterranean region is not discussed here.

II. THE MEDITERRANEAN HYBRIDITY PROJECT

The Mediterranean Hybridity Project was the result of discussions between members of Juris Diversitas, an international legal association dedicated to (i) the study of legal and normative mixtures and movements and (ii) the encouragement of interdisciplinary dialogue between jurists and others. Begun in 2007, the group has so far held two symposia on the subject of hybridity. The first was co-organized with the Swiss Institute of Comparative Law in September 2009. A collection of articles generated by that event was recently published as Comparative Law and Hybrid Legal Traditions (2010). A second symposium was held in June 2010 in Malta and focused on Mediterranean

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5. See Juris Diversitas at www.jurisdiversitas.blogspot.com (Last visited November 9, 2011). Our Executive Committee includes: Seán Patrick Donlan (Limerick), Ignazio Castellucci (Trento and Macau), Lukas Heckerdorn-Urschler (Swiss Institute of Comparative Law), Salvatore Mancuso (Macau), and Olivier Morétéau (Louisiana State). Our Advisory Board is composed of Patrick Glenn, Marco Guadagni, Roderick Macdonald, Werner Menski, Esin Örücü, Vernon Valentine Palmer, Rodolfo Sacco, Boaventura de Sousa Santos, William Twining, and Jacques Vanderlinden.
hybridity. It was co-organized with the Department of Civil Law and the Mediterranean Institute of the University of Malta. Professor Vernon Palmer, President of the World Society of Mixed Jurisdiction Jurists and author of Mixed Jurisdictions Worldwide: The Third Legal Family, was kind enough to launch the Mediterranean project there. In addition, a project planning roundtable was held in October 2010 at the Faculty of Political Science at the University of Catania to finalize the questionnaire to be used in our work and to begin the selection of jurisdictional reporters. This will occur over the course of 2011. Another colloquium will be held at Rabat, Morocco in June 2012.

The various legal orders, past and present, of the Mediterranean include the Anglo-British, canonical, continental, Islamic, Ottoman, Roman, socialist, and Talmudic traditions as well as various customary and trans-territorial legal traditions. This legal hybridity predates the establishment of modern nation-states. It is complemented and further complicated by an equally diverse and dynamic normative hybridity. Neither has received sufficient attention from jurists and social scientists. The project is rooted in the desire across the region and within different disciplines to improve our knowledge of the various legalities in the Euro-Mediterranean region. It encompasses both the state laws that are the domain of lawyers and the wider normative orders typically studied by social scientists. In particular, it will both draw on and go beyond earlier analysis of (i) ‘mixed legal systems,’ where


8. For a different, more critical, understanding of ‘hybridity’ in the Mediterranean, see Christian Bromberger, Towards an Anthropology of the Mediterranean, 17 HIST. & ANTHROPOLOGY 91, especially 96-98 (2006).

diverse state laws emerge from different legal traditions, and (ii) ‘legal’ or ‘normative.’ The focus of the former scholarship is typically limited to state law, especially mixtures of explicitly Western legal traditions. Study of the latter is rooted in empirical study, but is often focused on non-Western communities and rarely extends across state boundaries. As will be clear, these two bodies of scholarship are importantly related.

A Managing Committee is responsible for the coordination, steering, and oversight of the project. An Advisory Board is being created to assist the Committee. The project’s main objective is the relatively simple production of a comparative collection on legal and normative hybridity in the region. Our project addresses the existing lacuna in research by developing a collaborative inter- and multi-disciplinary network of experts on


12. In addition to me, the Committee includes Baudouin Dupret and Olivier Moréteau. The Committee provides continuity within the project’s flexible framework. Editorial and Advisory Boards may also be created to provide advice and assistance to the Committee.


the region—from law, anthropology, geography, history, sociology, etc.—to foster dialogue on the subject. The project will benefit from this jurisdictional and disciplinary diversity. Scholars from throughout Europe, the Levant, North Africa, and beyond will participate. Chief reporters will be selected for each of the jurisdictions involved. It will be the responsibility of the chief reporters, in collaboration with the Committee, to assemble a team of additional reporters appropriate to complete the reports and to ensure that deadlines are met. Essential to the project is the creation of a questionnaire on which to structure our work. This questionnaire will be produced by the Committee in discussion with the participants. The combination of such reports and their subsequent analysis is an established method of comparative law. The International Academy of Comparative Law takes an analogous approach in the thematic reports to its quadrennial World Congress. In the 1990s, two projects managed in a similar manner by the legal philosophers Neil MacCormick and Robert S. Summers ended in the publication of important comparative collections on statutory interpretation and precedent.\(^{15}\) Our project will take a broadly similar approach, but will marry this comparative approach with other conceptual and empirical models from the legal and social sciences.

In its origins, ‘hybrid’ had a very narrow meaning. The Latin “*hibrida* was the offspring of a (female) domestic sow and a (male) wild boar.”\(^{16}\) In fact, a hybrid is often seen as a complex *individual* entity, a singularity, from two parents. More recently, however, it has become far broader in application. Indeed, the


word in its current usages is arguably, as the historian Peter Burke has written, “a slippery, ambiguous term, at once literal and metaphorical, descriptive and explanatory.” 17 ‘Hybridity’ has also developed more nuanced meanings in, for example, Post-Colonial Studies, serving both as a recognition of social complexity, “a way out of binary thinking” about cultures (and individuals). 18 This understanding of hybridity is not entirely unrelated to our Project. Indeed, even the legal historian George Dargo, who wrote the classic work on the founding of Louisiana’s mixed system, has recently noted that, in Louisiana, “[h]ybridity produced a rich interaction—call it conflict, contestation, or negotiation—from within the mix of languages, cultures and legal traditions that the Americans found in their first true colony.” 19 Hybridity’ is thus meant to suggest, more explicitly than discussions of legal ‘mixes’—which typically focus on the various positive laws of the state—a more dynamic complexity of both laws and other norms. More diffuse normative influences and practical considerations, both internal and external are also relevant, not least geo-political, economic, and social relationships of power.

The phrase ‘legal hybridity’ is only rarely employed in either legal or social science. Where it is used, it is broadly synonymous with ‘legal pluralism.’ 20 Iza Hussin has used it to

17. Peter Burke, Cultural Hybridity 54 (2009).
18. Anjali Prabhu, Hybridity: Limits, Transformations, Prospects 1 (2007). Indeed, it also arguably “allow[s for] the inscription of the agency of the subaltern, and even permit[s] a restructuring and destabilizing of power.” Id. Note that the focus of Prabhu’s book is on the small islands of Mauritius and La Réunion, the former of which is a mixed legal system. See also Homi Bhabha, The Location of Culture (1994) and Alpana Roy, Postcolonial Theory and Law: A Critical Introduction, 29 Adel. L. Rev. 317 (2008).
capture not only plural laws and norms, but power relationships as well.\textsuperscript{21} For the purposes of the project, however, ‘legal hybridity’ refers to state laws and legal principles (hereinafter ‘laws’), those traditions generally, conventionally recognized as legal by modern lawyers.\textsuperscript{22} This is the focus of most mixed jurists, though it may extend still further to, among others, the ‘law in action,’ ‘legal formants,’ or ‘legal polycentricity.’\textsuperscript{23} ‘Normative hybridity’ is, for us, a far wider concept, largely synonymous with ‘normative pluralism’ and including both laws and wider patterns of normative ordering and non-state norms (hereinafter ‘norms’). Defined in this way, law and norms are not opposites but points on a continuum. As Baudouin Dupret writes,

[i]n our attempt to analyze the phenomenon of norms we should move resolutely away from legal categories and towards social categories, and . . . we should do this both at a conceptual level and at a methodological level. This is a shift from the law to the norm, with all that such a move implies in terms of assimilation with social constraints . . . Law must be stripped of its conceptual status and returned to the fold of general normativity, so that there is no longer any ex post facto distinction between it and other types of norms such as moral injunctions,

\begin{footnotesize}
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\item\textsuperscript{22} See e.g. Biagio Andò, Sean Patrick Donlan & David Zammit, “A Happy Union?” Malta’s Legal Hybridity, 27 TUL. EUR. & CIV. L. F. (forthcoming 2012).
\end{itemize}
\end{footnotesize}
political rules, traditions, habits, etiquette and even table manners.\textsuperscript{24}

This normative hybridity is not, or not necessarily, prescriptive, but descriptive of a social fact with which scholars must contend. Indeed, “as a purely descriptive matter, hybridity cannot be wished away.”\textsuperscript{25}

Herbert Hart, the foremost legal positivist of the twentieth century, began \textit{The Concept of Law} (1961) with the remark that “[f]ew questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as to the question, \textit{What is law}?”\textsuperscript{26} This fact, and related definitional complexities, have important consequences for our project. We must both recognize the complexity of defining ‘law’ while, at the same time, provide flexibility and reasonable coherence to our work. The distinction between law and norms employed here is largely meant to reflect juristic practice and modern, common understandings of the terms in the West. This is not meant to suggest deep ontological divisions between laws and other norms.\textsuperscript{27} It is


\textsuperscript{26} \textit{Herbert L.A. Hart, The Concept of Law} (2d ed. 1997). Twining has proposed a “flexible working conception of law” in which “[f]rom a global perspective it is illuminating to conceive of law as a species of institutionalized social practice that is oriented to ordering relations between subjects at one or more levels of relations and of ordering.” \textit{William Twining, General Jurisprudence: Understanding Law From a Global Perspective} 116-117 (2009).

\textsuperscript{27} Twining refers to the difficulty in distinguishing legal and non-legal phenomenon as the problem of “the definitional stop.” \textit{See} Twining, \textit{supra} note 25, at 497. There exists a long-established and widespread conventional usage of ‘law’ (or, at least, ‘lex’) that defines the ‘legal’ on the basis of some minimal
intended instead to prevent the project from becoming mired in complex theoretical debates in its early stages. State laws are distinct, at least in practice, from other norms. Western legal institutions, in particular, are highly formalized or institutionalized in contrast to alternative forms of normative ordering. This view is, however, open to challenge over the course of the project. Even within modern Anglo-American analytical jurisprudence or legal philosophy, there has been a move away from a narrow focus on state law. For example, the late Neil MacCormick wrote that “[i]nstitutional normative orders are characterized by the presence of explicitly issued norms and decisions in authentic (that, in some way official or authorized) texts, such that understanding and interpreting such texts becomes an implicit part of maintaining the order.” More important was the argument that “[l]aw is institutional normative order, and state law is simply one form of law.” As noted, our focus will extend to normative orders while avoiding, for now, any decision on whether such orders are indeed “law, properly so-called.”

Our decision to avoid using ‘legal pluralism’ is, in part, the result of the very different ways in which that phrase may be institutional structure and accepted authority. Critically, however, the development of this convention preceded the development of the mature state and a later conventional correspondence of law and the state. Cf. Jean-Louis Halpérin, The Concept of Law: A Western Transplant, 10 THEORETICAL INQUIRIES IN L. 333, 353 (2009). ‘Ius’ had, of course, a less precise meaning of right or rightness.

28. With sufficient support, a future meeting of participants will be organized that would allow for such theoretical considerations to be revisited.
31. See generally John Austin, The Providence of Jurisprudence Determined (1832), Lecture Five.
employed. Both comparative lawyers and legal historians frequently use ‘legal pluralism’ as a synonym for what is called ‘legal hybridity’ here.\textsuperscript{32} Social scientists have, however, usually used the same term in their more extensive discussions of the concept of normative hybridity.\textsuperscript{33} This social science use of ‘legal’ to include both state laws and non-state norms has admittedly made scholars sensitive to similarities between them. It has also often confused jurists, arguably dissuading many from engagement with social scientists.\textsuperscript{34} This is not always true. A small number of jurists have similarly noted that “the existence and content of explicit laws depend on a network of tacit understandings and unwritten conventions, rooted in the soil of social interaction.”\textsuperscript{35} These are also called law: ‘everyday law,’ ‘implicit law,’ ‘informal law,’ and ‘unofficial law.’\textsuperscript{36} But, as the anthropologist Sally Engle Merry puts it, “calling all forms of ordering that are not state law by the name law confounds the analysis.”\textsuperscript{37} Where project

\textsuperscript{32} In social science debates, this has often been called ‘state’ or ‘weak’ legal pluralism. Legal historians have to deal with an additional complication. The ‘State’ has not always existed and use of ‘state’ terminology can, depending on the historian’s focus, be deeply anachronistic.

\textsuperscript{33} This is also referred to as ‘deep’ or ‘strong’ legal pluralism. See Gordon R. Woodman, Ideological Combat and Social Observation: Recent Debate about Legal Pluralism, 42 J. LEGAL PLURALISM 21 (1998).

\textsuperscript{34} Franz von Benda-Beckmann, Who’s Afraid of Legal Pluralism?, 47 J. LEGAL PLURALISM 37, 40 (2002).

\textsuperscript{35} Gerald J. Postema, Implicit law, in Rediscovering Fuller: Essays on Implicit Law and Institutional Design 255 (Willem J. Witteveen & Wibren van der Burg eds., 1999). Postema was writing about Lon Fuller. Fuller’s thoughts on “implicit law” were discussed in LON FULLER, THE ANATOMY OF THE LAW (1968).

\textsuperscript{36} Roderick Macdonald uses each of these. See RODERICK MACDONALD, LESSONS OF EVERYDAY LAW/LE DROIT DU QUOTIDIEN (2002). See Edward J. Eberle’s use of “internal law” in, Comparative law, 13 ANN. SURV. INT’L & COMP. L. 93, 97-99 (2007). Other writers have even suggested that legal study, including comparative analysis, should focus on “the mundane and the very small within its gaze. There is often enough kinship between normative orders at various level of social life to make them comparable.” Daniel Jutras, The Legal Dimensions of Everyday Life, 16 CAN. J.L. & SOC’Y 45, 64 (2001). See also W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (1999).

\textsuperscript{37} Sally E. Merry, Legal Pluralism, 22 L. & SOC’Y REV. 869, 878 (1988); see also Brian Z. Tamanaha, The Folly of the ‘Social Scientific’ Concept of Legal Pluralism, 20 J.L. & SOC’Y 192 (1993). His response has been to suggest
participants want to emphasize the real continuum between laws and other norms, it was suggested they might, with other writers, refer to both as ‘legalities.’ As Christopher Tomlins has recently defined them, “legalities are not produced in formal legal settings alone. They are social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest.” This is admittedly something of a fudge. But ‘legalities’ underlines the similarities between laws and other norms without ignoring the genuine differences already noted. It might also be useful, for the purposes of the project, to make finer distinctions between different types of norms. In addition, as both comparatists and legal philosophers have noted, there is far more to the interpretation of the law of the state than a straightforward reading of its texts; context is critical.

Discussions at the Catania Roundtable largely focused on the questionnaire to be used in the project. For practical purposes, that “[l]egal norms are whatever people in the social group conventionally recognize as legal norms through their social practices.” Brian Z. Tamanaha, A Non-Essentialist Version of Legal Pluralism, 27 J.L. & SOC’Y 296, 316 (2000); see also The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociological Studies, 30 L. & SOC’Y REV. 163 (1996).


40. Tamanaha has, for example, recently listed “forms of normative ordering commonly discussed in studies of legal pluralism.” Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, 30 SYDNEY L. REV. 375, 397 (2008). These included both “official or positive legal systems” as well as “customary,” “religious/cultural,” “economic/capitalist,” “functional,” and “community/cultural” normative systems. See generally id. at 397-400.

it was agreed that the questionnaire should be completed in 2011.\footnote{As a working rule, the reports should not exceed 25,000 words.} It should be designed in a simple manner, complete with a basic lexicon of terms as used in project correspondence. The reports will focus on the contemporary situation in the jurisdictions covered.\footnote{Cf. the “country surveys” in the Yearbook of Islamic and Middle Eastern Law.} It is important, however, that sufficient attention be given to the historical development of the laws and norms discussed. Like much of the project, the appropriate amount of text dedicated to history can be determined together by the Committee and the Chief Reporters. More critically, the category of normative hybridity is potentially very wide, extending to ordinary etiquette and table manners. To narrow our focus, it was agreed that non-state norms should be limited to either “non-state justice systems” or to norms or normative orders that significantly influence legal or normative practices.\footnote{Miranda Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu 29 (2009). In discussing “normative orderings existing outside the state,” she includes “customary law, non-state justice systems, non-state legal fields, dispute-resolution systems, rule systems, folk law, informal justice, collective justice, popular justice and vigilantism.” Id. at 81. See also her discussion in chapter seven (“A typology of relationships between state and non-state justice systems”).} There is no simple metric for the application of this standard. The Committee will be responsible for determining whether reporters have established that norms have met this requirement. Insofar as is possible, both ‘internal’ perceptions of the actors engaged in the legalities involved and ‘external’ perceptions from actors beyond those legalities should be considered. The emergence of new legal or normative creations should also be considered.

Several approaches to the structure of the questionnaire were considered. It was agreed that the final version should lay out general headings that must be followed by reporters. These headings apply to both laws and norms (as defined here). Beneath the headings, however, will be more specific, optional questions that might be relevant. These questions might not apply to all jurisdictions and might not apply to both legal and normative
hybridity. The basic, preliminary draft questionnaire includes the following headings and questions:

1. **Historical background**: what are the origins of the major legal and normative traditions, especially through “diffusion?” How does this relate to the creation of the jurisdiction spatially?

2. **Sources and institutions**: what forms of state laws or non-state norms are applicable and in what institutions?

3. **Bodies of law and norms**: what bodies of state law or non-state norms—substantive and procedural—are utilized?

4. **Actors**: what actors are involved in state law and non-state norms?

5. **Methods**: what methods—“customary,” “doctrinal,” “legislative,” and “adjudicative” (or analogous forms)—are used in state law and non-state norms?

6. **Efficacy**: how certain is the enforcement of state law and non-state norms? What role does the “rule of (state) law” play in the jurisdiction? How litigious are people in the various fora available to them?

7. **Regionalism and globalization**: what is the impact of regionalism and globalization—including cultural, economic, and legal—on laws and other norms? This includes, of course, the role of human rights.

8. **Identity**: what is the relevance of state law and non-state norms to individual and community identities? Language, ethnicity, religion, and culture might all be considered.

As noted, this is a first draft. The final questionnaire will be completed in 2011. The approach is intended to provide a general, uniform structure with a menu of questions that will be answered, as appropriate, by the reporters. Throughout the project, the Committee will adjust the program and the questionnaire as
necessary. Participant feedback, project meetings, and the review of draft reports in advance of publication will almost certainly suggest changes. A bibliography will also be created for each report. And, insofar as is possible, the reports should combine existing empirical research with theoretical insight.45

A bibliography will also be created for each report. And, insofar as is possible, the reports should combine existing empirical research with theoretical insight. An important aspect of the project is the creation of legal and normative hybrids as the product of the ‘diffusion’ of law and norms. The mixtures and movements of both are two sides of the same coin.46 This is true both of time and space with the result that “comparative law merges the approach of the legal historian with that of the legal geographer.”47 Here comparative lawyers have generated an impressive, if bewildering, scholarship on the movements of law and legal thinking. Alan Watson’s ‘transplant’ thesis is especially influential.48 He has suggested that the transplantation of legal ideas and institutions is extremely common. While the difference between a ‘transplant’ and a ‘reception’ is probably best seen as one of degree, the latter is generally used for more wide-scale borrowing, especially the historical incorporation of the Romano-canonical *ius commune* by

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45. Given the current size of the project, it is not expected that new studies can be undertaken. It is hoped, however, that the project might encourage such research, especially where gaps exist.


the German states. It can also be used in other contexts, including the reception of Anglo-American law across the globe. These concepts are so important to modern comparative analysis that Michele Graziadei has even suggested that comparative law can be characterized as the “study of legal transplants and receptions.”

In fact, considerable ink has been spent on the metaphors of legal movement. In contrast to Watson’s organic ‘transplants,’ Nelken has suggested the more neutral ‘transfers.’ Others speak of ‘contaminations,’ ‘irritants,’ or the ‘migration of law.’ William Twining’s choice of ‘diffusion’ is preferred here for (i) reasons of simplicity and (ii) in parallel to discussions of similar processes within the social sciences. In addition, Twining’s use of the concept is particularly sophisticated, untangling the deep

49. Alan Watson, Aspects of Reception of Law, 44 AM. J. COMP. L. 345 (1996); see also Albert Kocourek, Factors in the Reception of Law, 10 TUL. L. REV. 209 (1936).

50. Michele Graziadei, Comparative Law as the Study of Transplants and Receptions, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2008). Indeed, “[u]nified visions of legal cultures and legal orders should thus be replaced by a more analytic, dynamic, and realistic picture of the local law, which also comprises that law’s interaction with other legal orders.” Id. at 471-472.


52. P.G. Monateri, The Weak Law: Contaminations and Legal Cultures, in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, BRISTOL 1998 (1998). See Olivier Moréteau, An Introduction to Contamination, 3 J. CIV. L. STUD. 9 (2010); see also Olivier Moréteau, Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination, in this same volume of the J. CIV. L. STUD.


54. Örüçü has also spoken of “law as transposition,” the “tree model,” and the “wave theory,” the last two borrowed from linguistics. See Esin Örüçü, A Theoretical Framework for Transfrontier Mobility of Law, in TRANSFRONTIER MOBILITY OF LAW (Robert Jagtenberg, Esin Örüçü, & Annie J. De Roo eds., 1995) and Esin Örüçü, Law as Transposition, 51 INT’L & COMP. L.Q. 205 (2002).

55. The term was also used a century ago in Robert W. Lee, The Civil Law and the Common Law: A World Survey, 14 MICH. L. REV. 89, 90 (1915).
complexity of the process of diffusion. These are important considerations in our work. Normative diffusion is, of course, still more complex.

At the time of the Roundtable, potential reporters were available for Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Libya, Malta, Morocco, Slovenia, Spain, Tunisia, and Turkey. It was agreed that reporters for additional jurisdictions would also be sought, especially for those jurisdictions falling outside of Western Europe. Particularly important was the inclusion of additional social scientists and, given the levels of relevant research and scholarship produced in French, that that language should be included as a working language of the project. The importance of funding and institutional support was also noted. Subject to securing such support, the project will progress through meetings, colloquia, and conferences. These gatherings will foster research and dialogue and prepare participants for production of the jurisdictional reports. At all events, the Committee will work to ensure dissemination of the information generated by participants, including, most importantly, publication of the final reports. The process towards publication will include pre-circulation of draft reports by participants before discussion in a colloquium.

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57. See e.g. the discussion of “ethnoscapes, technoscapes, finanscapes, mediascapes, and ideoscapes” in Arjun Appadurai, Disjuncture and Distance in the Global Cultural Economy, in MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996).

58. Additional reporters are now available.

59. E.g. Albania, Croatia, Lebanon, Montenegro, the Palestinian Authority, Syria, and additional microstates (Andorra, Gibraltar, Monaco, San Marino, Vatican City, etc). Additional countries not currently touching the Mediterranean Sea may also be included—e.g. Jordan and Portugal—depending on their historical and contemporary connection to the region. Rather than creating simplistic rules to determine difficult cases, the Committee will decide on the inclusion of additional countries on a case-by-case basis.
Participants will then be expected to edit their reports on the basis of those discussions. As the reports are completed, the project leaders will prepare a draft general overview to be discussed with participants. The leaders will complete an introduction and conclusion for the published collection. Finally, an international conference will be organized to publicize the project, the network, the resulting reports, and the database.

Participants also agreed to try to meet at various other related conferences and events (e.g. the World Society of Mixed Jurisdiction Jurists’ Third ‘International Congress’ held in Jerusalem, Israel in June 2011). The extended process of preparing reports will better enable participants to transcend jurisdictional and disciplinary boundaries. In addition to the published collection, we will work to disseminate, as widely as possible, the information gathered and generated. This will be accomplished in numerous ways, i.e. through

- various public events made possible by the project;
- teaching, blogging, and presentations by participants;
- additional research projects and publications—both academic and mainstream—generated.

In addition, a website hosting an online database of laws and norms in the region may be created and updated over the course of the project. This will provide for the collection of existing primary and secondary materials, links to information currently dispersed, and an extensive bibliography. Access to both existing official legislation and jurisprudence and more complex redactions of unofficial norms could be included. Each of these will assist knowledge transfer to jurists and scholars, to practitioners and policy-makers, and to civil society organizations and the wider community.

By combining the study of laws and norms and the methods of the legal and social sciences, the project will produce numerous conceptual and practical benefits. It will create more accurate, useful, and accessible accounts of Mediterranean hybridity. It might spur development of a new framework for scholarly collaboration. Indeed, it may produce an analytical model more
useful than existing taxonomies and methods for new research in the region, in Europe, and around the world. Most importantly, the project will permit a more empirically-grounded approach to issues of law and policy. The collective activities of the network and the research it generates may make important contributions to current Euro-Mediterranean debates on, for example, commerce, the environment, and human rights, and security. Another benefit will be to facilitate discussion of future alignments between Mediterranean and wider European cultures and their laws, i.e. the Union for the Mediterranean. Given continuing debates in research on the Mediterranean, it is important to note that the region will serve as a geographical and jurisdictional focus for our study. We do not seek evidence of a reified and perennial Mediterranean experience. As Peregrine Horden expressed in a different context, ‘[w]e put “the Mediterranean” within our frame rather than assume it as the frame itself.’\(^{60}\) Instead, the region is a laboratory.\(^{61}\)

III. LEGAL HYBRIDITY

The recognition of historical and comparative hybridity, both legal and normative, allows us to better contextualize modern traditions identified as ‘mixed legal systems.’\(^{62}\) These are designated as such largely through the failure of comparatists to assign them elsewhere.\(^{63}\) The crude classifications of much past and present comparative study—positivist, centralist, monist—have often resulted in pushing these jurisdictions “into a marginal

\(^{60}\) Peregrine Horden, Mediterranean Excuses: Historical Writing on the Mediterranean Since Braudel, 16 Hist. & Anthropology 25, 26 (2005). On these contemporary debates, see Horden & Purcell, supra note 10.


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and uncertain position.” 64 That peripheral status has begun to change. In the last decade, scholars have increasingly focused on mixed systems, or at least the European hybrids among them. The jurisdictions are, or so it has been argued, models for a more mixed century to come. 65 More specifically, it has been argued that mixed systems suggest what a future European common law, a novum ius commune Europaeum, might look like. 66 The implications of scholarship on mixed jurisdictions is, however, still more significant. Indeed, as Palmer argues,

[r]ecognizing that hybridity is a universal fact will no doubt require us to revise some of the received attitudes and prejudices about mixed systems . . . [M]ixed systems have been too much at the center of legal evolution to be regarded as something unusual or strange. They cannot be both paradigms and pariahs at the same time. A useful classification scheme ought to begin with their centrality as a point of departure. 67

Mixity is thus not the exception, but “the rule.” 68 Mixed traditions are simply the most explicit and obvious legal hybrids. 69 But


68. Du Plessis, in REIMANN & ZIMMERMANN, supra note 63, at 481.

69. ‘Mixed jurists,’ those working within or on mixed systems, may be, as a result, especially sensitive to the hybridity of all traditions. See Esin Örücü, A
difficulties remain in determining “how mixed a mixed system must be.” 70 Inevitably, classification of a tradition as mixed—or indeed ‘pure’—is subjective. It is also fundamentally historical. The transition from considerable legal hybridity to greater legal unity, largely occurring in the nineteenth century, also effectively created the modern distinction between ‘pure’ and ‘mixed’ legal traditions. 71 There remains, however, a meaningful division between the identification of past and present hybrids. Four decades ago, Joseph McKnight distinguished “between what may be termed mixed and that which has already been blended to an extent that origins of rules are lost in ordinary legal practice. The distinction is therefore at once a practical and a psychological one. . . .” 72 While the dividing line between these might be better seen as a fuzzy border between implicit and explicit mixes, it is nevertheless a significant distinction.

Discussion of mixed systems can be confusing. The topic is complex and the vocabulary of ‘mixity’ is “basically an accident of history.” 73 The classification of jurisdictions, explicitly mixed or

71. This is the “hidden temporal dimension” in the categorization of mixed traditions. Patrick Glenn, Quebec: Mixité and Monism, in Örücü et al., supra note 46, at 1.
otherwise, remains subjective.\textsuperscript{74} In current research, ‘mixed legal systems’ is generally used for those jurisdictions that contain significant and explicitly segregated elements of different pan-national legal traditions.\textsuperscript{75} It remains a residual, catch-all category for those that cannot be assigned elsewhere and can cover any mix, whether Western or non-Western. ‘Mixed jurisdictions’ may sometimes be used in this general manner or for any mixture of Anglo-American and continental laws.\textsuperscript{76} It is most often, however, applied to a narrower subset of Western mixes that dominate scholarship.\textsuperscript{77} Here, ‘mixed jurisdictions’ refers to situations in which (i) continental laws are “overlaid” or “suffused” with Anglo-American laws later in time\textsuperscript{78} or (ii) continental private law is joined to Anglo-American public and criminal law. For

\textsuperscript{74} PALMER (2001), supra note 6, at 17 and Palmer (2006), supra note 73, at 468.

\textsuperscript{75} For example, a list prepared and posted online by the University of Ottawa, uses ‘mixed legal systems’ to cover various collections of ‘civil law,’ ‘common law,’ ‘customary law,’ ‘Muslim law,’ and ‘Jewish law.’ Mixed Legal Systems, University of Ottawa, http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php (Last visited November 9, 2011). See generally, Classification of Legal Systems and Corresponding Political Entities, University of Ottawa, http://www.juriglobe.ca/eng/sys-juri/index-syst.php (Last visited November 9, 2011).


\textsuperscript{77} “Facetiously, one might therefore define a mixed jurisdiction as a place where debate over the subject takes place.” William Tetley, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified), 60 LA. L. REV. 677, 680 n.3 (2000).

\textsuperscript{78} See Smith (1965), supra note 76, at 5; Walton, supra note 4, at 1. In Israel, Anglo-American law was overlaid with continental law rather than the other way around. See Stephen Goldstein, Israel, in PALMER (2001), supra note 6, at 448-468.
historical reasons, the first has usually resulted in the second. The so-called ‘classical’ mixed jurisdictions’ are roughly the same, referring to specific jurisdictions—Louisiana, Puerto Rico, Quebec, Scotland, and South Africa—on which a scholarly critical mass has long existed. This terminological plasticity arguably impedes more accurate classification and effective communication.\footnote{79. See Donlan (2010), supra note 1.} For example, in an important essay on “The idea of mixed legal systems,” the Channel Islands, Cyprus, and Malta are each described as ‘mixed jurisdictions.’\footnote{80. Reid, supra note 73, at 7 n.1 (2003). See also George L. Gretton & Kenneth G.C. Reid, The Civil Law Tradition: Some Thoughts from North of the Tweed, 11 JERSEY & GUERNSEY L. REV. (2007), available at www.jerseylaw.je/Publications/jerseylawreview/Oct07/JLR0710_Gretton.aspx (Last visited November 9, 2011).} In fact, each is quite distinct, both from one another and the ‘classical mixed jurisdictions.’\footnote{81. The legal tradition of the Channel Islands combines Norman ‘Germanic’ folk law with the pan-European ius commune. This is, in fact, true for all of Western Europe. But its legal ideas and institutions also reflect both significant English influence and post-Code civil borrowings. In contrast to the classical mixed jurisdictions, Maltese criminal law combines both Anglo-American and continental law at both the substantive and procedural levels. Its civil procedures also reflect the investigative traditions of the continent. Cyprus, for example, mixes Anglo-American private law with continental public and criminal law. Symeon C. Symeonides, The Mixed Legal System of the Republic of Cyprus, 78 Tul. L. Rev. 441 (2003).} Non-Western mixed systems—Cameroon, Indonesia, the United Arab Emirates, etc—are still more diverse.

and South Africa. Palmer suggests that the jurisdictions can be treated collectively as a distinctive ‘third legal family’ between the well-known Anglo-American and continental legal ‘families’. In addition to combining continental private law with Anglo-American public and criminal law, he notes that in each of these jurisdictions Anglo-American law penetrates, to varying degrees, both (i) judicial institutions and procedures and (ii) substantive (private and commercial) law. The former is significant; the latter varies in a reasonably common “pattern of penetration and resistance.” Precedent in these jurisdictions falls somewhere between the parent traditions, “rais[ing] a defining issue in the quest for the ‘soul’ of the system.” While Palmer, like other mixed jurists, uses different terms at different times to label these different jurisdictions, he sees the classical mixed jurisdictions and the third legal family as synonymous. His classification can sometimes, however, marginalize elements, especially non-Western laws and customs, unique to a tradition that might otherwise exclude it from ‘third family’ gatherings: e.g., the customary laws of South Africa, the Islamic law of the Philippines, and the religious laws of Israel.

83. A footnote notes that “other of this type” include Botswana, Lesotho, Mauritius, Saint Lucia, the Seychelles, Sri Lanka, Swaziland, and Zimbabwe. PALMER (2001), supra note 6, at 4.
84. See PALMER (2001), supra note 6, at 7-10 and Palmer (2006), supra note 73, at 467-468.
85. Indeed, his inclusion of public law was an important shift from the traditional narrow focus of comparative law on private law. PALMER (2001), supra note 6, at 6 n.8.
86. PALMER (2001), supra note 6, at 57. While property law is largely unaffected, Anglo-American influence on obligations, especially tort, is more significant. Succession law is somewhat resistant, though pressure for freedom of testation has altered the laws of some jurisdictions. For practical reasons, Anglo-American commercial laws were also adopted with little resistance. Id., 53-59, 66-76 and Palmer (2006), supra note 73, at 471-472, 474. See Palmer’s detailed synopsis in Palmer (2009), supra note 73, at 343-344.
87. PALMER (2001), supra note 6, at 45. See id., 44-46. See also Palmer (2006), supra note 73, at 471.
88. It might be better to see the latter as a subset of the former with specific traits.
89. But note “The Stellenbosch Papers” generated in a colloquium on “Mixed Jurisdictions as Models? Perspectives from Southern Africa and
But Palmer is central to the study of mixed systems. This is, in part, due to his role as the driving force in the establishment of the *World Society of Mixed Jurisdiction Jurists* in 2002. But great strength of his work has been to promote communication among, and considerable scholarship on, mixed traditions. And Palmer’s *Mixed Jurisdictions Worldwide* is an especially important resource for the Mediterranean Project. The work is, as a result of his method, both far more general and richer in detail than that of other mixed jurists. His approach was broadly familiar to comparatists. He collected jurisdictional reports based on a questionnaire he produced. The study was collaborative, involving specialists in the respective jurisdictions supplemented by his own cross-cultural comparison.\(^90\) Palmer’s report categories included:

- the founding of the system
- the magistrates and the courts
- judicial methodology
- statutory interpretation
- mercantile law
- procedure and evidence
- the judicial reception of common law
- the emergence of new legal creations
- purists, pollutionists, and pragmatists
- the linguistic factor\(^91\)

Using these categories, he was able to go into considerably more detail than earlier discussions of mixed system. It is an obvious model for our work. And even within the intentionally juridical limits of his questionnaire, his analysis revealed the importance not only of history, but of culture, to the development and unique character of the mixed traditions studied.\(^92\)

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\(^90\) Palmer (2001), *supra* note 6, at 15-16.

\(^91\) The expanded questionnaire is included as ‘Appendix A’ in Palmer (2001), *supra* note 6, at 471-478. A report bibliography was also included.

\(^92\) This is especially true with respect to differences in the source and living languages of the law in the jurisdictions. Palmer (2001), *supra* note 6, at 41-44 and Palmer (2006), *supra* note 73, at 470. See also Roger K. Ward, *The
Equally important to the scholarship on mixed systems and our project is the work of Esin Örücü. Her writings, perhaps especially her “Mixed and Mixing Systems: A Conceptual Search,” may be the most sophisticated general analyses of legal hybridity. A native of Turkey, she has consistently argued for an ‘expansion’ of research beyond the classical mixed jurisdictions to more exotic hybrids. She has been especially critical of the traditional legal families of comparative law. Instead, Örücü has proposed a “family trees” model that “regards all legal systems as mixed and overlapping, overtly or covertly, and groups them according to the proportionate mixture of the ingredients.” She has also employed an especially colorful vocabulary and useful models. She has used, for example, culinary terms to describe the ways in which laws might mix:


93. Her scholarship on Turkey is especially important to our work. See especially Esin Örücü, Turkey: Change under Pressure, in ÖRÜCÜ ET AL., supra note 46 at 89; see also Esin Örücü, Turkey’s Synthetic Legal System and Her Indigenous Socio-Culture(s) in a “Covert” Mix, in ÖRÜCÜ (2010), supra note 73, at 150.

94. Örücü, supra note 46, at 335. The title—Mixed and Mixing Systems—underscores the dynamic, on-going nature of hybridity.


At times, elements from socio-culturally similar and legal-culturally different legal systems come together forming ‘mixed jurisdictions’ of the already mentioned “simple” kind, [i.e.] ‘mixing bowls,’ the ingredients being still in the process of blending but in need of further processing if a “puree” is to be produced . . . Next come the “complex” mixed systems, where the elements are both socio-culturally and legal-culturally different . . . [i.e., t]he “Italian salad bowl,” where, although the salad dressing covers the salad, it is easy to detect the individual ingredients clearly through the sides of the glass bowl . . . Then, there is . . . the “English salad plate,” the ingredients sitting separately, far apart on a flat plate with a blob of mayonnaise to the side into which the different ingredients can be dipped before consumption.98

Indeed, Örücü has repeatedly argued that “[i]nstances of mixing are complicated. They may be overt or covert, structured or unstructured, complex or simple, blended or unblended.”99 In her most recent edited collection, Mixed Legal Systems at New Frontiers, she has written that “it is invaluable to consider legal systems, designated as legal pluralisms, in order to appreciate the relationship between official state law and religious and customary laws, not only as anthropologists but as comparative lawyers.”100 While this might seem to suggest a focus limited to legal hybridity or state legal pluralism, she has also argued that “comparative law studies should extend to norms of non-state law, folk law and customary law, remembering that the law is global, national and local.”101 Combining these ideas of expanding research on legal

98. See Örücü, supra note 69, at 180; see also Örücü, supra note 54, at 10-12.

99. Örücü, supra note 95, at 67. As noted, Örücü has also written about the diffusion of law.

100. See Esin Örücü, General Introduction, in ÖRÜCÜ (2010), supra note 73, at 7; see also Örücü, supra note 46, at 342, 350-351.

101. See Esin Örücü, Developing Comparative Law, in ÖRÜCÜ & NELKEN, supra note 56, at 60-61. “In the context of ‘legal pluralism,’ law goes far beyond
hybrids with extending comparative study into other norms is a challenging, but promising, approach for future study. It is at the center of our project.

Even limiting ourselves to legal rather than normative hybridity, there remain still deeper complexities. First, all legal traditions are hybrids. There are also, however, a number of other approaches to law that underline the complexity of the most ordinary law and legal systems. One commonly-acknowledged type of complexity can be discovered in the distance between formal law and its actual application. Roscoe Pound famously formulated this as the gap between the ‘law in books’ and the ‘law in action’.102 If this is now a standard bromide in legal scholarship, Rodolfo Sacco’s theory of ‘legal formants’ arguably goes still further, underscoring the considerable diversity in the interpretation of state laws, a diversity that was frequently rooted in practical, professional differences among those interpreting the law.103 Similarly, the study of ‘legal polycentricity’ stresses legal diversity within or internal to state law, especially with regard to sources.104 Other varieties of post-modern and critical thinking provide many of the same conclusions. In each of these instances, the insistence on context significantly problematizes neat divisions between legal families, portrayed as closed and discrete ‘systems.’

IV. NORMATIVE HYBRIDITY

Örücü’s interest in non-state law reflects a wider “ethos of pluralism” in legal and social science scholarship.105 This ethos reflects the increasingly explicit complexity of contemporary law and legal systems at the global, national, and sub-national levels. Both within states and without, it is difficult to ignore the

the so-called ‘official law, and extends to multi-layers o systems. Thus, today, ‘law’ spans the range of positive law and then moves to non-state law, rules, custom and tradition.” Id., at 60. See also Twining, supra note 56, at 69-89.

102. Pound, supra note 23.
103. Sacco, supra note 23.
104. Petersen & Zahle, supra note 23 and Hirovonen, supra note 23.
proliferation of laws and the recognition of norms over the course of the last half-century. Social scientists, in particular anthropologists and sociologists, have long noted the frequently fuzzy divisions between state and non-state legalities.106 The coexistence of both, John Griffiths argued, “the omnipresent, normal situation in human society.”107 Social scientists and their allies in the legal academy have provided very sophisticated analyses, often rooted in empirical study, of these relationships. In a classic of the genre, Sally Faulk Moore has described these plural “legal” orders as “semi-autonomous social field[s]” that have “rule-making capacities, and the means to induce or coerce compliance; but [are] simultaneously set in a larger social matrix which can, and does, affect and invade it.”108 A few comparatists have also embraced (what I’ve called) hybridity, most notably Patrick Glenn and Werner Menski.109 Complementing in many respects the former’s analysis, Menski, a comparatist and social geographer, has “place[d] legal pluralism . . . confidently into the mainstream study of comparative law” and “emphasize[d] the need for strengthening socio-legal approaches.”110

In fact, the growth of scholarship on hybridity has brought an ever-expanding catalogue of ‘pluralist’ approaches. The first wave of social science research, the so-called ‘classical legal


109. See also Mattei et al., supra note 47 and Graziadei, supra note 50.

110. Werner Menski, Comparative Law in a Global Context: The Legal Systems of Africa and Asia 16 (2d ed. 2006). “Within a global framework for the comparative study of law and legal systems, it is evident that a narrow approach to law as state law leads neither to appropriate understanding of non-European societies and cultures nor to satisfactory analysis of the phenomenon of law even in its European manifestations.” Id. at 185-186.
pluralism,’ focused on non-Western, post-colonial communities.\textsuperscript{111} It often served as a critique of Western colonialism and hegemony. An important distinction is also made between (i) ‘weak’ or ‘state legal pluralism’ in which plural legal orders are effectively part of the wider state systems and (ii) ‘strong’ or ‘deep legal pluralism’ in which the focus includes both state laws and significant non-state norms.\textsuperscript{112} Understandably, lawyers, including comparatists, are often more interested in the former than the latter.\textsuperscript{113} More recently, research in so-called ‘new legal pluralism’ has included case studies of hybridity within the West, suggesting the continuing importance of non-state norms here.\textsuperscript{114} These works have suggested, that “[i]n most contexts, law is not central to the maintenance of social order.”\textsuperscript{115} And, if the “specifics are not yet clear,” one element of a third pluralist paradigm—after ‘classical’ and ‘new’ legal pluralism—is “global legal pluralism.”\textsuperscript{116} This encompasses international law, human rights, and, more problematically, involves the assertion of an increasingly important

\textsuperscript{111} There were exceptions. In addition to Ehrlich’s work, some early classics of “legal pluralism” were not limited to colonial societies. See e.g. GEORGES GURVITCH, SOCIOLOGY OF LAW (1947) and LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1971).

\textsuperscript{112} See e.g. Gordon Woodman, The Idea of Legal Pluralism, in DUPRET, supra note 24, at 5.

\textsuperscript{113} In the former, non-state normative orders exist with the approval of, or at the sufferance of, the state; the latter refers to non-state normative orders that exist despite the state. The lawyer’s distinction might be that between intra or praeter legem on the one hand and contra legem on the other. “[W]eak’ pluralism is no more than a plural arrangement in a diversified legal system whose basic ideology remains centralist.” Menski, supra note 110, at 116.

\textsuperscript{114} Merry, supra note 37, at 872 et seq. (This has sometimes been linked to research on ‘social norms’ linked both to political science and to the “law and economics” movement.); see also William K. Jones, A Theory of Social Norms, 1994 U. ILL. L. REV. 545 (1994) and ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

\textsuperscript{115} ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 280 (1991).

commercial ‘law’ or *lex mercatoria* created by non-state actors. These are often linked to debates on the character of globalization. Perhaps more useful to our project is ‘critical legal pluralism.’ Here, rather than “reify[ing] ‘norm-generating communities’ as surrogates for the State,” the focus is on the role of individuals in “generating normativity.” Rather than being the product of formal legislation or even informal custom, individuals are themselves the site of law or norm creation in a complex and fluid normative web. In a similar manner, the ‘post-modern legal pluralism’ of Boaventura de Sousa Santos details a “conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions.” He insists that the modern situation is one of the thick “interlegality” of both laws and norms.

In addition to the numerous internal debates on legal pluralism in the social sciences, broadening the mission of comparative law to include the study of both legal and normative hybridity has also encountered opposition. Among mixed jurists, Palmer has expressed concerns about the dangers of expanding the concept of ‘mixity’ to include the complexities of legal pluralism. While he has recognized the virtues of a functionalist or “factual approach” to the study of legal and non-state norms, Palmer has significant anxieties about the implications of the study.


120. De Sousa Santos (1987), supra note 119, at 298.

121. Note Palmer’s critical comment on the “eclectic list of systems”—including Australia, Algeria, and the European Union—discussed in Palmer (2009), supra note 73, at 333 n.43.
of hybridity on comparative law, especially in the classification of legal traditions. In discussing mixed systems, he has expressed concern about the loss of precision in expanding mixed scholarship to more complex varieties of legal hybridity or state legal pluralism:

To legal anthropologists and legal pluralists, the principal criterion of a mixed system is simply the presence or interaction of two or more kinds of laws or legal traditions with the same social field. The mixed nature of a legal order can be discovered and confirmed in an objective manner by research and observation. Any interaction between laws of a different type or source—indigenous with received, religious with customary, Western with non-Western—is sufficient to constitute a mixed legal system . . .

Palmer acknowledges the importance of expanding our understanding of how hybrid traditions are generated, but remains cautious:

Attempting to reclassify and reorder the mixed legal systems of the world in accordance with the information supplied by historical pluralism, ethnic pluralism, and transnational legal pluralism is the next daunting task of comparative law. If it can be accomplished, it would revolutionize the legal universe in a way comparable to the Copernican

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122. Palmer (2009), supra note 73, at 333. “Pluralism,” he writes, “has yet to present a taxonomy that differentiates and arranges the hybrids into useful groupings.” Id. at 335. Kenny Anthony has also noted that “in a mixed system, unlike a plural system, there is just one set of rules for every situation”: The Identification and Classification of Mixed Systems of Law, in COMMONWEALTH CARIBBEAN LEGAL STUDIES: A VOLUME OF ESSAYS TO COMMEMORATE THE 21ST ANNIVERSARY OF THE FACULTY OF LAW OF THE UNIVERSITY OF THE WEST INDIES 194 (Gilbert Kodilinye & P.K. Menon eds. 1992); The Viability of the Civilist Tradition in St Lucia: A Tentative Appraisal, in ESSAYS ON THE CIVIL CODES OF QUÉBEC AND ST. LUCIA (Raymond Landry & Ernest Caparros eds. 1985).
revolution on the old Ptolemaic system of astronomy.

He adds, however, that:

We are far from that at the present time. So far pluralism is an insight suggesting that the playing cards need to be reshuffled; it has yet to be shown how the cards can be re-dealt in a rational and coherent way.  

Palmer is right, of course, to note these very real difficulties. It is, after all, his focus on selected mixtures that has proven most constructive in the study of mixed systems.

But legal pluralists and their allies are not attempting to create new classifications, but to provide instead a conceptual lexicon and analytical models that allow for the unique characteristics of legal-normative orders (or the intersection of such orders). And Palmer’s ‘pluralist challenge’ may be met by the methodological pluralism he has suggested in other writings. He has written “that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow.” Comparative law must, in fact, “be accessible and its methods must be flexible.” For example, one response to this pluralist challenge is to look to alternative approaches to taxonomy. Both (i)
Ugo Mattei and (ii) Marc van Hoecke and Marc Warrington have recently suggested new models of comparative classification and corresponding paths to research. The legal philosopher Kaarlo Tuori has suggested classifying law according to its “surface level,” “legal culture,” or “deep structure.” Interestingly, Tuori borrows from, among others, Ferdinand Braudel. Reflecting the varying rates of historical change detailed in Braudel’s magisterial work, The Mediterranean and the Mediterranean world in the age of Philip II (originally published in French in 1949), Tuori suggests that:

Even within the law, approached in its symbolic normative aspect, we can distinguish between levels obeying different historical times. At the surface level, change is an everyday phenomenon, at the level of the legal culture the pace of change slows down, and the most inert level in its variation is the deep structure, which represents the long durée of the law.

Each of these approaches reflects a move away from the narrow observation of black-letter law. Other comparatists have begun to combine these different methods in novel and productive ways. 


129. Kaarlo Tuori, Towards a Multi-layered View of Modern Law, in JUSTICE, MORALITY AND SOCIETY: A TRIBUTE TO ALEKSANDER PECZENIK ON THE OCCASION OF THIS 60TH BIRTHDAY 433 (Aulis Aarnio, Robert Alexy & Gunnar Begholz eds., 1997); see also the discussion in chapter 6 of KAARLO TUORI, CRITICAL LEGAL POSITIVISM (2002).

130. Id. at 150. See also Kjell Å. Modéer, Mixed Legal Systems and Coloniality: Parts of the Construct of a Global Legal Culture, in ASIA AND EUROPE IN GLOBALISATION: CONTINENTS, REGIONS AND NATIONS 14 (Göran Therborn & Habibul Haque Khondker eds. 2006).

131. Lukas Heckendorn-Urscheler, Multidimensional Hybridity: Nepali Law from a Comparative Perspective, in CASHIN-RITAINÉ ET AL., supra note 1, at 55 (combining the traditional ‘legal families’ approach, Glenn’s ‘legal traditions,’ and Mattei’s ‘three patterns of law’).
Alternatively, of course, we might resist the taxonomic urge in favor of generating additional research. Aware that the two cannot be easily separated, we might instead “research first, categorize later.”

Our project takes up this task of researching both legal and normative hybridity, i.e. both ‘state’ and ‘deep’ legal pluralism. We will do so by combining the concentrated research, comparative method, and specific results of Palmer with the vivid, creative conceptual vocabulary of Örücü and the rich resources of the social sciences. Admittedly, a shift to studying both ‘official’ and ‘unofficial’ legalities significantly complicates the work of comparative law, drawing jurists into debates they typically avoid and for which they are arguably ill-prepared. Jurists and social scientists not only define ‘law’ differently, but also often adopt very different methods in their research. In a recent discussion of law and anthropology, for example, Thomas Bennett usefully outlined “[i]n very general terms, the preferences of each discipline . . .”

<table>
<thead>
<tr>
<th>Perspect</th>
<th>COMPARATIVE LAW</th>
<th>LEGAL ANTHROPOLOGY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject matter of research</td>
<td>Macro</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lawyer’s</td>
<td>Micro</td>
</tr>
<tr>
<td></td>
<td>The subject’s</td>
<td></td>
</tr>
<tr>
<td>Method</td>
<td>Formal laws</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rules and concepts</td>
<td>All normative orders</td>
</tr>
<tr>
<td></td>
<td>Theoretical and dogmatic</td>
<td>Social contexts</td>
</tr>
<tr>
<td>Ultimate concern</td>
<td>System</td>
<td>Social result</td>
</tr>
</tbody>
</table>

There are obviously more complex approaches between these two ideal types. They remain, however, meaningful disciplinary distinctions related to the respective goals of legal and social

132. Ignazio Castellucci, in CASHIN-RITAINE ET AL., supra note 1, at 75. In conversation, Castellucci has also noted that “only two things in life are certain: death and taxonomy.” We are, it is true, classifying animals. See also Giovanni Marini, Foreword: Legal Traditions—A Critical Appraisal, 2 COMP. L. REV. 1 (2011), available at www.comparativelawreview.com/ojs/index.php/CoLR/article/view/15/19 (Last visited November 9, 2011).

science research and pedagogy. The prescriptive purposes of state laws, either for social ordering or legal practice, are quite different from the comparative luxury of the descriptive research of social scientists. Tamanaha has created a similar table comparing “legal versus social scientific perspectives:”

<table>
<thead>
<tr>
<th>Concept of law</th>
<th>FIRST CATEGORY–LIVED NORMS</th>
<th>SECOND CATEGORY–ENFORCED NORMS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Phase</strong></td>
<td>◦ Patterned or regular conduct</td>
<td>◦ Social reaction to disruption of regular conduct</td>
</tr>
<tr>
<td>‘Legal’ Mechanism</td>
<td>◦ Complex of social obligations</td>
<td>◦ Institutionally imposed sanction</td>
</tr>
<tr>
<td>Sociological Studies</td>
<td>◦ Internal control—conformity</td>
<td>◦ External control—response to deviance</td>
</tr>
<tr>
<td>Sociological Mechanism</td>
<td>◦ Socialization</td>
<td>◦ Coercive application of power</td>
</tr>
<tr>
<td>Effective Moment</td>
<td>◦ Proactive (shaping conduct)</td>
<td>◦ Reactive (following disruptive conduct)</td>
</tr>
</tbody>
</table>

These disciplinary differences reflect not only distinctive training and research, but mirror the distinction between legal and normative hybridity, between “(state-)enforced” and “lived” norms. Combining the study of both will require a rarely exhibited interdisciplinary spirit. It will demand considerable collaboration and dialogue as well as translation between legal and social science vocabularies. We are optimistic about both the practicalities and the possibilities of our project. As Örücü has written, “[i]f comparatists and regionalists work more closely in the future, the outcome will prove to be extremely beneficial to both and to legal scholarship.”

While there are real obstacles to such research, several writers have recommended that the study of pluralism or hybridity might be the ideal subject on which jurists and social scientists can collaborate. Annelise Riles has suggested, for example, a “new rapprochement” was occurring between comparatists and socio-legal jurists, not least because of legal pluralism. Roger Cotterrell has similarly written that “comparative law and legal sociology are interdependent and . . . their central, most general and most ambitious scientific projects—to understand law in its development and its variety as an aspect of social life—are identical.” His suggestion that “a genuinely pluralist approach” to law involves shifting the research focus away from the state to communities might also be of particular use to our work. With others, Cotterrell has specifically noted that scholarship on comparative law and legal culture is also promising. Indeed, it points away from positivist understandings of law and “towards a legal pluralist understanding of the scope of law that is close to that of many legal sociologists and legal anthropologists.” Indeed, as Nelken notes:

138. Annelise Riles, Comparative Law and Socio-Legal Studies, in REIMANN & ZIMMERMANN, supra note 50, at 777. See id., at 805-806. See Bennett, supra note 133, at 25.

139. ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 129 (2006); see Roger Cotterrell, Comparatists and Sociology, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 135 (Pierre Legrand & Roderick Munday eds., 2003); see also Nelken, supra note 51, at 22. For an earlier attempt, see JEROME HALL, COMPARATIVE LAW AND SOCIAL THEORY (1963) and Jerome Hall, Comparative Law and Jurisprudence, 16 BUFF. L. REV. 61 (1966).

140. Roger Cotterrell, Transnational Communities and the Concept of Law, 21 RATIO JURIS 1, 10 (2008). See particularly the types of legal pluralism (monistic, agnostic, statist, and genuinely pluralist) discussed in id., at 8–10. See also Roger Cotterrell, A Legal Concept of Community, 12 CAN. J.L. & SOC’Y 75; see also ROGER COTTERRELL, LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE (1995).


142. Roger Cotterrell, Comparative Law and Legal Culture, in REIMANN & ZIMMERMANN, supra note 50, at 729; see also RENDEZVOUS OF EUROPEAN LEGAL CULTURES (Jørn Øyrehagen Sunde & Knut Einar Skodvin eds., 2010).
In employing the idea of legal culture in comparative exercises geared to exploring the similarities and differences amongst legal practices and legal worlds the aim is to go beyond the tired categories so often relied on in comparative law such as ‘families of law’ and incorporate that attention to the ‘law in action’ and ‘living law’ which is usually missing from comparative lawyers’ classifications and descriptions.143

Our project may appropriately be seen as a comparative study of both the ‘law in action’ and the ‘living law’ (as Ehrlich called it) in the Mediterranean.144 This cultural approach to comparative law is promising. It may even be essential to any genuine understanding of normative ordering, whether of the state or society, in context.145

Acknowledging the ubiquity of hybridity has important consequences for both comparative law and for legal theory.146 It undermines the dissection of plural and dynamic traditions into discrete, closed legal families or systems. It challenges legal


144. In discussing Ehrlich, Nelken writes that “it may be helpful to distinguish developments in the study of law beyond the law (law other than that contained in statutes and judgments), law without the state (especially the coexistence of plural legal regimes), and order without the law (the implicit norms that make order possible).” David Nelkin, Eugen Ehrlich, Living Law, and Plural Legalities, 9 THEORETICAL INQUIRIES IN L. 443, 466 (2008). See David Nelken, Law in Action or Living Law?: Back to the Beginning in Sociology of Law, 4 LEGAL STUD. 157, 169 et seq. (1984). See also Mathias Hertogh, A “European” Conception of a Legal Consciousness: Rediscovering Eugen Ehrlich, 31 J.L. & SOC’Y 457 (2004).

145. In part, this is the recognition that law is “constituted by culture, and culture (in no small way) by law.” LAWRENCE ROSEN, LAW AS CULTURE xii (2006).

146. Juris Diversitas, with the Swiss Institute of Comparative Law, held a conference (21-22 October 2011) on the theme of “The Concept of ‘Law’ in Context: Comparative Law, Legal Philosophy, & the Social Sciences.” A collection of essays from that conference will be published in 2012.
nationalism, positivism, centralism, and monism. Indeed, much of the scholarship of legal pluralism was rooted in a critique of state- and state law-centered analytical models. This parallels legal theory, informed by legal history, which suggests that much of the legal and moral thought of the pre-modern era adopted, by necessity, a more complex view of human ordering. Similarly, contemporary legal philosophers like Twining and Tamanaha—each with their own personal experiences with hybridity and links to the social sciences—have recently recognized the value, or necessity, of incorporating multiple sources of legal and normative authority into their analysis. Twining, for example, has stressed the importance of moving beyond Euro-centric and state-centered legal theory in an age of globalization. In demanding a less parochial ‘general jurisprudence,’ he noted that:

A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of relations and of ordering, relations between these levels, and all important forms of law including supra-state (e.g. international, regional) and non-state law (e.g. religious, transnational law, chthonic law, i.e. tradition/custom) and various forms of ‘soft law’

147. Roderick Macdonald and David Sandomiershi extend this critique to “prescriptivism,” which is “the belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate.” Roderick Macdonald & David Sandomiershi, Against Nomopolies, 57 N. IRELAND LEGAL Q. 610, 615 (2006).


149. As Geoffrey Samuel notes, with admittedly different ends, “[t]he task of historical jurisprudence is not, then, to provide the basis for a philosophy of law. It is to provide insights into law as an object of knowledge.” Geoffrey Samuel, Science, Law and History: Historical Jurisprudence and Modern Legal Theory, 41 N. IRELAND LEGAL Q. 1, 3 (1990). See also Harold J. Berman, The Historical Foundations of Law, 54 EMORY L.J. 13 (2005) and Geoffrey MacCormack, Historical Jurisprudence, 5 LEGAL STUD. 256 (1985).

150. Twining was born, raised, and taught for some time in Africa; Tamanaha is a native of Hawaii and practiced law there and in Micronesia.

151. Twining, supra note 56, at 71. This acknowledgement “that normative and legal orders can co-exist in the same time-space context,” he notes, “greatly complicates the tasks of comparative law.” Id.
Although there are important differences between their approaches, Tamanaha has made similar arguments. For both, state law is but one manifestation of normative ordering and the study of legal theory is closely linked to comparative law and socio-legal studies. And Twining and Tamanaha are not alone. Such theoretical insights will inform our project. But it is hoped that the data generated by the project as well as the project’s conclusions may also contribute to a more grounded philosophy of law and normative ordering.

V. CONCLUSION

In concluding, it is important to note that the legal traditions and normative orders that are the focus of the Mediterranean Hybridity Project are, by their nature, fluid and slippery, constantly in flux. Even their component parts are hybrids. As the anthropologist Brian Stross wrote in discussing ‘hybrid’ as a metaphor:

There are after all no ‘pure’ individuals, no ‘pure’ cultures, no ‘pure’ genres. All things are of necessity ‘hybrid.’ Of course we can construct them to be relatively ‘pure,’ and in fact we do so, which is precise how we manage to get (new) hybrids from purebreds that are (former) hybrids.

This article has briefly sketched an outline of our attempt to capture the legal and normative complexity of the Mediterranean region. It may be too much, of course, to ask that scholars as individuals grasp both the theoretical writings and detailed case studies of both jurists and social scientists. But a collaborative, interdisciplinary project might successfully combine both theory


and practice to produce new information and novel insights on both hybridity and diffusion. In attempting this, our project will combine three elements. First, the comparative method, concentrated research, and specific results of Professor Palmer on the classical mixed jurisdictions and the ‘third legal family.’ Second, the expansive vision and vivid conceptual vocabulary of Professor Örücü in her research on comparative law and mixed legal systems. Third, we will add the rich resources of the social sciences, especially the extensive scholarship on legal or normative pluralism. Recent political reforms and continuing social crises across the region suggest how timely and useful the Mediterranean Hybridity Project might be.
THE MEDITERRANEAN LEGACY IN THE CONCEPT OF SOVEREIGNTY: A CASE OF LEGAL AND PHILOSOPHICAL HYBRIDITY

Alessio Lo Giudice

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ABSTRACT

The ideas of centralized political power and monarchy that emerged from the Mediterranean world are among the most important philosophical bases for the concept of sovereignty. My thesis is that the normative idea of an absolute, independent, and exclusive center of power originates in a complex case of philosophical hybridity. It is the outcome of the alternation between the conception of the Sovereign as representing the supreme power (the indirect theory) and the conception of the Sovereign as directly containing that power (the direct theory). The former conception is usually associated with the history of Western

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political culture and the passage from Greek to Roman ideas of public authority. The latter conception is typically associated with the understanding of supreme political power found in Eastern culture, as exemplified in Persian kingship and the Byzantine theocracy.

My intention is to show how the modern concept of sovereignty has emerged from a mixture of these two conceptions. In fact, the early philosophical structure of sovereignty in both its monarchical and its democratic versions can be summed up in the notion of secularized transcendence. The sovereign benefits simultaneously from both the conceptual model of subjectivity (the indirect theory) as a mask that represents a center of attribution (le Roi est mort, vive le Roi), and the conceptual model of a material supreme subject (the direct theory) who embodies the primacy of an authority that is beyond actual social relationships (l’État c’est moi).

I. INTRODUCTION

My thesis is that the normative idea of sovereignty, that is, of an absolute, independent, and exclusive center of power, is a complex instance of philosophical and cultural hybridity. It constitutes a specific kind of mixture whose nature seems obvious in the complex transition from pre-modernity to modernity but that is clearly freighted with the multiple nature of the millennia-long historical experience of Mediterranean life.

This thesis does not challenge the widespread conception of sovereignty as a typical legal-political category of modernity. That conception is not at issue in my analysis. In fact, it is precisely from the perspective of a philosophical discontinuity in the concept of sovereignty that it becomes possible to grasp the unique mixture of ancient and modern features to be found in new ways of theorizing supreme legal and political power. In tracing this conceptual history, we need to adopt a specific approach that seeks to identify the area of convergence where past concepts are subsumed into and transformed by modern concepts. This approach entails taking account of both the rupturing impact on culture and society of new principles and the presence of traces of
past attitudes in the formation of new styles of life and thought. Thus I am not questioning the need to interpret and understand the concept of sovereignty in a holistic way, that is, by taking into consideration the network of social, historical, political, and cultural features that frame modernity.

At first glance, the conception of sovereignty in the Mediterranean region seems to consist of a temporal-spatial mosaic of interdependent elements that compose a single conceptual structure: that of a transcendent, absolute power intended to further human well-being. The modern European attitude towards centralized power would appear to derive from this structure, even when we take account of the indisputable differences between Eastern and Western conceptions of power. The point is that the cultural mobility that has always been a feature of the Mediterranean region allowed for numerous intersections and cases of intermingling between Eastern and Western cultures in a way that was decisive for the development of the concept of sovereignty.

II. BRIEF HISTORICAL OVERVIEW

From a historical perspective, an illuminating picture of this process of hybridization, specifically relevant to the development of the concept of sovereignty, is provided by the relationship between the theocratic autocracies established in the Egyptian and Persian empires and the structure adopted by the Roman Empire in the fourth century. As Mommsen observed, Roman imperial power was based at this time on the model of the Eastern Hellenistic monarchies. By means of this new model,

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imperial dignity had been sacralized. The emperor was no longer *primus inter pares* but rather a distant and holy person. He was viewed as a divinity that was to be honored; and then, following Constantine’s reform, as a person representing the divinity.3

These Hellenistic political models that so strongly influenced the Eastern Roman Empire and thus the complex process of formation of the Byzantine Empire had of course in turn been based on Alexander the Great’s celebrated conquest of the Persian and Egyptian empires and thus they incorporated a mixture of Greek, Egyptian, and Persian political and cultural characteristics. In Alexander’s project and in his political praxis, the intention was evident of combining Greek political models with elements of a pronounced Eastern character. Alexander was attracted in particular by the sacralized conception of the topmost political figures in Eastern culture.

From this Mediterranean dynamic of the interaction between legal and political power, the conception of the governor as *Deus et Dominus* and the establishment of a vast bureaucratic apparatus emerged as salient in the most significant political entities of the region. As well, the cult of the emperor was established, along with the organization of a system of officialdom closely linked to the source of power. Finally, this conception of the sovereign appears to have been systematically transmitted through the Byzantine interpretation of imperial divinity and was maintained (of course in Christian terms) even following the Christianization of the Empire.

Thus in this conception, the emperor, by virtue of his dignity, is understood to stand above all other people as the imitation of God. He is God’s shadow on Earth. He is invested with a majesty of divine origin. He is not just a representative of the supreme power, but an intermediate figure between God and humans who participates in the nature of the holy. He is the God of the World. Indeed, the emperor’s holiness and Christ’s divinity are strongly connected. Numerous imperial rites and ceremonies of Byzantine society evince the practice of a sort of

“Christomimesis.” Thus the common unifying feature of the most significant (in terms of extension in time and relevance to modernity) Mediterranean political experience, an experience that did not come to a formal end until 1453, was that of a relationship between politics and transcendence: a legitimizing relationship ensured by the role of a holy emperor conceived of as a figure with direct contact with the transcendent.4

This feature is closely linked to a belief shared by the Byzantines with other peoples of the Mediterranean region, namely that their community in some manner constituted a divine manifestation, a theophany.5 In a framework of this kind, a highly important notion is that of the center; that is, the idea of the supreme city as the center of the world where the point of contact with the transcendent is located.

III. THE HOLINESS OF THE POLITICAL

We are dealing, then, with the question of the relationship between politics, law, and the dimension of the holy. Within this framework, the concept of the “holy” is equivalent to the meaning of a productive social ritual that is never totally subjective, since its orientation depends on its relationship with the transcendent. In this sense, the dimension of the holy is the sphere in which mechanisms of collective and symbolic identification unfold. It is a foundational dimension for the “political,” since we find in it original and unchanging dynamics of inclusion/exclusion. We are dealing with a kind of process of political consecration that is in a sense very close to Émile Durkheim’s notion of the “holy.” For Durkheim, the holy stands for a collective representation that makes it possible to order, and thus constitute, reality. This representation is a sociocultural datum that allows individuals to transcend themselves by virtue of their identification with the group. Thus the symbolic separation of the “holy” from the

4. For an insightful overview of the relationship between holiness and political power in Christian Europe, see ADVENIAT REGNUM: LA REGALITÀ SACRA DELL’EUROPA CRISTIANA (Franco Cardini & Maria Saltarelli eds., Name, Genova, 2000).
“profane,” deriving from humankind’s original socio-religious attitude, is the original operation of social classification.⁶

And indeed, symbolic function is integral to sacrificial experience, both in original true sacrifices and in subsequent developments in which a purely linguistic ceremony prevails over the physical aspects of the ritual. What is at issue here is the symbolization of the community’s political and social origins through its link with the principle of the transcendent. But this reality is the product of a cultural process of social institution that, by consecrating a “place,” sanctions a difference between the real and the unreal, the human and the non-human. Pierre Bourdieu’s analysis of the meaning of consecrating rituals as legitimizing rituals of a social reality is precisely relevant here. According to Bourdieu, in rituals of consecration we are dealing with institutive rituals of sociality, that is, with rituals that lead to the recognition as legitimate and natural of a difference that is in fact arbitrary. From this perspective, the sacralization of a space and of a leader within this space is an institutive ritual of sociality because it simultaneously establishes and consecrates a difference.

Thus the institution of society is an operation of attribution of properties to places, persons, actions, behaviors, and objects in a way that makes it possible to perceive these properties as something natural. What is communicated and represented, and therefore perceived, as the manifestation of the holy (theophany) is precisely a political and legal order interpreted as the product of a consecrating separation: “To institute, in this case, is to consecrate, that is, to sanction and sanctify a particular state of things, an established order, in exactly the same way that a constitution does in the legal and political sense of the term.”⁷


IV. THE MODERN CONCEPT OF SOVEREIGNTY

What is really surprising, given the flux of change one finds in the history of ideas and cultures, is the reappearance at the end of the sixteenth century of extremely centralized organizations of political power, in contrast to the chaotic plurality of legal and political centers of power typical of the Middle Ages. This reappearance is especially surprising in its implicit assumption and positioning of a “holy” subject that transcends social reality for the purpose of governing it. In conceptual terms, this subject stands for the core of a single, central political and legal power. Thus from this perspective, the idea of an absolute, exclusive, and independent power, embodied in the institutional figure of the sovereign as the core of the modern state, shows the implicit persistence of a structural conception of supreme power. It is a conception in which, as we will see, the relationship between politics and the transcendent continues to figure; but this relationship has changed in significant ways and now emerges as a bare conceptual model fully contextualized within the complex turn of the modern.

It is widely recognized that the crisis of the medieval order is visible in the process of the formation of modern states. According to historiography convention, the Peace of Westphalia of 1648 is emblematic of this epochal political and legal transformation. What is crucially relevant to the thesis of the present article is the celebrated reaffirmation in the texts of the Peace of Westphalia of the principle of *cuius regio, eius et religio*, which had been established in 1555 in the Peace of Augsburg. This principle enshrines the link between an individual’s authority over a region (including over a kingdom) and that individual’s religious faith: the latter automatically becomes the state religion. Thus we have here the establishment of a link between territory and the cultural identity of a people that is forming itself as a nation under the exclusive and independent direction of a unique authority.

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8. The literature on the Peace of Westphalia is of course vast. For a systematic but also unconventional conceptual approach, see PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE (Randall Lesaffer ed., Cambridge University Press, Cambridge, 2004).
Within this set of interconnections that link territorial, political, and cultural-religious elements, we grasp the existence of the nucleus of sovereignty as the expression of the modern conception of political authority.

The feudal lord becomes sovereign in the territory that belongs to him. Within this framework, he accedes to the status of the one who has no superior. Thus the sovereign exercises his power *superiorem non recognoscens*. His authority is exclusive, since there is no possibility for the exercise of a legitimate power that, within a specific territory, is not subject to the sovereign’s will. But further, his authority is also independent of that of other sovereigns who symmetrically exercise their own power over specific populations and territories.

It can thus be affirmed that post-Westphalia European society was composed of a plurality of territorially based political systems. Each of these systems had a supreme and independent governing authority. The medieval political-theological *universitas* now acquired the nature of an international *societas* of sovereign states. Sovereign power emerged from the intersections and complex links among political and normative centers that had been typical of the Middle Ages. Thus the sovereign state, at any rate in ideal terms, neutralized the medieval system of dispersed powers and established a centralizing authority. The population governed by the sovereign had the duty to obey the laws he enacted; and the possibility of external interference by presumptively superior authorities, like the pope and the emperor, were in principle eliminated: *rex est imperator in regno suo*.

An important example of the modern theory of sovereignty that nevertheless reveals significant traces of its medieval origins is Jean Bodin’s *Les six livres de la République* (1576). Bodin advances an original notion of absolute power (*ab-solutus*, that is, without constraints). On one hand, absoluteness is to be confined

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to the exercise of political-legal power in the sense of the sovereign’s positive statutes. This means the absoluteness does not equate to power without limits, for the sovereign must respect God’s laws. On the other hand, Bodin’s intention is not to set factual limits on sovereign political power. Rather he wishes to preserve the normative value of the idea of “nature” as a horizon within which the rationality of sovereign power is to be confined. The measure of nature provides the foundation for the rationality of political power and thus the rationality of absoluteness as its inescapable prerogative. The conceptual supremacy of the sovereign is rationally justified by the absolute transcendence of the “natural” order. Interpreting Bodin’s thought, we might say that, in the modern “natural” world of equal individual subjects, a purely sovereign power finds its foundations in the rational idea of an absolute (and so “unequal”) center of power that, by virtue of its “inequality,” can serve as a legitimate authority over its subjects: “Similarly sovereign power given to a prince charged with conditions is neither properly sovereign, nor absolute, unless the conditions of appointment are only such as are inherent in the laws of God and of nature.”

Thus it is understandable that Bodin should arrive at this famous definition of sovereignty: “Sovereignty is that absolute and perpetual power vested in a commonwealth.” Under this conception, absoluteness coincides with the uniqueness of the political-legal source represented by the sovereign. Its perpetual nature is evident in the new prerogative assigned to sovereign power in modernity, namely exclusive competence to enact laws. Bodin situates the specific function of a sovereign subject in the concrete establishment of a normative order. The sovereign is


11. Id. The original version is in J. BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE 85 (1576) (“La souveraineté est la puissance absolue et perpétuelle d’une République.”).
justified and legitimized before his modern subjects by virtue of his ability to deal rationally with the need for coexistence and within the framework provided by God’s laws.

Another (perhaps more radical) instance of the development of the modern concept of sovereignty that—withstanding its disruptive assumptions and outcomes—features traces of a shared heritage with the Mediterranean tradition of absolute power is found in the theory Thomas Hobbes set out in *Leviathan* in 1651.12

According to Hobbes, the natural condition of equality between people is an essential condition of subjectivity. The anthropology of conflict advanced by Hobbes derives from this radically modern starting point:

Nature hath made men so equal, in the faculties of the body, and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind than another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.13

Hobbes’ anthropology, relying for its starting point on the metaphorical-transcendent notion of the state of nature, may be represented (if perhaps somewhat simplistically) in the form of this strict logical sequence: equality of individuals => equality of hope => possibility of convergent desires for the same goods => mutual diffidence => war of all against all as outcome of a strategy of anticipation => consequent generalized condition of brutishness and isolation.

According to Hobbes, anthropologically, the neutralization of this endemic conflict in a pre-legal and pre-institutional context can be guaranteed simply by an internal solution within the


dynamics of the conflict. The conflict itself will select a subject that has attained, even if only temporarily, to a power that overcomes all other subjective powers and is thus feared by everyone. But in order to exploit this precarious situation to obtain peace before the decline that is inescapable for any temporary superior power, a stabilizing step is necessary. This stabilization may be guaranteed by the institutionalization of this anthropologically based hierarchy. In particular, a stable context is achievable by means of legal tools (covenants) likely to make permanent the excess of power of a given subject who, being feared by all, will be capable of ensuring the peace. Thus the *pactum unionis* is also a *pactum subjectionis* to a subject who is invested with the power of all the individuals and who thus becomes the most powerful among them. This makes possible the transition from the precarious state of nature to a stable and permanent civil society.

This transition performs its function simply through the dynamic of representation in which is crystallized the idea of a sovereign subject who transcends the multitude of people represented and who is conceived of as an external center of unity and as himself the condition for unity:

> A multitude of men, are made *one* person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*. And it is the representer that beareth the person, and but one person: and *unity*, cannot otherwise be understood in multitude.14

Thus from a logical-temporal perspective, the covenants are not divisible, since the members of the multitude are associated with each other by virtue of the fact that they are subject to the same institutional person who performs a representative function. Representation, as legal form, frames the nuclear structure of the Hobbesian state and the Hobbesian concept of sovereignty.15 The

14. *Id.* at 109.
15. The literature on the concept of representation in Hobbesian thought is vast. To mention just a few insightful interpretations: YVES-CHARLES ZÁRKA,
sovereign power, whose institutional end is individuals’ safety, is legally justified by means of a reciprocal authorization exchanged by subjects *uti singuli*:

*I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner. This done, the multitude so united in one person, is called COMMONWEALTH, in Latin CIVITAS.*

Thus the sovereign stands in an external position with respect to the covenant. He is a third party who benefits from individuals’ authorizations. The subjects are the *authors* of the sovereign’s action. The sovereign is the *actor* who acts in the name of the multitude of people. The sovereign’s absoluteness is the outcome of the totalizing authorization derived from the subjects’ will. The sole effective limit on the sovereign is imposed by the purpose of his having been constituted, that is, by the guarantee of a peaceful social order. But at the end of the day, the effective ability of the sovereign to maintain the peace is not a limitation on the exercise of legal-political power. It is precisely the cause of the sovereign’s existence, and when he can no longer guarantee the peace he concretely loses the quality of sovereign. This means that conceptually the Hobbesian sovereign is substantially absolute. He is really a third party *superiorem non recognoscens*. He materially transcends the multitude, since he stands outside the social contract; and he *symbolically* transcends the multitude as well,

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16. HOBBS, supra note 13, at 114.
since he embodies its unity: he is “above” the plurality of the singularities that compose the multitude.

Thus the modern form of political representation as conceived by Hobbes serves as the condition for thinking about the unity of a collective body. It does not consist in the representation of different organizations, social bodies, or parties; it is, rather, the embodiment of the idea of a people and of its unity made possible solely by virtue of representation by one person. This unity acquires its form, its visibility, because of the representative action of the sovereign. Modern political representation, so conceived, has a productive and formative nature: it makes visible and present something that is invisible and absent (a people and its unity) through the presence of a public (representative) entity. As Carl Schmitt has said, the dialectical nature of the concept of representation resides in the fact that the invisible being is presupposed to be absent and yet at the same time made present.17

The invisible entity of reference, which seems so crucial to understanding the epochal political-legal meaning of the concept of sovereignty in modernity, indicates in a specific way the idea of openness to transcendence that we earlier described as the main Mediterranean legacy in our model of a supreme and absolute power. Thus what emerges from the modern concept of sovereignty, as well as from the significant role of the notion of representation within it, is a specific function filled by conceptual transcendence in order to constitute the political and legal order. The unity in the multitude that constitutes the crucial political question of modernity requires a transcendent movement from empirical reality. This movement is conceptually unresolved, since the ideal nature of the unity of a people is inescapable and is always ideal (absent) even when it is made present by virtue of the political representation of the sovereign.

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Given the conceptual outcome arrived at in the last paragraph, we should now specify and clarify the Mediterranean legacy in the concept of sovereignty with a reading of the relationship between legal-political power and conceptual transcendence. As Bertrand de Jouvenel has written, there is nothing less natural than that concentration of authority that makes authority distant and invisible.\(^\text{18}\) A certain aptitude for the mystical that has historically been weak in the West is needed to grasp the relevance of this concentration; or failing that, the clear presence of a dash of belief in the holy. Indeed, the mix of Eastern traditions of the sacred core of political power with the proto-secularized understanding of authority typical of Greek and Roman culture may be seen as one of the cultural conditions for possibility for the vast process of political unification effected by the establishment of the state in modernity.

From this perspective, early modern literary descriptions of political power are significant. The political and existential representation of the sovereign found in Rosencrantz’s speech in Act III, Scene iii, of Shakespeare’s \textit{Hamlet} seems to indicate a proto-modern centrality of the sovereign, of his soul in relation to the world around him. Like “a massy wheel / Fix’d on the summit of the highest mount / To whose huge spokes ten thousand lesser things / Are mortis’d and adjoin’d,” he is at the center of everything and has innumerable people attached to him, their destinies attached to his destiny.\(^\text{19}\) The fall of the sovereign is the fall of a world. This use of the form of the wheel and of the idea of the center as represented in the sovereign’s soul points to the unifying capacity of sovereignty when viewed, in modernity, as the locus of political unity.

The persistence of the symbolism of the center of the world, then, is highly relevant to an understanding of the modern face of the sociopolitical, within which the concept of sovereignty is framed. But how are we to understand the meaning of this

\(^{18}\) Bertrand de Jouvenel, \textit{De la souveraineté} (Genin, Paris, 1955).

persistence? How are we to understand this symbolism, given the cultural horizons of an age that has emerged out of a gradual process of secularization? Perhaps we need to recall the cultural and philosophical core meaning of the concept of sovereignty as it appeared in the era of the Peace of Westphalia and in the theories of Bodin and, above all, Hobbes.

The point is to grasp that, from a conceptual perspective, the logic that governs processes of political sacralization expresses the institution of a difference, of a distinguishing feature. On one hand, the process of legitimizing political authority in modernity is founded on the gradual establishment of a self-sufficient humanism; on the other hand, it emphasizes the need to institute a new order: an artificial order built by human beings as a creation *ex nihilo*. But as we have seen, the institution of an order is the institution of a difference in relation to the previous chaotic and profane space. The logic of modern sovereignty, then, is the logic of an instituted difference. The sovereign state establishes borders, that is, signs of difference from other profane states. The state is established through the consecration of a territory, its inhabitants, and their form of life.

But this institution is guaranteed, within the conceptual structure of sovereignty, by openness to a secularized transcendence: that is, the transcendence of a sovereign subject who has been instituted as different among equals, as a supreme being in comparison with inferior others, but above all as the locus of the authority that transcends all concrete social relationships. This is an authority that relies on the conceptual model of subjectivity as the mask to which is attributed the unity of the institution as the reflex of the ideal unity of the multitude; and this applies to both the monarch’s mask and the people’s mask. Thus the secularized transcendence of sovereignty issues from the long-term impersonality of the center of legal and political attribution in which it is embodied.

The *plenitudo potestatis*, as *potestas directa*, is the technical outcome of this conceptual transcendence. More precisely, it is the form that the sovereign, as representative of

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unity, must acquire in order to make visible the empirically absent unity in the multitude. The peculiar potestas of the sovereign, being the acting representation of a subject who is one because he transcends all parties, all singularities, guarantees the transition from the fragmented multitude of the state of nature to the person-multitude that is a people. Thus symbolically the sovereign must represent himself as an entity that tries to make immanent, by virtue of the absoluteness of his power and his decisions, what is in fact designed to remain transcendent: the pure ideal source of unity. The continuous attempt to render this ideal earthly is the regulatory principle of secularized transcendence as embodied in the modern concept of sovereignty. The process of secularization consists, then, of just this attempt, never totally successful, to bring unity to the world. 21 But the attempt is conceptually destined to partly fail because that unity in se stands outside the world; it consists precisely of the perspective of the ideal standing above the material many.

This dynamic helps account for the clear and deep traces of the pre-modern evident in the visible royal acts engaged in by several modern monarchies. At least until the French Revolution, the king could rely on the argument of the divine nature of his person, for example by pointing to his anointment at Reims; and this attitude was illustrated by his self-attribution of special powers (the Sun King proclaiming his own high and dazzling light). When Louis XIV said l’État c’est moi, he was expressing as well his awareness of being a material supreme subject who embodied the primacy of an authority beyond actual social relationships. Consistently with one strand of the Mediterranean legacy, and thus with the Eastern culture of political power, he affirmed a conception of the sovereign as directly containing the transcendent supremacy of an absolute center of power (direct representation). Sovereignty is embodied in the monarch’s body. We see here the attempt to delineate a subject that directly represents transcendence through the attempt to materialize ideal unity. This is not a third transcendent king evoked by the sovereign, but rather a presumed direct earthly-making of the unity in the king’s body.

At the same time, however, sovereign power represents itself as articulating, under various configurations, the medieval theory of the king’s two bodies.\textsuperscript{22} The monarch’s physical body, which, like every body, is destined to suffer disease and decay, is associated with, and not distinguished from, the institutional and impersonal political body of a king who, as a power, as the center of the world, is immortal. The traditional formula adopted following the accession of a new sovereign, \textit{le Roi est mort, vive le Roi}, is something like the emblem of the coexisting conception of secularized transcendence that seems to be largely associated, at least until the advent of the Byzantine Empire, with the Greek and Roman tradition of the impersonal nature of the supreme power.\textsuperscript{23} As Ernst Jünger has written,\textsuperscript{24} this formula implies a third extra-temporal king, and both the dead king and the living one are images of that king. They are like bodies that wear the mask of this third totally transcendent king who is the supreme center of attribution of legal, political, and social life within the state. Thus we have here, coexisting with the previous theory, a conception of the sovereign as strictly \textit{representing} the supreme power and therefore as representing the original and transcendent source of absolute power (indirect representation). Indeed, the king’s physical death makes clear the impossibility of an immanent unity. The \textit{true} sovereign is the third, extra-temporal, king and thus the indirect theory expresses the awareness of the irreducible distance between the physical unity of a person and the unity in a multitude. The latter is just an idea, but an idea with tremendous concreteness. This coexisting conception reminds us that the attempt to give unity earthly form is destined to fail; but this reference to unity as a third transcendent idea is understandable precisely because of the experience of many failures as part of the pretence of making unity earthly.

\textsuperscript{22} The best known overview of this theory is provided by \textsc{Ernst H. Kantorowicz}, \textit{The King’s Two Bodies: A Study in Medieval Political Theology} (Princeton University Press, Princeton, 1957).

\textsuperscript{23} For a groundbreaking interpretation of the formula “\textit{Le roi est mort, vive le roi}” see \textsc{Ralph E. Giesey}, \textit{Le roi ne meurt jamais: Les obséques royales dans la France de la Renaissance} (Flammarion, Paris, 1987).

\textsuperscript{24} \textit{See} Ernst Jünger, \textit{Der gordische Knoten, in 7 Sämtliche Werke} (Klett-Cotta, Stuttgart, 1980) (1953).
The center of attribution that I have now referred to several times would appear to be, then, the conceptual condition for thinking about the social bond and unity-in-difference in a secularized context. As has been implied, the structure here described has remained substantially unchanged even within the conceptual model of popular sovereignty that begins with Rousseau’s theory of democracy, and even taking into account Rousseau’s notorious aversion to representative democracy. The twofold conception of secularized transcendence in modern sovereignty as simultaneously representing directly and representing indirectly supreme and absolute power is manifestly a Mediterranean legacy and the expression of a dialectic that enables the state to perform its regulatory function. This dialectic has, indeed, a normative nature, since it is what to a certain extent has allowed, until the present-day crisis of sovereignty, for the guarantee of a movement towards the impersonality and stability of the institution as a condition for the regulation of contingent aspects of social life.

In fact, especially in the initial stages of the trajectory of change traced by the concept of sovereignty, the reference to the transcendent as embodied in the figure of the sovereign ensured that the project of a secularized unification received driving and legitimizing force. The unity of the supreme center implied the uniqueness of the source of law, with law viewed as the expression of the sovereign’s will, thereby guaranteeing the legitimization of positive law without structural reference to classical or explicitly theological forms of justification. Subsequently, the gradual unfolding of the process of secularization allowed for the emergence of an idea of transcendent sovereignty standing high above all other things: no longer embodied in the figure of the sovereign, but rather mainly represented in his person. In this way, the process of secularization gave rise to an idea more familiar to us, that of sovereignty as a supreme and depersonalized institution. What is really at issue in the Mediterranean legacy present in the concept of sovereignty, in the twofold form of conceptual transcendence that I have tried to describe, is the establishment of a dimension of institutional sovereignty, that is, the establishment of the impersonal legal-political condition for the unification of a secularized but not desacralized society.
On this reading, the present crisis of socio-legal unification found at the level of both states and supranational entities is also a kind of crisis of the very idea of conceptual transcendence that has been associated with the concept of sovereignty. In his celebrated introduction to Leviathan, Hobbes conceives of sovereignty as the artificial soul of the State, thereby implying it constitutes the immaterial core of supreme power. He seems also to have had clearly in mind the Mediterranean legacy that has been discussed in this paper, in particular as embodied in the Byzantine idea of the emperor as imitation of God. In Chapter XVII of Leviathan, Hobbes writes, after describing the social covenant: “This is the generation of that great LEVIATHAN, or rather (to speak more reverently) of that Mortal God, to which we owe under the Immortal God, our peace and defence.” 25 Thus, the Hobbesian covenant is also an act of faith. It expresses the rational process that leads subjects to have faith in their sovereign as the one able to protect them but also as the one who embodies, in his decisions and his representative actions, the unity of the state, the unity of the many.

VI. CONCLUSION

Could there be something in the structure of secularized transcendence that we have no choice but to come to terms with if our aim is the socio-political unification of individuals in a context of pluralism and great diversity? Is the radical horizontality of institutional relationships found in the various contemporary models of governance really suited to the establishment of a social bond?

On this score, it is worth remembering Immanuel Kant’s observations on the nature of the social contract. According to Kant, the indisputable practical reality of the social contract, as an idea of reason and as a keystone by which to measure the legitimacy of every public law, consists in the obligation on the

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legislator to enact laws in such a way that they could have been produced by the united will of a people.26

But the united will of a people is not an empirical fact discernible through opinion polls, referenda, or elections. It is, rather, a rational ideal that can be concretely grasped in the form of the duty of civil union, the duty of life together regulated by law. The instantiation par excellence of the public good is the civil constitution of a social union that guarantees everyone freedom by means of laws. Thus the truly general interest of a polity is an a priori that precedes any recognition of consent. It is the idea that allows us to stay together, guaranteeing that nothing has been decided for a people if that same people could never have rationally reached the very same decision on its own.

The general interest cannot, then, be the product of the aggregation of particular interests. The generality of the interest must be established and understood on a different level, one that transcends the logic of balance, of compromises, of negotiations. Indeed, without the assumption of a general interest so conceived, potential negotiations consistent with the democratic rule of law are not conceptually possible. Thus the general interest is the supreme investment in the salus publica; it is the investment in a regulated civil life that derives from a foundational and constitutional covenant. It coincides with the “prospect” of a (never totally) secularized transcendence embodied in the modern sovereignty of the people.

Modern democracy, in the form of power of the people and government by the people symbolically conceived, finds a condition for its possibility in the conceivability of the general interest, because a people as a synthetic unity finds conceptual consistency precisely in the representative form of the general interest. From this perspective, a people should be conceived of as the rational outcome of a way of thinking of political unity that presupposes a multitude of subjects. This way of thinking unity seeks unceasingly to bring to reality, to make immanent, the unity and the existence of a people. We need only consider all the

26. See Immanuel Kant, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, XXII BERLINER MONATSSCHRIFT, 201 (Sept. 1793).
attempts to render the direct will of the people empirically visible through referenda and deliberation and the fact that these attempts never seem to pin down unity in a material way and make it possible to perceive a people as one sole thing.

At the end of the day, what I hope can be grasped from the path pursued in this text is the pregnant historical-conceptual nature of the notion of sovereignty. Assuredly it is a modern concept, but within its structure of meaning a specific theoretical tradition about supreme political power has been absorbed and has evolved in line with modern conditions. The Mediterranean legacy bequeathed to the concept of sovereignty through the mutually enriching interactions between the Greek, Egyptian, and Persian cultures of power, and manifested in the mixture that constituted the principle of the topmost political subject in the Byzantine Empire, has clearly been incorporated into the founding ideas of political representation. In this model, representation always comes from the top, from the openness to transcendence that sacralizes the polity that constitutes representation. Modern political representation similarly comes from the top, from the ideal dimension of unity that cannot be discerned in the empirical multitude.

The major modern difference resides in certain foundational assumptions about the representation of unity. In modernity, the rational foundation emerges from the bottom, from the convergent wills of rational agents, naturally equal, free, autonomous, and independent. But at the same time, since the sum of particular wills is different from the will of a people, and since the will of a unitarian people is the sole requirement for the modern legitimization of power, openness to a “conceptual top,” where the idea of unity is visible, becomes inescapable even for modernity. This bottom/top dialectic seems thus to capture the movement of the concept of sovereignty in modernity; but I would argue that this movement appears to have been triggered by the long and venerable tradition of political power in Mediterranean culture.
I. INTRODUCTION

One may ask to which extent is codification compatible with the existence of a plurality of laws and the validity of different legal traditions within a jurisdiction. Perhaps at the first glance the title of this article may look provocative. That is not my intention though. I just want to make clear three points. First, Spanish legal history shows the existence of different legal traditions which are, in turn, composed of a plurality of laws. Second, I will show the compatibility of this variety of laws and legal traditions with the codification movement or, in other words, how Spain uncovers the myth whereby codification necessarily implies legal unification. And third, I will conclude with some considerations regarding the presence of the past in the current, Spanish private law system. In doing so, I will divide the paper into three parts. First, I will briefly explain both the plurality of
laws and legal traditions in Spain; second, I will turn to what, in my view, should be considered regarding the compatibility between the existence of different legal traditions and the codification movement; and third, I will conclude with some reflections on the presence of the past concerning the current validity of different legal traditions in Spain.

II. A BRIEF HISTORIOGRAPHICAL OVERVIEW: SPANISH LEGAL TRADITION? SPANISH LEGAL TRADITIONS

Spanish history has witnessed a long legal development which goes from the period of its legal Romanization until today. Interestingly enough, it has been said—although not always recognized by non-Spanish scholars—that Spanish legal history is one of the most instructive, oldest and richest legal tradition which has ever existed, a statement which could have been hardly written by a Spanish scholar. Instructive, because “Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in social sciences . . . (than) the ancient history of Spain.” Considering at least that

1. An interesting question to pose is at what time Spanish legal history really begins. There are different views among legal historiography. Some state that it begins with the Roman conquest (218 B.C.), others with the Visigothic period (476 or 568 AD), and others with the Constitution of Cádiz (1812). They give all different arguments to defend their own views. I think it is better to start from the beginning, that is, before the Romanization of the Iberian Peninsula, since it will enable us to cover the history of Roman law in Spain which constituted an important characteristic not only of Spanish legal tradition but also of civil law countries.

2. In my opinion, this is due to the fact that few non-Spanish legal historians can read Spanish, and that Spanish legal historians have made little effort to publish in other languages different from those used in Spain. Nevertheless, this is another matter that does not concern the topic of this paper.

3. Schmidt stated in the nineteenth century that:

 Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in social sciences . . . the ancient history of Spain [referring to the period of Iberians, Celts and Phoenicians], though obscure and by time and disfigured by fables, affords sufficient information to enable us to ascertain that it was at a very early period a rich and flourishing kingdom.

Spanish legal history should cover all laws made and applied throughout history in the territories that have formed part of Spain, it is clear that Spanish legal history is quite long and rich. As Putnam says, “it possesses one of the oldest developed systems of law—a composite of Roman, Germanic and Arabic elements, with a strong infusion of canon law.”\textsuperscript{4} Kleffens stated that “there is no doubt that the history of Spanish law in the Middle Ages is exceptionally rich.”\textsuperscript{5}

There is no doubt, as Kleffens recognized, of the richness of “Spanish law in the Middle Ages,” which comes not just from the fact of the presence of a plurality of laws, but of different legal systems or traditions. In fact, a clear feature of the Spanish historiography has largely been the study of legal sources and institutions of the different Spanish (or Hispanic) legal entities (Castile, Aragon, Catalonia, Valencia, Majorca, Navarre, etc.). A brief look at the considerable number of Spanish legal history

\textsuperscript{4} Putnam also says that:

\ldots Spain offers a fruitful field for study. It possesses one of the oldest developed systems of law—a composite of Roman, Germanic and Arabic elements, with a strong infusion of canon law; it is growing in industrial and commercial importance; it is participating actively in the legislative movement for social and economic reform; and—of particular interest to us—is the mother of the legal system of a large part of the world in which we have vital interests.

and later on, the same author states that:

the history of Spanish law assumes far more than a local importance. In the early Spanish codes and compilations may be traced some of the most lasting institutions of Roman law, and they were the medium through which Spain carried her law into the new world.


\textsuperscript{5} Kleffens says that:

there is no doubt that the history of Spanish law in the middle Ages is exceptionally rich; it’s study cannot but broaden the law-student’s understanding, and open his eyes to his merits and demerits of a great many solutions for a great many problems which, through the ages, are basically and generally the same everywhere . . . Surely, a legal system of such unique magnitude would seem to deserve more attention than it has hitherto received beyond the frontiers of Spain.

handbooks would be enough to realize the importance and autonomy of the different kingdoms in creating and developing their legal traditions, although none of them dared to state explicitly this important point in the very title of the handbook.

The plurality of laws—or legal pluralism—in Spanish legal history does not just refer to the duality between *ius commune* and *ius proprium* (or *iura propria*). In Spain, for example, the variety of legal sources of the different kingdoms was, like in other European territories, considerable. A legal historian dealing with the Spanish case, then, has to make the necessary effort to capture a clear picture of the different Spanish

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7. An exception can be found in ANICETO MASFERRER, SPANISH LEGAL TRADITIONS: A COMPARATIVE LEGAL HISTORY OUTLINE (Madrid, Dykinson, 2009).

8. On the distinction between the expressions “plurality of laws” and “legal pluralism,” see Séan Donlan, *All this together make up our Common Law: legal hybridity in England and Ireland, 1704-1804*, in MIXED LEGAL SYSTEMS AT NEW FRONTIERS (Esin Örücü ed., London, Wildy, Simmonds & Hill Publishing, 2010), and bibliographical references concerning this matter contained in Donlan’s article.

9. As said, the *ius commune*, or common law, co-existed with the particular law of every European kingdom or jurisdiction, called *ius proprium*. As a result, from the Late Middle Ages to the Modern Ages, there was a duality between the *ius commune* and *ius proprium*.
legal traditions. In doing so, the legal systems of Castile, Catalonia, Aragon, Valencia, Majorca, Navarre and Basque territories (Guipúzcoa, Alava and Vizcaya) need to be analyzed from different aspects, revolving all of them around the plurality of legal sources. A possible scheme of its structure may be as follows:

a) brief presentation of the main legal sources (local, territorial and general—or common to the whole kingdom—from the Modern Age, the general legal sources enacted to be in force within the territory of the whole monarchy should also be mentioned);
b) the role of the *ius commune* in the different Spanish legal traditions;
c) the *Cortes* and the King as lawmakers;
d) the enforcement of the law in a juridical system of divergent legal sources: the hierarchy of legal sources; and
e) the role of the judicial precedent and legal doctrine in developing law and legal science.

Furthermore, the historical approach of Spanish Law shows, leaving aside political and ideological tendencies, the existence of diverse cultures—Christian, Muslim, and Jewish, and different ethnic groups that populated the Iberian Peninsula. Spain was—and is still—“an aggregation of different regions, diverse populations and languages, with historical struggles to maintain a centralized national ‘Spanish’ State in the face of cultural pluralism.”

12. JOHN A. CROW, SPAIN: THE ROOT AND THE FLOWER (1985); see also WOODROW BORAH, JUSTICE BY INSURANCE: THE GEN. INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL 6 (1983) (in this sense, it has been said that following the complete Reconquest of Spain by Christians in 1492, the national legal system that emerged was based on beliefs “that there was a natural law binding on all people and peoples whoever they might be,” and there was “a variety of human observance, all of it permissible so long as it did not conflict with natural law and ius gentium,” “a common body of law and custom that might be found in the practices of all peoples.”); but see PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE’S CONQUEST OF THE NEW WORLD 1492-1640 69, 99 (1995) (It has also recognized that, when
As said, legal historiography has made clear this important aspect of Spanish legal history, dealing with the legal traditions of different kingdoms from the Middle Ages up until Late Modern Age. Literature on this matter written—and published—in English or/and by non-Spanish scholars have also emphasized this point, distinguishing the different kingdoms and their diverse legal sources and institutions. In doing so, Castile and Aragon have been much more explored than Catalonia, Valencia, and the Christians retook control of Spain, “Moslems were allowed to live under their own law and custom and to resort to their own courts for matters concerning themselves”); see also Donald Juneau, The Light of Dead Stars, 1 AM. INDIAN L. REV. 11, 13 (1991) (when the Spanish occupied the New World, for example, they also recognized Indian laws and courts. On August 6, 1555, Emperor Don Carlos (Charles V) and Queen Doña Juana issued a decree that “ordered and commanded” that the laws and good customs” of Indians, along with their usages and customs,” must “be kept and enforced.” This principle, firmly accepted in Spanish Indian Law, was lost when new states emerged in Latin America following the period of revolutions.).


other Spanish kingdoms. 18 The Spanish historiography also shows the autonomy enjoyed by kingdoms in creating and developing their own legal traditions, 19 synthesizing the peculiarities of

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Castile, Aragon, Catalonia, Valencia, Majorca, and the Basque Provinces. In the Spanish historiography there


are also works containing the making and development of both legal sources and institutions governing several kingdoms, either belonging to the same crown, or from different crowns.

26. See e.g. Rivero, supra note 25, at 3-4; for a panoramic overview of the legal traditions of the different kingdoms, see Aniceto Masferrer, Spanish Legal Traditions, supra note 7, at 161-219.

27. See e.g. Ana Mª Barrero García, El Derecho local, el territorial, el general y el común de Castilla, Aragón y Navarra, in Diritto comune e diritto locali nella storia dell’Europa 263 (1980); Enrique Álvarez Cora, La producción normativa medieval según las compilaciones de Sicilia, Aragón y Castilla (1998).


29. P. Domínguez Lozano, Las circunstancias personales determinantes de la vinculación con el derecho local: estudio sobre el derecho local altomedieval y el derecho local aragonés, navarro y catalán (Madrid, 1988); concerning the custom as a legal source, see F.L. Pacheco, Ley, costumbre y uso en la experiencia jurídica peninsular bajomedieval y moderna, in El dret comú i Catalunya. Actes del IV Simposi Internacional. Homenatge al professor Josep M. Gay Escoda 75-146 (Barcelona, Fundació Noguera, 1995).

Concerning the history of criminal law, see Manuel Torres Aguilar, El parricidio: del pasado al presente de un delito (1991); Miguel Ángel Morales Payán, La configuración legislativa del delito de lesiones en el Derecho histórico español (Madrid, 1997); Miguel Pino Abad, La pena de confiscación de bienes en el Derecho histórico español (1999); F.J. Burillo Albacete, El nacimiento de la pena privativa de libertad (1999); Aniceto Masferrer, La pena de infamia en el Derecho histórico español: Contribución al estudio de la tradición penal europea en el marco del ius commune (2001); Juan Sainz Guerra, La evolución del Derecho penal en España (2004); Isabel Ramos Vázquez, Arrestos, cárcel y prisiones en los Derechos históricos españoles (Dirección General de Instituciones Penitenciarias, 2008).
III. Spanish Legal Traditions, Legal Unification and Codification

The current Spanish legal system constitutes perhaps the clearest European model of codification without aiming at a complete unification of the law. Despite the French influence, it could be said that the Spanish codification of private law was original and attached to its own legal tradition. An important aspect of that legal tradition consisted precisely in the co-existence of different legal traditions, enjoying all of the legislative powers in developing their own legal institutions. Is that compatible with the codification scheme? How did Spanish legal traditions manage to survive when going through a codification movement seems to aim—theoretically—at legal unification?

Spanish legal traditions show that it is not accurate to maintain that codification is a legal source or tool whose main purpose consists in complete unification of law. Whoever may think this way should make up his mind after considering the Spanish case.

It is true that in the nineteenth-century European codification movement, which took place in the context of two legal theories, namely, the iusrationalism (or natural law theory) and the historicism, theoretically aimed at the unification of law, no matter its main source, was supposed to be found either in nature and reason, or in culture, history, and tradition.

I do not deny that in Spain the codification process did somehow lead to unify the law since, in fact, Spanish codification

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30. Merino-Blanco states that:
Prussia, Austria and France were the first European countries to have codes. However, it was the French Code Civil of 1804 which was the greatest of them all because of its technical perfection and the fact that it was elaborated in a country which already had a bourgeois revolution. The influence of the French Civil Code has been enormous. It was implemented and copied in several countries and inspired the codification of Civil law in many others, among them, Spain.

constituted an important step towards unification. It could be said, then, that Spanish codification tended to unify private law, but not in a complete way. More specifically, if it is true that the codification of criminal law, commercial law, criminal procedure, and civil procedure sought such an utter unification of law, the codification of private law never pursued to entirely unify the law.

It is very well-known that technical and political obstacles were to be overcome to codify the law. In private law, political and technical problems arose in such a way that the whole nineteenth


century was needed to enact the current Spanish Civil Code. While the first code was passed in 1822 (Criminal Code), the Civil Code was enacted in 1889, with private law being the last legal branch to be codified.

That was because the promulgation of the Civil Code was not wished by everybody. The conservative elite did not want it for different reasons, being afraid of entering into the school of liberal thought, and preferring the Roman, Canonical and Spanish law that they had been acquainted. Besides, the nineteenth century was politically complex: the War of Independence, the Carlist Wars, the military uprisings, changes of governments, the First Republic and the restoration of the monarchy.

Nonetheless, such delay was not much due to a lack of interest or political will to codify the private law, but because of the difficulty to assert the best way of codifying this legal branch without sweeping away some regional laws (Derechos forales), whose validity came from the Middle Ages and whose regions (particularly, some territories of the Crown of Aragon) did not accept the abolition of their own legal tradition.

The political will of codifying private law was clear from the beginning of the codification movement. Moreover, all Spanish constitutions contained expressed provisions dealing with the matter. Moreover, article 169 of the Statute of Bayonne, promulgated by the French during their occupation of Spain on July 6, 1808, stated, “[t]he Spaniards and the Indies shall be governed by a single Code of Civil and Criminal Laws.”

This provision of the Statute of Bayonne influenced the article 258 of the 1812 Spanish Constitution, which prescribed:

The Civil and Criminal Codes, as well as the Commercial one, shall be the same throughout the Monarchy, without prejudice to the variations which the Cortes may enact for particular circumstances.35

35. Diverse provisions on this matter can be found in other Spanish Constitutions (1937 SC, art. 4 (1937); 1845 SC, art. 4 (1845); 1869 SC, art. 91 (1869); art. 75 1876 SC adopted art. 91 of 1869 SC; 1931 SC, art. 8 (1931); see M.C. Mirow, Codification and the Constitution of Cádiz, in ESTUDIOS JURIDICOS
The current 1978 SC eventually makes clear that the legislative competence in civil law matters does not exclusively belong to the Spanish government and parliament, since the Autonomous Communities also enjoy legislative powers. Article 149.1.8 of the Spanish Constitution tried to settle a very complicated problem whose origin and development belong to Spanish legal history.

It is very well-known that the legal diversity in the Iberian Peninsula started in the Early Middle Ages, particularly in the context of the Christian Reconquest (Reconquista) over the Muslim dominance. In the long process of such Reconquest, which lasted almost eight centuries (from 722 to 1492), five Hispanic Kingdoms emerged. In the thirteenth century, the Peninsula had already been transformed into the territory of Leon,.
Castile, Aragon-Catalonia, Navarre and Portugal, kingdoms which from the beginning enjoyed political and juridical autonomy. Spain then went through a further metamorphosis in the last stage of the Reconquest when the marriage of the Catholic monarchs united the kingdoms of Castile and Aragon. The kingdom of Navarre was then incorporated into this unified political entity (1512) and the period of the Reconquest ended with the surrender of the last Muslim territory, Granada (1492).

The political unity achieved by the Catholic monarchs did not bring with it legal unification. In fact, one of the main— if not the main one— features of the Spanish monarchy from the marriage of Fernando and Isabel (October 19, 1469) was precisely the compatibility of political unity with legal diversity or plurality of laws. Every kingdom had not only its own laws but also its own legal institutions to make the law and develop it throughout time. The unification of Castile and Aragon did not then imply the unification of the law, although the law itself, due to several causes (mainly, because of the Royal legislation and the ever-increasing, wide-pervading influence of the *ius commune* over the different Spanish legal traditions), would experience a clear, progressive tendency towards unification.

The uneasy balance between political unity and legal diversity changed drastically when the last king of the house of Austria (Carlos II) was succeeded by Felipe V, a king from another Royal dynasty, called bourbon, after the Spanish War of Succession whose origin, causes and development cannot be here dealt with.\(^{38}\) What is really worth noting is how it was precisely the legal consequences of the Spanish Succession War that constituted an important shift on the development of Spanish private law tradition. The main legal consequence was the abolition of the

\(^{38}\) On this matter, see GÉNESIS TERRITORIAL DE ESPAÑA (José A Escudero ed., 2007); as known, the circumstances which led to the War of Spanish Succession went beyond to the Spanish interest, affecting many other European countries. In fact, the final outcome of the war was the result of diplomatic negotiations seeking a peaceful solution to the Spanish royal succession.
legislative power enjoyed by all the Crown of Aragon kingdoms (Aragon and Valencia, Catalonia, Majorca and Ibiza, and

39. The first Decree of Nueva Planta was promulgated by Felipe V on June 29 (NR, 3, 2, 3; NoR 3, 3, 1), 1707, by which the legal systems of the kingdoms of Valencia and Aragon were abolished. Later on, subsequent Decrees of Nueva Planta were enacted by Felipe V, affecting both kingdoms, namely, Valencia and Aragon. The main difference between the final outcome of the Decrees imposed to Valencia and Aragon was remarkable, namely, while Felipe V returned to Aragon its fueros concerning private and criminal law matters, the Furs of Valencia were never returned in these general terms. In this regard, on April 3, 1711 (NoR 5, 7, 2), Felipe V promulgated a Decree for Aragon, by which, among other things, a General Commanding Officer was established as the supreme authority (concerning military, political, economic, and governmental matters). Furthermore, a tribunal (Audiencia) with two chambers was created to settle judicial disputes in private and procedural law matters, being the former ones resolved according to the fueros of Aragon. Consequently, the civil law chamber could resolve the lawsuits related to the laws of the kingdom of Aragon, although they turned to the Council of Castile in the second instance of the appellation procedure. In other words, Felipe V eventually allowed Aragon to maintain its proper private law but abolished all public law by imposing the Castilian law; on Valencia, see A. MASFERRER, LA PERVIVENCIA DEL DERECHO FORAL VALENCIANO TRAS LOS DECRETOS DE NUEVA PLANTA (Madrid, 2008); see also Mariano Peset Reig, Notas sobre la abolición de los Fueros de los Fueros de Valencia, 42 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 657-716 (1972); Apuntes sobre la abolición de los Fueros y la Nueva Planta valenciana, in 3 PRIMER CONGRESO DE HISTORIA DEL PAÍS VALENCIANO 525-536 (1976); Mariano Peset, La creación de la Chancillería de Valencia y su reducción a Audiencia en los años de la nueva Planta, in ESTUDIOS DE HISTORIA DE VALENCIA 309-334 (1978); GÉNESIS TERRITORIAL DE ESPAÑA 41-201; 333-460 (José Antonio Escudero Lopez ed., 2007); on Aragon, see JESÚS MORALES ARRIZABALAGA, LA DEROGACIÓN DE LOS FUEROS DE ARAGÓN (1707-1711) (Huesca, 1986).

40. Catalonia was the next territory affected by the Decrees of Nueva Planta. More specifically, the new legal regime of Catalonia was established by the Decree of January 16, 1716 (NoR 5, 9, 1), by which a new legal-administrative system was imposed, abolishing and re-establishing in the same Decree the civil law, commercial law, criminal law and procedural law. Felipe V also wanted to make clear that the political constitution of Catalonia which had not been explicitly abolished was equally replaced by the new law, that is, the Castilian one. In doing so, chapter 42 of the Decree provided: “Regarding that which is not foreseen in the preceding chapters of this Decree, I command that the former Constitutions of Catalonia be observed; by which it is to be understood that they are established anew by this Decree.” It is true that the civil, commercial, criminal and procedural law were all maintained, but they were not affirmed through a pact, but rather by the absolute power of the king, being legitimated retroactively: “... by which it is to be understood that they are established anew by this Decree.” This was a concept of absolute power which, while referring to the past, projected itself much more into the future, definitely abolishing the political notion of pactism; see J.Mª Gay I Escoda, La gènesi del Decret de nova planta de Catalunya. Edició de la consulta original del ‘Consejo de Castilla’ de 13 de juny de 1715, 81 REVISTA JURÍDICA DE CATALUNYA 7-41,
Sardinia, although they all—apart from Valencia—were allowed to apply their own private legal institutions, not by virtue of their own political and juridical autonomy, but because of an express Royal concession. In other words, since then, in the whole of the Spanish monarchy’s territory there was only one source of political and juridical power, namely, the monarchy and its own administrative machinery.

In this regard, the Decrees of Nueva Planta promulgated by Felipe V (1707-1717) brought with it the definitive abolition of the political and juridical autonomy that the current Spanish Constitution established again. Setting aside the 1931 Constitution which, although it was never in force, was of great value in terms of influencing the making of the 1978 Constitution, the

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263-348 (1982); Notas sobre el Derecho supletorio en Cataluña desde el Decreto de Nueva Planta (1715) hasta la jurisprudencia del Tribunal Supremo (1845), 34/35HISPANIA ENTRE DERECHOS PROPIOS Y DERECHOS NACIONALES, REVISTA PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 805-865 (1990); GÉNESIS TERRITORIAL DE ESPAÑA, supra note 39, 205-330.

41. The Nueva Planta for Majorca and Ibiza was laid down through the Decree of November 28, 1715 (NoR 5, 10, 1), by which the main public institution, the Jurats and the Gran i General Consell, were abolished, while the Consolat de Mar and the Sindicat de fora were maintained. The Decree created the Audiencia of Majorca. Since then the Castilian law had to be applied concerning public law matters, while the Majorcan law sources (including the ius commune as subsidiary law) could be applied concerning private (including civil and commercial), criminal and procedural law matters; see GÉNESIS TERRITORIAL DE ESPAÑA, supra note 39, at 463-545. On Menorca, see PIÑA HOMS, ROMÁN: LA REINCORPORACIÓN DE MENORCA A LA CORONA ESPAÑOLA 1781-1798: MEDIDAS DE GOBIERNO Y ADMINISTRACIÓN (Palma de Mallorca , 1983); Las fuentes del Derecho en la Menorca británica, in ESTUDIOS EN HOMENAJE A MIGUEL COLL CARRERAS 523-540 (Palma de Mallorca, 2006).

42. Sardinia (Cerdeña), incorporated to the Spanish monarchy for a short period of time (1717-1720), was also affected by two Decrees of Nueva Planta of similar content of those which were granted to Catalonia and Majorca: Decree of November 24, 1717, and Real Cédula of February 16, 1719; see Regina Mª Perez Marcos, Cerdeña en el marco de la Guerra de Sucesión: Administración y gobierno, 13/14 IUS FUGIT 479 (2004-2006); GÉNESIS TERRITORIAL DE ESPAÑA, supra note 39, at 549-578.

43. Between the Decrees of Nueva Planta and the current Constitution, only the 1931 Constitution laid down a provision granting political and juridical autonomy to regional territories. In this sense, article 8 of 1931 C.E. envisioned autonomy for those regions meeting the requirements specified therein, which included the approval of a Statute of Autonomy. Power to legislate on matters such as forms of marriage and contractual obligations were exclusively reserved to the central government, although the autonomous regions could promulgate laws to regulate their execution C.E. of 1931, article 15 (1931)). For the matters
development of the legal diversity in the current territory of Spain has three marked, different periods:

- From the Reconquest (722-1492) to the Decrees of Felipe V (1707-1717), in which the kingdoms enjoyed legal diversity and legislative powers to develop their legal institutions;
- From the Decrees of Felipe V (1707-1717) to the current Constitution (1978), in which, leaving aside the short Spanish II Republic, old regional kingdoms (apart from Valencia) were allowed to use and apply their own private legal institutions without any possibility of developing them by means of legislative bodies, since they had been abolished; and
- From the creation of the 1978 Spanish Constitution to nowadays, in which only some Autonomous Communities (the name currently used for the different regional territories), have been granted political and legislative autonomy in civil matters which enables them to preserve, amend, and develop “wherever in existence” (article 149.1.8 of 1978 SC).

It could be said, then, that plurality of laws and legal diversity enjoyed by the old Spanish regions experienced two different contexts depending on whether the kingdoms had legislative (or institutional) autonomy or not. The legal diversity with legislative powers enjoyed by the kingdoms before the Decrees of Felipe V experienced a decisive shift after the Spanish Succession War whose legal consequences belong not just to the past, but also to the present.

over which Madrid did not enjoy exclusive competence, however, article 16 of the 1931 Constitution granted the autonomous regions “exclusive legislative powers and direct powers of execution pursuant to the provisions of their respective Statutes of Autonomy as approved by the Cortes.” The Catalan Government, for example, took advantage of this legal context to push the enactment of a Statute in which article 11 granted the Catalan Government (Generalitat) “exclusive legislative powers in civil law matters save those provided in the Civil Code.”
In effect, to a large extent the changing fortunes of the current Spanish regional legislative system mirrors the history of modern Spain. Granted by monarchs who amassed victories during the Reconquest but then proved unable to establish strong central governing institutions, the regional laws (fueros) were not eradicated by the unification of Aragon and Castile or the subsequent expulsion of Islam from the Iberian Peninsula. As noted, in 1707 Felipe V abolished the fueros and the legislative bodies of both the Crown of Aragon (including Aragon, Catalonia, Valencia and the Balearic Islands) in retaliation for their opposition to his claims during the War of the Spanish Succession. Although regional laws were soon returned to all but the Valencians, the defeated regions never regained their legislative powers.

In consequence, the Spanish history shows how fueros had to overcome two difficult periods, without which they would be unable to survive the strong tendency towards legal unification, first with Felipe V, and later with the codification movement.44

Concerning the codification period, the first thing that should be kept in mind is that, leaving aside the 1931 and the current Spanish Constitution, the other SCs did not provide the possibility of granting legislative powers to the territories that had regional laws. On the contrary, if some regional laws were allowed to be in force, they should be passed by the Spanish parliament (Cortes).45 In fact, the exercise of legislative powers was

44. Moreover, the distinction between the new “common law” (that is, the Castilian law) and the regional laws (the laws of Catalonia, Aragon, Valencia, etc.), had succeeded and the regional laws were considered as local (or municipal) and exceptional. In this regard, regional laws were considered to be an exception to the Spanish “common law” (Derecho común). In fact, the distinction between the “common law” (Derecho común) and regional law (Derecho foral) appeared after the Decrees of Felipe V and was invented by Gregorio Mayans y Siscar, an outstanding Valencian lawyer and scholar, and brought with it an important controversy concerning the adjudication law process, particularly in Catalonia; See Gay I. Escoda, supra note 40. Despite of all, the old regional laws managed to survive after the Decrees of Felipe V without any possibility of updating the law to the new political, social and economic context of the societies of Catalonia, Aragon and Majorca. Valencia, since Felipe V never returned its legal institutions, theoretically—not in practice—had no need of survival.

something which surpassed the codification scheme, being a constitutional issue which went beyond codifiers’ powers.

The codification movement began in Spain at the beginning of the nineteenth century, one century after the Decrees of Felipe V were passed. During the whole eighteenth century some old regional territories had to make great efforts to find effective ways to develop their own legal institutions without legislative institutions. Catalonia is in this regard the paramount example.

Some of the Spanish Constitutions made explicit reference to the regional laws in civil matters when providing the convenience of enacting codes for the whole Monarchy. Everybody agreed with the goodness of codes, even the members of the Cortes representing old regional territories. They never envisioned the civil code as a legal tool not compatible with the respect of the regional laws which constitute an important part of their legal identity.

If that is the case, one could ask why the enactment of the Civil Code experienced such a delay. Such delay was due not to the lack of acceptance of the Code itself as a convenient legal tool to modernize the law, but rather to the difficulty to reach an agreement about the role of the regional laws within the new code system, as well as the specific way or method to include them in the codification sketch (or outline). In fact, the regional aspirations did not hinder the codification of private law up to the Civil Code Project of 1851. Regional lawyers, who up until then had supported the codification enterprise, changed—some of them, radically—their attitude once the 1851 Project came out.

The main evil of the 1851 Civil Code Project could be found in its article 1992 which stated as follows:

All fueros, laws, uses and customs existing prior to the promulgation of this Code, in all matters that are the object of the same, shall not have the force of the law even when not contrary to the present Code.

The provision disregarded regional laws, since they were abrogated no matter whether they were not against the Project or compatible with it. In addition to it, the Project contained many institutions from Castilian Law, ignoring the other regional legal traditions, option which did not please Spanish jurists from some
Spanish territories like Catalonia, Aragon, and the Basque Provinces, among others.

This provision and the immediate reaction against it generated among the regional lawyers, particularly the Catalans, marked the beginning of a fierce and difficult controversy, similar somehow to that which originated in Germany (between Savigny and Thibaut) or in New York (between David Dudley Field and James Coolidge Carter) about the advantages and disadvantages of codes, although in Spain, like in Germany, the discussion did not revolve around the convenience to codify the law or not, rather around the sort of codification that was most suitable.

46. See Pablo Salvador Coderch, El Proyecto de Código Civil de 1851 y el Derecho Civil Catalán, in LA COMPILACIÓN Y SU HISTORIA 10 (1986). The attitude of resistance against this project can be also understood considering that in the second half of the 19th century emerged a renewed flourishing of regionalism in different Spanish regions. From a politico-legal point of view, these movements drew notably from Savigny’s ideas concerning the Volksgeist (“spirit of the people”), based on the Historical School of Law and, consequently, against a iusrationalist codification. Regionalist movement strove to preserve the regional differences and to maintain those established differences both in the same language and form of law. It is noteworthy that the ideas of Savigny came to Spain through the works of Duran y Bas, an outstanding Catalan lawyer who, after spending time in Germany, introduced Savigny’s legal theory in Spain. Logically, the Historical School was not much of a supporter of codification projects based on rational law rather than on the legal culture and tradition of the different territories where the people live and interact. As Badosa states:

Nineteenth-century opposition to the codification process had its roots in the ideology of the historical school of law and its rejection of codification. This influence is clear in the setting up in Barcelona of a ‘Spanish Committee’ linked to the Savigny Foundation of Berlin, under the honorary presidency of Pere Nolasc Vives i Cebrià, although Duran y Bas was effectively its leader. It was this Committee that requested a change in the statutes of the Foundation (12 September 1871) so that studies written in Spanish might be accepted.


It is true that the Spanish Constitutions of 1837 and 1845 provided that the entire kingdom would be governed by identical Codes. In this regard, article 4 of the Constitution of June 18, 1837 provided, “identical Codes shall rule throughout the Monarchy, and they shall not provide more than one fuero for all Spaniards in all common, civil and criminal trials.” The same principle contained the article 4 of the Constitution of 1845, “identical Codes shall rule throughout the Monarchy.”

However, the dispute over foral laws arose intensely in 1851, because such constitutional articles did not necessarily imply to ignore the different regional legal traditions. It did not imply it theoretically, but the 1851 Civil Code Project was clear enough in this regard, generating a reaction led by the champions of regionalism who succeeded in defeating the aforementioned Civil Code Project that intended to abolish all regional civil legislation. The Government, taking for granted that this Project had been killed before being born, did not go further with its approval, although it ordered its publication to bring it to general use and obtain opinions from the members of the law schools, the Judiciary and other institutions. After such a failure, the practicability of the codification in civil law was always questioned in connection with the problem of respecting or removing the regional (or foral) civil laws.

Not surprisingly, the 1869 Constitution once again recognized regional rights. In this sense, article 91 of the 1869 Constitution provided, “identical Codes shall rule throughout the Monarchy, without prejudice to the variations determined by law for particular circumstances.”

The First Spanish Republic lasted only long enough to draft a constitutional project. 48 Following the downfall of the First

48. This effort departed sharply from previous endeavors because it acknowledged, as we said, the existence and validity of regional laws and sought to incorporate them into a Constitution. Legislative powers were reserved exclusively to the Cortes, and the Federal Government was instructed to draft comprehensive codes. The federal entities comprising the Republic were not prohibited from legislating, and they were assured by article 92 full economic and administrative autonomy and as much political autonomy as compatible with the existence of the Nation.
Republic, the draftsmen of the 1876 Constitution formulated article 75 on the basis of article 91 of its 1869 counterpart.  

By a Royal Decree on February 2, 1880, Minister Álvarez Bugallal expressed the agreement to respect regional private law traditions in the future Civil Code, although not in their entirety, preserving only those legal institutions which deserved to be kept in force in their own territory. Moreover, he wanted regional territories to put them in a written form.  

At that time it was already clear that codification could not succeed unless room was made for regional laws. This explains why Manuel Alonso Martinez’s *Ley de Bases* of 1881, a project containing fundamental legal provisions to be developed in the future Civil Code, contained some regional civil institutions called to have validity for all Spanish citizens in the future Civil Code. Regional territories could conserve their own institutions, but the Civil Code would be a stopgap for all regional legislation, bringing to an end the validity of Roman law. Nevertheless, the *Cortes* did not accept this *Ley de Bases*.

After a private law conference, held in 1886, in which the majority of participants agreed with the idea of drafting a Civil Code respecting regional laws, Francisco Silvela, the Minister of Justice, presented another *Ley de Bases*, establishing that regional territories could conserve their legal institutions. In addition, the future Civil Code would be a stopgap only if Roman or Canon law could not be applied. Once the code would be completed, the government would proceed to draft appendices, containing the regional institutions. Silvela’s *Ley de Bases* was approved on May

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49. 1876 SC, article 75 (adopting article 91 of 1869 SC); and later it would be incorporated in article 8 of 1931 SC.

50. Article 4 of the Royal Decree of February 2, 1880; to that undertaking several lawyers were appointed as members of the Codification Committee (Comisión de Codificación) (which had been re-established five years before by the Minister Cárdenas, by Decree of May 10, 1875): Manuel Duran i Bas for Catalonia, Luis Franco López for Aragon, Antonio Morales Gómez for Navarra, Rafael López de Lago for Galicia, Manuel Lecanda Mendieta for the Basque Provinces, and Pedro Ripoll Palou for the Balearic Islands. Everyone presented his report containing the private law institutions which needed to be kept of his own region. The most important reports were written by the Catalan Duran i Bas, and the Aragonese Franco López.

51. The *Cortes* should not have to discuss every article, but just the main principles and fundamental bases of the civil legislation. Afterwards, the Codification Committee could draft the entire Code.
11, 1888.\(^{52}\) According to it, provinces and regional territories had to conserve all their legal institutions, the code being a stopgap just in these territories; later on, every regional territory would write appendices containing the legal institutions they considered to be conserved.

Taking into account the *Ley de Bases* of 1888, the current Civil Code was elaborated and published on October 6, 1888, coming into force on May 1, 1889.\(^{53}\) The Civil Code of 1889 granted regional civil laws temporary validity, a status they maintained until the amendment of the Code in 1974. The 1889 version of article 13 of the Code read as follows:

First. The provisions of this Title [Preliminary Section] shall be mandatory in all the provinces of the reign to the extent that they determine the effect of the laws, statutes and general rules for its application. The provisions of title IV, book I of the Code shall also be mandatory.

Second. As for the rest, the provinces and territories in which *foral* law endures shall conserve them *for the moment* in their integrity; and their actual legal regime, whether written or customary, shall not be altered by the publication of this Code, which shall be applied only as supplementary law, in the absence of what is set forth in the special laws of the *foral* regions. [Emphasis added]

The Civil Code did allow the existence of territorial laws, considered as a supplementary legal source. The Civil Code also provided matters for the compilation of *foral* laws and their incorporation into the Code as appendices. The Government appointed commissions to prepare the appendices. They devised a six month plan at the end of which they were to present their conclusions to the Government. It is important to note that the system was not comprehensive but restrictive, requiring a partial

\(^{52}\) The Codification Committee had to draft the Civil Code following that *Ley de Bases*, being published by the Government and then revised by the *Cortes*; the Code should mainly follow the 1851 Project.

\(^{53}\) However, on July 24, 1889, a new version of it was published, containing some necessary amendments and additions proposed by the *Cortes*. 
sacrifice of the foral regions, since they knew that they could only preserve certain elements. This explains why provinces and regional territories were not willing to write their appendices, preferring to extend indefinitely a situation in which their traditional law would continue to be in force in all their territories. It may be that this issue led to the ultimate breakdown of the system, where neither conclusions nor appendix were finally reached or approved, except that of Aragon.54

In the context of the Spanish II Republic, the Statute s of Autonomy for Catalonia and the Basque Provinces were approved on September 15, 1932 and on October 6, 1936, respectively, Catalonia and the Basque Provinces thus regained the legislative powers they had relinquished during the reign of Felipe V in Catalonia, and after the Third Carlist War in the Basque provinces (1876).55

In 1946 the status of Spanish foral laws changed even more when a Civil law conference, held in Saragossa, recommended that “Compilations” (instead of “Appendices”) be drafted for each foral region. The compilation system allowed codifying all foral laws without any restriction, so regional territories were not required to select some legal institutions refusing others. As from the decree on May 23, 1947 compilation committees were designated to draft

54. The Government approved the appendix of Aragon’s foral law by a Royal Decree of December 7, 1925. This appendix found a way to smooth over the differences between the Civil Code. It did this not so much by suppressing institutions that were of doubtful validity, but more by replacing those that were well-established, though they diverged from the “common law.” This appendix was arranged casuistically, with little order and with limited legal reasoning to its 78 articles and a single transitory provision. It was very unfavorably received. Other Regional territories that made some projects which never received approval were Galicia (published in 1915), Balearic Islands (finished in 1903), Navarre (1900), and Catalonia (published in 1896).

55. The Basque Parliament never enacted civil legislation. The application of the Statute of Autonomy in Catalonia, however, provoked tension between the Madrid government and local legislators when the latter, purporting to execute the Republican mandate, promulgated two decrees in 1936 which added new causes of divorce to the 1932 Divorce Law (Decree of September 18, 1936; Decree of December 23, 1936; among the new causes allowed following the Nationalist uprising of July 18, 1936 was “culpable” absence from the marital home without minimum requirement as to the time spent away). The 1936 Catalanian decrees called for their preferential application over the Divorce Law of the Republic. The Madrid norm would be resorted only when the Catalan laws proved inapposite. After the Civil War, the Nationalist forces repealed both the 1931 Constitution and the Statutes of Autonomy enacted under its aegis.
foral compilations of all foral territories. After the passage of such a decree on May 23, 1947, the following compilations were promulgated:


In all these territories the Compilation had to be applied before the Spanish Civil code, which was considered a supplementary legal source. Moreover, all foral laws not contained in the special compilations were abolished at the moment of the Compilations approval.

Consequently, the Decree of May 31, 1974 changed the temporary status of regional laws by revising the Preliminary Title of the Civil Code. As amended, paragraph 2 of article 13 emphasized the “full respect” owed to foral laws and eliminated the term “for the moment” that had appeared in the article prior to amendment:

. . . [F]ully respecting the special and local or foral laws of the provinces or territories in which these are in force, the Civil code shall be in force as general principle applying in default of specific regulation, when the foral law does not exist, in accordance with its special rules.56

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56. Accordingly, article 1 of Compilation of Special Civil law of Catalonia, for example, stated: “In accordance to what is established in the Constitution and the Statute of Autonomy, the provisions of the Civil law of Catalonia shall prevail over the Civil Code and other provisions of an equal general application.”
Furthermore, the Statement of Legislative Intent (Exposición de Motivos) of the Decree made clear that “the historical and political integration of Spain, instead of suffering there from, is completely realized by the acknowledgement of foral rights.” Suppressed by early nineteenth century liberal movements and briefly restored during the Second Republic, regional legislation was finally recognized as an integral part of the Spanish legal system by the 1974 amendment of the Civil Code. The creation of foral legislative bodies, however, would have to wait for the promulgation of the Spanish Constitution of 1978, whereby foral (and non-foral) regions would regain the legislative powers they had relinquished in the eighteenth century with the reign of Felipe V (kingdoms from the crown of Aragon), and in the nineteenth century (the Basque provinces as a consequence of the Third Carlist War, 1876; and Navarre through the Ley Paccionada, August 16, 1841).

IV. LEGAL DIVERSITY AND SPANISH LEGAL TRADITIONS TODAY: THE PRESENCE OF THE PAST

As said, the current 1978 SC eventually tries to make clear that the legislative competence in civil law matters does not exclusively belong to the Spanish government and parliament, since the Autonomous Communities also enjoy legislative powers.\(^{57}\) While some authors regard this system as similar to that of a Federal system,\(^ {58}\) others seem to be less optimistic, pointing out its weaknesses and dangers.\(^ {59}\) It is true that article 149.1.8 SC tried to settle a very complicated problem whose origin and development belong to Spanish legal history. It may seem unlikely, but that provision did not settle the problem, and in recent years the controversy about this matter has increased considerably. In fact, there has been constant, real friction between the Central Government and the Autonomous Communities. Furthermore, in

\(^{57}\) See article 149.1.8 SC, at supra note 36.
the last few years, controversies have arisen because of discriminatory treatment of different Autonomous Communities, with political reasons rather than strictly historical or juridical.

As said, the legal diversity with legislative powers enjoyed by the kingdoms before the Decrees of Felipe V experienced a decisive shift after the Spanish Succession War whose legal consequences drastically affected both the history of the Spanish legal system, and also the present.

Historically, up to Felipe V Hispanic or Spanish kingdoms enjoyed not only legal but also institutional (or legislative) autonomy, since they were provided by legislative bodies to develop their own laws and institutions. From then up to the 1978 Spanish Constitution (leaving aside the 1931 Constitution which never received legal enactment), the majority of regional identities were granted their fueros without legislative autonomy, so they had to find out different ways to develop their institutions without resorting to legislative outcomes.

However, Felipe V’s measures affected also the current Spanish legal system. Let me explain this very briefly. When article 149.1.8 SC provided that only Autonomous Communities which had some regional laws at the time when the Constitution was approved (1978) would enjoy legislative powers “to preserve, amend, and develop” their own private institutions, it was clear that only those old regions which managed to keep their laws in force were called to enjoy legislative competence in civil law matters. Interestingly though, there was an old regional territory, Valencia, with a considerable body of old laws which, according to a strict interpretation of the Spanish Constitution, had a very limited scope of legislative competences in civil law (because Felipe V never gave back in general terms their civil laws), while others (like Galicia), not being an old region at all and, hence, lacking old laws, enjoyed a great deal of legislative competence because in the twentieth century this territory took good advantage of the position of some Galician politicians who achieved the making of a private law compilation (1963) without old regional written legislation; so the Galician drafters adopted regional custom as their principal source.

Furthermore, while in some old regions, in drafting their compilations, drafters merely collected existing foral norms (it is
the case of Catalonia, Balearic Islands, and the provinces of Vizcaya), others either expanded their foral laws into areas not previously governed by regional legislation (Aragon, 1967), or pursued to limit the Madrid government’s power to modify or revise regional legislation, introducing entirely new sources of law which relegated the status of the more liberal Civil Code in Navarre to that of supplemental law (see Law of March 1, 1973, Leyes 5 and 6 Compilación del Derecho Foral de Navarra).

Moreover, since 2004 that problem became worse: Autonomous Communities, old and not that old regions, attempted to make good use of some advantageous, political context to promulgate new regional laws or even new Statutes of Autonomy, modifying the scope of the legislative competence in civil law matters, causing discriminatory outcomes whose justification could not be found in historical or legal reasons but only in political ones.60

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60. The cases of Galicia, Catalonia and Valencia constituted a paradigm in this regard. Galicia, lacking written legal tradition, currently enjoys legislative competence thanks to political reasons, just because some influential politicians held positions which enabled them to ensure and expand Galician private legal tradition.

Catalonia, since it had a written Compilation of Catalan private law at the time of the promulgation of the Spanish Constitution, from 1978 onwards was allowed to legislate in civil law matters inasmuch as they had been contained in the aforementioned Compilation. However, since 2004, the political context has favoured the expansion of its legislative competence to other private institutions which had never been regulated by this regional identity. Such expansion even acquired a legislative nature when in 2005 a new Statute of Autonomy was passed thanks to the support (that is, the votes) of the Socialist Party and the different parties governing Catalonia.

Valencia, trying to follow in the Catalonia’s footsteps, prepared a new Statute of Autonomy attempting to expand the scope of the legislative competence of the Valencian region in civil matters. Such law was, in fact, enacted with the support of the Socialist party. According to such legal reform, Valencian Parliament was allowed to “conserve, amend and develop” the customary institutions not abolished by Felipe V and which were in force at the time of the approval of the Spanish Constitution, as well as all the private institutions which had been abolished, and not returned, by Felipe V. The new Statute was very celebrated in Valencia. Nonetheless, a year later, when the Valencian Parliament, passed the first law on a private institution whose validity had been interrupted because of the Felipe V’s decrees, the state government presented an appeal to the Spanish Constitutional Court against that law arguing that its content violated the state jurisdiction concerning the legislative competence in civil law matters. Later on, because of new political circumstances which surpass our interest now, the stated government rectified and renounced to keep the appeal forward.
Nevertheless, it could be said that the current Spanish legal system shows that the coexistence of autonomous regions with their own legal traditions within a centralized State is possible. That all the Autonomous Communities currently enjoy legal and institutional autonomy is undeniable. The question at stake is the scope of legislative competence they have to “conserve, amend and develop” (article 149.1.8 SC) their civil law.\(^61\)

Theoretically, one may think that the scope of legislative competence on civil law matters should depend on historical reasons. In practice, the historical basis has been and is being biased out of political motives which sometimes constitute the driving argument and basis in determining the scope of legislative competence of Autonomous Communities in civil law issues.

V. CONCLUSION

Considering the evolution of the Spanish private law tradition, and particularly the impact of the codification movement, the following conclusions could be drawn. Codification does not mean complete legal unification; as said at the beginning of this paper, the Spanish case shows that it is not accurate to maintain that codification is a legal source or tool whose main purpose consists in complete unification of law. In fact, the compatibility of codification with the different legal traditions delayed the enactment of the Spanish Civil Code (1889).

Legal diversity entails necessarily the possibility of developing legal institutions, through either legislative bodies or doctrine (\textit{ius commune}), as it happened in Spain in some territories from the eighteenth century onwards.

The balance between state and regional, legislative competence in civil law matters has become a source of constant controversy, and its development is nowadays uncertain. While some regional identities are allowed to expand the scope of their legislative competence in civil law matters, others are forbidden, creating sometimes a discriminating and unequal treatment out of

political motives, disregarding strictly juridical or historical reasons.

The variety of legal sources of the different Hispanic kingdoms was, like in other European territories, considerable. In exploring and describing such complexity, a comparative approach is highly recommended. Otherwise, it would be difficult to capture a clear picture of the different Spanish legal traditions. Applying the comparative approach to the Spanish mixed, complex legal system constitutes a necessary requirement to appreciate a plurality of laws and legal traditions in force as of today. Although these legal traditions underwent a significant process of legal unification, it is important to keep in mind that in Spain legal unification never was entirely achieved, and different Spanish legal traditions are (and will be) in force.\footnote{62. See Aniceto Masferrer, \textit{Spanish Legal History: A Need for its Comparative Approach}, in \textit{How to Teach European Comparative Legal History: Workshop, Faculty of Law, Lund University, 19-20 August 2009} 107-142 (Kjell Ä. Modéer and Per Nilsén eds., Lund University, 2011).}
HOW WAS JUDICIAL POWER BALANCED IN MALTA IN EARLY MODERN TIMES?
A CURSORY LOOK AT THE MALTESE LEGAL SYSTEM THROUGH A HISTORICAL PERSPECTIVE

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I. INTRODUCTION

Today, Malta has one judicial system which is administered from one central building in Valletta. At the same time, the place where justice is administered is known in Maltese as Qrati tal-Ġustizzja or Courts of Justice. However, the fact that all these courts are situated under one roof causes the people to associate it

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as one institution. I think that this popular perception is more than correct and despite of the use of the word “courts,” all these different seats of power fall under the responsibility of one person—the Chief Justice. This sort of anomaly made me look into the semantic reason for the use of the plural *qrati* rather than the singular *qorti* even though people refer to this building by the latter nomenclature. In my opinion, the use of the plural conveys an older idea when Malta had a multi-court system.

In this paper, I shall be looking at the Court of the Inquisition in Malta and how it administered justice during the early modern period. I want to state from the onset that I am not a juristic scholar by profession. My training is that of a historian. Therefore, in this paper, I shall be analyzing the development of this tribunal between 1530 and 1798, that is, during the period when the Island was ruled by the Order of Saint John. Most of the observations that I shall be making on this tribunal are based on pragmatic observations that I have made on analyzing the different trials or *processi* of criminal justice judged by the Inquisition. I want to state very clearly that the reason for my analysis of these *processi* is to gather information to build the social framework of Maltese society during early modern times. However, studying these trials and other court records belonging to other Ecclesiastical Courts in Malta, I noted the different courts that existed on the Island and the different functions that these courts had in Malta.

II. TRIBUNALS

Already during medieval times, Malta had more than one judicial tribunal functioning on the Island. There was the Tribunal of the Church as well as the Tribunal of the State. Both had civil and criminal roles. Furthermore, the secular arm had more than one tribunal. There was a court in Malta and another in Gozo; both administering civil and criminal justice independently. The Maltese tribunal had its seat at Mdina whilst that of Gozo was situated at the Castello. From 1184, with the setting up of the Inquisition Tribunal in Sicily, Malta would begin to experience a new judicial system.
The Inquisition in Sicily was administered directly by the Dominican Order. It was the duty of the Sicilian General Inquisitor to appoint pro-Inquisitors to travel to those areas where the need was felt, or a request was made, for their presence. Thus, this Medieval Inquisition lacked a formal seat but relied on the figure of a peripatetic judge who began investigating cases according to the exigencies of the moment. Therefore, the figure of this Inquisitor was more of a prosecuting magistrate rather than a judge who had the faculty to investigate and pass sentences.

Local records never speak about the presence of an Inquisitor in Malta throughout the medieval period. Whenever the need for an Inquisitor was felt, a pro-Inquisitor was sent over to Malta. During this period, it is very difficult to differentiate between those cases that fell directly under the Inquisition and those related to the Ecclesiastical Tribunal led by the Bishop. The reason for this mix-up is related to the nature of the Medieval Inquisition itself. The local Bishop, more often than not, assumed a dual role. He could act as Bishop or as Inquisitor depending on the nature of the case. Bishops were given a power of attorney by the General Inquisitor in Sicily to investigate cases related to the Faith. To complicate matters further, more often than not, the Bishop was absent from Malta.

The surviving documents of court cases before the Ecclesiastical Tribunal show that this court mainly dealt with various cases of a domestic nature, such as requests from married couples to be granted divorce, nuns asking for dispensations to leave the convent, other cases related to the administration of church property, and issues related to aspects of authority between the Governing body in Malta and the Church.¹ These matters fell under the sole prerogative of the Ecclesiastical Court. Then, there were the cases of ecclesiastics who committed serious crimes and even though their crime was not of a religious or criminal nature, they were still dealt with by the Bishop. Lay people had their own tribunals. They were prosecuted by the tribunals of the Università, which in medieval times was the governing body in Malta. However, the Ecclesiastical Court had the prerogative over cases

¹. ALEXANDER BONNICI, 1 STORJA TA’ L-INKIŻIZZJONI TA’ MALTA 33 (Rabat, Malta, 1990-1994).
of marriage, such as separation, annulment of betrothals and permission to foreigners to marry after undergoing through what was known as the *Status Liberi* proceeding. Such prerogative remained in the hands of the Bishop even after there was a separation of roles and an Inquisitor began to be appointed for Malta.

With the arrival of the Order of Saint John in 1530, Malta would experience changes. At first, the legal changes were few except that the Knights now became practically responsible for the local lay courts. The magistrates and judges had to pledge their loyalty to these new rulers and immediately, the judges experienced a sense of limitation in their power. While, in medieval times, their power did not cover ecclesiastics, now such a limitation was extended to the members of the Order of Saint John; they too began to enjoy total immunity from the local courts. Instead, the Grand Master set up his own courts where Knights and other members of the Order could submit their complaints, whether civil or ecclesiastical.

While Malta was undergoing these changes, new developments were taking place in the field of the judiciary on the international scene which would have a direct influence on Malta. As part of the process of Catholic reform taking place in the sixteenth century, the Papacy decided to overhaul the structure of the Church’s Medieval Inquisition. Today, the word Inquisition carries a very negative semantic meaning. It stands for torture, corruption and utter disregard for human rights. However, these bad attributes are in part the result of a negative literature that has been produced about the subject; the result of a political stratagem aimed at putting the Catholic Church in a bad light. While the responsibilities of this Tribunal are not doubted, it is also an undeniable fact that this system was supported and used by the secular State and that the methods of investigation adopted by this Tribunal were no different to those of other judicial instruments that were being applied in the rest of Europe. Perhaps, in comparison with those of the secular powers, the system of procedure of the Roman Inquisition was fairer and more humane.

A semantic analysis of the word inquisition shows that it derives from the Latin work “inquisere” which had a very simple
judicial meaning to investigate. However, as early as the year 884, this Latin word acquires the meaning of persecution. Ironically enough, the stimulus for this legal imposition did not come from the Church or the Papacy, but from what may today be termed the Secular State. It was Emperor Charles II who admonished his Bishops to be vigilant over their subjects and obey his orders. Then, in 1184, Pope Lucius III set up the Tribunal of the Inquisition through the famous (or now infamous) decree *Ad Abolendam*. It was intended as a temporary deed, but in judicial systems, temporary measurements have the habit of becoming permanent structures. As already explained, this medieval Inquisition functioned more as an ad hoc tribunal, with a peripatetic judge who moved from one diocese to the next according to the exigencies of the day.

The next important development was the creation of the so-called Spanish Inquisition. Due to the practices adopted, including the indiscriminate use of torture, it has become the subject of a number of studies. Torture was not only applied to extract confessions but once a death sentence was passed, extreme torture was used to increase the suffering of the condemned. In 1932, Carlo Havas contributed an important study on the cruel investigative methods applied by the Spanish Inquisition. However, closer to our times, the political role of the Tribunal is being revised and re-evaluated through the works of Henry Kamen.

In 1542, Paul III began a long process of reform of the whole system through the bull *licet ab initio*. The Roman Catholic Inquisition was established. In principle, it followed the medieval model with the difference that it had to have a permanent seat whilst the Inquisitor was always accountable to his superiors in Rome. At first, Diocesan Bishops began to be entrusted with the dual role, that of a Bishop and of an Inquisitor. However, this new system also envisaged the appointment of the specific figure of the Inquisitor who could be totally independent of the Diocesan Bishop.

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2. *Id.* at 17.
In this reform, the inquisitorial judges were specifically instructed to show moderation and to treat all strata of society equally.\textsuperscript{5} The condemned was given the right of appeal to Rome from a sentence handed down.

Soon Malta would feel the effect of this reform. In 1558, Paul IV sent an Apostolic Commissioner, Fra Angelo from Cremona, to help the resident Bishop investigate and fight heresy. Thus, the role of the Inquisitor was envisaged as a sort of investigating magistrate rather than a neutral judge who hears and collects evidence. Once Fra Angelo returned to Rome, he made a report wherein he recommended the need of the presence of a resident inquisitor in Malta.

At first, it was decided that Malta’s Bishop would be given the added responsibility of Inquisitor besides his other duties. In other words, Rome was confirming the medieval vestiges that the local Bishop might still have had while rekindling any defunct judicial power. Thus, in 1561, Rome decided to set up a permanent Tribunal of the Inquisition in Malta.\textsuperscript{6} The resident Bishop Domenico Cubelles (1540-1566) was appointed Inquisitor.

For less clear reasons, the Bishop took over a year to act on the Papal Ordinance. Perhaps, such a delay demonstrates the resistance put up by the Knights towards instituting this Tribunal. In fact, the Tribunal of the Inquisition would become a cause of contention. Between June 16-19, 1562, the Bishop assembled Grand Master Jean Parisot de La Valette (1557-1568), the Council of the Order, the Conventual Chaplains, priests and friars and officially proclaimed the setting up of the Tribunal of the Inquisition in Malta.\textsuperscript{7} On their part, the Grand Master and the Council discussed the setting up of this new Tribunal at their Council meeting on July 25, 1562. The seventeenth-century Inquisition expert Sebastianus Salelles wrote about this dispute that this was the first and last time that a Grand Master of the Order would attend a sitting or a ceremony presided by the Inquisitor. Future Grand Masters expected the Inquisitor to call on them as Head of the Islands without expecting them to reciprocate.

\textsuperscript{5} Id. at 41.
\textsuperscript{6} Id. at 38.
\textsuperscript{7} Id. at 46.
There is no doubt that Bishop Cubelles had no clear guidance as to how to operate. Rules of procedure had not yet been established. He literally administered this Tribunal by trial and error. On one hand, he relied on instructions and outside help and on the other hand, he realized that this Tribunal had to be governed on the principle of case-law. Case-law becomes an important aspect of this Tribunal, and once praxis was established it would become difficult, if not impossible, to change. For this reason, the Bishop was given an assistant. The first one was Dominican Theologian, Tommaso de Vio but this was not enough and soon a pool of officials began to be recruited to support the trial system of the Inquisition. There should be no doubt that Bishop Cubelles wanted to create a Tribunal for the Inquisition independent from the ecclesiastical one even though he presided over both. Probably, the same court room was used, but both courts had a separate administration.

The Tribunal of the Inquisition was suspended during the period of the Ottoman Siege of Malta of 1565. The theologian de Vio left the Island, most probably out of fear, after the news announcing an impending siege of Malta was received. The suspension of office was so quick that there was not even time to pay the officials of the Tribunal.

With the death of Bishop Domenico Cubelles, in 1566, the occasion arose for serious efforts to be made by the Order of Saint John to curtail the authority of the Court of the Inquisition on the Island. For a long period the Island remained without a Bishop. It was only in 1572, that the Grand Prior of the Knights, Martin Rojas de Portalrubio was appointed Bishop. The Grand Master and the Knights’ Council did their utmost to remove the prerogative of Inquisitor from the Bishop’s portfolio. His inquisitorial power was considered a threat to their authority. Their efforts were not in vain. Starting in 1575, Rome separated the role of Bishop from that of Inquisitor. Two different courts were set up administered by two different persons. The Holy See began to send to Malta a resident Inquisitor. Besides being an Inquisitor, the appointee was given the added administrative duty of Apostolic Delegate, which was a lower rank than a Nuncio.

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8. *Id.* at 54.
The Knights immediately responded and showed their appreciation by offering the Inquisition a palace in Birgu which until then had been used as the seat of the civil and criminal court, which, in the meantime, was moved to the new capital city of Valletta. The Roman Catholic Inquisition unconditionally accepted this offer.

Therefore, Malta ended up with three judicial authorities, all having their own independent courts of justice. In terms of hierarchy, the Court of the Inquisitor ranked third; second was the Bishop, whilst the Grand Master was the Supreme Primate. In practice, the situation would soon appear to be very different for the Court of the Inquisition, through its direct link with Rome, began to have the upper hand and be shown the highest respect from the Maltese people.

In reality, the Inquisition ended up with two seats in Malta. The first was in Birgu and generally dealt with cases involving Maltese residents. Due to geographical reasons, the Inquisition felt the need to have a separate court in Gozo. Thus, an assistant was appointed for Gozo. Normally, the person chosen was a resident from Gozo who only dealt with those cases that fell under the jurisdiction of the Inquisition, concerning residents from this island.

The Lay Court had three seats for the administration of criminal justice. There was the court, known as Castellania, which was situated in Valletta. It judged religious crimes committed by residents from Valletta, as well as its suburb Floriana together with the three cities, Senglea, Bormla and Birgu and the surrounding environs. Mdina and Rabat and the neighbouring villages were looked after by another court, locally known as that of Captain of the Rod. The judge was always Maltese. Gozo had its distinct court. It was presided by the Governor of the Island, and was assisted by an assessor.

Malta’s thriving maritime trade required the setting up of a special court that dealt with cases of corsairing and other maritime disputes. For this reason, the Order set up the Tribunale degli Armamenti first in 1605 and the Consolato del Mare later in 1697; they were completely an independent courts. Commercial cases were decided through another court structure. There was the
Camera di Commercio, composed of an assessor and merchants to deal with cases of a business and commercial nature.

Lay civil justice was administered through three private auditors appointed by the Grand Master. They judged civil cases at the first instance. Appeal was possible and this was done in front of the Auditor of the Grand Master. Finally, there was a sort of a family judge to preside over cases of a household nature, such as cases concerning rent. For this reason, the judge was known as a Home Judge.9

The Inquisition expresses a high esteem regarding the Maltese Civil Courts in particular how they operated in the second half of the eighteenth century. On July 21, 1777, Inquisitor Antonio Felice Zondadari (1777-1785) wrote that the sentences handed down by the Maltese Civil Court are essentially just. However, he had reservations about the training of the local advocates. The advocates and the officials of the Civil Courts were all Maltese, some of whom had studied abroad. However, for Zondardari, some of the advocates were not sufficiently prepared, with the result that one had to be extremely vigilant to ensure that the correct court procedure was being employed. In case someone felt aggrieved by a sentence or a decision of the Civil Court, as a remedy, he could petition the Grand Master for redress. Grand Master Emmanuel De Rohan Polduc (1775-1796), for example, used to give particular attention to these petitions and used to appoint commissioners to investigate the cases.

III. THE DUTIES OF THE INQUISITION

The first obligation of the Inquisition was to safeguard the purity of the Catholic Faith and maintain obedience to the Holy See.10 This was done by being vigilant against heresy, polygamy, solicitation during confession, apostasy and superstition or better still magic. Swearing was judged by this Office as another form of heresy, while defamation was considered the same as swearing and was therefore judged by this Office.11 The non-observance of

9. 3 BONNICI, supra note 1, at 439.
10. ELINA GUGLIUZZO, IN VESTE DEVOTA, LE CONFRATERNITE DI MALTA IN ETÀ MODERNA 85 (Rubbettino ed. 2009).
11. Id. at 84.
abstaining from eating meat on Wednesdays and Fridays as well as throughout Lent was considered a crime that undermined the purity of the Faith. 12 Whilst circumcision was the hallmark that singled out a person as a Jew or Muslim during this period, abstinence distinguished a Catholic from other faiths.

Whatever a person’s position in society was, by contravening one of the briefs that fell under the jurisdiction of the Inquisition, he or she became liable to prosecution. Not even the Knights or the Bishop were immune from the Inquisition’s jurisdiction. This was considered by the Knights extremely dangerous. Besides, there was the privilege of immunity granted to the members of the Inquisitor’s retinue. They too enjoyed the privilege or immunity of not being prosecuted by any other court in Malta, even those who were not directly related to religion and therefore in normal circumstances did not fall under the competence of the Inquisition. In case of civil or other criminal infractions they would still be judged by the Inquisition.

The Inquisitors observed two particular characteristics in Malta. The first one was the risk of apostasy. This was a cause of grave concern due to the presence of Jews and Muslims and the contact that the Maltese had with North Africa and the Orient. The second one was a tendency, among the Maltese, to tell fat lies. They had no scruples about spreading false information to taint the names of honest people. 13 While these were the cause of moral concern, what created the biggest political concern was the issue of heresy as it became the bone of contention between the Inquisition and the Knights.

This was one of the few responsibilities which directly affected them and made them liable to prosecution. In fact, the Inquisitor could judge the Knights on two counts. In cases where they committed acts against the Faith and when they attacked any of their dependents. 14 Both were highly contentious. With regard to the first, it was an open secret that a number of Knights were attracted to the teachings of Luther and other protestant reformers. Some even began to give protection to foreign individuals who

12. 1 BONNICI, supra note 1, at 214.
13. GUGLIUZZO, supra note 10, at 93.
14. 1 BONNICI, supra note 1, at 156.
happened to be in Malta and expressed diverse religious feelings which went against the official teachings of the Church. For example, some French Huguenots in Malta found asylum and support from French Knights. Thus, they were liable to be prosecuted by the Inquisition. The second point was even more disturbing since it undermined the aristocratic Knights’ authority.

Most, if not all the men in the Inquisitor’s entourage, were Maltese and the Knights in Malta were losing their political edge to the Inquisition which was being run by the locals. While the local courts did not have any political will power to proceed against a Knight, in cases of a criminal act against a local who happened to belong to the entourage of the Inquisition, the entire judicial system was being turned upside down. Moreover, the Inquisitor began to surround himself with a number of consultants, most of whom happened to be locals.

This situation began to cause tension. The Order had the tendency to back the immunity of its members and at times would even use force against the Inquisitor’s agents who attempted to arrest Knights who were accused of heresy and were being summoned to appear before the Inquisition. This remained a bone of contention throughout their stay in Malta. Under such circumstances, one understands why the Knights did all in their power not to fall under the Inquisition and when this became unavoidable, they claimed that they ought to be treated differently to the rest of the population.

Each time they felt there was undue interference from the Inquisitor on matters which they considered an internal affair, the Knights lodged a protest against the Inquisition to the Pope’s Secretary of State through their ambassador in Rome. However, the Papacy, as expected, tended to support the Inquisitor.

However, the Inquisitor’s hands were tied. He could not enter into open conflict with the Grand Master. More often than not, he needed the latter’s help to execute particular sentences where force was required to execute an order, including those that

15. Id. at 151.
16. Id. at 120.
17. GUGLIZZUO, supra note 10, at 91.
18. Id. at 92.
did not involve members of the Order. The Grand Master had to be kept informed about the outcome of cases where the punishment entailed the assistance of the Secular State such as executing capital punishment. The Inquisitor was bound to personally call on the Grand Master and present him the relevant information about the case. Confidentiality was necessary in these cases since the Inquisitor was bound and had to restrain from making references or revealing the names of the witnesses.

It was within such a climate that a series of written and unwritten rules began to take hold and regulate the behaviour of the Inquisition and the procedure to be adopted in such cases. First of all, the Grand Master obtained the right to be informed beforehand whenever one of his members was going to be judged by the Inquisition. The Grand Master judged each and every case according to its own merits and when it was found that the indicated facts did not fall within the jurisdiction of the Inquisition, the latter’s role became that of a mediator. On the other hand if it was ascertained that the accusations were the competence of the Inquisition, then the Grand Master was to be kept informed of the outcome. To further strengthen the role of the Grand Master, the Order even acquired the right to be represented on the Tribunal by the Grand Master together with the Grand Prior and the Vice-Chancellor. Yet, these measures created more problems than they solved.

Elina Gugliuzzo in her book *In Veste Devota*, observes this situation. She rightly states that the fact that the Knights could not participate in the court proceedings as extremely humiliating to the extent that the Order began to appeal to the Pope, the Emperor of Germany and the Kings of Spain and Sicily for help. But each time, the Knights failed to receive a satisfactory answer or any support. The Knights qualified the Inquisitor as “nearly a monarch” due to the power vested on him by the Papacy. On their part, the Inquisitors began to refuse to go to the Palace of the

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19. 3 BONNICI, supra 1, at 127.
20.  Id. at 81.
21. Id.
22. Id. at 47.
23. GUGLIUZZO, supra note 10.
Grand Master to hold audiences there. The Knights reacted by not accepting to attend the court cases in Birgu. A status quo was reached. The Grand Master sought to bypass the issue of protocol, by appointing a high ranking member of the Order, usually a Grand Cross, to represent him on the Tribunal. Yet, this did not solve matters as even the Grand Crosses began to refuse to attend in Birgu. The reaction of the local Inquisitors was very clear. They began to hold their trials in Birgu without the presence of the Knights. This permitted the Inquisitor to continue hearing court cases against the Knights to the extent that by the time of Inquisitor Evangelista Carbonese (1608-1614), the right of the Knights’ dignitaries to sit on the Tribunal was considered obsolete.

One has to admit that it was not easy for the Inquisition to proceed against members of the Order; it was always an uphill struggle, primarily, because the Inquisition did not enjoy full legal freedom to proceed against the Knights or their servants. The Grand Master’s presence meant that the Order had more than a passive say on the proceedings, whilst the Knights sitting on the Tribunal tended to favour more the accused Knight rather than the course of Inquisitorial justice. The said issue of protocol facilitated matters for the Inquisition to get rid of the incumbent Knights.

From 1670 onwards, an agreement was reached that in cases involving patentees of the Inquisition who were harassed or had harassed members of the Order, the accused would be judged by a combined court made up of the Inquisition and members from the Order of Saint John.

IV. THE AREAS OF COMPETENCE

The relationship of the Inquisition with the Bishop was also another bone of contention. It was not a rare instance that a Bishop felt that an Inquisitor was interfering in the diocese’s internal

24. GUGLIUZZO, supra note 10, at 91.
25. 1 BONNICI, supra note 1, at 124.
26. GUGLIUZZO, supra note 10, at 91.
27. 1 BONNICI, supra note 1, at 120.
28. Id. at 123.
29. Id. at 171.
30. Id. at 81.
affairs. Sometimes, the situation became even more complicated for the Bishop’s court did not always see eye to eye with the Grand Master. The Knights were sometimes accused of being enemies of the priests. Like the Inquisitor, the Bishop had his own retinue which, besides all the members of the clergy and even individuals taking minor orders, included a number of patentees and lay staff. However, there was one cardinal difference. If any one of the Bishop’s patentees or ecclesiastical members erred against a principle of Faith or offended the Inquisition he became subject of scrutiny by the Inquisition and not the Bishop. Unlike the Knights of Saint John, the local Bishop was not given the right to judge members of his retinue in partnership with the Inquisitor.

The right of ecclesiastical immunity became a contentious issue between the local Curia, the Inquisition and the Grand Master. Immunity was a hot issue but in this case, the Bishop had the upper hand. Both the Grand Master and the Inquisition sought to limit the Bishop’s rights in this respect. Grand Master Jean De Lascaris Castellar (1636-1657) for example, put pressure on Inquisitor Antonio Pignatelli (1646-1649) to reduce the number of churches that enjoyed ecclesiastical immunity. The Grand Master wanted to reserve this privilege only for parish churches. The strong objection came from the Congregation of Immunity in Rome. Even the Inquisition could not infringe so easily upon such an ecclesiastical immunity. In fact, victims of the Inquisition could seek the protection of this immunity for any crimes they may have committed against the Holy Office and the Inquisition had no right to arrest them unless the guilt was related to heresy. Even escaped convicts of the Inquisition, who sought refuge in churches, could not be arrested by the soldiers of the Holy Office, unless the guilt was not related to heresy.

The judicial structure of the ecclesiastical world in Malta became even more complicated with the presence of Religious Orders. They enjoyed a certain amount of immunity and

31. Id. at 206.
32. GUGLIAZZO, supra note 10, at 92.
33. Id. (citing 1 BONNICI, supra note 1).
34. 1 BONNICI, supra note 1, at 124.
35. Id. at 120.
36. Id. at 296.
irregularities within the community could only be judged by their Superior General. However, sometimes, the line of separation was not always clear and there were cases which led to contestation between the Religious Orders and the Inquisition over which of the two had the right to judge an erring brother.

The cause of contention, with the Knights first and with the Bishop and Religious Orders afterwards, derived from the fact that the Inquisition was given the upper hand by Rome in any issue that regarded matters of Faith. This explains why a number of Maltese, including ecclesiastics began to seek the political coverage of this office by becoming associated with the Inquisition. They began to recognize in this institution a powerful body that could offer them protection.

Gugliazzo rightly observes that a number of ecclesiastics, priests and friars, did their utmost to obtain positions with the Tribunal of the Inquisition, in particular as consultants to the Inquisitor. Collaboration with the Inquisition gave them the right to be exempted from both the jurisdiction of the Grand Master as well as the Bishop’s. Even lay people sought to get such an exemption by becoming “patentati” of the Inquisitor. One way of becoming a “patentato” was by donating a piece of land to the Inquisition, but this donation was subject to two conditions: that from that donation they got an annual income and that they were appointed or included amongst the protégés of the Inquisition.

The Order of Saint John also had a section to which members from Maltese society were admitted. Adult male members were allowed to become priests within the ranks of Conventual Chaplains. Consequently, they enjoyed the right of exemption from being judged by other bodies such as the Inquisition and the Bishop and could only be prosecuted by the internal tribunal of the Order, represented by the Hospitaller’s Grand Council. The Inquisitor had difficulty prosecuting them, as they came under a special criminal code which made it problematic for the Inquisition to charge them since they enjoyed the same legal immunity as the Knights.

37. GUGLIAZZO, supra 10, at 83.
38. 1 BONNICI, supra note 1, at 165.
39. GUGLIAZZO, supra note 10, at 76-77.
Due to these complicated legal structures, it was often thought that the Maltese suffered most as a result of a hostility that was so profoundly rooted amidst these three Authorities. If the Bishop or the Inquisitor decided to take a Maltese under his protection making him one of his patentees they risked persecution from the Civil Authorities. The Grand Master greatly resented seeing most of the able-bodied Maltese escape his jurisdiction to pass over to the other authorities on the Island.40 

Yet, in reading the historical documentation and Inquisitorial proceedings, a different situation emerges. Such a fragmental judicial system turned out to be beneficial for the Maltese since it gave them the chance to seek protection in case they wanted to oppose one of these institutions. The office of the Inquisitor was the strongest. That of the Bishop was politically slightly weaker, even if in theory, the Bishop was the second most important person in Malta after the Grand Master. The Grand Master came third. First of all, no lay member was admitted within the ranks of the Order even if the Order sought to retaliate by creating a new noble class on the Island which owes the origins of its titles to the Knights.

Thus, it was through the office of the Inquisitor that the Maltese began to voice the first signs of protest, expressing disagreement in writing against the Order’s rule.41 It should be noted that at this period, such literature was punishable by death. Yet there were good reasons for protest. The behaviour of the Knights towards the Maltese was not at all exemplary. One particular traveller wrote: “These people are extremely devout. If only we could say the same things about the Knights.”42 

Once, two Knights assaulted a Maltese who formed part of the Inquisitor’s staff and died as a result of the attack. One may rest assured that had this assault been carried out in a different context, the Maltese victim would not have found any form of solidarity or justice but, being under the umbrella of the

40. Id. at 83.
42. GUGLIAZZO, supra note 10, at 89.
Inquisition, the murder could not pass unnoticed. The two Knights were arrested, prosecuted and both were condemned to death.\footnote{BONNICI, supra note 1, at 187-188.}

However, the Inquisition’s power to use the death penalty was already being curtailed in the seventeenth century. Many decades before, such a position was proposed by the Neapolitan jurist Pietro Giannone. By 1670, the power of the Inquisitor in criminal cases, in particular his power to condemn people to death, was diminished by Pope Clement X.\footnote{Id. at 188.}

Therefore, the affirmation that the Inquisition in Malta had instilled an atmosphere of fear, or to be exact, created a climate that Bartolomé Bennassar called the\textit{ pédagogie de la peur} should be considered as historically unproven. The local population supported the system and a proof of this is that a negative collective memory towards this Tribunal does not exist in Malta. The conclusion made that there was in Malta such “pedagogy of fear” came as a result of the number of accusations and auto-accusations made to this Tribunal.\footnote{GUGLIAZZO, supra note 10, at 86.}

However, the institution that truly carried a grudge and was afraid of the Inquisition was the Order of Saint John. Its members were those who really hated it as it was the only power in Malta that could exercise pressure and in some way restrain it. It was for this reason, according to Inquisitor Ludovico Gaultierio Gualtieri (1739-1743), that the Knights of Saint John always sought to demean the tribunal of the Inquisition.\footnote{Bonnici, supra note 1, at 146.} Gaultieri was not the sole Inquisitor to express such views. Manciforte had a similar opinion. “This is only tribunal of the Inquisition that . . . helps the poor Maltese, subject greatly suppressed by the Order.”\footnote{Id. at 360.} On their part, it was not rare that the Roman Inquisition in Malta performed acts of charity. In 1684, it distributed money to the poor of the Island.\footnote{Bonnici, supra note 1, at 228.} Acquaviva asked his superiors to allow him to use money of the Tribunal to help poor and persons in need.\footnote{Id. at 258.}
V. THE PROCEDURE

The method of procedure at the Inquisitors’ court was different from the rest of the courts present in Malta at the time. Foremost, the Inquisitor had the right to renounce to hear or preside over a sitting because he did not approve of, or had reservations about, the case. This was mostly relevant in relation to civil cases. In these cases, he was obliged first to consult his superiors.\textsuperscript{50} Then, any pending cases, both civil and criminal, were continued by succeeding appointees.\textsuperscript{51}

Definitely, the presence of this Tribunal introduced a new method as to how criminal justice was to be administered. Prosecution only began after presentation of a denunciation or report. In other words, somebody needed to make a report before inquisitorial procedures could begin. In this area, the system was not much different from the procedures used in the Lay Courts. In these courts too, proceedings began only if someone had lodged a report against someone else for some type of criminal offence or other. However, here lay the first major difference. In the Lay Courts, any person lodging a report first needed to have proof in hand as to the accusations he or she was making. The Inquisition’s system was different. Anyone could report somebody even on mere supposition or suspicion. It was then the duty of the Inquisitor to establish whether the report was true or not. The individual making the accusation was protected by anonymity. Therefore, the accused would never get to know who betrayed him. Even the witnesses were kept secret. The accused would not know who the witnesses testifying against him were. Then, there was a second aspect. The accused had the right to take the witness stand. The fact that the accused could take the witness stand brought about changes in the question of anonymity of the accusers. The Inquisitor could reveal the persons testifying against an accused should the need arise and confront the accused with those testifying against him. This had its positive and negative aspects as in the Secular Criminal Courts; the accused had no right to give

\textsuperscript{50} 3 BONNICI, \textit{supra} note 1, at 124.
\textsuperscript{51} 2 BONNICI, \textit{supra} note 1, at 202.
testimony until 1909. The Inquisition avoided direct confrontation. Only in rare instances did such confrontation take place, and only if, in giving evidence, the discrepancy was so great as to be unable to establish who was saying the truth.

The reason for discouraging such a procedure was very simple. It was aimed at helping and encouraging people, even from the lower classes of society, to come forward and denounce their superiors. There was the real risk that a person, socially inferior, would feel threatened and extremely uncomfortable if he was to be asked to testify against his superiors or confront someone who was his peer. The system worked. Instances exist where slaves reported their masters to the Inquisition such as when Turkish slaves did so because they were denied the prescribed liberty they were entitled to.

Yet, this system too had its risks. For this reason, even in this area, protective measures began to be taken to avoid the beginning of proceedings against somebody on the simple pretext of suspicion, in particular in the area of solicitation during Confession. This turned out to be one of the most contentious issues of the Inquisition. Typically, accusations were launched by women who felt that they had been sexually harassed by priests during Confession. Touching the shoulder or hand of a woman at this period was tantamount to harassment. Thus, to avoid cases where accusations were lodged more out of revenge than for any other motive, proceedings only began if the Inquisition received more than one report against the priest. The second innovative aspect of this Court was the praxis to accept and encourage auto-denunciations. Such a concept was also present in the Secular Courts. The Inquisition expected that if a person made a mistake, that same person would appear voluntarily before it to auto-confess.

53. 1 BONNICI, supra note 1, at 68.
54. Id. at 75.
55. Id. at 212.
56. Id. at 236.
57. Id. at 68.
Thirdly, there was the possibility of appealing a sentence to an external authority based in Rome. At the same time, the Roman Church Authorities sought to check and counter-check the work of the Inquisitor. For this reason, Rome requested the local Inquisitor to gather as much information as possible. In case of missing information, Rome reserved the right to ask for such information before proceeding to pronounce itself on the case. Fourthly, the Inquisitor was also given the right to consult with Rome during the compilation of evidence to seek advice about procedure and practice.

Denunciation followed an established protocol. It was made in front of the Inquisitor, his assistant or assessor. The person who made the denunciation had to take an oath that he or she was denouncing somebody not out of hatred but as a result of religious duty. He or she also had to give the exact circumstances of the case, the place where the crime had occurred, its context and time. If these were not clear, questions were put by the Inquisition to establish these facts. The Inquisition had to ask whether there were others who knew about the fact. The accuser had to be asked whether he had any reason to hate the person that he was accusing.  

\[58\]

A. Secrecy

The person who made the denunciation was then bound by an oath of secrecy. The principle of secrecy was paramount. No one could speak out, not even the Inquisitor. Even the files were secret and were kept in a special place under lock and key.

Once a report was received, irrespective of whether it was an auto-denunciation or not, the procedure was the same. In cases where there was no suspicion of guilt, the case would stop there. No one would get to know. The outcome was different when the accusation held water. The accused would be informed and asked to appear in front of the Inquisition. The first question the accused would be asked was to list the persons whom he or she thought hated him. It was after having done so that he or she was informed

\[58\] Id. at 214.
about the substance of the accusation. Then, the Inquisition had the right to start questioning.

Afterwards, it would be the witnesses’ turn to appear before the Inquisition. They were not called by the accused but were only asked to appear at the behest of the Inquisitor. Even the Inquisitor could not name witnesses arbitrarily. The Inquisitor could only ask those individuals whose names were listed by the accuser or were mentioned by the accused when listing down his enemies or during investigation. In turn, if the witnesses mentioned other names that were related to the investigation, these too could be asked to appear in front of the Inquisition. Therefore the gathering of witnesses took time and was not conditioned by the collation of evidence by the prosecution or the response of the defense advocate. There was no such division. The Tribunal and all the convoked witnesses were expected to remain silent and maintain secrecy on any denunciation made.

In cases of auto-denunciation, the procedure was shortened. Witnesses were not called and the case was normally closed with the usual admonition and penitence. If the person making the auto-denunciation mentioned third parties, then the case protracted as the Inquisitor would begin investigating. When auto-denunciation was pronounced by a Knight, proceedings were even quicker as the Inquisitor had no need to call other members of the Order or the Grand Crosses to attend the hearing.59

Secrecy protected the accused and, if innocent, he or she was being spared adverse exposure. Today, we are witnessing in our system public prosecution judgment by the media. Then, there was the constant fear of mistakes, but this was in part counterbalanced by giving the accused the faculty to initiate proceedings against the members of the Tribunal in case of wrong doing.60

For this reason, through its history, the Inquisition resisted all efforts from ruling Grand Masters to reveal the names of the witnesses. In 1677, such type of pressure was extremely strong but

59. Id. at 214.
60. Id. at 128.
Inquisitor Visconti objected and considered such a request and procedure as a means to diminish freedom in court proceedings.61

**B. Torture**

While the role and importance of the Tribunal was underestimated due to the use of torture to obtain confessions, this was a minor feature in the whole procedure. First of all, it should be remembered that torture was not an exclusivity of the Inquisition. It was used by the inquiring judges, including by the Secular Courts. Perhaps, as Henry Kamen noted,62 the use of torture by the Inquisition was more a cause of controversy after this office was abolished than when it was in operation.

First of all, as thoroughly bad and inhuman as it was, torture was regulated and could not be arbitrarily applied by the Inquisitor. It was only his absolute right, or that of the Assessor to use torture in cases when there was strong suspicion that the accused was lying to the court. Moreover, it was meant to be used only in those proceedings arising from reports. Torture was not supposed to be applied to those who appeared of their own free will to make an auto-denunciation.63

An Inquisitor could apply torture against anybody who was being accused in front of him, irrespective of his rank or social status. Ecclesiastics, for example, were tortured.64 What he had to ensure was that, when torture was applied, no extreme cruelty was used. It was not considered a sign of good behavior by the Holy Office in Rome.65 In fact, the use of torture began to come under the scrutiny of Rome.

Once the hearing of evidence ended, the Inquisition went on to pass sentence. The accused had to listen to the sentence on his knees with a lighted candle in his hand. However, only in cases

61. 2 BONNICI, supra note 1, at 181.
62. KAMEN, supra note 4.188-192.
63. Id. at 159.
64. Id. at 193.
65. Id. at 288.
of being condemned was a sentence pronounced. Witnesses could also be present for sentencing.\textsuperscript{66} Otherwise the accused was set free without any need of issuing a sentence. In case of guilt, there was always a sentence of a spiritual nature which normally included the obligation to go to Confession and receive Holy Communion on at least the four principal feasts of the Church: Christmas, Easter, Ascension of Christ and the Assumption of the Virgin. There could also be corporal punishments, which could include public flogging, sentencing to the galleys and, in extreme cases, the death penalty. Corporal punishment was normally executed by the Civil Justice.\textsuperscript{67} In theory, the Holy Office in Rome was against pecuniary punishment. Pecuniary punishments were considered by Rome dangerous as they could give a bad name to the Inquisition. Any pecuniary punishment needed first the approval of Rome.\textsuperscript{68}

By the eighteenth century, public punishments fell out of use and the execution of corporal punishment was done in private, in the Inquisitorial prison and without disclosing it to the public.\textsuperscript{69}

\textbf{C. Appeal}

The Inquisition’s judgment was not final. Once a sentence was pronounced the Inquisitor did not have the power to change it. However, mechanisms of appeal where created which first of all permitted the Inquisitor himself to change a sentence given by one of his predecessors’ or even by himself, by first seeking consent from his superiors in Rome.\textsuperscript{70} More importantly, the accused enjoyed the same right of appeal which he could file in two ways.

First, anyone who was condemned by the Inquisition in Malta had the right to appeal to Rome to ask for a revision of the sentence or request clemency.\textsuperscript{71} This was an expensive procedure, which only the rich could afford. This explains why this sort of appeal was rare.

\begin{flushleft}
\textsuperscript{66} \textit{Id. at} 228.
\textsuperscript{67} \textit{Id. at} 225.
\textsuperscript{68} \textit{Id. at} 196.
\textsuperscript{69} 2 \textsc{bonnici}, \textit{supra} note 1, at 380.
\textsuperscript{70} 1 \textsc{bonnici}, \textit{supra} note 1, at 259.
\textsuperscript{71} \textit{Id. at} 157.
\end{flushleft}
The second procedure was simpler and within the reach of everybody. The condemned had only to wait for the appointment of a new Inquisitor. There were a number of possibilities. The new Inquisitor would be asked to re-open the case or make a plea for a revision of the sentence to Rome or ask for clemency. When one considers that the length of service of an Inquisitor in Malta was short—on average, he stayed on the Island for two and half years—an appeal was extremely feasible. In all cases, the Inquisitor would write to Rome. Rome’s reply was always the same irrespective of whether the plea came directly from the accused or the Inquisitor. The Holy Office in Rome considered the case on its own merits and if there was a reason for a change in the sentence, the Inquisitor would be informed accordingly and he would be given the possibility to change the sentence. However, the final decision was normally left to the Inquisitor’s discretion. There were cases when it was decided to absolve the accused or else the sentence was commuted to a lighter one. For example, the parish priest of the village of Chircop was sent to prison in 1659 by the Inquisition. He appealed to Rome, and Rome took his side and wrote to the Inquisitor in Malta, Gerolomo Casanate (1658-1663), giving him the faculty to commute the sentence.

The intervention of Rome was not just sought for the revision of a sentence but also to supervise that the sentence was being correctly executed. For example, sometimes prisoners sentenced to the galleys continued to be kept at the oars despite the fact that their term had expired. Thus, the prisoners used to appeal to Rome to be liberated. For this reason, the local Inquisition received warnings from Rome to monitor that the sentences handed down by the Inquisition were properly executed by the State within the terms of the sentence.

The procedure could take two different forms. The abuser could be denounced directly to Rome or else, whenever the presumed offended party did not possess such power, he had to

72. Id. at 52.
73. Id. at 83.
74. Id. at 193.
75. 2 BONNICI, supra note 1, at 52.
76. 1 BONNICI, supra note 1, at 156.
wait for a new Inquisitor to be appointed before making a report.77 Once, a jailer denounced an Inquisitor taking the opportunity of doing so when there was a change in office and when the new Inquisitor, Giovanni Ludovico Dell’Armi (1592-1595), arrived.

The Supreme Sacred Congregation of the Roman and Universal Inquisition looked positively at the possibility of appeal as it argued that appeal increased rather than decreased the good name of the Inquisition.78

D. Internal Mechanisms

The Inquisition’s system had a number of internal mechanisms to auto-regulate itself to ensure that all was working well. The idea that people in authority were immune by the mere virtue of their position ceased to hold ground in the late sixteenth century. The Inquisitor himself could be liable to investigation following accusations made by his subalterns.

An Inquisitor could also risk censorship from Rome in particular if he carried out an illegal arrest on an individual who did not fall under his jurisdiction or the crime committed was not within the competence of the Inquisition. Therefore, the Inquisitor was also liable to be accused of abuse of power.79

However, at the same time, in theory, he had power to investigate both the Grand Master, who was the ultimate ruler of Malta, and the Bishop. Such power was exercised in the sixteenth century but would become ineffective in the following centuries. During the time of Inquisitor Federico Cefalloto (1580-1583), both the Grand Master and the Bishop were suspended from office. The Grand Master was censored by his own Council but the Bishop, Tommaso Gargallo (1578-1614) was first censored by Inquisitor Cefallato after he refused to pay tithes to the Inquisitor. Cefallato’s successor, Inquisitor Pier Francesco Costa (1583-1585) would again suspend Gargallo after the latter performed acts of barbarity in executing a warrant of arrest which led to the demise of two Monsignors of the Cathedral and protected persons who

77.   Id. at 137.
78.   2 BONNICI, supra note 1, at 193.
79.   1 BONNICI, supra note 1, at 194.
assaulted the Assessor of the Inquisition. This was not the last time that the Inquisition ended up investigating the actions of the local Bishop. In the seventeenth century, Inquisitor Giulio Degli Oddi (1655-1658) received instructions to be vigilant on Bishop Miguel Jean Balaguer Camarasa (1635-1663) and on the local clergy. Inquisitors were warned to scrupulously observe the rules of the Inquisition unless they did not wish to be removed from office and they had to defend all the Tribunal’s privileges. They were also warned by Rome not to gather information about cases which did not fall under their jurisdiction. The Inquisitors were asked to follow the same praxis as their predecessors. Rome strongly advised the Inquisition not to go back on decisions and decrees issued in the past.

Each time an Inquisitor was appointed, a period of grace was announced. The period could vary from 12 up to even 30 days wherein the faithful were asked to denounced their wrongdoings and having done so would be exempted from any punishment from the Inquisition. All the decrees of the Inquisition, including the ones issued to announce the appointment of a new Inquisitor, were to be read out in all the churches. Finally, he enjoyed the faculty to issue a general pardon.

VI. THE STRUCTURE OF THE OFFICE OF THE INQUISITION

The office of the Church’s Inquisitor was a pyramidal structure. The Inquisitor was always answerable to his superiors. Up to 1575, the post of Inquisitor was filled by the local Bishop, thus the Church continued to follow the medieval structure, but after this date, this post was always occupied by a foreigner, often of noble birth, who was appointed by Rome. The choice of a noble person came naturally for Malta when one considers that Malta

80. 2 BONNICI, supra note 1, at 35.
81. 1 BONNICI, supra note 1, at 163.
82. Id. at 253.
83. Id. at 163.
84. Id. at 192.
85. Id. at 212.
86. Id. at 162.
87. Id. at 313.
88. 2 BONNICI, supra note 1, at 80.
was run by an aristocratic Order. Besides, being an Inquisitor, the person in this position was also appointed Apostolic Delegate. This last appointment was only given to Inquisitors from 1575 onwards. When this post was also linked to that of Bishop, he did not have such a role. It became a normal praxis for Rome to give three briefs to the person nominated Inquisitor in Malta, and before he received them from the Secretary of State, he could not leave for Malta. The first brief was that of Inquisitor, the second of Apostolic Delegate and the third the right to judge criminal cases. Once in Malta, he had to present these briefs to his staff as well as to the Grand Master and the Bishop.

The history of the Malta’s Inquisition shows that the persons appointed by Rome as Inquisitors always held a University degree in Civil and Ecclesiastical law. Finally, all Inquisitors were ecclesiastics but not necessarily priests. Some were simple clerics, others were just priests and in one particular case, the Inquisitor was consecrated Bishop in Malta. Eventually, this Inquisitor, by the name of Fabio Chigi (1634-1639), became Pope Alexander VII. When the office was held by a Bishop, the Bishop remained an Inquisitor for life. When his appointment began to be made directly by Rome, the term of office was definite. Young ecclesiastics, sometimes in their early thirties, began to be appointed Inquisitors and were normally kept in office for a few years - on average two years - after which they would ask for a transfer and obtained a promotion within the church hierarchy.

The second important person at the office of the Inquisition was the Assessor. He acted as Vice-Inquisitor and could take over the administration of the office in lieu of the Inquisitor, especially during the transition period between the departure of one Inquisitor and the appointment of the next.89

In the early days of the Inquisition, the post of the Assessor was not considered of great importance within the Tribunal. He had the passive role of serving as a substitute to the Inquisitor whenever the latter was unavailable. However, from 1610, the Assessor began to have a more active role. He began to sit next to

89. *Id.* at 131.
the Inquisitor and share with him the responsibility of the Tribunal.  

The Assessor was practically always a Maltese. He could be either an ecclesiastic or a lay person. The major academic qualification for this post was a degree in jurisprudence. For this reason, the choice originally fell on a lay advocate but later, for practical purposes, an ecclesiastic began to be preferred for the simple reason that when the Inquisitor left, he could run the office. According to Canon Law, an Assessor could only run the Tribunal office if he was an ecclesiastic. The person held this office practically for life.

The Tribunal included the figure of the Promotore Fiscale. He was the public prosecutor and this post was always occupied by a Maltese. He gathered the denunciations and presented them to the Inquisition. He led the prosecution and asked for the condemnation of the accused according to the laws of the Church. His assistant was known as sotto-Fiscale. This office was further complemented with the post of the “istruttore.” He was responsible to search for any missing evidence in the investigation of the case. To a certain extent, he did the work that is nowadays carried out by the police. These posts too were occupied by Maltese.

The Prosecutor’s office was counter-balanced by the post of the Defense Advocate. He was known as the Advocate of the Poor, as his services were used only by those who could not afford a defense lawyer. Yet, unlike today, the presence of the Defense Advocate was only required in those cases where a trial would be held and could lead to the accused being condemned. In case of an auto-denunciation, his presence was not requested. In these cases, the sentence inflicted was always one of a spiritual nature and for this reason his presence was not felt necessary.

Then, there were the Consultants. They were appointed to give advice to the Inquisitor. These were either local ecclesiastics, that is, priests, friars or lay advocates. Even members

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90. *Id.* at 170.
91. *Id.* at 179.
92. *Id.* at 70.
93. *Id.* at 207.
94. *Id.* at 180.
95. *Id.* at 170.
of the Order, including Knights or Conventual Chaplains could be enrolled in this post.\textsuperscript{96} There number was never less than four and never more than eight. They were appointed for life and removed only in case of incompetence in performing their duties, though they could be asked to resign due to health reasons. The role of the Consultant was a passive one as his main function in the Tribunal was to give authoritative advice. As their counsel carried heavy weight, in extreme situations, their role could switch to an active one. The Inquisitorial procedures allowed them to participate whenever the Inquisitor asked them to cast their vote in cases where agreement about a case was not reached. Yet, their role remained that of enlightened jurors.\textsuperscript{97}

The last authority of the Tribunal was the Chancellor. His post was similar to that of the Registrar of the Court. This post was occupied by a person who was authorized to work as a public notary in Malta. He was responsible for safe-guarding the court records, including each and every court case.\textsuperscript{98} He was assisted by clerks who sat in the court taking down the minutes and recording the testimony given in court. The clerks could act as or be flanked by interpreters.

The above constituted the core staff of the Inquisition. For this reason, they had to take the oath of loyalty each time a new Inquisitor was appointed. For this ceremony, the Vicar-General was also invited to attend and he, too, took the oath of allegiance.\textsuperscript{99} The Tribunal had the support of a full administrative staff. At the head was the Depositario whose position was equivalent to the present day Director of the Courts. He was the Accountant of the Tribunal. He took care of all the payments, including the Inquisitor’s salary.\textsuperscript{100} There was also the spenditore. He was always Maltese\textsuperscript{101} and his role was that of a servant at the service of the Inquisition acting as a sort of a court messenger with the

\textsuperscript{96} Id. at 205.
\textsuperscript{97} Id. at 181.
\textsuperscript{98} Id. at 180.
\textsuperscript{99} Id. at 310. The other members of the tribunal who took this oath, were the chancellor, the assessor, the advocate of the poor, and the consultants of the Inquisition.
\textsuperscript{100} Id. at 180.
\textsuperscript{101} 2 BONNICI, supra note 1, at 73.
added responsibility to take care of the Inquisitor’s personal affairs.

The Tribunal availed itself of the services of a medical doctor, a jailor and a Captain to oversee the small force at the service of the Holy Office. The doctor was needed first of all to oversee the administration of torture to obtain a confession. Secondly, the prison was within the same Tribunal and office of the Inquisition. The Inquisitor lived in the same palace together with his prisoners. Thus, a doctor could be needed for medical tests and assistance to both the Inquisitor and his prisoners. The presence of a prison within the palace walls brought the obvious need for a jailor. The Inquisition had its own police or soldiers. They fell under the command of the Captain of the Holy Office. Unlike the Commissioner of Police in today’s society, he could only act under the strict instructions of the Inquisitor. He could not make arrests on mere suspicion. He had to have clear orders from the Inquisitor. In other words, he could not act arbitrarily. Vestiges of this system have remained in our present system, as in particular instances, police inspectors have to request the permission of the courts to make an arrest. Therefore, the authority of the Captain of the Inquisition was only to execute a sentence. 102 On his part, as was the custom at the time, he wore a chain of office or carried a rod as a sign of authority. 103 The Inquisition’s officials were limited to 15 104 and had its own messengers. 105 The last position in the palace of the Inquisition was that of the butler. Each and every Inquisitor had a butler who took care of all the work related to the administration of his palace and the household chores. 106

Other services engaged by the Tribunal of the Inquisition were those of professional translators. Malta was extremely cosmopolitan at the time, and people of different nationalities appeared in front of the Inquisition. The official language of the Inquisition was Latin and Italian but the accused could speak in his own language, in which case there were interpreters who translated everything into Italian. Even evidence given by the Maltese were

102. 1 BONNICI, supra note 1, at 180.
103. Id. at 181.
104. Id. at 149.
105. Id. at 181.
106. Id. at 311.
translated into Italian.\textsuperscript{107} In most cases, the post of interpreter was occupied by friars.\textsuperscript{108}

At the turn of the seventeenth century a new figure was introduced in the Tribunal. This was that of the Catechist whose purpose was to guide sinners back onto the right Christian track. In other words, they were appointed to teach Christian Doctrine to those who were considered to have fallen into heresy.\textsuperscript{109} These Catechists were friars, and in most cases, they were either foreign or locals trained in foreign languages so that they could be in a position to teach foreigners who also had lapsed and needed to be brought back into the Catholic fold.\textsuperscript{110} Perhaps their position would be equivalent today to that of a social worker, aimed at helping social diverters to turn away from their devious social habits.

The choice of staff was not to be conditioned by any sort of recommendation. The Inquisitors were specifically instructed not to accept recommendations or references from anybody.\textsuperscript{111} Thus, any letters of recommendation for any of the above posts was not even considered.\textsuperscript{112} For the same reason the Inquisitor was to refuse any offer of gifts. More important, he had to lead an exemplary life and be a guiding force to all his staff.\textsuperscript{113}

The Inquisitor had the right to create his own entourage known as \textit{familiari} of patentees of the Inquisition, and all were lay people.\textsuperscript{114} The number of \textit{familiari} was fixed at 20.\textsuperscript{115} Though there were always attempts by the Inquisition to increase this number, these requests were always turned down by Rome.\textsuperscript{116} A person who was a patentee of the Inquisition was literally in possession of a document in which it was attested that only the Inquisitor had judicial rights over him.\textsuperscript{117} He had the right to show it to any Authority on the Island in case of need, which practically

\textsuperscript{107}. \textit{Id.} at 180.
\textsuperscript{108}. \textit{Id.} at 298.
\textsuperscript{109}. \textit{Id.} at 182.
\textsuperscript{110}. \textit{Id.} at 298.
\textsuperscript{111}. \textit{Id.} at 163.
\textsuperscript{112}. \textit{Id.} at 271.
\textsuperscript{113}. \textit{Id.} at 59.
\textsuperscript{114}. \textit{Id.} at 206.
\textsuperscript{115}. \textit{Id.} at 149.
\textsuperscript{116}. \textit{Id.} at 163.
\textsuperscript{117}. \textit{Id.} at 100.
meant when confronted with an arrest warrant. Married patentees tried to extend this jurisdiction to the rest of the members of their immediate family, that is, wife and unmarried children.

Finally, the Inquisition in Malta owned arable land which was tilled by a number of peasants. The peasants working in the Inquisitor’s fields began to be considered as part of the *familiari* of the Inquisition and ended up being given similar rights as the *patentati*, that is, they were excluded from prosecution by the other judicial authorities present in Malta. The applicants for these posts came from the best Maltese families. At the same time, to safeguard the integrity of this Tribunal, the respective officials employed with the Inquisition had to be independent and not be involved with any other Tribunal in Malta.

VII. CONCLUSION

Inquisitors were continuously reminded by Rome to carry out their duties with a sense of charity and friendship and should not feel that they were judges even if this was being asked of them. For this reason, Rome insisted repeatedly that the plaintiff brought in before the Court had to be treated with charity and justice. At the same time, if somebody was condemned by the Inquisition, such a sentence did not signify automatic social exclusion and definitely it did not hinder social advancement or promotion. For these reasons, one can rightly conclude that the Maltese, in general, were convinced that this Tribunal offered them a sense of fair justice and it was, by far, more serious than the other Tribunals operated by the State at that time.

118. *Id.* at 172.
119. *Id.* at 229.
120. *Id.* at 181.
121. *Id.* at 299.
122. *Id.* at 237.
123. *Id.* at 186. For example, Baldassare Cagliaris was condemned by the Inquisition for showing lack of respect to the Inquisitor’s *familiari* when he was still Conventual Chaplain. This conviction did not stop him from making it to the highest post in Malta, that of Archbishop of the Diocese.
124. *Id.* at 84.
ARTICLE 1045 OF THE MALTESE CIVIL CODE: IS COMPENSATION FOR MORAL DAMAGE COMPATIBLE THEREWITH?

Claude Micallef-Grimaud†

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ABSTRACT

The paper focuses on Article 1045 of the Maltese Civil Code regulating liquidation of compensation (damages) under Maltese tort law and examines whether or not compensation for moral damage is compatible therewith. French law and Austrian law (being the main sources of Article 1045) are analysed and contrasted with the peculiarities of Maltese tort law whilst the motivations of the original

* This paper is based on the author’s LL.D. thesis entitled The Rationale for Excluding Moral Damages from the Maltese Civil Code: A Historical and Legal Investigation, University of Malta, 2008 (hereafter Excluding Moral Damages). Reproduction of extracts from this paper is permitted provided that clear acknowledgment is made of the author as the source. This paper elaborates on the key points tackled in the presentation delivered by the author during the Juris Diversitas Symposium on “Mediterranean Legal Hybridity” held at the Old University in Valletta, Malta, June 12, 2010.

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legislator (Sir Adriano Dingli) are also critically discussed. The paper subsequently examines the dichotomy between responsibility in tort and damages under Maltese tort law and concludes by analysing some selected case law.

I. INTRODUCTION

Les larmes ne se monnaient pas goes one of the sayings for rejecting what is known in civil law countries as dommage moral and in common law countries as a “non-pecuniary loss” or a “non-economic loss.” If the loss is one which can be easily measurable in monetary terms, almost all legal systems throughout the world agree that compensation is due. Having said that, acceptance of “dommage moral” or “non-pecuniary loss” is not universal. “Moral damage” is generally understood to encompass the pain suffered by the victim or the victim’s family for crimes or torts against the life, health, honesty, integrity or emotional well-being of the victim and is generally difficult to calculate in monetary terms. Munkman refers to moral damage as including “pain and suffering, both physical and mental; loss of the pleasures of life; actual shortening of life; and at least in some cases, mere discomfort and inconvenience . . .”

In Malta, barring recent legislative proposals which might introduce limited forms of compensation for moral damage in the Maltese Civil Code in certain specific instances, and the presence of such compensation scattered in specific branches of law, the core provisions of Maltese tort law have never really developed beyond certain basic principles introduced in the Nineteenth Century and to

1. “Tears do not permit calculation in money.”
2. As opposed to “dommage matériel.”
3. As opposed to “pecuniary losses.”
5. JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 62 (1938).
6. Including in particular, Article 1046 of the Maltese Civil Code (which is not discussed in this paper).
7. Namely: Human Rights cases, the Consumer Affairs Act (Chapter 378 of the Laws of Malta), the Press Act (Chapter 248 of the Laws of Malta), the Promises of Marriage Law (Chapter 5 of the Laws of Malta), and the Enforcement of Intellectual Property Rights (Regulation) Act (Chapter 488 of the Laws of Malta).
8. Which were in turn heavily reliant upon Roman law principles.
date, claiming compensation for moral damage explicitly is seemingly generally precluded. However, the question is whether or not there is more to this issue than at first meets the eye.

The origins of Article 1045\(^9\) of the Maltese Civil Code can be traced back to Ordinance No. VII of 1868\(^10\) which regulated delicts and quasi-delicts. This was the work of Sir Adriano Dingli who was appointed crown advocate general on December 27, 1853 and who was tasked with the drafting of several Ordinances which would eventually constitute the Maltese Civil Code. It is apparent that in drafting the provisions regulating delicts and quasi-delicts (or torts and quasi-torts), Dingli was greatly influenced by the \textit{Code Napoléon}, but as shall be seen below, this was not the only source used.\(^11\)

The Napoleonic Code or \textit{Code Napoléon} was established under Napoléon I.\(^12\) It was drafted by a commission of four eminent jurists and entered into force on March 21, 1804. The Code, with its stress on clearly written and accessible law, was a major step in establishing the \textit{rule of law} and historians have called it “one of the few documents which have influenced the whole world.”\(^13\)

\footnotesize

9. At the time of writing, Article 1045 states as follows:

(1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions 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.

(2) The sum to be awarded in respect of such incapacity shall be assessed by the Court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.

10. “[E]nacted to amend and consolidate the laws concerning the rights relative to property, and the different modes of acquiring and transmitting it.” GEORGE ALFRED PAGE, A GUIDE TO THE LAWS AND REGULATIONS OF MALTA. 57 (1868).


12. Originally called \textit{Code civil des Français}.

“Delicts” and “quasi-delicts” are dealt with in Book III, Title IV, Chapter II of the *Code Napoléon* and are regulated by merely five articles. The provision that basically governs the entire law of tort in France today is contained in Article 1382 of the *Code civil* which has remained identical to the words found in the *Code Napoléon*. This article states, “Any act committed by a person which causes damage to another obliges that person by whose fault it occurred to make reparation.” It is clear that in terms of *delictual responsibility*, this provision is very similar to the Maltese equivalent, In fact, Article 1031 of the Maltese Civil Code, provides that “Every person . . . shall be liable for the damage which occurs through his fault.” This general fault-based liability is defined in Article 1032 of the Maltese Civil Code which states:

1. 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 paterfamilias.

Under both legal systems, the elements of damage, fault and the causal link between them are necessary preconditions for any successful action in tort. It is important to note that moral damage is completely absent from the French text, despite its being so similar to the Maltese equivalent. Having said that, although the French text remained to a large extent unchanged in the Code civil, the interpretation given to the law clearly came to include what is now known as *dommage moral* or similarly, *préjudice moral*.

There is no doubt that when Sir Adriano Dingli was drafting the Maltese provisions in question, such interpretations had already surfaced. As early as 1833, the French Cour de Cassation established that the words of Article 1382 were sufficiently general to allow compensation to be awarded for *dommage moral*. It is said by some that the case, which dealt with the grief of a family upon the death of one of the family members, might not have been directly supported in the *travaux préparatoires* which might mean that the authors thereof only had

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15. Translated from: “Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.”
16. Imposing a liability to make reparation upon anyone causing another a “dommage” in general.
material damage in mind. However, Mazeaud and Tunc write that since there was an absence in the French provisions of an express exclusion of dommage moral, then its acceptance by the old pre-code law could be relied on. Even Pothier himself—the père du Code civil—who is said to have cut-off from Justinian doctrine, defined “délit” in a wide enough manner to include moral damage within it. There is ample evidence that the dommage mentioned by Pothier was wide enough to include even dommage moral. The Maltese courts themselves, as early as 1909, were quoting Laurent and other influential commentators who were of this opinion and were taking it as a fact that moral damage was included in Article 1382 of the French Civil Code.

Today, there is no doubt that French law accepts compensation for moral damage. The réparation du dommage moral is a concept that has been commented upon by numerous authors. Some of these define the so-called “préjudice moral” (as opposed to a préjudice matériel) as being “celui qui atteint le monde immatériel, incorporel, des pensées et des sentiments.”

These authors however, admit that the notion of “moral damage” needs further explanation and some say that a préjudice moral refers to

19. See Mazeaud & Tunc, supra note 18, at 299, 302.
20. “On appelle délit le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort à une autre. Le quasi-délit est le fait par lequel une personne, sans malignité, mais par une imprudence qui n’est pas excusable, cause quelque tort à un autre.”
23. See e.g., Armand Dorville, de l’intérêt moral dans les obligations (1901); André Mantelet, Réparation du préjudice moral (1907). See also, Marcel Planiol & Georges Ripert, 6:1 Traité pratique de droit civil français: Obligations 753 (2d ed., 1952) (where Planiol and Ripert confirm that as long as the damage is personal, direct and certain, the following can be stated: “Toute espèce de préjudice lésant un intérêt protégé par le droit justifie une action en justice, qu’il touche la personne ou le biens, qu’il soit matériel ou moral, susceptible ou non d’une évaluation exacte en argent.”).
“celui qui ne se traduit point par une perte en argent, parce qu’il porte atteinte à un droit extrapatrimonial.”

It is important to note that moral damage is not all treated in the same manner in France. Since the concept has been refined over the years, we find various categories of moral damage in France including *pretium doloris* (or “psychological suffering”), *préjudice esthétique* (or “disfigurement”) and *préjudice d’agrément* more generally (meaning “deprivation of the pleasures of life”). In Malta, for reasons explained below, it seems that no such developments can take place unless the law is amended.

The words in respect of “tortuous responsibility” and “fault” more specifically, are very similar to the Maltese equivalent, and it is a fact that Maltese law contains no express exclusion of moral damage, so the question is why damages cannot be awarded explicitly under the Maltese Civil Code to compensate moral harm. The answer, it seems, lies in the fact that Maltese law contains additional provisions inserted by Sir Adriano Dingli which are not found in French law. These “additional provisions” deal with damages, and in this author’s opinion, actually dilute the civil law nature of the provisions on responsibility in tort. Unlike the provisions on delictual responsibility, the provisions on damages in Maltese law, (including Article 1046 which is not discussed in this paper) seem to function very much on a common law basis in the sense that the Maltese courts do not usually grant any compensation unless a particular type of damage falls within the classes of compensable damage contemplated therein.

English law is very different to the general fault-based system found in Maltese law dealing with delictual responsibility. English law recognises a large number of specially designated torts such as trespass, negligence, nuisance and defamation. In this respect, it is the Maltese provisions on “damages” which seem to function on a similar basis. The Maltese courts’ own reference to British case law may of course, be the reason why the provisions function this way, but it may be argued that Adriano Dingli himself may have been more influenced by the British

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25. *Id*. Emphasis added.
27. Just like French law.
29. Which are clearly rooted in the civil law tradition.
rule in Malta than one might realise.\textsuperscript{30} Moreover, the idea of regulating specific categories of moral injuries such as in case of a breach of the Promises of Marriage Law,\textsuperscript{31} or else of Press Law\textsuperscript{32} is clearly a common law practice and the Ordinances that grant compensation for moral damage in these specific instances must also be studied on the basis of this premise.\textsuperscript{33}

As was mentioned above, the notion of damage was not regulated specifically in the Code Napoléon (and still is not today), so Adriano Dingli must have drawn inspiration elsewhere in this regard. Dingli’s own appunti state that this “influence” was not derived from French law or even English law but Austrian law.\textsuperscript{34} It is therefore time to examine the domestic text dealing with damages, in light of the Austrian provisions cited by Dingli himself.

II. THE ORIGINAL DOMESTIC TEXT AND AUSTRIAN LAW

In Adriano Dingli’s appunti, one finds an index of the provisions he introduced. Adjacent to these provisions, one finds a short description of the sources used (as well as some general remarks). The daunting question here is why Dingli felt the need to exclude reference to moral damage from Maltese tort law, when it appears that the Austrian provisions he was using as a reference, permitted the awarding of damages for “suffering”—at least in certain limited instances. This is what shall be examined in this section.

The modern Article 1045 of the Maltese Civil Code was originally split into two articles: Article 751 and Article 752 of Ordinance No. VII of 1868 (also referred to as the “Ordinance” hereinafter).\textsuperscript{35} The former dealt with damnum emergens whilst the latter with lucrum cessans.

\begin{itemize}
\item[30.] As evidenced in the cases cited infra.
\item[32.] Which is today embodied in the Press Act of the Laws of Malta. Id. at ch. 248.
\item[33.] This issue is explained in great detail by the author in the paper entitled MORAL DAMAGES OUTSIDE THE AMBIT OF THE MALTESE CIVIL CODE, ID-DRITT VOLUME XXI, 109-139, (GhSL–the University of Malta’s Law Students’ Society, 2011).
\item[34.] ADRIANO DINGLI, APPUNTI DI SIR ADRIANO DINGLI 59.
\item[35.] See MALTA CIV. CODE, supra note 9 & 28, at art. 1045.
\end{itemize}
A. Damnum Emergens

Article 751 of Ordinance No. VII of 1868 states as follows:

Il danno che dev’ essere risarcito da colui il quale lo abbia recato senza dolo, consiste nella perdita reale che il fatto abbia direttamente cagionato al danneggiato; nelle spese che questo abbia in conseguenza del danno dovuto fare; e, se il danneggiato e’ una persona che lavora per salario o altro pagamento, nella perdita ancora di tale guadagno.36

Very basically, *damnum emergens*, as dealt with in this article, are those actual losses incurred as a result of the injury sustained. It is a well-known fact that Maltese courts have generally restricted *damnum emergens* to pecuniary losses that can be easily quantified and have almost never explicitly included moral damage under this heading.37 The words *senza dolo* (without malice) in the original text indicate that in cases of culpable negligence, only *damnum emergens* could be claimed whereas in those cases where the person who caused the damage did so intentionally or maliciously, even *lucrum cessans* could be claimed. In respect of the type of damages that could be claimed under *damnum emergens* at the time back then, the situation is more or less similar to the position today. Article 751 indicated that the damage shall consist:

1) “. . . nella perdita reale che il fatto abbia direttamente cagionato al danneggiato.”

This translates almost identically into the wording of the modern Article 1045: “. . . the actual loss which the act shall have directly caused to the injured party . . .”

It can be argued that basing ourselves purely on the wording of the law, it might be difficult to understand why a moral damage should

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36. Translated into English as follows:
The damage that has to be made good for by whoever caused it without malice consists in the actual loss which the act shall have directly caused to the injured party, in the expenses that that the latter may have been compelled to incur as a result of the damage caused and if the injured party is a person who works for a salary or other payment, in the loss of such earnings.

37. The reader is advised to refer to the author’s thesis for more detail on this issue. See Micallef-Grimaud, *Excluding Moral Damages*, supra star-footnote.
be excluded from this “actual loss.” With respect to the concept of a 
perdita reale the Maltese courts have always understood an “actual loss”
to be a material or economic loss and nothing more.38 By way of 
example, harm caused to movable or immovable property would usually
lead to depreciation in value of the said property, and such “actual loss,”
if directly caused by the act in question, can be compensated under this
heading. This contrasts sharply with the recent innovations that have
taken place outside the ambit of the Civil Code.39

Having said the above, in the recent judgment Linda Busuttil et 
v. Dr. Josie Muscat et40 the Court addressed this issue (among others)
and indicated that the term actual loss found in Article 1045 (as well as
the term any damage found in Article 1033 of the Civil Code)41 can no
longer be interpreted as referring solely to patrimonial damage and must
therefore encompass damage of all kinds,42 including non-patrimonial
damage. In this particular case dealing with a physical injury (a facial
scar on a female victim)43 resulting from an unsuccessful medical
intervention, the plaintiff was awarded €5,000 in compensation for moral
damage, calculated on an arbitrio boni viri basis. This judgment has been

38. Id.
39. Especially in the realm of Intellectual Property Law where in one
particular legislative provision (Article 12 of Enforcement of Intellectual
Property Rights (Regulation) Act [Chapter 488 of the Laws of Malta]) “moral
prejudices” seem to be included under “actual prejudices.” Enforcement
of Intellectual Property Rights Act, in LAWS OF MALTA
ch. 488 art. 12 (2006), available at
=8954&l=1 (Last visited November 7, 2011). The author has his doubts on the
consciousness of such innovations and believes that this is more a case of strict
adherence to European Union directives and regulations rather than anything
Parliament and of the Council of April 29, 2004 on the enforcement of
intellectual property rights which is transposed almost word-for-word into
Chapter 488 of the Laws of Malta.
40. Linda Busuttil et v. Dr. Josie Muscat et, First Hall (Civil Court 2011).
41. Article 1033 states as follows: “Any person who, with or without
intent to injure, voluntarily or through negligence, imprudence, or want of
attention, is guilty of any act or omission constituting a breach of the duty
imposed by law, shall be liable for any damage resulting therefrom.”
42. “Ħsara” in Maltese.
43. A category of injuries which has generally been treated in a particular
manner by the Maltese courts as illustrated infra.
appealed and it therefore remains to be seen whether or not the principles enshrined therein will be confirmed or rejected by the Court of Appeal.44

2) “. . . nelle spese che questo abbia in consequenza del danno dovuto fare . . .”

As the reader will note, this is also almost identical to its modern-day equivalent: “. . . in the expenses which the latter may have been compelled to incur in consequence of the damage . . .”

This refers to expenses such as necessary repairs after one’s property sustains damage. While the expenses of repairing the said property fall under this sub-heading, the *reduction in value* of the same (which in most cases can never return to its former state) is an *actual loss* as seen above. The courts resort to many principles in compensating, such as developing the rule that the victim should try to minimize expenses, as far as possible, that the person who committed the tort will have to pay.

Medical expenses for physical injuries are also recoverable under this heading (excluding any claims for “pain and suffering” caused by the injuries). Expenses for the treatment of *psychological* injuries (as distinguished from compensation for the *injury itself*) would also theoretically be recoverable under *damnum emergens*.

3) “. . . e, se il danneggiato e’ una persona che lavora per salario o altro pagamento, nella perdita ancora di tale guadagno.”

The third category of damages that could be claimed originally is also similar to what may be claimed today under Article 1045: “. . . in the loss of actual wages or other earnings . . .”

The well-known case *Butler v. Heard*,45 dealing with a street collision between two vehicles, effectively laid down the basic formula for calculating such damages (which goes beyond the scope of this paper). It suffices to say that such formulae give rise to certain problems under this heading just like they do under the *lucrum cessans* heading (as discussed below).

The notion of “loss of wages” under *damnum emergens* can merge with *lucrum cessans* (“loss of future profits”) unless some sort of dividing line is drawn. In the case *Shaw v. Aquilina*46 it was concluded that the reference to a loss of “actual or other earnings” in Article 1045,

44. The appeal was registered on December 16, 2010.
45. Court of Appeal (Civil, Superior 1967).
can be deemed wide enough to include loss of actual profits until the date of the judgment. Profits that could be lost in the future are deemed to fall under *lucrum cessans* (discussed infra). In Malta, *damnum emergens* are usually easily proved and very often, compensation under this heading is awarded without any contestation from any of the parties.

Alongside Article 751 dealing with *damnum emergens*, Dingli wrote:

> “Austr. 1293, 1323 a 1325 con modif.”

As confirmed by local case law, Article 751 was derived almost entirely from Austrian law as amended by Adriano Dingli himself. Private law in Austria is divided into general private law—applicable to all persons—and specialised forms of civil law—applicable only to certain categories, such as commercial law for businessmen or employment law for employers and employees. The major part of what is considered “general private law” is regulated in a comprehensive private law code called the Allgemeine Buergerliche Gesetzbuch (“ABGB”). It is interesting to note that ever since Dingli referred to the laws contained in the ABGB, very little has changed. In fact, the provisions he quoted have remained almost identical. Let us look at the laws cited by Dingli.

Article 1293 (ABGB) is the first article to deal with “damage” whilst Articles 1323 and 1324 (ABGB) deal with methods of indemnification for damage. Article 1325 (ABGB), which was also cited explicitly by Dingli, is very important. This so called *Schmerzensgeld* dealing with bodily harm, has definitely existed since

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47. That is, after the judgment has been delivered.
48. See Giuseppe Fenech v. Vincenzo Pace, Court of Appeal (Civil 1937) *(per A. Mercieca, Rob. F. Ganado & E. Ganado).*
49. And states as follows: “Damage is every detriment which has been caused to any person in regard to his property, his rights or his person. The loss of profits which a person expects according to the usual course of his affairs is to be distinguished there from.”
50. Article 1323 (ABGB) states as follows: “In order to make amends for damage caused, the damaged property must be returned to the former state (status quo) or, if this is not possible, the estimated price thereof must be paid. Compensation for only the actual damage suffered is called indemnity; compensation which includes lost profit and the elimination of all effects of the injury is called full satisfaction,” whilst Article 1324 (ABGB) states as follows: “In case of damage caused by malice or by gross negligence, the person injured is entitled to demand full satisfaction, and in other cases only indemnity. Where the general expression ‘damages’ occurs in the law, it is to be interpreted pursuant hereto.” ALLGEMEINES BÜRERLICHES GESETZBUCH (1811), available at [http://www.ibiblio.org/ais/abgb1.htm](http://www.ibiblio.org/ais/abgb1.htm) (Last visited November 9, 2011).
the origins of the ABGB, so the following applies in Austrian law today as it did at the time when Adriano Dingli was using it as a reference:

A person who harms another person bodily shall bear the expenses of the cure of the person injured, compensate him for lost profits, or where the injured person is made incapable of earning a livelihood for the lost future gains, and moreover pay him at his request a compensation for his suffering, in accordance with the particular circumstances of the case.

It is imperative to focus on the italicized words. It is clear from these words that Austrian law has always allowed “some form” of damages for suffering even though it must be said, it appears that “immaterial damage” is not generally compensated under Austrian law. That being said, certain damages for pain and suffering are actually allowed but only if the person responsible acted with intent or gross negligence, and if the law does not exclude compensation of non-economic damage.\(^51\) The type of “non-pecuniary damage” which is compensable is worth mentioning here. Such damage includes the so-called affection interest, the deprivation of the possibility to use a damaged or destroyed item of property, the loss of comfort and recreation, and finally frustrated expenditures.\(^52\) The question thus is self-evident: Why did Adriano Dingli seemingly and entirely exclude damages for pain and suffering?

Before answering this important question, we need to examine what was included in domestic Article 752 dealing with lucrums cessans (found in Article 1045 today), which must be read together with Article 751 and in respect of which Article 1325 of the ABGB gains even more importance.

B. Lucrum Cessans

Very basically, lucrums cessans is referred to in the law as being a loss of future earnings which must be a result of the permanent incapacity that which the act shall have directly caused. The Maltese courts have generally been more ‘liberal’ in respect of the lucrums cessans heading and it is here that they have sometimes taken moral damage into consideration–some in a more explicit manner than others as shall be seen below.\(^53\)

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51. As in Article 1330 of the ‘ABGB’ for example. Id. at art. 1330.
52. Inferred from the second half of Article 1331. Id. at art. 1331.
53. See supra Part II.A.
Article 752 of Ordinance No. VII of 1868 states as follows:

Il danno pero` che dev’essere risarcito, da colui il quale lo abbia dolosamente recato, si estende, oltre le perdite e le spese menzionate nell’articolo precedente, al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo stato. La corte fissera` per la perdita di tale quadagno, secondo le circostanze, una somma non eccendente cento lire sterline.54

It is apparent that for this type of damage to be recoverable, the person liable for its causation must have acted intentionally. It should be noted that the law was amended in 193855 changing this requirement and grouping *lucrum cessans* and *damnum emergens* into the same article. 56

It should also be stressed that, at least theoretically, the loss of future earnings can only be compensated if there is a permanent incapacity. Temporary disabilities (however long they may last) are excluded here, although from the Shaw v. Aquilina case discussed above, it can be deduced that any effect the temporary disability may have on one’s income until the date of the judgment should be recoverable under *damnum emergens*.

Another thing that must be noted is the fact that generally, what one is compensated for under *lucrum cessans* is the effect the disability has on one’s ability to generate an income and not for any effect of the disability on any other areas of one’s life (like harm to one’s feelings.) It is important for the reader to note that there have been several exceptions in this regard. 57

Under Article 752, the legislator included a ceiling fixed for *lucrum cessans* and this was limited to £100. Thus, the approach of the

54. Basically translated as follows:

However, the damage which must be compensated from whosoever caused it maliciously, extends in addition to the losses and expenses mentioned in the last preceding article (i.e., Article 751), to the future earnings which the fact (causing damage) prevents the victim from receiving, taking into account his state. The Court shall establish for the loss of such future earning, depending on the circumstances, a sum not exceeding one hundred sterling (£100).


56. The modern Article 1045. MALTA CIV. CODE, supra note 9 & 28, at art. 1045.

57. See supra Part II.A.
original legislator was to limit damages under *lucrum cessans* by linking this to “loss of income” (as opposed to “loss of enjoyment of life”) and also by limiting the amount that could be awarded in compensation. We shall examine the rationale for this in some detail below. The legal position was amended in 1938 due to an apparent change in mentality\(^{58}\) and in 1962, the ceiling was removed completely\(^{59}\) so that the courts were free to award large amounts in compensation for the effects of an injury on one’s future earnings. The position today is that in all probability, a new ceiling will be imposed in the very near future (which seems to be around €600,000 according to current proposals).\(^{60}\) It obviously remains to be seen in what manner this will be applied and what effect it will have on claims for damages under Article 1045.

The main point here is that the *lucrum cessans* heading was always problematic—and remains so nowadays, despite the fact that certain cases attempted to create guidelines which might help the courts. Above, reference was made to the *Butler v. Heard* case.\(^{61}\) It is important to note that the appeal stage of *Butler v. Heard* (discussed below) effectively laid down a method of compensation which would be followed (albeit tweaked) by most judgments to this very day. It should also be noted that this method of compensation might be explicitly mentioned in the amendments to Article 1045 and 1046 of the Maltese Civil Code (henceforth referred to as the “Amendments”) which are currently being proposed.\(^{62}\) The basic workings of the “*Butler v. Heard* formula” used to calculate the *lucrum cessans* due have been included in rudimentary style as a footnote for the reader’s convenience.\(^{63}\)

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58. Reflected by the numerous cases that began exhibiting a change in attitude as discussed in the author’s LL.D. thesis.


61. *See supra* note 45.

62. As mentioned *supra*, articles 1045 and 1046 are currently under review and it is highly probable that they will be amended in the near future. An Act amending the said articles had already been passed by the Maltese Parliament (Act VI of 2004) but this never came into effect. Since these new amendments might be contained in other legislative instruments, it would be more prudent to await the termination of the consultation period currently underway before commenting in any detail on the said amendments.

63. The average weekly wage of the complainant is taken and adjusted for inflation. It is then multiplied by the number of weeks in a year and then
The Amendments in question would, among other things, introduce a set of “guidelines” which would help the courts adopt certain methods of calculating damages, as well as include a detailed table listing various percentages of disability depending on the type of injury sustained. The scope of such Amendments seems to be of aiding pre-trial assessments of particular disabilities and therefore facilitating out-of-court settlements.

Alongside Ordinance No. VII of 1868 art. 752, dealing with *lucrum cessans*, Adriano Dingli wrote in his *appunti*: “Austr. L. c. con modif.”

Presumably, no specific article is cited because in drafting his own provisions on *lucrum cessans*, Dingli was looking at the Austrian provisions as a whole as well as the specific articles mentioned above—particularly Article 1325 (ABGB). The content of Dingli’s Article 752 in fact, is taken from various Austrian provisions, some of which were not separated from the content found in Article 751 of the Ordinance.

It was Dingli’s *modifiche* that separated the concepts of *damnum emergens* and *lucrum cessans* into separate provisions and it was his idea to give them separate requirements. One would generally have had to verify whether the injury was caused intentionally or else through culpable negligence\(^4\) to see which provision applied. As noted above, the Austrian provision on methods of indemnification defines both *damnum emergens* and *lucrum cessans* in the same provision as being “indemnity” and “full satisfaction” respectively.\(^5\)

It is clear that Adriano Dingli was very selective in transposing provisions from the ABGB into Maltese law. The only rationale Dingli gives for limiting the various provisions of the ABGB into just two domestic provisions and for limiting the amount that could be claimed

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\(^4\) Which is not stated explicitly, but can be inferred from the general notions of tort.

\(^5\) *See Allgemeines, supra* note 50, at art. 1323.
under Article 752 dealing with *lucrum cessans* is found in his *appunti* where he states:

I am including a limit of 100 (sterling) because otherwise, it might cause the (financial) ruin of the person causing the damage, whilst future earnings are subject to probability and might be lost from one moment to another for natural causes. The limit is a norm for the Courts in this entirely new subject matter.\(^66\)

Although Adriano Dingli only described his rationale for limiting the amount that could be claimed under *lucrum cessans*, one may infer his more general concerns as well. The first concern exhibited by Dingli is, “the (financial) ruin of the person causing the damage.”\(^67\) Dingli was hesitant to leave the amount of damages open-ended because this could lead to the financial ruin of the person liable to compensate the injured party. This is a fear that some bring to light to justify excluding open-ended compensation for moral damage even today.\(^68\)

His second concern relates to the fact that, “future earnings are subject to probability and might be lost from one moment to another for natural causes,” meaning that he feared cases of unjustified enrichment taking place.\(^69\) Since the future is uncertain, one could in theory, compensate someone for future earnings which might never materialise, thus going beyond the concept of *restitutio in integrum*. Of course, this may trigger a wider discussion on whether or not the *possibility* of such unjustified enrichment taking place should jeopardise the right to seek justice by opting for alternative means of compensation.

The third comment to reflect upon is, “this entirely new subject matter.”\(^70\) It seems thus, that Dingli decided to start slow and impose limits on this untested virgin law. Several years later, some cases would

\(^{66}\) Translated from the original Italian text: “Metto un limite di 100 perché’ altrimenti si potrebbe cagionare la rovina del danneggiante, mentre il guadagno futuro e’ cosa di probabilità e puo’ mancare da un momento all’ altro per cause naturali. Il limite e’ una norma alla Corte in questa materia tutta nuova.”

\(^{67}\) “… la rovina del danneggiante …”

\(^{68}\) See Micallef-Grimaud, *Excluding Moral Damages*, supra starfootnote, at ch. 4.

\(^{69}\) “… il guadagno futuro e’ cosa di probabilita’ e puo’ mancare da un momento all’ altro per cause naturali.”

\(^{70}\) “… questa materia tutta nuova.”
quote Dingli and would even argue that he was correct in adopting such a careful approach.\footnote{71}

It is this author’s opinion that the omission of damages for “pain and suffering”—which was clearly intentional—was not a decision based on ideological incompatibility, but one based on practicality. In drafting the “unique” provisions on damages, Dingli chose a system of law that was similar to Malta’s at the time. Austrian law is fault-based just like French law. It is also made up of Roman law concepts, which still survive in Maltese legislation to this day. If Dingli felt that compensation for moral damage would not be compatible with Maltese law, he could have very easily excluded it explicitly. This author believes that Adriano Dingli’s limitations were merely a manifestation of initial hesitation; and that he probably expected further development of this dynamic branch of law.

The references to the sources of law are there to aid the courts in their interpretation of Dingli’s provisions. If the courts felt that compensation for “suffering” (which was in the original source of law) should have been interpreted in the words, “... al guadagno che il fatto impedisca al danneggiato di fare in avvenire, avuto riguardo al suo stato. ...”,\footnote{72} what was there to stop them? Where does it say in the original law that moral damage should not be taken into account when calculating what is owed to the injured party? Certainly, there was never an explicit provision entitling such injured party to compensation for moral damage on a separate basis, but this cannot be interpreted as a defiant repulsion of the concept of moral damage.

III. THE DICHOTOMY BETWEEN RESPONSIBILITY IN TORT AND DAMAGES UNDER MALTESE LAW

It may be argued that if compensation for moral damage was to be explicitly excluded from Maltese law, then Adriano Dingli would have worded the provisions relating to responsibility in tort differently. There would not have been the possibility of interpreting “damage” (in terms of harm done) to include also a moral damage. The problem however, is that this remains a plausible interpretation even to this day.\footnote{73}

Above, it was noted how a recent judgment (which has been appealed)
has proceeded to award compensation for moral damage on the basis of such non-restrictive interpretation.\textsuperscript{74}

An important early case, which dealt with compensation for moral damage specifically, was the 1908 judgment \textit{Cini v. Townsley}.\textsuperscript{75} Our scope here is to examine what was said in relation to moral damage and its compatibility or otherwise with the wording of Ordinance No. VII of 1868 (which was illustrated in the previous section). This case dealt with an \textit{iniuria}, which is a generic term derived from Roman law, usually meaning a “harm done to one’s honour or reputation” as examined by the author in other works.\textsuperscript{76} There are actually various types of \textit{iniuria}, some of which were (and still are) regulated elsewhere in specific areas of Maltese law,\textsuperscript{77} and which also allow compensation for moral damage if certain conditions are met. Here, however, the type of \textit{iniuria} being alleged was one caused by “parole ingiuriose e diffamanti all’indirizzo dell’attore tendenti ed atti a gettare discredito sul detto Royal Hotel (belonging to the plaintiff) e quindi a recare grave danno all’attore,” which fell under the “general concept of \textit{iniuria}.”\textsuperscript{78} Since this type of \textit{iniuria} was not regulated by any specific law, the claim had to be based on the general provisions of the Ordinance.\textsuperscript{79}

The case is interesting because the claim made by the plaintiff explicitly lists moral damage before material damage in the demand for compensation despite the fact that there is no mention of moral damage anywhere in the Ordinance as drafted by Adriano Dingli. The Court of First Instance, commenting on whether it could grant damages or not, simply said that in addition to the fact that such moral damage was not proven, the action could not succeed because “... our laws do not contemplate the ‘moral damage’ upon which the present case is based (Ordinance VII of 1868 art. 739,751, 752).”\textsuperscript{80}

\textsuperscript{74.} See supra note 40.

\textsuperscript{75.} Michele Cini v. Ernest Townsley ed altri, First Hall (Civil Court 1908).

\textsuperscript{76.} See Micallef-Grimaud, supra note 33; Micallef-Grimaud, \textit{Excluding Moral Damages}, supra star-footnote.

\textsuperscript{77.} As for example, in the Promises of Marriage Law. \textsc{Laws of Malta}, supra note 31, at ch. 5.

\textsuperscript{78.} Which seems to have never been regulated by specific provisions of the Ordinance (or indeed the modern Civil Code).

\textsuperscript{79.} Ordinance No. VII of 1868 arts. 739, 751, 752.

\textsuperscript{80.} Translated from the original Italian text: “... le nostre leggi non contemplano il danno morale sul quale c’basata la presente istanza.” Ordinanza VII del 1868 arts. 739, 751, 752.
Thus, the courts more than one hundred years ago, adopting a strict-interpretation approach, were citing the lack of a legal basis as the main reason for not compensating for moral damage in general (and in an explicit manner). Although the plaintiff’s claims were eventually rejected by the Court, an appeal was filed and the case took a very interesting twist when private international law was invoked by the Court of Appeal.81

At the appeal stage, the Court stated that the applicable law was not Maltese law but French law since the incident took place in the territorial waters of Tunisia.82 What the Court had to say in respect of French law is very important because it indicates to us whether Maltese courts, at that particular moment in time, were ready to reject or accept compensation for moral damage in general (not merely in cases of an intiuria) based on laws very similar to those found in Malta. The Court immediately pointed out that the applicable legal provision was Article 1382 of the French Civil Code. The reader will remember from what was discussed above that this provision makes absolutely no reference to moral damage and is, ironically enough, a reflection of the Maltese law on responsibility in tort. Despite the similarities with the Maltese provision on “fault” (even to this very day), the Court quoted Aubry & Rau, and Laurent amongst others who state that “not only material damage is compensable but also moral…”83

The Court actually went on to determine the “extent of moral damage” that could be compensated for in this case and said that in calculating this, the Court had to carefully examine the gravity or otherwise of the effect produced by the damage in question.84 Although the Court decided that the moral damage in this case was not grave, (owing to the fact that the plaintiff’s business was not negatively affected by the comments made by the defendant), the Court nonetheless reversed the first instance judgment and proceeded to award five shillings as compensation for the moral damage suffered by the plaintiff.

This case is also noteworthy because the Maltese Court actually adopted an interpretation given to a foreign provision which is similar to

82. Id.
83. “Secondo l’opinione più’ accreditata nella dottrina e nella giurisprudenza di quella nazione non solo il danno materiale, ma anche il morale è risarcibile mediante un indennizzo pecuniario.”
84. “Nel calcolare l’estensione del danno morale devesi avere specialmente riguardo all’effetto più’ o meno grave che la causa che ve diede luogo e’ atta a produrre e, nel caso, tali effetti sono minimi.”
its counterpart in Malta. The only difference is that Maltese law does not stop at regulating responsibility in tort. Maltese law, to this day, also regulates the damages that can be awarded in what were then Articles 751 and 752. In other words, moral damage was accepted on the basis of the French provision dealing with responsibility in tort because the Maltese Court appreciated the fact that moral damage could be reconciled with the wording thereof. So, the question is: “If Maltese law did not contain the articles regulating liquidation of compensation but merely those regulating responsibility in tort, would the Court of First Instance have interpreted Maltese law in a similar fashion?"

In this regard, Professor V. Caruana Galizia believes that:

[D]amage may refer either to the person or to the property, and according to the prevailing doctrine, which is based on the juridical traditions of Roman law which included defamation among private delicts, the damage may also be moral. This principle has been implicitly recognised by the judgment delivered by the Court of Appeal in re Cini v. Townsley, on, the 10th November, 1909.\(^{86}\)

This brief statement, which was not removed in 1978 by Professor J.M. Ganado in the revised edition of Caruana Galizia’s \textit{Notes on Civil Law}, is very important. Caruana Galizia argues that what the Court of Appeal was saying in terms of French law, applies even to Maltese law by inference. He even mentions the juridical traditions of Roman law and indirectly cites the concept of \textit{iniuria} as being applicable to Maltese law as well. However, according to the findings of the thesis upon which this paper is based, a moral damage (or harm to one’s feelings more generally) only seems to be sufficient to give rise to responsibility in tort.\(^{87}\)

When it comes to liquidation of damages, the Maltese courts are faced with provisions that were included by Adriano Dingli but are not found in French law. What is peculiar in Maltese law is that even though there seems to be agreement on the issue of responsibility, there is no corresponding provision in the Maltese Civil Code which explicitly entitles the victims to claim compensation in tort for such harm if it is purely a moral damage. In other words, a “moral harm” seems to be sufficient to find the culprit directly responsible in tort under the Maltese

\(^{85}\) Being almost identical to the French provisions cited in this judgment.

\(^{86}\) V. CARUANA GALIZIA, \textit{NOTES ON CIVIL LAW} 312 (J. M. Ganado ed., 1978).

\(^{87}\) See \textit{supra} star-footnote and accompanying text.
Civil Code but “Danni Morali” in terms of compensation, cannot be the sole basis of the claim—at least within the rigid confines of the law currently in force. In theory, thus, this discrepancy means that a person who causes a moral harm to someone, may be found responsible under Maltese law of tort, but in all probability (subject to possible exceptions as discussed above), such person would not be forced to compensate the victim(s) unless some sort of real or material damage is also caused or unless the issue is regulated by a specific branch of Maltese law outside the ambit of the Maltese Civil Code.

In other words, it appears that the provisions regulating compensation under Maltese law actually restrict the more general provisions regulating responsibility in tort and actually prevent compensation for moral damage from being claimed explicitly under the former. The irony here is that French does not explicitly address compensation for moral damage, but since the French provisions only deal with responsibility, the problems that arise locally are non-existent in France.

It appears thus, at least in theory, that had Adriano Dingli omitted the provisions he modeled from Austrian law the Maltese courts might have been ready as early as 1909 to deem compensation for moral damage as being part of Maltese tort law.

IV. SELECTED CASE LAW SEEMINGLY TAKING MORAL DAMAGE INTO CONSIDERATION

Due to length constraints, it is only possible to comment on a few cases here. These shall serve the purpose of illustrating certain “liberal” mechanisms used by the Maltese courts when compensating in tort.

The important 1952 case *Victor Savona pro. et noe. v. Dr. Peter Asphar*, dealt with the amputation of a boy’s leg as a result of the

88. The very recent case Linda Busuttil et v. Dr. Josie Muscat et which was discussed above (see supra note 40) awarded compensation for moral damage to the plaintiff, partially on the basis of Article 1033 of the Civil Code (dealing with responsibility in tort) despite the content of Article 1045 (dealing with damages). However, it remains to be seen whether or not this judgment will be confirmed by the Court of Appeal.

89. *Id.*

90. *See supra* note 7.

91. And which the courts have applied in practice very much on a common-law basis as described above and as shall be seen in the next subsection.
negligent medical intervention carried out by the defendant and the conclusions reached therein clearly indicate that every scenario has to be judged on a case-by-case basis. The Court of First Instance\(^2\) claimed that apart from the *damnum emergens* due as a result of the erosion of the injured party’s patrimony\(^3\) the plaintiff was also entitled to *lucrum cessans*. After several discussions relating to the percentage of disability that applied (a deficiency that has always beleaguered the Maltese legal system),\(^4\) the Court of First Instance went on to make it clear that under this category, one had to include also: “[T]hose damages due for the psychological insult of the loss of the leg, the inability of Victor Savona to go to school and his moral suffering when he sees, especially in the future, that he is always going to depend almost entirely on others.”\(^5\) The Court of First Instance decided to award £650 as compensation under *lucrum cessans* and in doing so, it is clear that moral damage was taken into consideration. The fact that the Court could not award compensation for moral damage *explicitly* is obvious for the reasons stated above, but the Court nonetheless used the legal basis of *lucrum cessans*, and particularly the guidelines in what is today Article 1045(2)\(^6\) to award, at least in part, compensation for what it called “moral suffering” and the “psychological insult” of losing a leg due to someone else’s fault.\(^7\)

The Court of Appeal\(^8\) argued that there was no need to go into the issue of *damnum emergens* because these damages were clearly due. Similarly to what had been taking place up until then (and what generally happens today), the Court dealt with *damnum emergens* quite briskly and without complicating its calculations by including any novel concepts.

The reasoning of this judgment is very important because the Court of Appeal actually increased the amount of compensation due under *lucrum cessans*, and it did so predominantly on the basis of the

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\(^2\) First Hall (Civil Court 1952).
\(^3\) Amounting to 132 pounds and 6 shillings.
\(^5\) “[D]awk (id-danni) dovuti ghall-insult psikiku tat-telfa tas-siq, l-inkapaċita` ta` Victor Savona li jmur skola, u s-sofferenzi morali tieghu meta jara, wisq izjed ‘il quddiem, li huwa dejjem u f’kollox irid kwazi jiddependi minn hadd ieħor.”
\(^6\) Article 1088(2) at the time.
\(^7\) Through negligence.
\(^8\) Court of Appeal (Civil, Superior 1952) (*per* L. A. Camilleri, A. J. Montanaro Gauci & W. Harding).
moral injuries and the pain and suffering caused to the plaintiff. The Court of Appeal started its reasoning by summarizing what is today Article 1045. Among other things, the Court commented on the fact that the maximum that it could now award as *lucrum cessans* was £1,200 because the act was not intentional (in which case there would have been no capping). The Court also said that in exercising its arbitrary discretion, the Court should consider the circumstances of the case, the nature and degree of the incapacity, and condition of the injured party. This reflects the wording of Article 1045(2), which is very important because these words served as the legal basis for taking into consideration several circumstances which had nothing to do with economic or material calculations.

The Court went on to trace the law’s development through time. It commented on Adriano Dingli’s *appunti* and illustrated his fears in respect of *lucrum cessans*. The Court pointed out that the 1938 amendments were a reflection of the fact that times were changing and that the legislator felt the need to modernise the laws drafted by Dingli. The Court stated that this was justified due to the “augmented intensity of life” and the great burden on incapacitated persons who will likely lose more future earnings (and suffer a loss of their “purchase power”).

The Court then invoked the maxim *in probatione lucri cessant e sufficiunt praesumptiones* and went on to refer to English case law. It pointed out that in the case *Philips v. London & South Western Rail Co.*, it had been stated that: “Such damages cannot be a perfect compensation of the circumstances of the plaintiff and by making allowances for the ordinary chances of life.” In relation to an argument that rages on to this very day, the Court opined that fixed scales are not really possible in such situations. To give weight to this argument,

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99. This capping was removed by the 1962 amendments. See supra note 59.
100. “Fl-eżerċizzju ta’ l-arbitriju diskrezzjonali taghha l-Qorti ghandha tqis ċ-ċirkustanzi tal-każ, ix-xorta u grad ta’ l-inkapaċita’ u l-kondizzjoni ta’ parti li tbati l-ħsara.”
101. Which were only limited to those cases involving *dolo* and capped at £100.
102. “[I]ntensita’ awmentata tal-hajja, li minn naha wahda timponi eżiġenzi akbar u kwindi l-inkapaċi aktar jitlef aktar qliegh futur, u stante l- “purchase power” diminwit tal-flus.”
103. 5 Q.D. 78 (Court Appeal 1879).
the Court quoted Law Justice Scott in the English Court of Appeal case *Bailey v. Howard*\(^{105}\) who was of this same opinion. The Court then moved on to assess the amount of *lucrum cessans* due to the injured party in the case at hand, and determined that the defendant’s negligent act left the boy with a stump that could not be improved by benefitting from artificial limbs. Despite the fact that the boy had already been slightly incapacitated from birth, the Court said that the act of the defendant now rendered the boy a ‘hopeless cripple.’ The Court was clearly angered by the state the boy was reduced to, and it moved on to discuss the moral injuries at play by referring to the English case *Heaps v. Perrite Ltd.*\(^{106}\)

According to what was common practice at the time (especially prior to the 1938 amendments), it should come as a surprise to many that a Maltese court would consider such things as “suffering,” both present and future, and such concepts as “the joy of life” which is a non-material consideration *par excellence* (not being easily quantifiable in monetary terms). Despite this fact, the Court in this case was ready to take into consideration the fact that the boy in question would no longer be able to ride a bicycle or kick a football; these are undoubtedly moral considerations.

It is also clear that the Maltese Court was not merely quoting a foreign case. In its own reflections on the case at hand, the Court did not focus on any economic losses *per se* or even the child’s earning capacity. It adopted the spirit of English case law and focused on the child’s ability to enjoy life. It said that following the defendant’s negligent intervention, Savona would no longer be able to do certain things like “play with

\(^{105}\) December 14, 1938, where Justice Scott said the following:

... I see no means of arriving at any sort of quantitative scale for the guidance of judges and juries, except the gradual working out, chiefly through the common sense of juries, of the amount that in the civilization of today is regarded as reasonable for that particular head of damages.

\(^{106}\) *Heaps v. Perrite Ltd.*, 2 All E.R. 60 (Eng. 1932), where it was stated that:

We also have to take in consideration not only the suffering which he had immediately after the accident, but the suffering that he will have throughout his life in future, the constant necessity of having assistance in the curious things that he has to do for his own purposes, apart from earning money; also the fact that the joy of life will have gone from him; he cannot ride a bicycle, cannot kick a football, he cannot have any of the forms of recreation which appeal to the healthy ordinary man...
children and keep up with whatever he wishes to do.”\textsuperscript{107} Even in its closing arguments, the Court did not swerve into any specific economic considerations and made reference to the “... opportunities which life has to offer healthy persons and persons who can keep up with life’s exigencies.”\textsuperscript{108}

The Court then said that it also considered the amounts given in other local cases when the injury was of a far less severe nature.\textsuperscript{109} After considering all those facts, it concluded that the amount awarded by the Court of First Instance was too low and it therefore raised the amount due from £650 to £900 pounds. The total sum awarded was £1,032.60\textsuperscript{110} and was perhaps one of the largest sums awarded in similar cases up to that moment in time. Subsequent cases would quote this judgment in justifying similar awards.\textsuperscript{111} The Court of Appeal used the legal basis of the \textit{lucrum cessans} heading to compensate the injured party for the moral damage suffered. The Court also based its reasoning on Article 1088(2) (the modern 1045(2)),\textsuperscript{112} and it must have felt that the words contained therein were wide enough to include even moral harm as being one of the “relevant circumstances” which would help the Court reach an equitable sum to be awarded.

Another case that was decided on similar grounds to the above is the 1964 judgment \textit{Paolo D’Amato noe v. Joseph Ebejer}.\textsuperscript{113} This case dealt with a “sfreğju,” or scar, caused to the face of the plaintiff’s daughter. Whereas in cases of unlawful deaths, the injured parties were being compensated almost exclusively on economic terms,\textsuperscript{114} in cases of this nature the Court stated explicitly that “one must not look (at the

\begin{footnotes}
\footnotetext{107}{“... jilgħab mat-tfal u jlahhaq ma’ dak li kien jixtieq jagħmel.”}
\footnotetext{108}{“... l-opportunitajiet li toffri l-ħajja għal min hu b’sahħtu u jista’ jlahhaq ma’ l-eżiżenzi tagħha ...”}
\footnotetext{109}{See Coppola v. England Sant Fournier (1944); Borg v. Bonnici (1948).}
\footnotetext{110}{With relative interest payable at different rates.}
\footnotetext{111}{See e.g., Carmela Fenech pr. et ne. pro et noe v. Antonio Galea (1956) (confirming several points made in this judgment).}
\footnotetext{112}{Article 1045(2) of the Maltese Civil Code, which, as already illustrated above, states as follows: “The sum to be awarded in respect of such incapacity shall be assessed by the Court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.” MALTA CIV. CODE, supra note 9 & 28, at art. 1045.}
\footnotetext{113}{First Hall (Civil Court 1964) (per Edoardo Magri).}
\footnotetext{114}{See among others, Emmanuela Galea pr. et ne. pro et noe v. Paolo Gatt net, Court of Appeal (Civil, Superior 1958) (per A. J. Mamo, A. J. Montanaro Gauci & W. Harding).}
\end{footnotes}
matter) merely from the level of incapacity to work but from the complexity of the consequences which the burns left on her person."\textsuperscript{115}

The Court then went on to say that certain other moral injuries must also be taken into consideration in such cases. The Court said that the burns on her face "... created and will create in the future embarrassment and a sense of suspension and continual fear if she ever marries and gets pregnant."\textsuperscript{116}

The Court did not stop there. It further took into consideration the fact that it would be very hard for this girl to find a husband anytime in the future and, even if she did, she "... would always be exposed to mortification and to certain disappointments that she will inevitably suffer when the poetry of matrimonial life is briskly interrupted with the discovery of these defects."\textsuperscript{117}

By mentioning such things as “the poetry of matrimonial life,” the Court clearly took into consideration the fact that this girl suffered a moral injury that would preclude her from enjoying such sentiments as “matrimonial bliss.” Similar to the \textit{Savona v. Asphar} judgment which we saw above (dealing with the loss of a small boy’s leg), the Court went on to say that such injuries would also lead to certain men feeling “repulsed” by the image of the girl and that this certainly does not contribute towards the pursuit (and obtaining) of happiness, which the Court described as every human being’s prerogative.\textsuperscript{118}

The Court said that this impediment to “the pursuit of happiness” or this “loss of enjoyment of life” would include also, a certain “embarrassment in society”\textsuperscript{119} and that all this “... is an aspect of the damage caused which cannot be compensated within money.”\textsuperscript{120} The Court itself made reference to the \textit{Savona v. Asphar} case which clearly dealt with a more incapacitating injury than a scar on one’s face. This notwithstanding, the Court decided that this case still merited a higher

\begin{itemize}
  \item \textsuperscript{115} “Wieħed m’għandux iħares lejha biss mill-grad tal-inkapaċita` ghax-xogħol, iżda mill-kompless tal-konsegwenzi deleterji li l-ustjonijiet hallew fuq il-persuna tagħba . . .”
  \item \textsuperscript{116} “... holqu u aktar joholqu ‘l quddiem motiv ta’ mistħija u sens ta’ sospensioni u ta’ biża’ kontinwu jekk tiżżewweġ u toħroġ gravida.”
  \item \textsuperscript{117} “... l-gharusa tkun dejjem esposta għall-mortifikazzjonijiet u ċerti delużjonijiet li immankabilment ikollha tghaddi minnhom meta l-poesija tal-hajja matrimonjali tiġi bruskament interrotta bl-iskoperta ta’ dawn id-difetti. . .”
  \item \textsuperscript{118} “... dan żgur ma jikkontribwixxi xejn fit-triq tal-prerogattiva li kull bniedem għandu versu r-riċerka u l-otteniment tal-feliċita` tiġi fil-hajja ta’ kuljum.”
  \item \textsuperscript{119} “mistħija fis-soċjeta’.”
  \item \textsuperscript{120} “... huwa aspett ta’ dannegġjament li ma jistax jiġi risarċit bi flus.”
\end{itemize}
amount of compensation than on that occasion! Commenting on the fact that the two cases were different, the Court in this case awarded the plaintiff £1,000 as compensation under the “lucrum cessans” heading, which was £100 more than the Court had awarded in Savona v. Asphar.121

What must be duly noted in respect of the above is that it is actually quite rare for the Maltese courts to use such colourful language in referring to such moral considerations, especially post Butler v. Heard. However, it must also be pointed out that facial scars on female victims generally seem to trigger a sense of compassion which at times drives the Maltese courts to award compensation on the basis of innovative interpretations of Maltese law of tort.122

The facts of the above-cited Butler v. Heard case are by now, well-known to most local legal practitioners and scholars alike. The case (as already mentioned above) dealt with a traffic collision between two vehicles—a car driven by the defendant (Heard) and a motorcycle driven by the plaintiff (Butler). As already mentioned above, the case is important for the way in which it liquidates damnum emergens under Article 1088 (today Article 1045), but more important when dealing with lucrum cessans because it is here where the courts had previously allowed themselves to be “liberal.” The interesting thing to note here is that as soon as the Court moved on to discuss damages due under lucrum cessans, which it defined as “by far the most important,”123 the Court started its reasoning by immediately referring to moral damage. As it turns out, it did this to be very clear that compensation in the case at hand was only due for pecuniary losses. This is how the Court interpreted Article 1088 (today 1045) at the time—perhaps restricting certain previous interpretations that might have included compensation for moral damage as seen above. The reader should, however, bear in mind that whilst the Court deemed the law not to grant the legal basis to award compensation for moral damage explicitly, it was in no way opposed to this ideologically. Actually, the Court went so far as to say that Maltese law is inferior to other laws that specifically allow for compensation for moral damage. To make it absolutely clear that the Court was not just quoting a foreign source to illustrate the position abroad, it went on to

121. Taking into account certain considerations like inflation.
122. See the very recent judgment Linda Busuttil et v. Dr. Josie Muscat et as discussed above, supra note 40, by way of example.
123. “bil-wisq l-aktar importanti.”
express its hope that this branch of Maltese law would be reformed in the near future.124

In truth, the only reforms that were made since then were court-driven developments in respect of breaches of human rights and legislative innovations in the realms of consumer law and intellectual property law more specifically.125 In terms of the Maltese Civil Code, at the time of writing, no legislative reforms have ever been made since then. What can be inferred here is that those individuals who oppose the introduction of compensation for moral damage (of whatever kind) in the Maltese Civil Code cannot use Butler v. Heard to boost their arguments because the Court made it quite clear that it favored its introduction.

The Court proceeded to comment on the relief felt by the courts following the 1962 amendments (which removed the capping of damages) and how the courts were at full liberty to attain justice in favor of injured parties or their families. After creating what is now known as the “Butler v. Heard formula” which the reader is advised to refer to,126 the Court went on to reduce the amount awarded by the Court of First Instance but it nonetheless awarded £5,100—one of the largest amounts ever awarded at the time.

It must be noted that judgments delivered post Butler v. Heard have tended to focus more on the intricacies of the calculations to be made rather than introduce any new theories or novel interpretations. Having said that, although many cases do in fact seem to take such considerations into account when liquidating damages (some in a more explicit manner than others), the usual practice is to “disguise” any moral considerations by tweaking the formulae used127 for such calculations. The following case is an example of such reasoning.

The 1997 case Paul Scerri et pro et noe v. Tancred Cesareo128 dealt with a serious permanent incapacity. The amount of compensation awarded in this case for the serious disability caused to the plaintiff was Lm80,888 (€188,418.35). As we find in other similar cases, the medical expert appointed to determine the percentage of disability and its effect on the victim’s “income earning capacity” in this case, drifted also into other considerations which the Court was unable to compensate directly. Among other things, the medical expert said that the injured party was:

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124. “Ta’ min jawgura illi din il-fergha tal-liġi taghna ma ddumx ma tiġi kif jixraq riformata.”
125. As mentioned above.
126. See supra note 63.
127. Michael Butler v. Peter Christopher Heard, Court of Appeal (Civil, Superior 1967).
128. First Hall (Civil Court 1977) (per G. Valenzia).
. . . grossly handicapped and will always have problems with walking, going up and down stairs, ladders, etc. . . he may find it difficult to find a partner and marry. His body image of a disabled person may cause psychological problems etc.

These words indicate a rational analysis of the case under examination. Above, we have seen how in the past, such considerations were at times even undertaken by the courts themselves. In this case however, we see how difficult it is for the medical expert to determine what percentage of the disability will affect one’s income-earning capacity (as opposed to other areas of one’s life). Of course, philosophically speaking, one might question the rationale for distinguishing these two concepts at all. Why not compensate the victim for the effect the disability might have on other areas of his life—like the damage to his love life as mentioned by the medical expert here? Although the Court’s final calculations might seem to be by-the-book, it should be noted that it is always within the Court’s discretion to determine the components of the “Butler v. Heard formula” (which at the time of writing is still not legally binding on the courts). In deciding the “multiplier” for example, the Court quoted foreign commentators and despite the fact that the future is uncertain and includes various “vicissitudes of life,” the Court still came up with a thirty-five year multiplier, which is partly responsible for the scale of the amount due. It reached this figure because of the circumstances of the case and of the incapacitated person. This makes us understand how the courts will ultimately determine whether the compensation due is justified or otherwise depending on all the facts and circumstances of the case.

At first glance, one might think that in this case, the fourteen-year-old boy struck by the defendant’s car (who suffered a serious disability as a result of the accident), was treated like anyone else, but the mathematics involved in the judgment should not distract us from the fact that the Court was well aware of the seriousness of the case.

As Lord Scarman stated:

Knowledge of the future being denied to mankind, so much of the award as is to be attributable to future loss and suffering will almost certainly be wrong. There is

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129.  80 (wage per week) x 52 (weeks in a year) x 35 (‘multiplier’) x 60% (percentage of disability) x 20% (lump sum reduction) = Lm69,888 as lucrum cessans + Lm11,000 as damnum emergens = Lm80,888 (€188,418,35).


131.  “. . . minħabba ċirkostanzi tal-każ u tal-persuna inkapacitata.”
really only one certainty: the future will prove the award
to be either too high or too low.\textsuperscript{132}

The Maltese Court was willing to award quite a large sum of money
despite this “uncertainty of the future” which the Court itself cited in the
judgment. Can we confidently say therefore, that the boy’s suffering in
general was not taken into consideration?

Although the previous judgment is a typical example of how the
Maltese courts seemingly take moral injuries into consideration (\textit{i.e.},
indirectly), certain recent case law has re-ignited the discussion of
whether or not compensation for moral damage can be \textit{explicitly} awarded
on the basis of Article 1045 of the Maltese Civil Code. The case \textit{Linda
Busuttil et v. Dr. Josie Muscat et}, which was already discussed above,\textsuperscript{133}
merits particular attention in this regard. In this judgment (dealing with a
facial scar caused to a female victim as the result of an unsuccessful
medical intervention), the Court awarded the plaintiff €5,000 purely on
the basis of the moral injuries suffered by same. Above, it was already
mentioned that this judgment is important in the manner in which it
interprets the term “\textit{actual loss}” found in Article 1045 to include also
“non-patrimonial damages”–despite the fact that the Maltese courts have
generally refused such interpretation. On this point, this author had
already previously expressed views similar to those found in the
judgment in question\textsuperscript{134} and hopes that the same will be confirmed by the
Court of Appeal.\textsuperscript{135}

The judgment in question is also very creative in the manner in
which it resorts to EU law to obtain a remedy for the plaintiff. Very
innovatively, in its deliberations, the Court said that the female plaintiff
suffered a physical injury as well as an injury to her “psyche.” The Court
observed that the “physical and mental integrity” of the person is a right
enshrined in the Maltese Constitution, in the European Convention on
Human Rights as well as in Article 3 of the Charter of Fundamental
Rights of the European Union (the “Charter”).\textsuperscript{136} The Court then argued
that since the Charter has the same legal status as the Treaties of the

\begin{footnotes}
\item[133.] See supra note 40.
\item[134.] See the author’s LL.D. thesis, supra star-footnote.
\item[135.] An appeal was registered on December 16, 2010.
\item[136.] European Union, \textit{Charter of Fundamental Rights of the European
Union}, December 7, 2000, Official Journal of the European Communities,
December 18, 2000 (2000/C 364/01), \textit{available at http://www.unhcr.org/refworld/docid/3ae6b3b70.html} (Last Visited November
12, 2011).
\end{footnotes}
European Union in Malta, the Maltese courts are bound to interpret Maltese law in conformity with the principles enshrined therein (despite the fact that the provisions of the Charter are applicable only when Union law is being implemented by Member States).\textsuperscript{137} This author commends the Maltese Court for entertaining such liberal interpretations in its deliberations but believes that the judgment is on more solid ground when discussing the interpretation of the terms “any damage” in Article 1033 and “actual loss” in Article 1045.\textsuperscript{138}

Very recently, there has been another interesting judgment\textsuperscript{139} which has attracted considerable media attention.\textsuperscript{140} Although this judgment (which has been appealed\textsuperscript{141}) does not explicitly veer into moral considerations \textit{per se}, the fact that the Court awarded €1,250,000 in compensation to the victim of the traffic accident in question\textsuperscript{142} as well as to the other plaintiffs (being members of the victim’s family), is noteworthy to say the least.

These recent judgments (which are not yet \textit{res judicata}) indicate a certain willingness by the Maltese courts to compensate victims of torts and quasi-torts in a more comprehensive manner. However, it remains to be seen to what extent the above-cited Amendments will reflect such views.

V. FINAL THOUGHTS

The uniqueness of Article 1045 emerges from the fact that unlike the Maltese provisions modeled on the French legal system\textsuperscript{143} the “damages” encompassed in the said Article were inspired by Austrian law, and whether intended or otherwise, function very much on a common law basis. Unless the damage inflicted (including moral harm) is one which falls within the classes of compensable damage under Article 1045\textsuperscript{144} then, despite the responsibility of the tortfeasor, no

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at art. 51.1.
  \item \textsuperscript{138} \textit{See supra} note 9 & 41.
  \item \textsuperscript{139} Alexander Caruana et pro et noe v. Daniel Bonnici, First Hall (Civil Court 2011).
  \item \textsuperscript{140} \url{http://www.timesofmalta.com/articles/view/20110315/local/man-disabled-in-accident-awarded-1-25-million-in-damages} (Last visited November 12, 2011).
  \item \textsuperscript{141} An appeal was registered on April 4, 2011.
  \item \textsuperscript{142} Who did not die but suffered one hundred percent disability.
  \item \textsuperscript{143} In other words, the provisions relating to tort liability (which are rooted in the civil-law tradition).
  \item \textsuperscript{144} Or Article 1046 dealing with damages when death ensues.
\end{itemize}
compensation will usually be awarded to the victim. The nature of Article 1045 itself\(^{145}\) led to the Maltese courts’ hands being effectively tied for well over a century.\(^{146}\) It is only in certain instances that the courts came up with liberal interpretations of Article 1045 that allowed them to award compensation for moral damage. In such cases, a strict interpretation of the law would seem to indicate that these are indeed incompatible with the provisions on damages.\(^{147}\) That said, without entering into the complex mechanisms for liquidating such damages in tort,\(^{148}\) since the dawn of the Maltese Civil Code, the courts may not have been explicit, but the pain and suffering of certain complainants was clearly taken into account when calculating the amount of compensation due.\(^{149}\) Another thing to note is that certain cases are generally dealt with in a particular manner. For example, cases involving an *iniuria* (or harm to one’s honour or reputation) are generally treated with added caution—perhaps owing to the serious damage such offense may lead to in a small territory such as Malta.\(^{150}\) Bodily harm inflicted on children is also usually tackled in a more sensitive manner, and the basis

\(^{145}\) The legal rationale of which was examined above.

\(^{146}\) Despite the amendments that took place in 1938 and 1962.

\(^{147}\) That is, both article 1045 as well as article 1046 of the *MALTA CIV. CODE*, *supra* note 28, at arts. 1045 & 1046.

\(^{148}\) Which is the subject of Fiona Cilia’s paper, included in this volume of *J. CIV. L. STUD.*

\(^{149}\) A prime example being the case *Paul Scerri et pro et noe v. Tancred Cesareo* discussed *supra* note 128.

\(^{150}\) See *Perit Joseph Boffa v. John A. Mizzi*, First Hall (Civil Court 2002) (*per* P. Sciberras) which granted the plaintiff Lm300 (€698.81) as damages for the *iniuria* against the memory of his late father. The Court reached this sum on an ‘*ex aequo et bono*’ basis, which indicates that the claim was decided on general principles of law rather than article 1045 of the Civil Code). The reader should note that there have been recent developments regarding this case. On November 22, 2011 in a Chamber judgment of the European Court of Human Rights in the case *John Anthony Mizzi v. Malta* (application no. 17320/10), the Court held (by a majority) that there had been a violation of Article 10 (freedom of expression and information) of the European Convention on Human Rights. The Court held that Malta was to pay Mr. Mizzi EUR700 in respect of pecuniary damage, EUR4,000 in respect of non-pecuniary damage and EUR5,300 for costs and expenses. More information on this is available at [http://www.codex-online.com/codex/contents.nsf/vWebAccessDocuments/CC29F5CFE5BFB1BB C225795300463FA/$file/Chamber+judgment+John+Anthony+Mizzi+v.+Malta+22.11.11.pdf](http://www.codex-online.com/codex/contents.nsf/vWebAccessDocuments/CC29F5CFE5BFB1BB C225795300463FA/$file/Chamber+judgment+John+Anthony+Mizzi+v.+Malta+22.11.11.pdf) (Last visited November 30, 2011).
for compensation is often clearly based on moral considerations.\textsuperscript{151} Another category of injuries includes cases of scars or disfigurement on young females which, as we have seen above, sometimes lead to rather innovative ways of interpreting Maltese law on damages in tort.\textsuperscript{152}

It remains to be seen to what extent the above-cited Amendments will alter Article 1045 (if at all), and whether the principles outlined above will be solidified or else shaken at their core.

\textsuperscript{151} As seen in Savona v. Asphar discussed \textit{supra}.  
\textsuperscript{152} As seen in Paolo D’Amato noe v. Joseph Ebejer discussed \textit{supra}. \textit{See also}, Peter Sultana v. Anthony Abela Caruana, Court of Appeal (Civil, Superior 2002) (\textit{per} J. Said Pullicino, C. A. Agius & J. D. Camilleri), which dealt with what the Court referred to as a “psychological injury” caused as a result of a scar left on the plaintiff’s face.
MARE NOSTRUM AS THE CAULDRON OF WESTERN LEGAL TRADITIONS:
STIRRING THE BROTH, MAKING SENSE OF LEGAL GUMBO WHILST UNDERSTANDING CONTAMINATION

Olivier Moréteau∗

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The author thanks Ignazio Castellucci, Seán Donlan, Nicholas Kasirer, Agustín Parise, and Jacques Vanderlinden for tasting the broth and contributing additional spices. Readers may enjoy the result, add ingredients, and continue the cooking: this is an open-source recipe.
I. OVERTURE:
OF TIME AND PLACES

In *Metaphysics*, Aristotle told us that the whole is more than the sum of its parts. He invited us to have a holistic view of the world. Holism comes from the Greek *holos* meaning *all, whole, entire, total*. Holism is the contrary to reductionism.

Comparative law exists in the middle, stretching between holistic macro-comparison and reductionist micro-comparison. The zoom is our optical device, and the accordion our musical instrument.

In Malta, we are at the core, at the geographic center of a whole region stretching on three continents. The Mediterranean populated the cosmos with hundreds of gods and heroes before discovering that there is only one God, and giving the world three most influential monotheist religions. It developed the Talmud, the Sharia, Roman and Canon Law. It exported these all over the world and received other traditions, including the Common Law here in Malta, Gibraltar, Israel, and at one time in Egypt.

The French historian Fernand Braudel wrote a most impressive and influential fresco of the Mediterranean, showing that there is no single Mediterranean Sea.¹ He views many seas in it, and describes it as a vast, complex expanse within which men operate. Braudel identified a first level of time, very slow, la *longue durée*, which is the geographical time or time of the environment. Braudel died in 1985, when time was about to accelerate under the effect of climate change. The second level of time comprises social and cultural history. It encompasses social groupings, empires and civilizations. Change at this level was much more rapid than that of the environment, at least in the days when I discovered Braudel’s texts, and viewed magnificent programs he presented on television, in the 1970s. The series was called *Méditerranée*.

Braudel added a third level of time, that of events (*histoire événementielle*). It includes the history of individuals with names.

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For Braudel, this time of the *courte durée* is that of the surface. It is deceptive.

We seem now to be in a time of confusion, where the environment changes as rapidly as the second level of time by the effect of global warming and climate change. Meantime, the third level, the level of events, is not counted in years or generations but days and minutes, conveyed by the most sophisticated instantaneous technologies seemingly telling us things before they happen. The latest news, or what will make the news tomorrow, matters more than history. We live in an era of acceleration. Not so long ago, we could watch and analyze the cooking pot of history warm up and the contents simmer. Now we see it reach the boiling point, the point of confusion, in which it gets difficult to analyze and isolate the ingredients. In a sense, our Mediterranean Sea or *Mare Nostrum* may be compared to a boiling cauldron.

Knowing that I was due to give this introductory lecture, Jacques Vanderlinden sent me a *Rêverie d’un alter ego solitaire*. He calls me his *alter ego*, which I view as my highest academic honor, since the day he associated me to the drafting of a general report on the *Structure of Legal Systems*, for the 16th World Congress of the International Academy of Comparative Law, in Brisbane in 2002.

Here it is, in the original French.

**II. RÊVERIES D’UN ALTER EGO SOLITAIRE**

Prenez un chaudron. Appelez-le Méditerranée (dite aussi *Mare nostrum*).
Enduisez son pourtour intérieur d’une couche de graisse. Appelez-la HistoireS.


Ajoutez-y quelques morceaux de choix, comme un Khadafi, un Sharon, un Papadopoulos, un Berlusconi, un Ben Ali, selon le prix du marché.

Versez dedans un bouillon. non de culture, mais d’attentes de millions de gens souvent jeunes, pauvres, et ignorants.

Laissez mijoter.

Vous ne savez pas ce que cela va donner,
Mais dans votre gros livre de recettes de maître (pas en droit)-coq (pas gaulois)
Il y a celles des common lawyers, des rom-
(ah !non)-ano-germaniques,
des (si peu) coutumiers, des qui se croient (et le sont encore moins) religieux,
des union-européens (tous experts) et unions-de-la-
méditerranéens (politiques)
Et aussi celles des empoisonneurs qui rendent fou à Wall Street ou dans la City
Et qui sait-on encore ?

Peut-être quelques pluralistes radicaux, doublés souvent d’inceurables utopistes,
Qui pensent que le droit est ce que chacun pense qu’il doit être.
Qui, face au chaudron souhaitent que cela ne bouille pas « au dessus »
Qui ne croient plus aux « systèmes » (même pas le D)
dans un monde en désordre (ce qui ne veut pas dire chienlit)
Qui pensent que le dialogue inspiré d’un « fondamental » (comme en CE et CM)
Doit tendre à rétablir l’harmonie entre les attentes contradictoires
De moins en moins satisfaites au quotidien
A travers le vaste monde, mais aussi à notre porte
Des femmes et des hommes vivant en société.4

Jacques Vanderlinden’s cauldron beautifully echoes the gumbo that symbolizes the Group Juris Diversitas. The Louisiana gumbo is a soup where ingredients of various origins remain solid and visible but combine in a unique savor.

III. LOOKING INTO THE CAULDRON

The gumbo is a favorite dish in Louisiana, a remote region in the United States Deep South, peopled by French and Spaniards, Africans, Native Americans, Americans of Scottish or Irish descent, Germans whose names are pronounced as if French, etc. Much like gumbo,5 this makes for a complex and rich environment and culture, the Gulf of Mexico being to some extent comparable to the Mediterranean, where so many different traditions meet and mix. Louisiana has its mysteries and paradox. Christianity recombines with Voodoo, everything is a matter of festival where food and music are always major ingredients, often mixing with

5. Here are the ingredients for the chicken-and-sausage gumbo: cut andouille sausage, skinned bone-in chicken breasts, vegetable oil, flour, chopped medium onion, chopped bell pepper, sliced celery ribs, hot water, garlic, bay leaves, Worcestershire sauce, creole seasoning, dried thyme, hot sauce, sliced green onions, hot cooked rice. Good recipes can be found on the web, but it is recommended to enjoy gumbo just anywhere in South Louisiana. Seafood gumbo is another favorite.
the unexpected. Even in times of ecological disaster, after the 2010 explosion of the Deepwater Horizon oil rig and the BP oil spill, the town of Morgan City not far from New Orleans and Baton Rouge celebrated its “75th Shrimp and Petroleum Festival,” with the risk of contaminating the gumbo with the wrong kind of oil.

Two of the initiators of Juris Diversitas have close links with the Bayou State. Juris Diversitas however did not originate in the bayous. It was born in the back room of a tavern in the oldest part of Edinburgh, at the end of the second Congress of the World Society of Mixed Jurisdiction Jurists, in July 2007. While savoring haggis and indulging beer or scotch, we discussed many possible words that go beyond the idea of a mix. “Contamination” happened to be the word of the night. P.G. Monateri had used it once in the context of the law, in an article focusing on legal discourse and the importance of legal cultures. It is not a clean and comfortable word like the floral “hybrid” or “transplant,” it sounds less inviting than “reception” or “circulation,” and less law and economics than the “import and export” speech. It has unhealthy, dirty overtones. The announcement of a world conference on Legal Contamination may not sound very appealing and yet, as Monateri’s article points out (though without elaborating on the meaning of the word), it focuses on the legal system that borrows and on the impact of the import on its legal culture. Monateri singles out “two major aspects of comparativism: the ‘culture and difference’ branch and the ‘import and export’ branch.” Contamination clearly belongs to the “culture and difference” branch.

Contamination, the ‘C’ word as we called it in later communication, is not a fully negative term. When taken out of the medical sphere where it typically indicates that something is going wrong, the word may return to its etymological sense.

6. Seán Donlan grew up in Louisiana and received his juris doctor at Louisiana State University, and though I grew up in Lyon where I studied and taught law, very close to the Mediterranean, I now teach and operate at Louisiana State University.
8. Id. at 591.
9. Id. at 578.
Here is how I defended the use of the term in an email sent to the participants to of the Edinburgh dinner on May 31, 2008, before another meeting in Lyon, this time around andouillettes:

Contamination means “to enter in contact with.” The Latin tamen (taminare) is the fact of touching, and is also connected to impure contact. Of course we have the prefix cum, with. From an anthropological viewpoint, this is a very rich concept, inviting [us] to revisit mix[edness] with a new and less conventional eye. In an anthropological perspective, all contact includes the risk of being soiled. Lawyers use taxonomies as ways of putting things in closed boxes and do not like to admit the existence of grey zones or contact zones where torts are polluted by contracts and contracts by torts etc. to take a conventional example where I did some work. Too many lawyers view law as being pure (see Kelsen and his still formidable influence on legal thinking in the most positivist countries, like France).

Physics and biology show that there is nothing such as hermetic boundaries to things. There is no life without contamination, of course with mechanisms to fight or protect.

What I propose here is a reflection on the ‘C’ word, in view of a better understanding of the heuristic value of the concept of contamination in comparative legal scholarship. Contamination happens when, voluntarily or by imposition, one system borrows legal rules or institutions from another, creating a mix that differs from the originating system. In a sense it is what happens in the cauldron, where the mix of the ingredients may sometimes produce an unexpected result. The same happens with social groups that mix or remix, binding or not (like the sauce in the cauldron), and not always in expected ways.

10. On file with the author.
11. Ignazio Castelluci, Seán Donlan, and Olivier Moréteau participating.
Monateri described French and German influences on the Italian legal system, concluding that “the borrowing system resulted in a unique mixture of French and German patterns that would have been unthinkable to either of the donor countries. This ‘contamination’ is inherent in the particular selectivity of borrowing. From a wider perspective I maintain that this kind of contamination in legal cultures is the key feature of borrowings and transplants of legal patterns.”

The author further writes: “the process of importing and exporting rules and institutions is an almost unconscious process of integrating them into the ideology of the borrowing system. Thus, the meaning of the borrowed institutions depends solely on the struggle among the formants of the receiving system, which almost always will produce something different from the original.”

However, Monateri also takes into account the ideology of the original system: “I also think that the ideology of a system is very often not merely a local product, but a contamination of several local traits by foreign ones,” which leads him to conclude that “the actual legal world is more a world of contamination than a world split in different families.”

IV. UNDERSTANDING CONTAMINATION

The word contamination focuses on contact and its consequences. The contact with others is an unavoidable necessity in personal and social life. We get born by contact, we feed and are fed by contact, and we may die by contact. To enter into contact with another may be for good or for evil. Cum tangere and later cum taminare: enter in contact with; originally the word was used in a religious context, with a meaning of impure contact.

12. Monateri, supra note 7, at Part II.
13. Id. at 591.
14. Id. (italics are mine).
15. Id.
16. Id.
17. My main source is the DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed., 2006), tracing not only the etymology of words but the evolution of their meaning over time. Religion abandoned the word. Alain Rey shows that in the 17th century, contaminate meant “soil by an impure contact” (souiller par un contact impur, Furetière) but was marked as an “old” word. Medicine gave it a revival in 1863. Contagion had given the French
Note that linguists use the word contamination in a perfectly neutral way. The Maltese language is a good example, combining or recombining Latin with Semitic and Arabic. There is no value judgment in describing a linguistic contamination. It is apparently the same in the musical world.

In comparative law we no doubt prefer the use of more neutral terms, especially if they avoid the idea of a soiling physical contact. Influencer, to “influence,” is a much cleaner word.\textsuperscript{18}

Influence has to do with a flow, fluere, fluent . . . taking us back to the ‘C’ word, influence also gave influenza, or flu!

We certainly make much use of the word influence in our comparative work. The word has a very convenient distance and fluidity, to refer once more to etymology. We can describe all kind of influences, positive or negative, internal or external, legislative or jurisprudential, doctrinal or from practice.

The word influence is conveniently neutral, devoid of the troubling, possibly judgmental, dimension of the word contamination. It also has the advantage of allowing reverse flows, cross-influences.

I used it recently in the title of a workshop series that I organized at LSU, but combined it with other words: Civil Law and Common Law: Cross Influences, Contamination and Permeability.\textsuperscript{19}

\textsuperscript{18} In the 13th century (1240), the Latin influentia marked the flux coming from stars or celestial luminaries, and acting on human behavior and the course of things. Influence is distant and invisible and suits perfectly the word of concepts and ideas. One forgets however that the word originally referred to astrology, to describe the action of stars on human destiny. The word “influence” was later in the 13th century extended to a slow and continuous action exerted on a person or on a thing. In 1780, at least in French, the word describes the authority or prestige of a person, leading others to adjust to her views. In the 19th century (1814), the word enters the scientific language, to describe in French, un effet produit à distance or “a remote effect.” (DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE, supra note 17).

\textsuperscript{19} Papers published in 3 J. CIV. L. STUD. (2010).
What is it that the ‘C’ word expresses and that you cannot find in the other words? Why not stick to the clean and neutral language of influence? There is always the risk of being changed or altered by the contact with otherness. Alter means other but also gave alteration, with its negative connotation. The same can be said of contamination. Our identity, our multiple identities, are under a constant threat of change or alteration at the contact of others. We never are the same, we change, and this is the history of the Mediterranean people, this is the history of all people on earth.

Rome exerted political, military, and later religious influence over much of the Mediterranean world. This influence still shapes public and private life in many Mediterranean countries. Some of the Greek influence largely receded from Athens to Constantinople and from there to Moscow, moving away from the Mediterranean, when Islam took control of much of the region. The Ottoman Empire later disappeared but Islamic populations and their culture presently penetrate many of the countries that were once strongholds of the Roman influence. All these movements must have an impact on the law, if not always as enacted, at least as applied, not applied, or perceived by the people, in other words on legal culture.

From this comes my question:

What does the word contamination add to the more conventional language describing these phenomena? Reception, transplants, migration, circulation, and the like describe the visible. Contamination refers to the less visible. Its effects, good or bad, may appear later on. A transplant may take place with all its visible effects, yet generating some invisible or less visible changes in the system of the recipient and its legal culture. This is where contamination takes place.\(^{20}\)

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Contamination goes many ways and can be reciprocal. Its study is conducive of legal pluralism, even in its most radical forms. In the Mediterranean world, it can be addressed within the civil law tradition, or wherever the civil law and the common law intersect, among themselves or with other traditions such as Islam, the Talmud, Canon law, or any other societal model producing, weakening, or destroying norms.

One may think of possible contamination of the western legal traditions by exogenous elements, though we are more likely to find examples going the other way around. However, imagining the civil law tradition or any western legal model as a contaminating factor is disturbing to many. We western scholars think highly of our legal traditions and systems, which were exported as models. We know they are borrowed from even in those places where we did not impose them. In addition, they are actively marketed by international institutions such as the United Nations and its multiple agencies, the World Bank, and the International Monetary Fund.

The use of contamination when studying non-western systems invites us to open our minds to the cultural experience of others, in order to identify the changes that are taking place in their systems and cultures under western influence. Changes cannot be identified unless we first have a genuine understanding of what these systems and cultures were prior to western influence, whether we address the changes that were brought at the time of colonization or in post-colonial times.

One must adopt a broad approach embracing as many social and cultural parameters as possible, also inviting world history to set the proper perspective. World history is made of invasions and colonization conducive of pervasive influences. Invasions and colonization have oftentimes been the fact of “western” political powers that developed around the Mediterranean or were substantially influenced by it. These powers exported their faith, culture, and legal systems, largely born on the coasts of the Mediterranean or its hinterland. The fact that
“western” invasions and colonization caused millions of people to die and empires and cultures to collapse is a historical fact that we must be mindful of, especially when investigating our present neo-colonial age.

The indigenous people of Central and South America died of contamination also in the medical sense. The conquistadors brought sicknesses and diseases that were unknown to indigenous people and against which they had no protection. True, some unknown diseases were also brought back to the old world. Germs are among the first things human beings exchange when traveling and trading. Talking about culture, much the same happened. Flourishing cultures and civilizations such as the Inca or the Aztec nearly completely disappeared, to which we give the generic name of Pre-Colombian, categorizing them from our western viewpoint. Similar phenomena occurred at the same or different times in Africa, in Asia, in the Pacific Rim, hitting sophisticated and less sophisticated cultures that we keep assessing according to our western standards. So called “westerners” sometimes mean it well: many were or still are convinced that they bring positive things, such as wealth, better health, better infrastructure, and a great legal tradition, not to mention the troubling word “civilization,” casting a blind eye on selfish motives and greed that lead western nations and corporations to plunder natural and human resources of “underdeveloped” nations.

Signs that we are convinced of the superiority of our model, be it political, economic, legal etc., appear in the language we use, centering the world on us. Our vision was first Mediterranean centric, everything remote being barbarian; it then became Eurocentric leaving others as salvages, before turning “western centric,” which truly does not mean anything, hence our preference for the word “global,” which conveniently undermines what is not purely western or western influenced, once relegated to a “third world.” We hide our western contaminative influence under the conveniently neutral “global” term.

Comparatists are nowadays blamed for an almost exclusive focus on western legal traditions: we either ignore the others or
marginalize them, relegating them to “otherness.”

A few prominent scholars propose to go beyond the western conception of law and order, giving better access to the understanding of Asian and African systems. This cannot be done without revisiting our theories of law and legal order, adopting pluralist views, which is the raison d’être of the group Juris Diversitas. The concept of contamination helps towards a better understanding of otherness and different approaches to the law.

When presenting this paper orally in Malta, I proposed to explore the effect of contamination in the context of “sophisticated” and “less sophisticated” legal systems. I pointed out that sophistication is not a positive term, indicating that I did not think highly of sophist philosophers. I am not sure however that this is a legitimate disclaimer. It keeps projecting a western vision of legal systems, because I am and remain a western jurist, despite my efforts to learn from anthropologists: they tell us that in order to understand other cultures, we cannot afford to stay at the center. I have to abandon a value-based approach and prefer a more neutral one. Speaking of “western” and “non-western” systems is not any better, since it means we keep mapping the


23. This is the major project conducted by MENSKI, supra note 22.


26. As Maurice Godelier writes, it is our effort to decenter that legitimates anthropology as a social science: “C’est le travail de décentrement qui fait de l’anthropologie une science sociale.” MAURICE GODELIER, AU FONDEMENT DES SOCIÉTÉS HUMAINES : CE QUE NOUS APPRENDAUT’ANTHROPOLOGIE 63 (2007). At pp. 52-64, Godelier explains that it is necessary in ethnology to understand in order to compare and to compare in order to understand, pages that should be read by all social science scholars. Id. at 52-64.
world from where we are, unless I insist that it is the Mediterranean cauldron that I place at the center, with my being located in a remote position. At least it decenters me a little bit, hopefully enhancing my cognitive self.

Let us look into the cauldron or in the vicinity, first visiting contamination within the western legal systems. Let us also venture some exploration outside the western world, addressing systems where the western influence invited itself or was later invited. Brief concluding remarks will take us back to the mare nostrum.

VI. CONTAMINATION WITHIN WESTERN LEGAL SYSTEMS

I will make the case that western legal systems (I mean national or local legal systems) contaminate one another. Two examples will be briefly discussed, one taking us far away from the cauldron but in a region where its influence is largely felt, and another one bringing us back to Europe.

A. The Case of Louisiana

After the Louisiana Purchase in 1803, the Territory of Orleans, later to become the State of Louisiana, resisted political attempts to impose the common law. The civil law was maintained and the adoption of a Digest of the Civil Laws in 1808 and of a Civil Code in 1825 confirmed that Louisiana belonged to the civil law world at least as far as private substantive law was concerned. The State Constitution contains provision that prohibits the adoption of the common law by reference, as had been done in a number of other states. The Civil Code in its revised

27. For a detailed account, see GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (Rev. ed. 2009).
29. LA. CONST. art. III, §15B: “A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of laws shall be adopted by general reference to it.” This provision appeared in the first Louisiana Constitution of 1812, § 11, and is to be found in all subsequent versions.
version makes provisions regarding its interpretation. These provisions, like the rest of the Code, are of civil law fabric.

The Civil Code however does not contain the entire legislation governing matters that fall within the realm of private law. Many statutory rules affecting matters dealt with in the Civil Code are found in the Revised Statutes. They form Title 9 of the Revised Statutes, under the heading of Civil Code Ancillaries.

Title 9 is just one among 56 titles. The big bulk of legislation in Louisiana is to be found in the Revised Statutes. The Revised Statutes are arranged in Titles running in alphabetic order, with General Provisions in Title 1 and running from Aeronautics (Title 2) to Wildlife and Fisheries (Title 56).

But there is more to it. The General Provisions of Title 1 start with a Chapter 1, Interpretation of Revised Statutes, which contains interpretative provisions that differ from the traditional rules to be found in the Civil Code and are of a common law facture. For instance, R.S. 1:7 and 8, providing that singular may denote plural and one gender may denote others, sound like Section 6 of the British Interpretation Act 1978 or similar provisions of other states’ codes.

As indicated by the amount of detail found therein, the length of the provisions, the lack of systematic organization, the heavy legislative style, the Revised Statutes are of common law fabric, a style alas to be found in too many recently revised articles of the Louisiana Civil Code. Even when local universities take efforts to teach the civil law, not all Louisiana judges are trained in the civil law, and are more likely than not to apply common law methods of interpretation when applying the Revised Statutes, moving away from the civilian idea that a code is a system where provisions are to be interpreted by reference to one another. This is a sign of common law contamination. As a consequence, Louisiana resembles its models just like a child resembles both parents, having features of both but being a very

31. Id.
32. Id.
33. Id.
34. Though examples of overly detailed and verbose legislation can also be found in most civil law jurisdictions.
different entity. It is said to belong to the “third” legal family of mixed jurisdictions, but may also be described as a legal system of its own in a world of contaminations.

In another article, I discussed a way to resist this contamination in order to maintain a civil law attitude, but this paper so far did not generate comments, indicating that whether they like it or not, Louisianans can live with this form of contamination. I also indicated somewhere else that the use of the case method in the Louisiana law schools lead students, attorneys, and judges to focus on cases and somehow neglect the analysis and interpretation of Civil Code articles.

This being said, examples of contamination of United States law by the civil law are many, the Uniform Commercial Code offering a powerful one. As suggested above, such contamination produces a result very distinct from what we observe in civil law jurisdictions, due to the blending with a predominantly common law culture.


36. In An Introduction to Contamination, supra note 20. I recommend the addition of the preliminary provision tailored on the model of the Civil Code of Quebec, which may say:

The Civil Code comprises a body of rules governing basic obligations and rights of citizens regarding their person, property, and relations between persons and property which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. It must be interpreted in harmony with the general principles of law and subject to norms having a constitutional nature.

Id. at 14-15.

37. Olivier Moréteau, De revolutionibus, The Place of the Civil Code in Louisiana and in the Legal Universe, in Le droit civil et ses codes: parcours à travers les Amériques 1, 16 (Jimena Ando Dorato, Jean-Frédérick Ménard & Lionel Smith eds., 2011).
B. The Case of the European Union

Until the first enlargement in 1973, the European Communities developed a legal system largely influenced by the French and to a lesser extent the German model. Common law influence developed with the membership of Ireland and the United Kingdom. The presence of common law judges on the European Court of Justice had an impact on its practice, a point I had a chance to discuss with the late Lord Slynn of Hadley, who before becoming Lord of Appeal in Ordinary (1992-2002), served as Advocate General (1981-1988) and Judge (1988-1992) on the European Court; he was impressed by how much his continental colleagues delighted in engaging in the art of distinction, regardless of the fact that traditional civil law interpretation methods command that where the law does not distinguish, we should not distinguish. Interestingly, common law contamination increased with the addition of ten member States in 2004, due to more extensive use of the English language. English being the natural language of the common law, and Europeans (with the notable exception of the Scots), not being used to the practice of the civil law in English, conceptual contamination is taking place, a phenomenon pointed out by Louisiana scholars, who give a number of significant examples.38 French and German are less used than in the past as the language of drafting and more and more, other linguistic versions of regulations and directives happen to be translated from the English.39

Contamination goes the other way as well, with English courts (re)discovering the teleological or purposive approach in interpreting the treaties and directives, consciously borrowing from the civil law tradition and less consciously contaminating the method of interpretation of purely domestic statutes. After showing


39. The phenomenon and ways to solve the problem were described before the enlargement of 2004: Olivier Morétau, Can English become the Common Legal Language in Europe?, in COMMON PRINCIPLES OF EUROPEAN PRIVATE LAW 405 (Ř. Schulze & G. Ajani eds., 2003).
embarrassment caused by the use of general language in the European treaty and directives and yet understanding that some adjustment had to be made,40 English courts moved away from literal interpretation to adopt continental methodology, at least as long as community law was to be applied.41 This eventually permeated the approach to interpretation even on matters not connected to community law,42 until the House of Lords finally abandoned the prohibition to cite the records of parliamentary proceedings when interpreting statutes.43 A formidable evolution took place, contribution to a “civilization of the common law.”44

This offers no example of a weak system contaminated by a stronger one, but of a strong system that largely resisted the cultural influence of Roman law (though it borrowed some Roman law techniques),45 contaminated by an equally strong system.46

The impact of legal practice is also to be explored in this perspective. Much could be said of the impact of the export of large law American and English law firms on the European continent.46

Let us turn to contamination outside the western world, where examples of the “strong” contaminating the “weak” (to

40. Macarthys Ltd. v. Smith, [1979] 3 All E.R. 325 (Court of Appeal), where the opinions of Lord Justice Lawton reflecting the English embarrassment is to be contrasted with that of Lord Denning who understood what adjustments were to be made.


44. H. Patrick Glenn, La civilisation de la common law, 45 REVUE INTERNATIONALE DE DROIT COMPARE 559 (1993).


move back to Monateri’s terminology)⁴⁷ are expected to predominate.

VII. CONTAMINATION OUTSIDE THE WESTERN WORLD

The less organized and sophisticated a legal system is, the more it is likely to be contaminated by imports from other legal traditions. Such systems may not be equipped with antibodies limiting the impact of the import on their legal practice and culture. During colonial times, the very existence of law in “primitive societies” was simply denied, and this is particularly the case when addressing Africa.⁴⁸ Negative views about Africa were expressed long before colonization, by the ancient Greeks and later the Romans.⁴⁹

There is much we can learn from anthropologists and a few comparatists about laws in Africa, especially when they adopt pluralist views.⁵⁰ One may safely write that the confrontation with western culture has caused (colonialism by the western powers) and is still causing (neo-colonialism by multinational companies) much disruption and destruction in non-western cultures, proving the dangers of contamination.

Two examples will take us far away from the Mediterranean Sea.

A. The Example of Bhutan

Commenting on a short experience that I had in Bhutan, I wrote:

One must beware not to impose an exogenous western model to people who live under different customs and a different view of what we call legal order. Let us first check with them to determine

⁴⁷. Monateri, supra note 7.
⁴⁸. MENSKI, supra note 22.
⁴⁹. Id.
⁵⁰. See the writings of Jacques Vanderlinden.
whether they really need what may look essential to us.51

In November 1999, I was invited to participate in a one-week seminar sponsored by the United Nations Development Program in the Himalayan Kingdom of Bhutan, one of the very few “third world” countries having escaped western colonization. One US judge, one US attorney, one Indian law professor and one Indian attorney participated in addition to me, and the forty local participants were legal professionals from the judiciary, government ministries, the financial institutions and the private sector. I chaired the seminar sessions, which had the over-ambitious project, in a very short period of time (one week) to investigate the legal aspects of commercial practice in the kingdom, and to disseminate some basic western knowledge in the field. In my opening statements, I said:

I would also like to express my deep admiration for Bhutan and the Bhutanese and your tradition to solve disputes without resorting to the courts and the law. You might have heard that there is a rather recent movement, in western countries, to promote informal justice, by way of mediation and conciliation. We use the generic term of alternative dispute resolution. We certainly have a lot to learn from you in this respect and it would be very good to invite you in our countries for seminars on the subject. I do not know whether that could be covered by the UNDP52 . . . We should not forget this tradition and it is our duty, we foreign experts, to try to understand your culture and legal tradition. If we want to bring you something and help, we may only be efficient if listening to you and understanding your problems and existing solutions.53

52. Never again did the UNDP invite my contribution.
53. Olivier Moréteau, Remarks at the Seminar on Commercial Law, Thimphu (Nov. 1999) (on file with the author). On Bhutan, see Alessandro
During the fourth day of the seminar, secured transactions and bankruptcy were discussed. The American lawyer leading the debate recommended that the customary rule whereby a minimum five acres of land is protected for each family be abandoned, so that individual entrepreneurs could use such land as collateral. I remember my efforts in having the resource persons and the local participants think about the consequences of such a change, in a country where 90% of the population make a living out of farming and where famine is practically unknown. Such a change could accelerate rural exodus with its flow of adverse consequences.

B. The Example of Vanuatu

When created in 1980 after the independence of the British-French condominium of the New Hebrides, the Republic of Vanuatu kept a complex legal system with colonial law remaining in force unless changed by the legislature. It meant a mix of English common law and French civil law, “wherever possible taking due account of custom.”54 French law was immediately abandoned but the country remained multilingual, with English and French retaining a special status of language of education.55 Recent research on the interaction of norms in the Republic of Vanuatu56 reveals that judges tend to ignore and despise custom, and that local chiefs are intimidated and do not manage to

Simoni, A Language for Rules, another for Symbols: Linguistic Pluralism and Interpretation of Statutes in the Kingdom of Bhutan, in L’INTERPRÉTATION DES TEXTES JURIDIQUES RÉDIGÉS EN PLUS D’UNE LANGUE 273 (Rodolfo Sacco ed., 2002).

54. Constitution, art. 95(2) reads, Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

55. Constitution, art. 3(1) reads, “The national language of the Republic of Vanuatu is Bislama. The official languages are Bislama, English and French. The principal languages of education are English and French.”

communicate adequately to make their custom known to the judge. The inferiority complex of the local population causes its culture to be contaminated by the dominating model, though the supreme law of the land gives a special status to custom, especially regarding the ownership of land.\textsuperscript{57}

This is a powerful example of contamination of local practice by the western model. When traveling in Bhutan and Vanuatu, I have discovered rich local legal traditions, and yet always the shy deference to westerners who supposedly know better and are expected to tell the locals how to do it. As Monateri says in his article,\textsuperscript{58} and Menski explains in his book,\textsuperscript{59} we cannot develop comparative law leaving \textit{rapports de force} and culture on the side. The concept of contamination proves to be a powerful tool in our genuine efforts to go beyond the study of legal techniques, rules, and institutions, in order to understand how legal formants interplay and how they blend in unique legal cultures.\textsuperscript{60}

\textbf{VIII. Coda: Of Knowledge and Contamination, Back to Genesis}

Bringing knowledge to man is a dangerous exercise. Our Creator knows it, but did we understand his message? Let us revisit the first book of the Bible. Genesis, Chapter 2, mentions the forbidden fruit. As a human being and a scholar, I never understood why God would restrict access to knowledge, prohibiting man from eating the fruit of the tree of knowledge.

“And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food; the tree of life also in the midst of the garden, and the tree of knowledge of good

\begin{itemize}
\item[57.] Constitution, art. 74 reads: “The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.”
\item[58.] \textit{Supra} note 7.
\item[59.] \textit{Supra} note 22.
\item[60.] With a pastiche of the final verses of Hamlet, Jacques Vanderlinden (\textit{Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy}, 4 J. CIV. L. STUD. 1, 21 (2011)) invites us to leave our dear little boxes or categories on the side: “Here cracks a noble scientific process, Good night sweet taxonomy, And flights of angels sing thee to thy rest.”
\end{itemize}
and evil."61 A few verses down: “And the Lord God commanded
the man, saying, Of every tree of the garden thou mayest freely eat:
But of the tree of the knowledge of good and evil, thou
shalt not eat of it: for in the day that thou eatest thereof
thou shalt surely die.”62

Did our loving God mind our having access to the
knowledge of good and evil? After all, He created, “man in his
own image, in the image of God created He him; male and female
created He them?”63 May be He simply tried to protect us from the
danger of contamination, to those not prepared to contact with
some kind of knowledge. Beyond the risk of too much information
(a real threat in the present world) this points to the danger of not
being open-minded and placing too much reliance on officially
recognized sources.

The Sacred Book tells us that our ancestors were cursed
and expelled from the Garden of Eden.64 Paintings and engravings
show them bending and suffering. They might have eaten too
much of the forbidden fruit, and were not prepared for it. They had
to run not to soil the Paradise God had given to them, and the angel
shows them the way out.

Let’s face it, Adam and Eve would have been better off
picking and mixing fruit from the many various trees God had
grown around them. He might have cast a blind eye on their using
one apple from the tree of the knowledge of good and evil, diluting
its effect in a diversified fruit salad.65

As the Book goes saying, Adam and Eve multiplied. Their
offspring populated the surface of the earth, experiencing wars,
famines, and epidemics. They cultivated the land, built cities, and
developed empires. Cities grew larger and larger; men
domesticated nature and the elements, tamed unknown energies. In
recent generations, human development ran out of control, like a
cancer that threatens the future of our species. This time we have

61. Genesis 2, 9:9, King’s James Version.
63. Genesis 1:27.
65. Back to the legal field, this contributes to a famous salad bowl: Esin
soiled the earth, but unlike Adam and Eve, we have no other place where to go.
ABSTRACT

This article starts by critiquing two recent attempts to sociologically account for court delays in Mediterranean societies.

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1. An earlier draft of this paper was presented at the European University Institute’s 10th Mediterranean Research meeting held in Montecatini Terme.
The first account was produced by the sociologist David Nelken and uses the concept of legal culture to explore the causes of court delays in Italian criminal trials, while the second account was produced by the anthropologist Michael Herzfeld, who sees court delays in Crete as metonymically encapsulating a broader cultural context. It is argued that both accounts omit an important dimension of the issue, which is how such delays are produced and justified at the level of legal practice itself. By referring to the author’s fieldwork in the Maltese civil courts it is argued that court delays are best explained with reference to the social relations involved in legal practice, particularly those between lawyers and clients. Delays must be related to the ways in which lawyers see their role in litigation and these professional understandings are in turn connected to the kinds of expectations that their clients have of them.

In this article particular attention will be paid to discursive invocations of these professional understandings by Maltese lawyers in the mid-1990’s, while resisting administrative reforms intended to streamline the procedures through which evidence is compiled in court. Delays were justified as necessary consequences of the lawyer’s professional role as locally understood. This is possible as, although often considered as synonymous with corruption, delay as a professional strategy is capable of signalling an extraordinary range of meanings. In particular, delay makes it possible for lawyers both to affirm and to traverse the distance between everyday and legal concepts of evidence, truth and reality. Delay is an intrinsic part of the practical symbolism through which the specificity of “the legal” is enacted. Through delay Maltese lawyers cope with the specific demands of their clients by performing specific professional understandings of legal representation as a matter of balancing between patronage and professional detachment. The generative matrix of these professional understandings can itself be located in the colonial encounters which shaped Maltese legal history and its mixed jurisdiction.

(March 25-28, 2009). I am grateful to the participants of the workshops for their helpful feedback and advice.
I. INTRODUCTION

Although it evokes orientalising scholarly tropes about “weak states” in Southern Europe and “Mediterranean time,” the issue of delays in Mediterranean court litigation appears as an interesting target of ethnographic investigation. This is not only because these delays feature so prominently within internal and external discourses about corruption, the nature of the state and (the lack of) efficient governance, but also because the study of how they are created and justified in practice requires precisely the sort of detailed examination of the practices of judges, advocates and other court-room actors that is needed in order to overcome the dichotomy between “law in the books” and “law in action.”

Recent research by the anthropologist Michael Herzfeld and the sociologist David Nelken can serve to indicate why researching court delays may produce a broad range of insights into Mediterranean states and societies. Nelken focuses on the causes of court delays in Italian criminal trials. He seeks an explanation in a range of factors drawn from both “internal legal culture” (including the organizational structure of the courts and a tendency to multiply procedural safeguards) and “external legal culture” (including such factors as the general tempo of Italian social life and the contested character of the state). By contrast, Herzfeld sees court delays in Crete as rooted in a broader cultural context, where the accusatory rhetoric of clients and the attitudes they bring to their dealings with state officials are matched by various defensive responses on the part of the bureaucrats, particularly delay. While these investigations consider court delays as a sort of window capable of giving us glimpses into very diverse aspects of Greek and Italian social and cultural organisation, they can also be criticized for neglecting to examine an important dimension of the phenomenon, which is that of legal practice itself.

2. This distinction originated in the work of Roscoe Pound’s distinction and has now become the starting point of most research in the field of Law and Society.


Asking how delays are experienced and justified at the level of legal practice means adopting an ethnographic perspective which focuses our attention less on generic features of culture and social structure, or even of legal culture,⁵ and more on the practical choices which must be made by the parties involved, particularly the lawyers, in the course of the actual litigation when these delays materialise and must be somehow justified or accounted for.

Using the ethnography of legal practice as a prism through which to explore court delays requires a microscopic focus on the social relationships through which the work of legal representation is carried out, particularly those between lawyers, clients and judges, and it also requires us to remember that each of the parties involved is a “theorising agent”⁶ in his/her own right. As court litigation is largely controlled by legal professionals, such as lawyers and judges, their theories concerning appropriate professional practice must be interrogated in order to discover how court delays can coexist with a professional self-image. Framing the inquiry in this way follows the trend in the sociology of the professions to view professionalism as primarily an “emic” or folk-concept and investigate it as such.⁷ It has the added advantage that it avoids making unwarranted and ethnocentric assumptions that the content of professional ideals is the same in all European legal systems, that the pursuit of these ideals necessarily leads lawyers to promote the public interest,⁸ or that delay is an inevitable result of corruption and a failure of professionalism.

An ethnographic approach, which concentrates on the role played by professional ideals in the daily practice of lawyers, makes it possible to overcome what has been described as the:

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⁵. That is, assuming that legal culture is conceived as a distinctive way of structuring and organising the legal field. See, Nelken supra note 2.


“arbitrary separation between the sociology of law and the sociology of the legal profession.” 9 Such an approach makes visible the complex inter-relationships between professional ideals and the specific social and cultural contexts in which they are implemented. At the same time a purely ethnographic, “present-tense” approach itself needs to be embedded within the broader social and historical framework provided by social anthropology.

II. FIELDWORK IN MALTA

This paper will draw on my anthropological fieldwork, carried out in the Mediterranean island-state of Malta, to examine the ways in which Maltese lawyers interpret and invoke professional ideals in the course of their legal practice and when confronting recent administrative reforms to the court procedures for compiling evidence. These themes will here be approached from the standpoint of my fieldwork on legal practice in Malta. Initial fieldwork was carried out for a total of twenty-two months between April 1996 and May 1997, followed by shorter periods of field research in 2002 and 2006. 10 It was based on participant observation in the offices of four Maltese lawyers 11 and in the civil courts. I had access to these offices because I have a law degree, having trained in law before studying anthropology. My research concentrated on the ways in which lawyers and clients negotiate the “facts” of the case, the production of evidence during court litigation and its assessment during adjudication. The aim was to acquire a holistic understanding of Maltese legal representation in civil litigation by exploring the social relations through which it is carried out. Through focusing on legal practice, I tried to build on my own legal background so as to carry out a more reflexive and practice-orientated ethnography, of the sort that sociologist Pierre

10. I am grateful to the Universities of Malta and Durham for funding my research. This was made possible through a staff scholarship by the University of Malta and an ORS grant on the part of the University of Durham.
11. According to my calculations, there were during the period of my research close to three hundred lawyers involved in court litigation.
Bourdieu has recommended. In 2010, I expanded the scope of my research to explore the historical development of court delays in Malta by means, primarily of documentary research.

III. SCOPE OF THIS INVESTIGATION

This paper will initially focus on the pressures clients place on their lawyers in office interviews. Against this backdrop, the way Maltese lawyers interpret and invoke professional ideals in their legal practice will be explored. This will be followed by an ethnographically informed case study of the reforms attempted by the Maltese government in 1996 to court procedures for compiling evidence, which will attempt to account for the failure of these reforms and in the process highlight the defensive and largely obstructive responses of legal professionals and the role played by professional ideals in legitimating these responses. This article will then explore how Maltese legal practice was described by practitioners in 1912 and relate this to the trends which were observed during my fieldwork. Finally, some more general conclusions about the character of the Maltese legal system will be attempted.

IV. LAWYER/CLIENT INTERVIEWS

Office interviews with lawyers, in which clients communicate the facts and receive legal advice and guidance, are an indispensable starting point to explore the social uses of professional ideologies. These interviews are central to lawyer/client interaction as during their discussion of the case both parties will also informally negotiate their relationship. During my fieldwork, story-telling was the most prominent feature of the interviews I observed. While my training in law had led me to expect clients to state “facts” structured according to legal categories, what I experienced was a more confused and contested process. Rural and working class clients in particular would smuggle stories stressing their own morally upright behaviour.

within their narrative accounts of the facts. Such stories were told despite the inattention of lawyers and even though they seemed legally irrelevant. In one case, for instance, a small rural businessman seeking his lawyers’ help in some financial transactions, explained that he had always “walked straight,” (i.e., acted honourably) and that while he was prepared to give away free gifts, he could not tolerate being robbed by others. Similarly, a working-class widow who was trying to repatriate her husband’s money kept insisting with her lawyer that she did not want this money for herself, but so as to leave it to her children equally in the event of her death. The persistence of clients in recounting these personalised stories seemed even more paradoxical since lawyers told me that their only aim was to get the facts straight and disclaimed any interest in the moral qualities of their clients: “who should only be judged once.”

Certain features of clients’ stories throw light on their significance. These narratives create moral sympathy for clients because they inject powerful cultural values into descriptions of past actions. This can be illustrated by the story of the rural businessman earlier mentioned. He talked about “walking straight”, because in Maltese “walking” is used metaphorically to morally evaluate the way in which a person relates to others. A person who “walks straight” is one who avoids corrupting social obligations which deviate one’s life-walk, impeding straightforward adherence to moral ideals. Consequently the businessman endowed himself with an honourable autonomy, which could be used to exert pressure on his lawyer, authorising him to express powerful emotions and thump on his desk in anger at being robbed. Through these stories, moreover, clients also try to translate their moral virtue into legal entitlement in their lawyers’ eyes. This is made explicit in the businessman’s case, since the expression: nimxi dritt, or “I walk straight” plays on the way dritt in Maltese not only means straightness, but also a legal right, or even the undifferentiated whole of legal and moral rules.

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13. Analogously, by stressing her impartial concern for her children, the widow sought to portray herself as a good wife and mother as the role was traditionally conceived in Malta.
This analysis indicates that clients’ narratives are best understood not solely as ways of communicating the facts, but also as attempts to control their relationships with their lawyers. They operate as what linguist Deborah Tannen\textsuperscript{14} has called: “involvement strategies,” since they are a medium through which clients can involve lawyers in personal relationships based on shared moral values, obliging them to actively “advocate” their interests. Anthropologists have observed such patronage relationships in Malta\textsuperscript{15} and elsewhere in the Mediterranean region.\textsuperscript{16} Their ideological structure has been aptly described as: “the moral englobing of political asymmetry that allows the client to maintain self-respect while gaining material advantage.”\textsuperscript{17} Clients use various strategies to try to create these patronage relationships.\textsuperscript{18}

These efforts to create patronage derive from complex social causes, which can only be briefly indicated here. Some seem to be common to other Mediterranean societies. Thus, Herzfeld\textsuperscript{19} has related the need for mechanisms of social incorporation in Greek society to the absence of a fully integrated capitalist economy, the competitive and hostile character of extra-familial social relations and the weakness and relative youth of the nation-state.\textsuperscript{20} Other causes relate more specifically to Malta, such as the

\begin{itemize}
  \item \textsuperscript{14} DEBORAH TANNEN, TALKING VOICES: REPETITION, DIALOGUE AND IMAGERY IN CONVERSATIONAL DISCOURSE (Cambridge University Press, Cambridge, 1989).
  \item \textsuperscript{15} JEREMY BOISSEVAIN, SAINTS AND FIREWORKS: RELIGION AND POLITICS IN RURAL MALTA (Progress Press Co. Ltd, Valletta, Malta, 1993).
  \item \textsuperscript{16} JOHN K CAMPBELL, HONOUR, FAMILY, AND PATRONAGE (Oxford University Press, New York & Oxford, 1974).
  \item \textsuperscript{18} For instance, I often observed Maltese clients give gifts to their lawyers and trying to involve them in discussions about non-legal matters. Gifts ranged from the proverbial bottle of whisky in Christmas to providing free access to a beach resort owned by the client.
  \item \textsuperscript{19} MICHAEL HERZFELD, THE SOCIAL PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF WESTERN BUREAUCRACY (Chicago University Press, Chicago, 1993).
  \item \textsuperscript{20} Herzfeld explains that consequently the Greek nation-state has not absorbed into itself all the idioms of social identity; so that these can function independently of and be employed to contest the state structure. \textit{Id.}
\end{itemize}
historically derived sense of alienation of the Maltese from a state apparatus belonging to a foreign colonial power\textsuperscript{21} or the modelling of political power on Catholic religion with its stress on saintly mediators between person and God.\textsuperscript{22} In a small-scale society impersonality can become a scarce (and valued) commodity. As one Maltese proverb has it: “Malta is small and people are known.”\textsuperscript{23}

Popular perceptions of lawyers and the court system may also motivate clients to try to create patronage relationships. Rampant delays in litigation have given a bad name to the Maltese courts and clients may seek their lawyers’ patronage to ensure that their cases are handled efficiently. The ambiguous social role of lawyers as mediators between their clients and the state legal system may make it difficult to discover whose side the lawyer is on. If middle-class clients complained about the links between lawyers and criminals, those coming from a rural or working-class background saw lawyers as part of a dominating and exploitative upper class. Significantly, it is the clients who were the most socially distant from the urban professional classes who often seemed to be trying hardest to involve their lawyers in patronage relationships.

It seems clear, therefore, that Maltese lawyers often come under intense pressure from clients, especially those coming from a rural or lower-class background, who try to create personal relationships with them in order to control the way they carry out their work. Clients make indirect attempts to develop these patronage ties, evoking moral sympathy through the way they narrate the “facts” of the case. This strategy is difficult to rebuff, given the “inescapably moral”\textsuperscript{24} quality of the stories through which the “facts” are communicated.


\textsuperscript{22} Boissevain, supra note 14.

\textsuperscript{23} In Maltese this reads: “Malta zghira u n-nies maghrufa.”

Lawyers’ professional ideals have here been approached from the standpoint of their interviews with clients. This is because these ideals are not simply abstract principles to which lawyers pay lip-service. On the contrary, they have a direct practical application, helping to equip lawyers to cope with the pressures clients place on them. These social uses of professional ideals are revealed by the way they are taught to new generations of lawyers. Until recently professional ethics were not fully incorporated into the standard academic curriculum of the University of Malta. They are still mostly transmitted to young lawyers by practitioners during the liminal period of transition from the University to legal practice. Moreover a Maltese code of professional ethics for lawyers was only published in 1996. Thus the transmission of professional ideology is still largely seen as part of a process of oral socialisation through which young lawyers learn to view themselves as members of a professional community with its own distinct interests.

An important practical use of professional ideals is that of justifying lawyers’ non-response to their clients’ stories. During my fieldwork, I often observed lawyers keeping a sceptical distance based on the need to preserve their professional detachment. This refusal to fully endorse clients’ narratives was signalled by the ironical comments lawyers sometimes made, the contextual absurdity of which showed they were not taken in. A sense of professional detachment could also be transmitted through

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25. Generally professional ethics are taught in the final year of the LL.D. course, which was until very recently perceived as a period when the academic teaching of law was at an end, so that students concentrate on their apprenticeship and on preparing their theses. Professional ethics are also favourite subjects for speeches on such occasions as the granting of the professional warrant, or in seminars organised by the law students’ society.


27. For instance, in one case, a landlord kept telling his lawyer what a gentlemanly relationship he enjoyed with his tenants, while he also sought advice on how he could legally increase the rent. His lawyer calmly observed that as the tenants were professional people, it was going to be difficult for the landlord to make fools of them!
formal clothing, the organisation of space in legal offices and an aloof attitude when interacting with clients. These invocations of professional ideals clearly reflect attempts by lawyers to resist entanglement in patron/client relationships.

The connection between the professional ideals upheld by Maltese lawyers and their clients’ involvement strategies can be perceived by exploring the way the task of legal representation is described according to professional ideology. The comments of one established and highly respected lawyer are typical in this regard. When interviewed on this point, this lawyer made a distinction between the “case,” which the lawyer is duty bound to present to the court as effectively as possible, and “facts,” which are “in the hands of the client” to prove. He observed that the stories clients tell under oath and in the courtroom context are often very different from the ones they originally told their lawyers. Consequently facts should emerge in the courtroom setting of an oral hearing, which he termed a “search for truth” undertaken before the judge. He therefore objected to the use of written affidavits as an alternative way of collecting evidence; claiming that they tempted lawyers to write their clients’ stories for them and risk perjuring themselves. He also observed that he had never witnessed a signature in the absence of the person concerned.

Thus, professional ideals portray legal representation as a process where the lawyer’s concern with the issues at stake is distinguished from that of her client. Lawyers are concerned solely with the “case,” consisting of the legal arguments and claims to be made. It is the client’s primary responsibility to prove the “facts,” on the basis of which these legal arguments are raised. This distinction establishes a conceptual boundary between the domain

28. Professional detachment was conveyed by maintaining a spatial demarcation between the ‘front office,’ where clients wait and their files are located and the ‘inner office,’ where lawyers sit surrounded by law-books.

29. In Maltese this reads: “Il-fatti f’idejn il-kljent.”

30. An affidavit is a written statement of the client’s version of the facts. They are supposed to be precise reproductions of their stories and clients must confirm them on oath. Maltese judges are increasingly requesting the presentation of affidavits instead of oral testimony.

31. Lawyers are prepared to accept more involvement with the facts in criminal cases.
of the client, which is one of potentially changeable oral stories of dubious credibility, and the domain of the lawyer, which is one of legally valid writing. By drawing such a boundary, lawyers escape responsibility for proving their clients’ stories, confining their role to legal argumentation. In fact, Maltese lawyers constantly assert their detachment through expressions like: “trying to win the case for the client,” which imply they have no personal interest in the outcome.32

This professional model of legal representation is significant for two principal reasons. Firstly, it is almost diametrically opposed to the way most clients would like to construct their working relationships with lawyers. Whereas clients would like to start from a moral consensus with their lawyers concerning the facts of the case, the professional model requires lawyers to base their court-room representation on a prima facie assessment of the facts which is solely intended to clarify the legal issues involved. Clients often believe that once they take on a case, lawyers assume responsibility for ensuring a successful outcome in the court-room. By contrast, the professional model places the burden of producing convincing evidence firmly in the hands of the client, restricting the lawyer’s role to “purely legal” argumentation.33 Consequently, although the client might feel that this is unethical, the professional model authorises a lawyer to institute a court case on behalf of an insistent client even if the lawyer believes that he will lose the case because his evidence is not sufficiently persuasive or credible.34 Evidence belongs in the clients’ hands and lawyers are distanced from any responsibility for it.

Secondly and more importantly, it seems clear that professional ideals which have the effect of distancing them from

32. Strictly speaking, lawyers have no financial interest in winning lawsuits. This is because their fees are calculated according to an official tariff, according to such matters as the value of the object of the suit. Naturally, however, lawyers who consistently lose suits will probably fail to attract as many clients as others.

33. Thus, clients’ views on affidavits contrast to those of lawyers. In fact, clients complained to me that their lawyers had barely glanced at the affidavits they wrote. While clients expected their lawyers to take responsibility for the evidence, this is precisely what the latter wanted to avoid.

34. Of course the lawyer has a recognised duty to inform his client that he thinks he will lose the case.
responsibility for the “facts” can be very useful to lawyers in a social context where clients try to use their narration of the “facts” to implicate them in patronage relationships. I suggest that Maltese lawyers favour an extensive interpretation of the meaning of professional detachment when representing clients in litigation precisely because it allows them to escape the pressures which clients exert through the medium of the “facts.” If this is correct, then it shows how the interpretation of professional ideals is influenced by the practical context in which it occurs.

This analysis is open to the objection that I have over-emphasised the homogeneity of Maltese lawyers, ignoring the occupational differentiation of the profession and possible differences in style and approach which might lead to different interpretations of professionalism. However, the internal differentiation of the Maltese legal profession is not very great. My statistics show that when my ethnographic research commenced in the mid 1990’s, 44% of lawyers were sole private practitioners, 28% were employed with law-firms and 13% with the Government. The remainder was either non-practising or employed with various private companies. Moreover, Maltese law-firms are usually small partnerships where the type of work closely resembles that of a sole practitioner. Indeed, only four of the law-firms listed in 1994 had a membership of seven or more and the largest of these grouped eleven lawyers. In the exercise of their profession, most firm lawyers find that it is important to be flexible and to be prepared to carry out different types of work, even if they have specialised in certain fields.

Stylistic differences in handling clients exist and they do seem to be broadly correlated to occupational status. Sole practitioners are more likely to devote time to listening to their clients and to provide some endorsement of their stories, while firm lawyers tend to place a higher premium on efficient time management. However most lawyers find it necessary to

35. Data was culled from the ‘Legal and Court Directory’ produced by the Camera degli Avvocati, the Maltese lawyers’ association. The directory contains a list of practising lawyers which can be considered as fairly exhaustive, given that practically all practising lawyers are members. I consulted the 1994 and 1992 issues of this Directory.

36. This is due to the small size of Malta, which means that the number of legal jobs available in any area of practice is necessarily limited.
strategically balance between patronage and professionalism when handling clients. The attractions of professionalism are obvious, since it frees lawyers from clients’ pressures and allows greater efficiency. Yet there are important reasons why even firm lawyers find that they cannot avoid acting as if they were, to some extent, their clients’ patrons. Thus, as already observed, many clients want to create patronage relationships and lawyers, who operate in a very competitive market, are eager not to alienate them. Moreover certain clients do not feel able to confide secrets to their lawyers unless they have a personal relationship with them. Finally, as was previously argued, patronage relations are in a way in-built into clients’ stories.

It follows that despite the existence of occupational and stylistic differences among Maltese lawyers, they generally attempt to strike a balance by providing limited endorsement of their clients’ narratives while also trying to emphasise their professional detachment from them. Few lawyers are willing to forego the benefits of belonging to the “Professjoni Libera,” or “free profession” as they call it, by wholeheartedly identifying themselves with their clients in patronage relationships. Indeed, one such case reported to me is highly instructive. The lawyer concerned is criticised by some of his colleagues both because he develops close patronage relations with his clients and because he drafts long, verbose, affidavits on their behalf. This criticism clearly shows how lawyers equate professional detachment, in the sense of keeping the necessary distance from the client, with professional legal representation, in the sense of confining oneself to the legal issues and leaving ultimate responsibility for the “facts” to the client. Clearly, most Maltese lawyers believe their

37. By, for instance, occasionally waiving payment for legal advice and giving more attention to clients.


39. A similar model of legal representation is found in the Maltese code of ethics for lawyers (op. cit.). Significantly, this code prescribes that an advocate representing clients in civil litigation: “is under a duty to say on behalf of the client what the client should properly say for himself or herself if the client were allowed to plead for himself or herself and possessed the requisite skill, knowledge and legal training” (Rule 11, Part IV, Cap 1). By requiring advocates to restrict their representation to what clients should “properly” say, this code prevents their complete identification with clients.
professional detachment requires them to performatively avoid excessive involvement with the “facts,” viewed as a potential source of “symbolic pollution,” in Mary Douglas’ terms.40

VI. THE PROCEDURAL REFORMS OF 1996

Having explored the way lawyers interpret professional ideals in the ordinary course of their legal practice, it is now possible to reach a deeper understanding of the obstacles impeding certain reforms which the Maltese Government carried out in 1996 to the system by which evidence is compiled in court. By focusing on this particular case-study, the broader social effects of professional ideals will be highlighted. Firstly, however, it is necessary to explain the pre-1996 system for compilation of evidence and the public discontent which motivated these reforms in the first place.

Litigation before the Maltese civil courts occurs in two successive phases. A preliminary written phase, in which the litigants send each other their respective written legal claims and statements of defence, is followed by an oral phase when the parties and their witnesses testify and the lawyers question witnesses and present their own arguments. During the written phase and together with their legal claims, the litigants are obliged to send each other a “declaration of facts” which should contain their respective statements of the “facts” at stake. Together with this, each of the litigants is also expected to file a list of the documents and a list of the witnesses which s/he intends to produce during the case. After the preliminary exchange of their written claims, the case then shifts to the oral stage where each of the litigants has a chance to testify and to produce any witnesses mentioned in her list. Testimony is usually heard in a certain order: starting from the plaintiff and continuing with his witnesses and followed by the defendant and his witnesses. Witnesses are first examined by the lawyer for the party who summoned them and then cross-examined by the opposing lawyer. Their replies are

transcribed by the court clerk. Often, important documents are handed over to the court by witnesses in the course of testimony. After all the witnesses have been examined, the judge defers the case so that he can pronounce his judgement.

What this account omits are all the delays which are caused when this system is implemented in practice. These are due to various causes. For instance, litigants often find it impossible to summon all their witnesses to testify on the same day. Consequently, cases are usually postponed for three months so as to hear the testimony of new witnesses. Some litigants tend to name fifty or sixty witnesses and expect to be allowed to summon them all to testify! Additional problems are caused when particular witnesses do not come to court or cannot be traced and the case is normally put off to allow lawyers to try to contact these witnesses. There are many other causes of delay which cannot be mentioned here. It is important, however, to note that delays mostly arise during the oral phase of litigation, when testimony is being produced. Court delays had multiplied during the late 1990’s and remain a persistent cause for concern today.\(^{41}\) Thus, statistics given by the Minister of Justice for 1997\(^ {42}\) indicate that by the end of January 1997, there were a total of 22,861 cases pending before all the Maltese courts, many of which were pending before the civil courts.\(^ {43}\) By comparison, government statistics\(^ {44}\) indicate that at the end of March 2011, there were a total of 23,133 pending cases before all the Maltese courts.\(^ {45}\)

\(^{41}\) See the report on the recent visit conducted in Malta by the Council of Europe’s Commission for the Efficiency of Justice, Court Backlog under Scrutiny, TIMES OF MALTA, Nov. 24, 2011 (Malta, Allied Newspapers Ltd.).

\(^{42}\) These figures were given by Justice Minister Charles Mangion in a reply to a Parliamentary Question. They were reproduced in The Times of Malta on March 5, 1997.

\(^{43}\) Of these, 1067 cases were pending before the Court of Appeal; 8318 before the Civil Courts, and 11,150 before the Magistrates’ Courts.


\(^{45}\) Of these, 1348 were pending before the Court of Appeal, 6450 before the Civil Courts, 15,223 before the Magistrates’ Courts and there were 112 pending cases before the Criminal Court. In order to ensure comparability of this data with the that given in 1997, I have added together the data for pending Civil cases which was compiled on March 31, 2011 with the published data concerning pending Criminal cases of March 2011. The figure for the total
At the time increased media attention had begun to focus on the issue of court delays, as is still the case today. It is acknowledged as a serious problem which results in the denial of justice and alienates people from the courts.46 Partly in reaction to this growing public concern and in order to enhance the efficiency of the courts, the Maltese government in July 1996 enacted a law to reform various procedural rules.47 This law contained provisions relating to the trial of law-suits which caused controversy. In particular attention focused on the new procedure to be followed by judges when compiling evidence in civil trials.

In terms of this new procedure, a pre-trial hearing was to be held before the first sitting in the case. The aim of this hearing in the words of the government minister, himself a lawyer, who introduced the amendments, was to allow the court to “identify and record the points of law and fact in contention and the proof to be given by each witness.”48 The second major innovation was that after the pre-trial hearing, judges were given the option of choosing the system by which evidence was to be heard.

pending Appeal cases was reached by adding together the data concerning pending cases before the Constitutional Court, the Criminal Court of Appeal and the Civil Court of Appeal in both Gozo and Malta in its Superior and Inferior sections. The figure for the total pending Civil cases comprises cases pending before the Family court apart from those pending before the First Hall of the Civil court. The figure for the total pending cases before the Magistrates’ Court was reached by adding together all the pending Civil cases before the Magistrates’ Court together with all the Criminal cases for both Gozo and Malta and excluding the statistics for cases pending before the Small Claims tribunal, which did not exist in 1997.

46. A good example of the tone of the comments made by the Maltese newspapers is represented by two newspaper editorials which both appeared during June 1997, while I was writing up my research. While the editorial of the conservative daily The Times emphasized the need to speed up court proceedings, that of the left-wing weekly It-Torca claimed “In the administration of justice, the citizen expects the legal process to be efficient (emphasis added), comprehensible and really just. The citizen is not satisfied on any one of these points.”

47. The law in question is Act 24 of 1996, which amended the Code of Organisation and Civil Procedure. The provisions of this law which concern us were brought into effect by means of a legal notice in 1996.

Previously the principle was that all testimony had to be heard orally. Instead judges were now given the option of compiling all evidence by means of written affidavits prepared by parties and their witnesses and deposited in court.\(^4\) However, even if this “affidavit system” were to be chosen, the opposing lawyer was to continue to enjoy the facility of conducting an oral cross-examination of parties and witnesses on the testimony contained in their affidavits. Finally, the third innovation was that judges were then to fix a date for a full hearing of testimony (if the evidence was to be compiled *viva voce*) or for hearing by cross-examination (if the affidavits system was selected). During this sitting all the oral testimony to be presented in the case was to be heard uninterruptedly. There were to be no adjournments except in very special circumstances. This contrasted with the previous system, in which witnesses were heard on several different sittings and adjournments were frequently granted.

Before exploring these innovations further, it is important to consider the way they were implemented. The collective response of judges to the amendments was to introduce a new judicial role: that of the Master, which was not contemplated in the amendments.\(^5\) By agreement among the bench, one of the judges assumed this role and was entrusted with around 3,000 cases in which, to quote the current Chief Justice “very little was being done.”\(^6\) His task was to be that of conducting a pre-trial hearing in this case and in all new cases to be filed in the future. After he had clarified the points in issue and the proof to be made by different witnesses, he was to transfer these files to the other judges before whom the actual court sittings would be held. Consequently while the amendments had contemplated that *all* judges would hold a pre-trial hearing in every law-suit they adjudicated, the effect of the judges’ decision was that only one of the judges would conduct the pre-trial hearings. Moreover this judge would not be the one before whom these cases were actually heard. The Chief Justice justified these changes on the grounds that:

\(^{4}\) Previously, the use of affidavits tended to be restricted to the testimony of the litigating parties themselves.

\(^{5}\) The master system was modelled on English procedures.

In a situation like ours where the administrative infrastructure is lacking, where the number of judges was inadequate and the culture of accepting certain systems of control on the compilation of evidence and the regulation of the cause by the judge objected to, all these amendments, rigidly applied, could not have the desired beneficial effect without bringing about a traumatic experience. There was, on the contrary, the danger that this would bring about a total collapse of the system (emphasis added). It was principally for this reason, therefore, that through an administrative process—which was not contemplated in the amendments and introduced clandestinely (emphasis added)—the system of the Master was introduced.52

In November 1996, there was a change of Government. On meeting with the new Minister of Justice, the President of the Chamber of Advocates called for the abolition of the affidavits system, which was the second plank of the newly introduced reforms. He claimed that this worked against the conscience and professional training of lawyers. He hoped, however, that the Master system “would be operated more effectively.”53 Following this, there was mounting criticism of the new Master system from various lawyers and judges, on the grounds that it had only served to create another bottle-neck, since one judge could not possibly hold pre-trial hearings in 3,000 cases together with all the new lawsuits that were being filed.

The next development occurred in April 1997, when a seminar was organised to discuss the implementation of the new amendments. Opening this seminar, the Chief Justice admitted that the Master system was not working as well as originally planned.54 Then, in June 1997, the Minister of Justice announced the setting up of an Advisory Committee for the Law-Courts. The committee was given an extensive brief, which included continuous

52. Id.
53. R. Cremona, Chamber of Advocates meets new Justice Minister: Call for abolition of affidavits system, THE SUNDAY TIMES, Nov. 7, 1996 (Malta, Allied Newspapers Ltd.).
54. Pulicino, supra note 51.
monitoring of the situation and recommending changes to the laws, administrative set-up and the Master system in order to increase the efficiency of the courts. While I was unable to discover whether this committee still exists and what recommendations it might have made, the failure of the 1996 reforms to alter significantly the mode of trial in Malta was already clear by January 1999 when the President of the Chamber of Advocates delivered a speech in which he called on the legal profession to give the new Master system a proper try, asking them: “not to discard the system before attempting to employ it in its entirety.”

VII. PROFESSIONALLY DISTANCING LAW FROM FACT

My reason for recounting the history of these failed reforms to trial procedures is to highlight the relationship all the protagonists drew between court delays and the manner in which evidence is compiled. They argued that there is a Maltese culture, or “ingrained mentality,” which resists greater control on the process of compilation of evidence. This mentality is so powerful that it induced judges to introduce the Master system, so as to avoid “a traumatic change [which could] lead to the total collapse of the system.” Moreover, this mentality had even subverted the Master system itself. However, in the light of the preceding discussion of the way Maltese lawyers interpret their professional role, the repeated failure of these reforms does not seem so surprising. If Maltese lawyers believe that professionalism is asserted through avoiding excessive involvement with the facts of the case by leaving them in the hands of their clients to prove, then they might not be too keen about reforms which operate precisely by obliging lawyers to take more responsibility for the factual aspect of cases.

Taking more responsibility for the facts is the common thread which links the various reforms proposed in 1996 to the system of compilation of evidence of the Maltese courts. This is

55. R. Cremona, Call on legal profession to give master system a proper try, THE SUNDAY TIMES, Jan. 21, 1999 (Malta, Allied Newspapers Ltd.).
57. Pullicino, supra note 51.
most evident in the case of the proposed system for compiling evidence through affidavits, which provoked lawyers’ protests that it obliged them to act unprofessionally. However even the proposed “pre-trial” and Master systems function by requiring the parties to state the facts as they see them at the start of the case in a less formal arena than that of ordinary litigation. In such a setting, lawyers would not have had such a clearly defined role as they have during a court-room trial and it would be more difficult for them to assert their detachment from the factual aspect of the case. Lawyers would be more personally involved in telling and validating their clients’ stories.

In resisting these reforms, lawyers followed a well established tradition. As part of an attempt at reforming the Maltese courts, the British Royal Commission of 1913 had recommended that a written “declaration of facts” be submitted by litigating parties at the start of their lawsuit. While this requirement was incorporated into the law, it was negatively perceived by the lawyers, who scented a threat to their professional detachment. Their collective reaction was to draft these “declarations of facts” in such an elliptical way as to turn them into what are effectively summaries of the statements of the legal claims being made in the case; thus leaving the “facts” to emerge in the course of the oral court-room hearing.58

Analogously, lawyers expressed resistance to the 1996 procedural reforms in both direct and indirect ways. As the earlier-quoted extract from the Chief Justice’s speech made clear, it was actually judges rather than lawyers who aborted the system of pre-trial hearings by “clandestinely” introducing the Master system. However, as the Chief Justice also noted, they were anticipating the objections lawyers would make; given their objections to “certain systems of control on the process of compilation of evidence.”60 All Maltese judges are drawn from the pool of practising lawyers, together with whom they constitute a tightly-

58. So as to explore this issue, I examined the first fifty law-suits filed in February 1997. There were only three instances in which the ‘declaration of facts’ filed by the plaintiff was substantially different from the ‘citazzjoni’ (the statement of the plaintiff’s legal claims), containing additional details which were not mentioned in it.
59. Pulicino, supra note 51.
60. Id.
knit court community. Maltese judges are keen to uphold their independence in the face of possible government interference. They are therefore disinclined to rigidly apply administrative reforms which could antagonise lawyers, especially if these reforms appear to raise problems of professional ethics. These attitudes seem also to have contributed to widespread non-compliance with the rule that all evidence be produced in one court sitting and to a notable lack of enthusiasm for the new option of compiling most of the evidence by means of affidavits.

Through their resistance Maltese lawyers managed to safeguard their understanding of their professional role in the face of administrative reforms which threatened to define it differently. While the logical implication of this analysis is that the causes of court delays are rooted in the way these lawyers have understood their professional role in litigation, it is important to avoid an overly idealistic account of these professional understandings. By leading lawyers to avoid taking responsibility for the “facts” and to insist that these must be proved by clients in the courtroom, they create room for various lawyerly tactics through which the process of producing evidence is made more elaborate and time consuming. These tactics depend for their success on the increased time it takes to produce oral, as opposed to written, evidence in court. Written affidavits also take less time to read and make it easier to establish the points of contrast and similarity between the versions of the different parties and their witnesses. Conversely, if the “facts” are orally produced, then it becomes possible to:

1. Produce irrelevant testimony or contest all the evidence presented by one’s opponent in litigation. This is because the relevant “facts in issue” remain unclear for a longer time.
2. Summon many witnesses to testify to the same “facts.”
3. Conceal valuable evidence from the opposing party in litigation, until it becomes strategically appropriate to disclose it.

The outcome of these tactics can be described as the “problematisation of evidence.” By referring to “problematisation,” I want to highlight how difficult and
problematic the process of compilation of evidence can be made and to suggest that such an outcome may often be actively intended. After all, it can be in the interest of both lawyers and their clients to create delays. In this way, lawyers can gain more control over the evolution of litigated cases and acquire more space to manoeuvre in the interests of their clients. Moreover, a client who looks set to lose a case may benefit from such delays. It seems, in brief, that professional interests may easily fuse with professional ideals in a powerful combination which explains the perseverance with which lawyers have resisted attempts to reform the system by which evidence is compiled.

This analysis leads to the conclusion that there is a clear connection between the specific way in which Maltese lawyers interpret their professional role, pervasive court delays and the failure of Government efforts to reform the administration of justice. Other implications stem from a deeper consideration of the tactics through which the production of evidence is “problematised.” As I have shown, the leitmotif behind these tactics is that they create obstacles to the effort to bring “law” and “fact” into some sort of facile correspondence with each other, although creating such a correspondence is the central function of court litigation. By expressing professional ideals which separate “law” from “fact” and lawyer from client, these tactics also reinforce a particular way of imagining Maltese law, which constructs the legal domain in separatist, exclusive and self-referential terms. The production of delay and inefficiency in court proceedings hence becomes invested with symbolic meaning. In particular, delay makes it possible for lawyers both to affirm and to traverse the distance between everyday and legal concepts of evidence, truth and reality. Delay is an intrinsic part of the processes by which the specificity of “the legal” is affirmed in practice. This inverts Nelken’s analysis, as delay appears as a tool by which lawyers themselves construct, in their own way and for their own purposes, the distinction between “internal” and “external” legal culture.

VIII. DELAY AND THE “COLONIAL ENCOUNTER”

Through delay Maltese lawyers cope with the specific demands of their clients by enacting specific professional understandings of legal representation as a matter of distancing “law” from “fact” by balancing between patronage and professional detachment. Yet these professional understandings must themselves be explained against the backdrop of Maltese legal history. In fact the resistance put up by the Maltese legal profession in the past to legal and judicial interventions by the British colonial authorities seems to have legitimised separatist and exclusive ways of conceiving of Maltese law and the lawyer’s professional role today. The emergence of such conceptions can be seen as being partly a by-product of the very process of attempting to describe the Maltese legal system in the context of unequal discursive exchanges between Maltese legal professionals and foreign colonial agents.

In this regard it is interesting to take a look at the proceedings of a British Royal Commission which visited Malta in 1911 (henceforth the “Mowatt Commission”).62 As part of its remit covered reforms to Maltese judicial procedure, the Commission, which was presided over by a British MP and two judges, interviewed various prominent personalities from the Maltese legal community, including the Chief Justice, the Crown Advocate General, the Court Registrar and the President of the Lawyers’ Association.63 These were questioned exhaustively on a range of subjects, focusing understandably on procedural issues which could be causally linked to delays in civil litigation. Most of the questions dealt with the procedures for opening a court case, giving testimony, conducting the hearing and appeals. Court officials were asked to provide statistics on the time which various proceedings took and on related costs. Yet these inquiries tended to raise broader issues concerning the nature of the legal system and key characteristics of Maltese law.

63. In Malta this is called the “Chamber of Advocates,” originally the “Camera degli Avvocati.”
A good example of the way in which procedural questions tended to evoke more substantive answers occurred when Sir Mackenzie Chalmers, one of the Commissioners, asked Mr. Leo Benjacar, the then Registrar of the Maltese Courts about a particular case—*Cini v. Townsley*. He immediately launched into an account of the facts of the case before being pulled up short by Chalmers, who informed him that: “We are not concerned with the merits of the claim, but with the length and nature of the proceedings.”\(^\text{64}\) More than a simple mistake, this exchange suggests a lower sensitivity on the part of the Maltese respondent to the distinction between procedural and substantive law, which is prominent in the common law tradition.\(^\text{65}\) Other answers are even more telling. Questioned about the maximum amount of days before an appeal can be put down for hearing in the list of the Court of Appeal, Mr Benjacar observed that this would amount to 57 days, but that this period would apply “whether the amount is only £5 or whether it is £500.”\(^\text{66}\) He later attempted to justify the way court processes did not distinguish cases on the basis of their value:

I should like to remark that it is not always the (financial) nature of the case that makes it a big case; very often it is the nature of the exceptions (legal pleas). Sometimes a case of a few pounds becomes an important case because of the nature of the exceptions.\(^\text{67}\)

What is being elaborated here is thus a conception of law as an autonomous field of activity possessing its own internal criteria of value and which ought not to be assessed in terms of external monetary criteria. This conception was itself developed in reaction to the Commissioners’ questions which were premised on the need to assess the cost and financial importance of cases, reserving full access to the legal process to those who had the means. Thus, in a

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\(^\text{64}\)  Mowatt & Chalmer, *supra* note 61, at 243.


\(^\text{67}\)  *Id.* at 240.
statement redolent of a Victorian subordination of legal process to social hierarchy, Commissioner Chalmers suggested removing the possibility of an appeal in minor cases before the Magistrates’ court:

We hold rather strongly that in these small cases between small people, where everything is irregular, the Judge ought rather to act as a judicial arbitrator and to decide on substantial merits than to work out points of law. The elaboration of points of law, where everything is irregular, between small people, is in fact, an injustice.68

This picture of Maltese judicial proceedings as obeying an intrinsic logic which cannot be reduced to the financial interests or social hierarchies involved, is reinforced by another theme to which the Commissioners gave a lot of attention, which is the actual temporal schedule adopted by the courts to structure the hearing of cases. Since the Mowatt Commission had been instructed to tackle what the colonial authorities considered to be unacceptable delays in Maltese court cases, they tried to follow up particular cases to find out what caused these delays. They were clearly surprised to discover that the system adopted for the hearing of civil cases seemed to be based on the assumption that instead of a single session in which the case would be tried, there would be a series of hearings, which could reach thirty or forty over a number of years and which were usually separated from each other by periods of some three months or so. Each of these hearings was ostensibly dedicated to tackling a particular aspect of the trial, such as the examination of a particular witness, or a request for an interlocutory degree. Often, however, even these issues were not dealt with due to the failure of one of the witnesses or lawyers to “appear” in court. In any case the court would then adjourn the hearing to another date until all the aspects of the case had been tackled. On any particular day, the judge would have a list of thirty or forty cases scheduled to be tried in this piecemeal way by him.

Various aspects of this “system” were criticized by the Commissioners, who observed that: “under that system a case of

68.   Id. at 278.
any complication may last indefinitely, because every witness suggests another."\textsuperscript{69} They therefore made many suggestions to speed up this process, based on the way hearings were structured before the English courts. Yet most of these suggestions were rejected by their Maltese interlocutors, who tended to justify existing delays and to imply that speeding up court processes would be detrimental to justice. When asked whether Judges could limit themselves to scheduling four or five cases per day (instead of thirty or forty) and actually finish them, Mr. Benjacar objected that "It would come to this: that if one of the lawyers reported himself ill, the judge would lose a day."\textsuperscript{70} When the Commissioners repeated this recommendation at a later stage, to the Advocate General, Dr. Frendo Azzopardi, he observed: "The question is whether a case can be disposed of in one or two sittings."\textsuperscript{71} The way in which he justified this reluctance to even consider changing the system is interesting for at least two reasons. Firstly, he invoked the functional integrity and specificity of "the system" to try to blunt the Commission’s unfavourable comparisons of the Maltese hearings to those held before the English courts, observing: "When you have a certain system, all the details of that system work very well and correctly, but when you have to alter the whole system, it is very difficult."\textsuperscript{72} Secondly, the above quoted extract implies that trying to speed up the trial unduly could lead to cases being "disposed of" in a way which is legally unsatisfactory. As Mr Benjacar claimed, when rejecting the idea that a case could be adjourned to the next day instead of three months, "You must give the plaintiff or the defendant, or their counsel, time to look up books or precedents."\textsuperscript{73}

These quoted exchanges barely scratch the surface in terms of the insights that could be gleaned from a careful reading of the Mowatt Commission’s proceedings. But the above suffices to make clear the apparent continuity which exists between colonial

\begin{thebibliography}{99}
\bibitem{69} Id. at 241.
\bibitem{70} Id. at 240.
\bibitem{71} Id. at 280.
\bibitem{72} Id. at 281.
\bibitem{73} Id. at 240.
\end{thebibliography}
and post-colonial reform projects for the Maltese courts\textsuperscript{74} and the discourses of resistance which they provoked. In both cases it is clear that the specificity of law is insisted upon and any attempt to reduce delays by changing the procedural rules relating to court trials is depicted by Maltese legal professionals as simultaneously threatening their professional identity and the integrity of the legal system.

IX. CONCLUSION

The implications of this research appear in sharper relief if it is placed in a comparative perspective. A touchstone is provided by Sally Merry’s\textsuperscript{75} study of the legal consciousness of working class American clients. She showed how these clients often view court proceedings as a way to escape the close and constricting communities in which they are embedded. Litigation offers the possibility of socially distancing oneself by asserting one’s rights as a citizen of a bureaucratically organised nation-state. By comparison, the present study focuses on the other side of the coin, by showing how lawyers try to socially distance themselves from their clients and invoke professional ideals for this purpose. Yet this professional detachment cannot always be maintained. Maltese lawyers cannot afford to excessively discourage their clients and must therefore walk the tightrope between patronage and professionalism. Paradoxically, this may create a situation where the professional ideals of lawyers are themselves utilised to service their patronage relationships with their clients; since they allow lawyers to create delays by “problematising” the compilation of evidence.

This article aims to demonstrate how particular understandings of professional detachment represent practically motivated attempts on the part of advocates to symbolically separate law from fact and their role in litigation from that of their

\textsuperscript{74} Indeed, affidavits, pre-trial hearings and the introduction of the office of the “Master of Rolls” were among the solutions considered by this commission.

\textsuperscript{75} Sally E. Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans (Chicago University Press, Chicago, 1990).
clients. It further argues that the association between delay and professional detachment has a long history in Malta which is rooted in the relationship of opposition between formal (colonial) administration and informal (Maltese) law; an opposition which has been maintained and reproduced for over two hundred years. This may go some way towards explaining why Maltese law, a hybrid product that still bears the marks of its colonial origin, is a difficult and problematic medium of governance. The reasons why this is so are clearly evidenced by the prophetic words of Sir Adriano Dingli, drafter of the Maltese Civil Code, with which I would like to end this article. In 1880, in a letter appended to the Keenan report, which advocated the compulsory Anglicisation of the Maltese educational system, Dingli objected to this reform as:

It would be the worst public course, for the attainment of the desired consummation, to resort to compulsory measures, in a place like Malta, where the effects would be disastrous to the immediate personal interests of the professional classes . . . perseverance in this might engender an acrimonious feeling, which the rising generation would share in, and which might continue long after its origin would be forgotten.76

DUTCH NOTARIES: DO THEY HAVE A FUTURE?
HOW THE HISTORICAL FOUNDATIONS OF THE
CIVIL LAW CAN HELP SURVIVE A
MODERN CRISIS

Kees Cappon*

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I. INTRODUCTION

The notarial profession in the Netherlands is going through difficult times. The media and professional journals warn that Dutch notaries are on the brink of disaster,¹ speak of an ongoing crisis in the profession,² and document the loss of the good relations among notaries that have been carefully preserved and cherished for so long.³ Herman Tjeenk Willink, vice-president of the Council of State, wrote in his last annual report that the independence and impartiality of the notariat are showing signs of strain.⁴ Those who prefer a bolder turn of phrase have even used the word ‘degeneration.’⁵ Dutch notaries feel under siege, and a mantle of uncertainty has settled over them. What they feel uncertain about, in essence, is the very future of their ancient profession.

II. THE SEEDS OF UNCERTAINTY

It has a worrying ring: uncertainty among the very professionals whose task it is to provide certainty. Without legal

4. Tjeenk Willink, De Raad in de staat 19; see also Politiek heeft volgens de Raad van State oren te veel laten hangen naar de markt, HET FINANCIEELE DAGBLAD, Apr. 9, 2009.
certainty, for government and the public alike, creating a reasonably well-ordered society would seem an impossible task. By implication, this uncertainty may well be prejudicial to the Dutch legal community. How can a profession described as being of ‘vital importance’ to Dutch society have allowed such a situation to develop? Allow me to outline the steps that led to this crisis with a few broad brushstrokes.

When the Dutch welfare state completely outgrew its financial limits at the end of the 1970s, the reaction came in the form of a fairly fundamental reorientation. Inspired by Anglo-American economic theories and the policies derived from them by Reagan and Thatcher, and stimulated by the challenge of European cooperation, the Dutch government initiated a process of deregulation in the 1980s, allowing market forces to come to the fore. The fall of the Berlin Wall in 1989 injected a powerful forward thrust into this policy. Deregulation came to symbolize the ultimate triumph of the principle of a market-led democracy. This policy, which has endured to the present day, has expanded not only the power of the market, but also that of the state, which has created instruments for itself to supervise those very freed-up market forces. In the course of the 1990s, this tended to undermine the autonomy and self-regulatory powers of the legal professions.

In those same decades, a sharp rise in the demand for specialist services from government and the business community led to the growth of large commercial offices offering a variety of legal services such as advocacy and notariat working alongside

6. N.J.H. Huls & Z.D. Laclé, Het notariaat: Latijns, Angelsaksisch of provinciaals?, 77 NEDERLANDS JURISTENBLAD 1408-1413 (2002). “De maatschappelijke behoeft aan een onpartijdige deskundige jurist als notaris is immense” (The public demand for an impartial, expert lawyer such as a notary is enormous). Id. at 1409.
7. For the historical context and the political, philosophical and economical motives for the wave of deregulation and the embrace of the free market as a regulation mechanism in the Western world since the 1970s, read the captivating article of the English historian Tony Judt, What is living and what is dead in social democracy?, in LVI THE NEW YORK REVIEW OF BOOKS nr 20, 86-96 (2009). The views set forth in this article are also to be found in a broader context in Judt’s latest and last book ILL FARES THE LAND: A TREATISE ON OUR PRESENT DISCONTENTS (London, Allen Lane, 2010).
8. Willink, supra note 3.
9. Id. at 18.
each other and in some cases together. This trend was further enhanced by the internationalization or Europeanization of economic and administrative/political structures. Following the example of the big law firms in the United States, cooperative structures were created by British and Dutch firms, in some cases culminating in mergers. The Anglo-Saxon commercial mindset gradually took possession of the top ranks of Dutch legal services.

Another profound influence, one that should not be underestimated, has been the growth of communication and information technology. Not only has the digital revolution radically altered the nature of the work done by individual lawyers, but it has also made cooperation among different legal professions, in both national and international frameworks, virtually indispensable, and has brought legal services, in a manner of speaking, into the client’s home. The internet has turned professional expertise into simple merchandise. That, in a nutshell, is how the legal professions have developed in the Netherlands over the past few decades.

III. THE NEW NOTARIES ACT

The Dutch notariat was not in the vanguard of these developments in the period I have just described, but notaries gradually became aware that ignoring them was not an option. Starting in the 1970s, the Royal Dutch Notarial Society (KNB) appointed one committee after another to formulate conclusions regarding the future position and working methods of the notariat. These exercises produced little in the way of concrete


results—until the Purple Coalition, driven by an old-fashioned belief in progress based on the principle of economic rationalism, took the initiative.

On May 3, 1994, the then state secretary for justice, Aad Kosto, introduced into parliament a bill for a new Notaries Act, to replace the Notaries Act of 1842. According to the explanatory memorandum accompanying the bill, the pressing need for this new legislation arose mainly from 'the greatly increased complexity of society,' which had led to a proliferation of legislation and to the ‘juridification’ of society. This in turn had created a great need for scale expansion, said the state secretary. To achieve this, the existing system in which practices were established in fixed places should be replaced by one in which notaries were free to set up business where they chose.

The state secretary had a second deregulation measure in store: the scrapping of fixed fees. Until then, the fees for notarial services had been laid down in the 1847 Tariffs Act. But these fees had never been amended since then; the fee for a notarial act was nominally the same in 1994 as it had been in 1847: three guilders. So this Act was of no practical significance. Since the 1930s, notaries had charged fees according to rates laid down by their professional body, the KNB. In this respect, the Netherlands was out of step with other European countries, where governments set these fees by act of parliament. But state secretary Kosto argued that a system of uniform fees imposed centrally had no

13. The “purple coalition” consisted of Labour (PvdA), the conservative liberal party VVD, and the liberal democrat party D66.
17. Staatsblad 1847, nr. 12, at 5-6.
place in a government policy geared towards encouraging market forces. The fees for notarial acts should be determined by the market. Tellingly, it was the ministry of economic affairs that had added the operation of market forces to the bill at the last moment; the justice ministry initially resisted the idea.20

The passage of this bill through parliament took five years. At the beginning, the House of Representatives balked at introducing market forces into notarial services. Only the liberal democrat party D66 was really enthusiastic.21 After the government made a number of concessions concerning the pace at which market forces would be allowed to take over, the House of Representatives finally passed the bill on April 16, 1998, with only the two members of the Socialist Party voting against it.22 Then the Bill went to the Senate, where it encountered opposition that was based more on points of principle. The small Christian parties rejected the notion that a notarial act should be seen as ‘a pure economic product for which a price could be negotiated as if it were a box of oranges at the market.’23 The Labour Party (PvdA) saw the bill as ‘an example of confidence in the blessings of market forces being taken to extremes.’24 And the conservative liberal party VVD called the bill’s abandonment of standardized fees ‘a serious flaw.’25 The Senate eventually passed the bill with

22. Handelingen II 1997-98, at 5466-5472, 5646-5647. In the Nadere memorie van antwoord which was sent to the Eerste Kamer (Senate) on November 20, 1998, the state secretary of Justice M.J. Cohen summarized the opinion in the Tweede Kamer (Lower House) in the following words: “Na het wetgevingsoverleg van 8 april 1998 bleken de meeste fracties in de Tweede Kamer, die aanvankelijk negatief stonden tegenover het vrijlaten van de tarieven, uiteindelijk vóór het wetsvoorstel te stemmen, waardoor het voorstel vrijwel unaniem door de Tweede Kamer is aangenomen” (i.e., the parties which were negative about the bill in the beginning all voted in favour of it in the end). Kamerstukken I 1998-1999, 23 706, nr. 25a, at 11.
24. Id. at 1014.
25. Id. at 1017.
35 votes in favour and 28 against. Here too, political support for the bill ended up trumping objections to its content.

IV. THE CIVIL-LAW OR LATIN NOTARIAT

Just how warranted were the misgivings expressed by many members of the Senate has now become very clear, ten years on. The introduction of freedom of establishment and of market forces has precipitated the notarial profession into a crisis. There is nothing incomprehensible here. Abandoning old certainties and accepting radical change is difficult and takes time, especially when the profession’s internal crisis is exacerbated by an economic malaise in which notarial firms have been hit badly. But does all this also constitute sufficient reason to question the viability of the notariat as an independent profession of public officers, as some voices—not the least authoritative voices by any means—have occasionally suggested? I do not believe so.

26. Id. 1126.
27. The legal professions were hit hard by the credit-crunch of 2008-2009. The Economist of January 21, 2010 published that 2009 was “the worst year ever for law-firms lay-offs.” Laid-off lawyers, Cast-off consultants, The Economist, Jan. 21, 2010, http://www.economist.com/node/15330702 (Last visited November 11, 2011). And while the Financieele Dagblad of February 18, 2010 said “Topadvocaten weerstaan recessieve” [“Top-lawyers withstand recession”] and “Na eerste schrik floreven advocaten aan de Zuidas ook tijdens recessive” [“After the first shock the lawyers along the Amsterdam Zuidas thrive again”], one could also read that the law firm Boekel de Nerée in 2009 let 12 of their 27 notaries go, among which three of the seven associates. Topadvocaten weerstaan recessieve, Financieele Dagblad, Feb. 18, 2010, at 13. In all fairness it should be noticed that this reorganization was not only due to the credit-crunch. The positive coverage in the Financieele Dagblad met no response in the NRC Handelsblad which said on March 26, 2010, “Grote advocatenkantoren krimpen door crisis” (“Big law firms shrink as a result of the crisis”). Grote advocatenkantoren krimpen door crisis, NRC Handelsblad, Mar. 26, 2010, at 13. Many law firms in the top fifty have reduced their number of lawyers by ten to twenty percent. Especially the law firms with an Anglo-Saxon mother reduced their staff. The crisis in the notariat resulted in a decline from 601 to 564 notaries at the fifty biggest law firms, according to NRC Handelsblad. Id.
In one of six G.M. Trevelyan lectures delivered at Cambridge University in 1961, the famous historian and historical theorist E.H. Carr (1892-1982) said: ‘It is at once the justification and the explanation of history that the past throws light on the future, and the future throws light on the past.’ In the spirit of the first part of this aphorism, I shall take a closer look at the history of the public notariat, a history that inspires me with confidence that the profession will weather this storm too. It is a long and volatile history, and one that is closely intertwined with the legal culture of continental Europe. It can be encapsulated in a single phrase: the civil-law or Latin notariat.

The term ‘Latin notariat’ is often used incorrectly. For instance, in the course of the five-year parliamentary debate on the new Notaries Act, the question was repeatedly raised of whether the introduction of market forces did not amount to a break with the tradition of the Latin notariat. From the numerous comments made on this issue by ministers, state secretaries and MPs, it is clear that those concerned were basing themselves on a narrow and in some cases quite false definition of the Latin notariat. Take André Rouvoet, who was the leader of the parliamentary party of the Protestant RPF. At a meeting held to discuss the proposed bill on April 8, 1998, he said: ‘The difference of opinion is limited to a few points, and these are precisely the points which constitute infringements of the Latin notariat: freedom of establishment and the freedom to set fees.’ So in Rouvoet’s view, fixed places of establishment and fixed fees were characteristic features of the Latin notariat. But this picture of the Latin notariat is actually based on the notarial profession as it had existed in the Netherlands since the Second World War. That is obviously a highly relevant

Nouwen (a Dutch notarial professor) foresaw that notaries would soon merge with lawyers. A.A. van Velten, *Het notariaat: Interdaad een Elastisch Ambt, Het Nederlandse Notariaat in de Tweede Halff van de Twintigste Eeuw*, 70 LEGAL HIST. REV. 164, n. 58. See also "Notarissen kraaien oproer," MR. MAGAZINE VOOR JURISTEN 5, 7, nr. 11 (2009) (In which notary H. Oosterdijk is quoted with the words "De kwaliteit en het voortbestaan van het notariaat staan op het spel" ("The quality and the survival of the notaries is at risk").


context for a politician. But it is a narrow view of the term—too narrow. If politicians had been better informed about the history of the notarial profession, a great many discussions about ways in which the new Notaries Act supposedly violated the essence of the Latin notariat could have been pursued differently, or avoided altogether. But it is not just politicians who sometimes have a rather limited historical perspective. What is more worrying is discovering inaccurate descriptions of the Latin notariat in doctoral dissertations in law. In her 2007 dissertation at Leiden University on the consequences of the introduction of market forces in the notariat, Zayènne Laclé writes: “The Latin notariat was created by the Napoleonic Ventôse Law that served as an example in many European countries.” Now Napoleon was certainly responsible for numerous innovations in the spheres of law and administration, but the Latin notariat is not one of them. So both among politicians and law graduates, it appears that the Latin notariat is not always fully understood. All the more reason to try to provide a little clarity on this issue this afternoon. What is the Latin notariat? What is its essence? And why does this very essence instil confidence for the future?

V. THE RISE AND SPREAD OF THE LATIN NOTARIAT

The notariat as it is now known in the Netherlands, as a profession of public officers who derive their income from providing services to the public, is one of the creations of the Italian legal genius that laid the foundations of our legal system during the twelfth-century Renaissance, with some help from

Roman law. The public notary was born from a symbiosis of Northern Italian legal practice of the High Middle Ages and Justinian ideas. Although ancient Rome did not have a notariat in the sense defined above, Roman law did help to shape this institution, through the agency of the glossators, the first legal scholars to devote Justinian’s Corpus Iuris Civilis to systematic study. The Corpus Iuris contained many of the terms and concepts that mediaeval jurisprudence linked to the incipient notarial profession.


These developments took place in Lombardy in Northern Italy. From the end of the eighth century onwards, this kingdom witnessed a development that, in retrospect, was crucial to the genesis of the public notariat. At this time, Lombardy had officials who combined the roles of judges and notaries. When such a judge-notary drew up an act for a private citizen, a purchase agreement for instance, he did so in the form of a report of legal proceedings, with claim, defence, and judgment. The judge-notary essentially staged legal proceedings, and the legal transaction therefore took the form of a judgment. This contentious jurisdiction had great evidentiary advantages. Like any judicial document, the notarial act too now constituted prima facie proof; it was regarded as authentic. The formulation of a notarial act in the form of a judgment handed down by a court was a decisive step in the creation of the public notariat. Even when this judicial form was abandoned in the eleventh century, the notarial act retained its authentic character.36

Two developments in Northern Italy in the eleventh and twelfth centuries did much to help this Lombardic judge-notary grow into a legal institution that would spread throughout Europe in the course of the Middle Ages. Europe, and Northern Italy in particular, enjoyed a marked economic and cultural revival in the eleventh and twelfth centuries.37 This greatly boosted the demand for notaries’ services, and the number of notaries steadily increased. At the same time, the study of jurisprudence was developed at the University of Bologna on the basis of the study of Justinian’s Corpus Iuris.38 The glossators discovered in the Justinian legislation scores of passages referring to public clerks

38. KOSCHAKER, supra note 32, at 55-86; WIEACKER, supra note 32, at 30-46.
known as *tabelliones*. As was customary among mediaeval jurists, they interpreted these passages in the context of their own times, in other words they related them to their own notariat. In so doing, they wove the notariat of Northern Italy into the authoritative framework of Roman law and endowed it with a sophisticated barrage of legal terminology. It is no exaggeration to say that without this academization of law, the dissemination of the notarial profession throughout Europe would not have been possible.

Like the Roman *tabellio*, the mediaeval notary was a clerk who offered his services to the public. To express this, they referred to themselves more and more frequently in the course of the eleventh and twelfth centuries as *notarius publicus*. The term *publicus* also had a second meaning—it signified ‘public confidence.’ A notarial act was therefore also known as an *instrumentum publicum*, a document that inspired public confidence, an authentic document. The notary owed this public confidence to the fact that he was appointed by the public authorities—something that was always strongly emphasized by mediaeval legal scholars. Understandably so, since this was what defined a notarial act as *prima facie proof*.

What was the public authority responsible for appointing notaries? In Northern Italy, the right to appoint notaries initially resided with the kings of Lombardy. When this monarchy fell to the Holy Roman Emperor in the tenth century, this created the conditions for the spread of the public notariat throughout the known Western world. In theory the emperor’s authority was absolute, which meant that the notaries he appointed could work

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40. For this method of the mediaeval jurists, see Koschaker, *supra* note 38, at 87-91; see also P. Stein, *Roman Law in European History* 71-74 (Cambridge, Cambridge University Press, 1999).


wherever they chose. The other universal ruler in the Middle Ages, the pope in Rome, had claimed the right to appoint public notaries in the twelfth century. They performed exactly the same duties as the notaries who worked by imperial authority, and they too could offer their services in any part of Christendom by virtue of the pope’s universal authority.

How did this public notariat spread from Northern Italy to the rest of Europe? In answering this question, we must distinguish between Southern and Northern Europe. In Italy, Southern France, and Spain, after the fall of the Western Roman Empire (AD 476) Roman law continued to exist but at a low ebb, mainly in the form of customary law. Jurists who had studied Roman and canon law at university could set to work in that system straight away. In these conditions, the public notariat, which—thanks to the glossators—bore the clear imprint of Roman law, spread easily. Its dissemination was facilitated by the great value that the legal culture of Southern Europe, with its tradition of Roman law, attached to written evidence. Around 1200, public notaries appeared throughout the Southwest European part of the Mediterranean region. They worked there by authority of the

43. Oosterbosch, supra note 34, at 18-19.
45. Cappon, supra note 33, at 7-9.
47. Boüard, supra note 34, at 183-187; Dolezalek, supra note 36, at 7; Van den Bichelaer, supra note 35, at 13-14; F. Roumy, Histoire du notariat et du droit notarial en France, in Handbuch zur Geschichte des Notariats der Europäischen Traditionen 125-168 (M. Schmoeckel & W. Schubert eds., Rheinische Schriften zur Rechtsgeschichte, Baden-Baden, Nomos, 2009) (hereinafter “Handbuch zur Geschichte”). Roumy states that in the South of France the notariat makes his first appearance in the cities around the middle of the twelfth century; only in the course of the thirteenth century it spreads over the countryside of the Midi. At which moment the notariat really became a public notariat, Roumy finds difficult to say, but at the end of the twelfth century
emperor and/or the pope, and were appointed by city councils or sovereign rulers; they could therefore only work within the borders of the civic or sovereign territory. 48

Northern Europe had less favourable conditions for the adoption of the public notariat. The law in Northern France, the Netherlands, Britain, and Germany was of Germanic origin. An essential feature of this law was the emphasis on oral proceedings and evidence. 49 So in contrast to Southern Europe, this region had no practice that linked up seamlessly to the services offered by a public notariat. In consequence, the notariat did not penetrate this region in a more or less spontaneous process, as it had in Southern Europe, but instead entered through the channels of ecclesiastical courts. 50 As a universal power, the Church had jurisdiction over diverse areas of law throughout the Christian world. This ecclesiastical justice, like the Roman law from which it derived, was based on written proceedings. 51 Since 1215, it had been a requirement of this Roman canon law that a written record must be kept of the proceedings by a persona publica, that is, a public notary, or by two other reliable persons. 52 So public notaries first appeared in Northwest Europe around 1239, as clerks of ecclesiastical courts. 53 But they had come to stay.

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50. Dolezalek, supra note 36, at 12.
52. Dolezalek, supra note 36, at 7-9; Oosterbosch, supra note 34, at 17-19; Van den Bichelaer, supra note 35, at 14-17.
53. Dolezalek, supra note 36, at 12.
Between 1250 and 1350 the public notariat was introduced into the Netherlands and became an established profession there.\textsuperscript{54} Just as in other parts of Europe, two factors played an important role in this development. The first factor was the presence in the country of itinerant notaries from Southern Europe, some of whom operated independently while others worked in the retinues of papal legates. The second was the influence of the ecclesiastical courts: the ecclesiastical judges or Officials in the Netherlands started hiring notaries around 1300.\textsuperscript{55} These notaries worked under the auspices of the imperial or papal authorities, but were also permitted to offer their services independently. They were initially appointed by the bishop, and in the late Middle Ages increasingly by sovereign rulers.\textsuperscript{56} Ecclesiastical and secular authorities alike had a considerable stake in guaranteeing reliable legal transactions within their jurisdictions. From this time on, the public notariat was permanently entrenched in the Netherlands.
VII. THE NOTARIAT IN THE TIME OF THE UNITED PROVINCES

In the sixteenth century, the Northern Netherlands severed the universal, mediaeval ties that had bound it to Church and Empire. The Reformation and the Dutch Revolt naturally had repercussions on an institution that owed its public confidence and dissemination (though not, it should be recalled, its existence) to the public heirs to the greatness of Rome. But these religious and political convulsions did not induce any revolutionary change in the notariat. Secular rulers had already taken a keen interest in the notariat in the fifteenth century, and this trend became more pronounced in the first half of the sixteenth century. Legislation enacted by the country’s overlord Charles V established the notariat definitively as a regional institution. From then on, notaries were appointed by the regional overlord—that is, the country’s sovereign ruler—and after the Act of Abjuration in 1581 they were appointed by the regional States.

The Reformation in turn had the effect of making it impossible, in the long run, for notaries operating under papal authority to work in the Netherlands. The profession became secularized: clerics in lower orders were replaced by lay notaries. Only those who belonged to the Reformed Church were admitted: the notariat, as a public office, was not open to Catholics. Still, the essence of the profession was unaffected by these developments: a notary remained a clerk who was certified and appointed by the public authorities and who provided the public with authentic documents.

VIII. FRENCH-STYLE NOTARIAT

To say that the French revolutionaries had little respect for the legal system of the ancien régime is something of an understatement. But the notariat formed an exception to this rule.

57. De Monté Ver Loren, supra note 42, at 249-268.
Its abolition was proposed, but never given serious consideration. Quite the contrary, the revolutionaries found the notariat indispensable, as a provider of legal services to the people and a guardian of legal certainty.59 Frequently quoted are the words of the lawmaker Favard de Langlade in 1791: ‘the notariat stands firm amid the ruins of the revolution;’ he was, after all, the son of a notary to the king.60 A legislative committee wrote in 1799 that the notariat had been retained during the Revolution ‘parce qu’elle est bonne en elle-même’—because it was good in itself;61 a rare quality, to be sure! And that same year, Favard de Langlade remarked that the notary fulfilled ‘one of the most important functions in society’.62 So to any Dutch notary who finds himself troubled by doubts concerning the reputation of his profession, I would say: do not go looking for a personal coach, but read the legislative history of the Ventôse Law. You will start the next day’s work brimming with self-confidence.

Certain changes did ensue from the Revolution, in particular, as a result of that celebrated Ventôse Law of 1803, which the French, true to their reputation for nationalist pride, see as the foundation of the modern Latin notariat.63 As I have already noted, these changes were not revolutionary. True, the papal and seigneurial notariats were abolished, but neither was very significant, and the possibility of purchasing the office was abolished in 1791; but royal notaries were subsequently appointed for life. What is important, of course, is that the notary’s status as a public officer, a status the profession had long enjoyed in France, was retained. Notaries set fees for their services in consultation

60. Stevens, supra note 59, at 44. About Favard de Langlade, see P. ARABEYRE ET AL., DICTIONNAIRE HISTORIQUE DES JURISTES FRANÇAIS (XIÈ-XXE SIÈCLE) 322 (Paris, Quadrige/Puf, 2007).
61. Stevens, supra note 59, at 50.
62. Id. at 51; Duinkerken, supra note 59, at 40.
63. F. STEVENS, LA LOI DE VENTÔSE CONTENANT ORGANISATION DU NOTARIAT ET SA GENÈSE. DE VENTÔSE-WET OP HET NOTARISAMBT EN HAAR GENESE (Brussels, Bruylant, 2004); see also Stevens, supra note 59, at 39.
with the client. So the notion of standardized fees laid down by the
government was unheard of in 1803.\textsuperscript{64}

On March 1, 1811, following the Netherlands’ annexation
by the French Empire, the Ventôse Law entered into effect in this
territory, introducing uniformity into the notarial legislation.
Another consequence of this law was the introduction of the
notariat into parts of the Netherlands that were as yet unacquainted
with it. The Ventôse Law remained on the statute-books until it
was replaced on July 9, 1842 by the Notaries Act, a piece of
legislation to which many people now look back−ten years after its
demise−with a sense of nostalgia.

IX. THE DUTCH NOTARIAT UNDER THE 1842 NOTARIES ACT

Strictly speaking, of course, the 1842 Notaries Act was a
home-grown piece of legislation, but like the Civil Code that was
adopted in 1838, it was a revised version of a French law.\textsuperscript{65} It
retained the notary’s status as a public officer appointed by the
Crown. Still, the Act did make certain changes. For instance, it
held out the prospect of the introduction of fixed fees. In this
respect, it included more government control than the Ventôse
Law, which provided that the fee should be agreed in consultation
between notary and client.

So was the notarial profession content with the new Act,
which introduced only minor changes−statutory fees−in
comparison to the Ventôse Law? Not a bit of it! From the moment
it entered into effect until the beginning of the twentieth century,
the 1842 Act was the butt of sometimes harsh criticism.\textsuperscript{66} But
dissatisfaction with the Act and its perceived flaws was not the
only cause of the general mood of disgruntlement into which the

\footnotesize{\textsuperscript{64} The changes brought about by the law of Ventôse are described by
Duinkerken, \textit{supra} note 59, at 37-42.}

\footnotesize{\textsuperscript{65} B. Duinkerken, \textit{Het Nederlandse notariaat vanaf de Bataafse Republiek
tot de invoering van de Notariswet van 1842, in Gehlen, \textit{supra} note 33, at 231-
261.}}

\footnotesize{\textsuperscript{66} H.W. Heyman, \textit{Het ontwerp voor een nieuwe notariswet van de
Staatscommissie van 1867. Een blik op de problematiek van het notariaat rond
het midden van de negentiende eeuw, in Nève, Kuys & Verbeek, \textit{supra} note 59,
at 69-104. R. de Jong, \textit{Tussen ambt en vrij beroep. Het notariaat tussen 1842 en
1999, 116 ARS NOTARIATUS 11-13 (Amsterdam, Stichting tot Bevordering der
Notariële Wetenschap, 2002).}
Dutch notatari slumped after 1842. Notaries were also incensed at the competition they were facing from informal representatives (zaakwaarnemers).\textsuperscript{67} Such representatives performed numerous tasks that lay within the notary’s working field but for which the latter had not been granted exclusive competence—in other words, legal transactions that did not require an authenticated deed. Numerous people with a ready pen, from municipal officials and court registrars to bailiffs, schoolmasters and former notary’s clerks, discovered that drafting private documents could generate a fine source of income. These informal representatives could charge a lower fee and provided fierce competition, causing many notaries to vent their indignation in writing. Some were unable to suppress their rage, calling informal representatives ‘parasites’ and comparing their actions to the spread of a fatal disease. The falling income among notaries that resulted from the actions of informal representatives heightened competition among notaries themselves, triggering a new hunt for business; the notarial profession became commercialized. This did not enhance the quality of the services that were provided; ‘abuses’ were reported.\textsuperscript{68} Browsing through the notarial journals that were published in this period, one is left with the impression that some notaries had succumbed to existential doubt; they believed that the profession was in a state of ‘serious decline.’\textsuperscript{69} The doom-laden mood that took hold of the notarial profession around 1870 exhibits striking parallels with the situation at the present time. But around 1870, that same disgruntled notariat—it is a historian’s privilege to point out—was in fact standing on the threshold of a century of growth and prosperity.

I started this historical excursion with the aim of clarifying the essence of the Latin notariat. The principle of fixed places of establishment is not, as Rouvoet suggested in 1998, a defining feature of the Latin notariat. The early efforts of the notarial profession to steer the establishment of notaries within its jurisdiction in the right direction arose from a concern to consolidate the profession’s reliability. It was a supervisory

\textsuperscript{67} Heyman, \textit{supra} note 66, at 76-80. De Jong, \textit{supra} note 66, at 22-26.

\textsuperscript{68} See, e.g. Heyman, \textit{supra} note 66, at 73.

\textsuperscript{69} \textit{Id.} at 77-78.
measure that derived quite naturally from the government’s direct responsibility for the public notariat. After all, it was the government that certified and appointed each new notary. Fixed fees are likewise not a defining feature of the Latin notariat. Not until the mid-nineteenth century did a central system of standard fees come into play for notaries’ diverse services. It was unknown under the ancien régime, and the Ventôse Law did not provide for any such mechanism. In the Netherlands, statutory, standard fees for notarial services were not introduced until 1847. Clearly then, it is completely wrong to say that the major innovations introduced by the Notaries Act of 1999 constituted a break with the Latin notariat. In fact, taking a historical view, one might well argue that a public notariat with freedom of establishment and freedom to charge fees is closer to the original model of the Latin notariat than the Dutch notariat as it had existed since the Second World War.

The essence of the Latin notariat consists solely of the power to issue self-authenticating documents, *prima facie* pieces of evidence that lose their probative value only if they are proven to have been forged or falsified. Since time immemorial, issuing self-authenticating pieces of documentary evidence has been the prerogative of the public authorities. And since time immemorial, judgments handed down by a court of law and deeds drawn up by authorized public officers have constituted *prima facie* proof. The public notariat evolved from the office of judge in Lombardy and has retained the character of a public office ever since. Indeed, it could not be otherwise. Without government authority there would be no authenticity. The unique characteristic of this public officer is that he is not employed by the government. He works for a fee in private practice. When I was preparing this address, the conviction gradually took hold of me that a hybrid profession of this kind could only have originated in Italy. For there is surely no other European culture that can be so flexible and practical in its creative solutions. No other European culture takes such an instrumental view of the state as to legalize a combination of a public office with a private income. In that respect too, the notariat is a true Bartolian construct.70

70. The fourteenth-century Italian school of the Commentators or Bartolists, called after Bartolus de Sassoferrato (1313/14-1357), is known by a very free
The central feature of the notariat, then, is the power to draw up and issue authentic acts. A brief excursion into comparative law will demonstrate the correctness of this proposition. In England, the public notariat never developed into full maturity. The explanation for this should be sought in English procedural and evidentiary law. English law, of course, is so-called common law, which is a different legal system than that of continental Europe. Common law is of Germanic origin, while the civil law of continental Europe is rooted in Roman law. The procedural law of the late Roman Empire that was introduced on the continent, through the intervention of the Church, as the Roman canon law of procedure, was based on written sources. This system was based on written evidence, such as notarial acts. The Germanic law of procedure was in principle based on oral proceedings, and the common law system has held firm to this emphasis over the centuries. The openness and public nature that are characteristic of numerous legal transactions in Germanic law

and practical method of interpretation of the Corpus iuris civilis of the Byzantine emperor Justinian (527-565). Partly due to the method of the Commentators the Roman law of Justinian found its way into European society. Of course I’m aware of the fact that the earliest history of the Latin notariat dates from before the Commentators. However, already in the earliest Italian legal science (twelfth century) one finds the tendency for a practical interpretation of the Justinian legislation. The Latin notariat is at least partly a product of a practical interpretation of the Corpus iuris too and in this broad sense also to be seen as a bartolistic construct. The famous ars notariatus (treatise about notarial deeds) of Rolandinus Passagerii (died 1300) has been written after the golden age of the glossators (1100-1250) and is to be considered as an early bartolistic work. N. Horn, Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts, in HANDBUCH DER QUELLEN, supra note 34, at 354-355.

71. VAN CAENEGEM, supra note 49, at 59.
73. VAN CAENEGEM, supra note 49, at 37, 60-61.
have always remained inherent to proceedings under common law. These qualities are reflected, for instance, in a strong preference for oral rather than written testimony. This preference was strengthened by the introduction of the jury system, given that many jurors, in the past, were partly or wholly illiterate.

This explicit preference for oral testimony explains why common law courts have never accorded a special evidentiary status to written legal instruments, including notarial acts. In common law, every legal instrument in principle possesses equal probative value: in this system, no private legal instrument can acquire the status of a self-authenticating act, that is, an act regarded as *prima facie* proof; only acts of parliament and judicial records have such probative force. The court will subject all other written pieces of evidence, including acts drawn up privately, to the same evidentiary procedure as any other kind of evidence. In short, in countries such as England, in which written documents do not possess any particular probative value, the public notariat has only a very modest role to play.

XI. CONCLUSION

English law helps to highlight *a contrario* the defining feature of the public notariat: it is the strong probative value of the written forms of evidence that notaries issue to members of the public. This essential quality of the notariat gives me confidence for the future of this venerable institution. As long as the civil law holds fast to written proceedings, to the centuries-old Roman canon law of procedure, the public notariat will remain indispensable.

74. *Id.* at 59.
A JURILINGUISTIC STUDY OF THE TRILINGUAL CIVIL CODE OF QUÉBEC*

Jimena Andino Dorato

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* The title of the trilingual Code, following the suggestion of the translators, uses no accent on Quebec in Spanish. In recent decades, the practice in legislative drafting in English, at the level of the province, has been to write the name of the province with the French accent. However, this is not the practice in the Spanish language, nor was it traditionally the case in Quebec English (see, for example, sections 2, 3, 4, 5 and 21 of the schedule to article 17 of the Civil Code of Lower Canada). For the present article, the choice was made to adopt the spelling which is without an accent, every time the name of the province is going to be used, other than in text expressed in French or the title of the Civil Code of Quebec.

For the misuse of the word in the Civil Code of Québec, see Pierre Legrand, Civil Codes and the Case of Quebec: Semiotic Musings around an accent aigu, in ROBERTA KEVELSON, CONSCIENCE, CONSENSUS AND CROSSROADS IN LAW 195 (Peter Lang, New York, 1995), cited in Roderick A. Macdonald, Encoding Canadian Civil Law, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM: COLLECTION OF STUDIES, L’HARMONISATION DE LA LÉGISLATION FÉDÉRALE AVEC LE DROIT CIVIL QUÉBÉCOIS ET LE BIJURIDISME CANADIEN : RECUEIL D’ETUDES 135, 137 (Ottawa, Department of Justice Canada, 1997) (hereinafter “Encoding Canadian Civil Law”). This choice is provisional and will probably merit further development in future research.

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ABSTRACT

L’auteure souhaite, par cet article, présenter la jurilinguistique comme une discipline en croissance pouvant apporter une approche originale à la recherche. Afin d’illustrer son propos, elle étudie les différentes étapes du processus de traduction en espagnol du Code Civil du Québec ayant mené à la publication d’un Code trilingue. Son analyse met en relief les difficultés rencontrées en cours de route par les traducteurs et réviseurs et, plus particulièrement, les spécificités de la traduction d’une loi bilingue vers une tierce langue.

The author seeks, with this article, to introduce jurilinguistics as a growing discipline that could contribute a new and distinct approach to scholarly research. As an instance supporting her remarks, the author studies the different stages in the process of translating the Civil Code of Québec into Spanish, leading to the publication of a trilingual Code. Her analysis
highlights the difficulties encountered along the way by the translators and revisers. It emphasizes in particular the aspects which are specific to translating a bilingual law into a third language.

I. INTRODUCTION

In 2008, Wilson & Lafleur published a trilingual edition of the Civil Code of Québec (the trilingual Code). At first sight, the rectangular “landscape” format of the book’s pages catches the reader’s attention. This shape is due to the fact that a third column with a Spanish version has been added to the columns of the French and English versions, so commonplace for any jurist familiar with commercial editions of the Civil Code of Québec. The Spanish version makes up the left column, the French one the middle column and the English one the column on the right. This order is not followed for the index. The pages of the Spanish index are placed last, those of the English placed in the middle, and those of the French come right after the last article of the Code.

Another point worthy of notice is the existence of seventy-eight translators’ notes. This is almost the only piece of evidence that the book is a translation. There is just another reference to

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In the spirit of this study, trilingualism is a fundamental point of this essay. As it will become clear later, French and Spanish were predominant during the research work of this essay. Consequently, English was the language chosen for this essay. The second choice was to keep quotations in their original language; they will be explained in English but not necessarily translated. Similarly, titles will fluctuate from one language to another.

2. Following the Preface of the trilingual Code, the word “version” will more often but not exclusively be used, in preference to the word “text,” to refer to an instantiation of the Code in one or other of the three languages. For nuances on the use of these terms, see Preface to the Original Critical Edition, in CODE CIVIL DU QUÉBEC. ÉDITION CRITIQUE. CIVIL CODE OF QUÉBEC. A CRITICAL EDITION (18th ed., Jean-Maurice Brisson & Nicholas Kasirer eds., Montreal, Yvon Blais, 2010) (hereinafter Preface).


4. These translators’ comments are marked by an asterisk but not all of them are presented as “N.T.” However, as will be further explained, for ease of reading, they are called here translators’ notes.
translation, in the words of thanks in the Note de l’éditeur.
Otherwise, the book’s presentation does not bear the marks of a
translation. All three columns on its pages have similar
characteristics (size of characters, paragraphs, etc.). Even the title
of the book does not include the word translation, nor does the
Preface. The title simply enunciates the content of the book in
three languages: “Código Civil de Quebec-Code Civil du Québec-
Civil Code of Québec.” In the Preface, the Quebec Government
refers to the Spanish version of the Code “[qui] s’ajoute à celles de
langues française et anglaise.”

After this overview, the reader will probably wonder about
the use to which this work is destined. This query finds a
preliminary answer in the Preface, which proposes the trilingual
Code as a tool for legal practice in Quebec “dans l’espace
linguistique hispanophone.” The Preface also proposes a more
theoretical use, as an asset in comparative law, where the trilingual
Code “assurera à notre droit civil un rayonnement remarquable
dans les milieux juridiques hispanophones” and can serve as
“source d’inspiration pour plusieurs législateurs étrangers.” But
there seems to be another possible use, one not mentioned in the
Preface but which led to the present essay. This use, and hereafter
the goal of this essay, will be presented in the following two
sections: 2. A jurilinguistic study . . . 3. . . . of the trilingual Civil
Code of Québec. Each section will clarify a part of the paper’s title
as well as the methodological choices.

II. A JURILINGUISTIC STUDY

Set aside the practical uses and the comparative aspects of
the trilingual Code; this study takes a jurilinguistic approach. It is

5. MONIQUE GAGNON- TREMBLAY & JACQUES P. DUPUIS, Préface, in
   CODE CIVIL DU QUÉBEC, supra note 1.
6. CLAUDE WILSON & HUBERT REID, Note de l’éditeur, in CODE CIVIL DU
   QUÉBEC, supra note 1.
7. As the present text does not seek to be exhaustive, but rather to open
debates, the verb “seem” will be much used. For the use of the verb sembler
when exhaustiveness is not sought, see Jacques Vanderlinden, D’un paradigme à
l’autre. A propos de l’interprétation des textes législatifs plurilingues, in JEAN-
CLAUDE GEMAR & NICHOLAS KASIRER, JURILINGUISTIQUE : ENTRE LANGUES ET
DROITS [JURILINGUISTICS : BETWEEN LAW AND LANGUAGE] 293, 304 (Éditions
Thémis/Bruylant, Montreal/Bruxelles, 2005).
important to note that this is not a work on jurilinguistics theory. It is not a paper on what jurilinguistics is but on presenting different options of doing jurilinguistics. However, since jurilinguistics does not yet have a well-developed and agreed-upon meaning, it seems necessary to mention, mostly in footnotes, the theoretical ideas behind the different possible research venues, here explored.

The methodology for this exploration follows another jurilinguistic work: the Critical Edition of the Civil Code of Québec, published every year by Éditions Yvon Blais (the Critical Edition). The work records conflicts in meaning between the two official texts of the Code with a dagger symbol and notes “infelicities of language” with an asterisk. The authors of the Critical Edition indicate conflicts but do not express a preference between the alternatives. However, even pointing out the issue implies an interpretative act and thus a jurilinguistic analysis.

The trilingual Code has a parallel to these asterisks: the translators’ notes. By using an asterisk, the translators outline difficult or controversial choices in translation. The comments the translators made this way are called here translators’ notes, whether they have the “N.T.” notation following the asterisk or not. The reason for the existence of the majority of these notes will become clear later.

In similarity with the Critical Edition, this essay seeks, through the analysis of the translators’ notes, to open the way to a different perspective but will not provide a definitive answer or exhaustive study. It revisits each translators’ note and suggests a jurilinguistic approach for the matter.

In this sense, in its guidelines, it proposes a notion of jurilinguistics as a discipline fluctuating within/entre two main pillars: linguistics and law, neither prevailing over the other.

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9. See Preface, supra note 2, at XXXVI–XXXVIII.
10. See id.
11. For studies on law and language and the relevance of their close ties, see generally JEAN-LOUIS SOURIOUX & PIERRE LERAT, LE LANGAGE DU DROIT (Presses universitaires de France, Paris, 1975); JEAN-CLAUDE GÉMAR, LANGAGE DU DROIT ET TRADUCTION : ESSAIS DE JURILINGUISTIQUE [THE LANGUAGE OF THE LAW AND TRANSLATION : ESSAYS ON JURILINGUISTICS] (Linguatech/Conseil de la langue française, Québec, 1982) (hereinafter “LANGAGE DU DROIT ET TRADUCTION”); CARLES DUARTE & ANNA MARTÍNEZ, EL LENGUAJE JURÍDICO (A-Z editora, Buenos Aires, 1995); Nicholas Kasirer,
There is no neat border between them. On the contrary, there is an ongoing communication between the two pillars. Jurilinguistics is a two-way bridge where traffic never stops.\(^\text{12}\) This makes for the richness and particularity of the discipline.

Thus, the goal of this essay is to stay within/entre both pillars. It is neither a comment on Quebec’s *jus commune*\(^\text{13}\) nor a study on a particular legal institution of the Code. It is not a terminological analysis of the language of the Code or of particular

\(^{\text{12}}\) The idea of movement is taken from Laplantine and Nouss’s thoughts on the notion of *entre* as: “l’interstitialité métisse, qui est le contraire de l’homogène et du compact, ne désigne pas un état situé dans un espace. Elle introduit un devenir. Elle n’occupe pas une place intermédiaire entre deux pôles, elle n’est pas un point situé à équidistance entre les deux, mais un mouvement rythmique d’intermittence.” \textit{See, François Laplantine & Alexis Nouss, Métissages : de Arcimboldo à Zombi} 217 (Paris, Pauvert, 2001).

\(^{\text{13}}\) For the role of Quebec’s Civil Code as the foundational general law and the use of *ius commune* or *jus commune* in English, see the Code’s Preliminary provision comments. \textit{See, Preface, supra} note 2, at XXXVI, 1. \textit{See also} Macdonald, \textit{Encoding Canadian Civil Law}, supra star-footnote.
formulations. It is not a study of the Spanish translation itself. It was tempting to take only one of these better known paths and develop it. However, the goal is to present the potential of jurilinguistics as a broad discipline\textsuperscript{[14]} whether autonomous or auxiliary. As a result, there is no particular aspect fully developed but an eclectic palette of research opportunities.

Through the analysis of the translators’ notes, this study first focuses on aspects traditionally and largely developed by this growing discipline\textsuperscript{[15]} It aims to provide the scholar, with new research venues on legal translation, legal language and comparative law (V.A. Necessary translators’ notes, V.A.1 Neutral Spanish and V.A.2 Legal Institutions). Second, it presents jurilinguistics as a tool to understanding law (V.B.3 Bilingualism of the Code).\textsuperscript{[16]}

\textsuperscript{14} For new approaches that tend to overcome the exclusive terminological approach that seems to reign in jurilinguistics, see MARCUS GALDIA, LEGAL LINGUISTICS 21 (Frankfurt am Main, Peter Lang, 2009).

\textsuperscript{15} Its main ideas are largely upheld in J.C. Gémard’s work. This author’s term, jurilinguistics, is kept as a useful way to identify a blooming discipline as well as the professionals practicing it. Also, following this author, legal translation is considered to be at the core of any examination of jurilinguistics. However, J.C. Gémard’s vision seems excessively limited to aspects drawn from linguistics. Therefore, it seems useful to keep in mind the more juridical approach upheld by Gérard Cornu, who preferred to use the term \textit{linguistique juridique} instead of jurilinguistics. It is relevant for the present essay that this author pointed out jurilinguistics’ role as auxiliary to “la science fondamentale du droit” and to comparative law, as well as its main role in language rights issues. See JEAN-CLAUDE GÉMAR, LANGAGE DU DROIT ET TRADUCTION, supra note 14; JEAN-CLAUDE GÉMAR, LES TROIS ÉTATS DE LA POLITIQUE LINGUISTIQUE DU QUÉBEC: D’UNE SOCIÉTÉ TRADUITE À UNE SOCIÉTÉ D’EXPRESSION (Québec, Gouvernement du Québec Conseil de la langue française, 1983); JEAN-CLAUDE GÉMAR, TRADUIRE, OU, L’ART D’INTERPRÉTER (Sainte-Foy, Presses de l’Université du Québec, 1995); Jean-Claude Gémard, \textit{Le langage du droit au risque de la traduction. De l’universel et du particulier}, in GÉRARD SNOW & JACQUES VANDERLINDEN, FRANÇAIS JURIDIQUE ET SCIENCE DU DROIT 123 (Bruxelles, Bruylant, 1995) (hereinafter “De l’universel et du particulier”); Jean-Claude Gémard, \textit{Langage du droit et (juri)linguistique. États et fonctions de la jurilinguistique}, in JEAN-CLAUDE GÉMAR & NICHOLAS KASIRER, JURILINGUISTIQUE: ENTRE LANGUES ET DROITS [JURILINGUISTICS: BETWEEN LAW AND LANGUAGE] 5 (Éditions Thémis/Bruylant, Montreal/Bruxelles, 2005); GÉRARD CORNU, LINGUISTIQUE JURIDIQUE (3rd ed., Paris, Montchrestien, 2005); GÉRARD CORNU, VOCABULAIRE JURIDIQUE (8th ed., Paris, Presses universitaires de France, 2007).

\textsuperscript{16} This is largely inspired in in the Honourable Nicholas Kasirer’s work with respect to jurilinguistics. See Kasirer, \textit{Dire ou définir le droit?}, supra note 1; Nicholas Kasirer, \textit{What is vie commune? Qu'est-ce que living together?}, in MÉLANGES OFFERTS PAR SES COLLÉGUES DE MCGILL À PAUL-ANDRÉ
Accordingly, this essay aims to explore if and how jurilinguistics, as an “empowered discipline,”17 can provide the scholar in disciplines with well acquired status with fresh and even new lenses for analysis. It is important to insist that no example will be fully developed but merely presented. The examples chosen outline what can be called jurilinguistics opportunities based on the aller-retour within both pillars of jurilinguistics. This aller-retour reflects an “[état] d’esprit” which opens fresh avenues for research and study.18 This essay will ask whether a jurilinguist, as mediator between law and language, could have reached different conclusions when facing difficult choices.19

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17. See Kasirer, Postface/Afterword, supra note 19, at 579.
18. This expression is used by J-C. Gémar when he refers to the different professionals that can have a jurlinguistic approach. See Jean-Claude Gémar, Avant-propos/ Foreword, in JEAN-CLAUDE GEMAR & NICHOLAS KASIRER, JURLINGUISTIQUE: ENTRE LANGUES ET DROITS [JURLINGUISTICS: BETWEEN LAW AND LANGUAGE] (Éditions Thémis/Bruylant, Montreal/Bruxelles, 2005) (hereinafter “Avant-propos/Foreword”); Nicholas Kasirer, L’outre-loi, in LYNN CASTONGUAY & NICHOLAS KASIRER, ÉTUDES OFFERTES À JACQUES VANDERLINDEN : ÉTUDIER ET ENSEIGNER LE DROIT : HIER, AUJOURD’HUI ET DEMAIN 239 (Yvon Blais, Cowansville/Bruxelles, Bruylant, 2006).
In this sense, the legal translator will find in the story of the process of getting to the trilingual Code an interesting tool to enrich the debate on the training required to translate legal texts. The essay will also provide the legal terminologist with new examples reflecting on the necessity or even possibility of a neutral language, beyond vernaculars, as well as on other questions of legal language. Comparatists will find a most interesting


21. For varieties of legal languages, even when using the same language, see generally Emmanuel Didier, Langues et langages du droit : Étude comparative des modes d'expression de la common law et du droit civil, en français et en anglais 209 (Montreal, Wilson & Lafleur, 1990); Kasirer, Dire ou définir le droit?, supra note 11; Jacques Vanderlinden, Exercice comparatif au départ d'un sujet convenu. Le droit sud-africain entre principe et réalisme, in Rodolfo Sacco, L'interprétation des textes juridiques rédigés dans plus d'une langue 297 (Torino, L'Harmattan Italia, 2002); Nicholas Kasirer, Délit’ interdit! No ‘Offence’!, supra note 19, at 203. Especially for English it is worth remembering the distinction between civil law English and that of the common law. See Alain Levasseur & Vincenç Feliú, The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in
empirical work on the well-known relation between language, culture, translation and comparison, not to mention the comparative value of the trilingual Code itself.

But the jurilinguistic approach, as an opportunity for the legal scholar to study legal institutions (in this case, provisions of the Civil Code of Québec) from a different perspective, will be of most interest. Thus, jurilinguistics may allow understanding and interpreting both foreign and vernacular law in a way that they are less foreign and vernacular. Accordingly, the “Other” (the third language, the Spanish column and the foreign law prejudices) will dialogue with and challenge the “Self” (the Civil Code of Québec in its two official languages).22 There is an aller-retour between interpreting via legal translation and understanding via comparison. This seems an innovative jurilinguistic approach to study law.

It is time now to focus on the second part of the title of this study and to better introduce the trilingual Code and its difficulties, as well as other important methodological choices.

III. THE TRILINGUAL CIVIL CODE OF QUÉBEC

In order to better understand the process of preparing the trilingual Code and the attendant difficulties, the strategy of the present study is to let the main actors in the work serve as guides. Their voices can be heard through two main sources: interviews with the professionals involved in the process and the translators’ notes in the trilingual code.

The selection of interviewees was a natural choice as the professionals involved are named in the Note de l’éditeur of the trilingual Code. The main actors in the work can be divided into

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22. For the dialogue between the two official versions, see Preface, supra note 4, at XXXIV; for the idea of dialogue between the translation and the original text, see ANTOINE BERMAN, L’ÉPREUVE DE L’ÉTRANGER : CULTURE ET TRADUCTION DANS L’ALLEMAGNE ROMANTIQUE, HERDER, GOETHE, SCHLE格尔, NOVALIS, HUMBOLDT, SCHLEIRMACHER, HÖLDERLIN 13 (Paris, Gallimard, 1984).
three classes: the translators, the revisers and the publisher. Accordingly, twelve interviews were conducted in Montreal, Quebec City, Sherbrooke and Buenos Aires between February and May 2009. They were done either in French or Spanish, depending on the interviewee’s preference. The prominence of these two languages led to choose English as the language used for this article. This way, the presence of all three languages will allow for reflection on a certain trilingualism.

Each interview lasted approximately one hour. They addressed two main topics: the project’s background and then the project’s methodology and challenges. The first topic was divided between the personal background and goals of the interviewee, and the history of the project itself. The second topic also had two sub-themes: the dynamics of the work and the difficulties encountered in the process. Questions were general and open-textured, in order to give the interviewee the opportunity to freely develop his or her thoughts.

Following the jurilinguistic focus of this study, the legislative bilingualism of the Code was a topic of discussion in

23. Following the expression lawyer-revisor/lawyer-reviser or translator-revisor/translator-reviser used in Quebec, the professionals who revised the Spanish version of the trilingual Code will be named revisers.

24. Interview with Robin Dejardin, in Montreal, Quebec (Feb. 26, 2009); Roberto Godoy, in Montreal, Quebec (Apr. 29, 2009); Interview with Denis L’Anglais, in Quebec, Quebec (Apr. 21, 2009); Interview with Rosarys Mercado-González, in Montreal, Quebec (Apr. 27, 2009); Interview with Elizabeth Patterson, in Montreal, Quebec (Feb. 17, 2009); Interview with Hubert Reid, in Quebec, Quebec (Apr. 21, 2009); Interview with Julio César Rivera, in Buenos Aires, Argentina (Mar. 19, 2009); Interview with Juliana Rodríguez-Anido, in Sherbrooke, Quebec (May 15, 2009); Interview with María Alejandra Tello, in Buenos Aires, Argentina (Mar. 19, 2009); Interview with Elyse Turcotte, in Montreal, Quebec (Mar. 3, 2009); Interview with Marcela Rossana Valdivia, in Montreal, Quebec (Apr. 29, 2009); Interview with Walter Viegas, in Buenos Aires, Argentina (Mar. 19, 2009).

25. The Civil Code of Quebec is an Act of the Legislature of Quebec so it has to be printed and published both in English and in French. It is clearly a bilingual legal text. See Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K), s. 133; Charter of the French language, R.S.Q., c. C-11, s. 7; Doré v. Verdun (City), [1997] 2 S.C.R 862, at para. 24-26 (Can.) (hereinafter cited as Doré v. Verdun); Kasirer, What is vie commune?, supra note 19, at 487; Pierre-André Côté, La tension entre l’intelligibilité et l’uniformité dans l’interprétation des lois plurilingues, in JEAN-CLAUDE GEMAR & NICHOLAS KASIRER, JURILINGUISTIQUE: ENTRE LANGUES ET DROITS [JURILINGUISTICS : BETWEEN LAW AND LANGUAGE] 127-133 (Éditions Thémis/Bruiyant, Montreal/Bruxelles, 2005); PIERRE-ANDRÉ CÔTÉ, THE INTERPRETATION OF LEGISLATION IN CANADA
every interview. This essay starts from the premise that both of the
official texts should be taken into account. There cannot be a
trilingual version of the Civil Code of Québec if the translation
comes exclusively from one official version. The
acknowledgement of a bilingual text seems a requirement to get to
the trilingual text.26

Accordingly, the particularity of the Code’s bilingualism as
well as the influence of the common-law will guide this
jurilinguistic study.27 From these interviews, it became clear that
the legislative bilingualism of the Civil Code of Québec, this
“distinctive feature of Quebec legal culture,” was not fully but only
partially considered.28

The translators agreed on the usefulness of the English
version. During the interviews, they categorically affirmed that it
“ayudó mucho.”29 The English version was for them an essential
tool in what they considered cases of ambiguity or lack of clarity.
However, the status of the English version is left unclear when it is
mentioned in the translators’ notes. Some of them reflect the idea
of the English text as merely a translation of a French original and
some others simply refer to the English version, still not clear on

134 (3rd ed., Scarborough, Carswell, 2000); RÉMI MICHAEL BEAUPRÉ,
INTERPRÉTATION DE LA LEGISLATION BILINGUE (Montreal, Wilson & Lafleur,
1986); RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF
STATUTES (4th ed., Markham, Butterworths, 2002); MICHEL BASTARACHE, THE
LAW OF BILINGUAL INTERPRETATION (Markham, LexisNexis, 2008).

26. It is not a trilingual text merely because of the presence of three
languages (having official status or not). It is not trilingual because one
unilingual text has been translated into two languages as is the case, for
example, of the trilingual Netherlands Code. The work under study here is
trilingual because a bilingual text was translated into a third language. However,
the challenges encountered in the case of the Netherlands Code can sometimes
be used as a tool for comparison, especially with respect to the role a jurilinguist
has to play in such a work. See Ejan Mackaay, La traduction du nouveau Code
civil néerlandais en anglais et en français, in JEAN-CLAUDE GEMAR &
nicholas kasirer, jurilinguistique: entre langues et droits [jurilinguistics: between law and language] 537 (Éditions
Thémis/Bruxlant, Montreal/Bruxelles, 2005).

27. See MAURICE TANCÉLIN, DES OBLIGATIONS EN DROIT MIXTE DU QUÉBEC

28. Preface, supra note 4, at XXXVI.

29. See Interview with Riviera, supra note 27; see Interview with Viegas,
supra note 27.
its value as a version; only in a few cases is its official status recognized.

The revisers, on the other hand, did not consider the English version as useful. Some of them stated they had not used the English version at all or only in a very few specific cases. Besides, some of the revisers considered the French version to be the only one with official status and disagreed with the use of the English version by the translators and the inclusion of notes to that effect. The reviser’s attitude unfortunately reflects the general approach that lawyers who are not sensitive to jurilinguistic matters have towards bilingualism. These different approaches of the two groups will become clearer in the next section: 4. The interviews or la petite histoire d’un ouvrage de prestige en trois actes.

IV. THE INTERVIEWS OR LA PETITE HISTOIRE D’UN OUVRAGE DE PRESTIGE EN TROIS ACTES

This story presents the result of the interviews in an Introduction, three Acts and an Epilogue. The introduction sets-out the origins of the trilingual Code. The three Acts describe the three stages in the process: the translation, the revision and the publishing. The Epilogue is sort of a practical lesson drawn from this story and opens the way for further study of the difficulties encountered in the process.

A. Origins of the Trilingual Civil Code

The origins of the trilingual Civil Code of Québec go back to 1998. At that time Argentina, intending to reform its Civil Code, passed a bill which was to a significant extent inspired by the

30. The priority accorded to the French version seems also present in the publisher’s decision with respect to the page layout for the three texts and to the order in which are placed the three indices. See infra Part IV, D.

31. Hubert Reid considered the trilingual Code “un ouvrage de prestige” and this was his argument to overcome the reticence of Wilson & Lafleur towards publishing a work which did not have a self-evident audience. See Interview with Reid, supra note 27.

32. HÉCTOR ALEGRÍA ET AL., PROYECTO DE CÓDIGO CIVIL DE LA REPÚBLICA ARGENTINA UNIFICADO CON EL CÓDIGO DE COMERCIO (Buenos
Civil Code of Québec. Members of the reform commission saw the latter as a modern Code, recently enacted, clearly written and an excellent fusion between civil law and common law. After the launch of the text of the reform project, the commission was approached by Denis L’Anglais, the Quebec delegate in Buenos Aires at the time, and the idea of translating the Code into Spanish was born. It seemed a very interesting way to export Quebec legal ideas into Spanish-speaking countries. The timing was excellent since this was a decade of re-codification efforts in Latin American countries. The project started timidly when Julio César Rivera, a member of the reform commission, began directing the translation work. Rivera practices commercial law and teaches civil law in two Buenos Aires universities. In his academic work, he had translated scholarly articles from French and Italian into Spanish. In this endeavour, he was usually assisted by María Alejandra Tello and Walter Viegas. So when the idea of translating the Civil Code became more concrete, having them assist him was a natural choice. M. A. Tello and W. Viegas are both lawyers and sworn translators, with academic and practical experience in the legal field. These three professionals were thus the main actors in the First Act: the translation stage.

Aires, Abeledo-Perrot 1999). The Bill never came into force and Argentina still has its original Civil Code from 1871, including of course the several amendments introduced to it over the years.


34. Contrary to the choice made by the publisher for the “Note de l’éditeur” of the trilingual Code, all professionals participating in the trilingual Code are designated here by their names, omitting any reference to their titles. This is justified because what seem important here are their abilities and qualifications as jurilinguists and not other training these professionals might have. Therefore, in order to avoid confusion, only full names are used.

35. Some of these recodification efforts led to success, including those in Paraguay (1985), Peru (1984) and, more recently, Brazil (2009); some, including those of Argentina and Puerto Rico, never did.

36. It is worth noting that a traductor público in Argentina has a very solid legal background. This is particularly the case in Buenos Aires, where Tello and Viegas studied; the degree program there is taught in the Faculty of Law and about 40% of the curricular credits are shared by both programs. The profession is regulated by statute and a society of traductores públicos. See LEY N° 20.305, COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD
During the first stage, there was no funding and translation fees were privately arranged between J. C. Rivera and the team of M. A. Tello and W. Viegas. There was no official request from the Quebec Government nor was there a publisher interested in the work.

It took a year and a half to obtain a first draft of the Spanish version. None of the professionals involved worked on it full time. M. A. Tello and W. Viegas did the translation work. They divided the articles of the Code equally between themselves and supervised each other’s work in order to achieve a coherent result. Drafts were sent to J. C. Rivera periodically, and he supervised the work. Then, the three of them had fortnightly or weekly meetings to arrive at a consensus on the translation. They deeply believed in this division of tasks: it was necessary that the translation be done by the legal translators and thus the role of J. C. Rivera was to supervise the work with his experienced scholarly eye. He clearly expressed “yo no soy traductor, sólo abogado.” When they finished the first draft, they allowed themselves another seven or eight months to arrive at a second verified version, including some modifications that the Code had undergone during this period. All along, D. L’Anglais assisted them with his Quebecer’s perspective, none of the others having had contact with the Quebec reality.

Once the Spanish version was completed, it gained the interest of no publisher in Argentina. Hence, D. L’Anglais started to “frapper à d’autres portes” in Quebec. Even as D. L’Anglais represented J. C. Rivera in the search for a publisher, the former took on a new role as supervisor of the translation’s quality; he imposed this role on himself as a condition for a Quebec printing. He was convinced that supervision from a Quebecer’s perspective was necessary to get an accurate Spanish version. He thus
gathered and led a group of ten Quebec lawyers, including himself, with the mandate to supervise the Spanish translation: Jorge Armijo, Robin Dejardin, Adelia Ferreira, Roberto Godoy, Rosgarys Mercado, Elizabeth Patterson, Juliana Rodríguez, Marcela Valdivia, and Elyse Turcotte. Voilà, the main actors of the Second Act: the revision stage.

C. Act II or à la Recherche d’un Editeur-la Révision

The decision to gather ten revisers had a practical basis: one for each of the ten Books of the Code. It was not easy to find ten lawyers fluent in Spanish, who were ready to do the work almost pro-bono and on the side of their regular professional activities. Therefore, the team ended up being quite heterogeneous, while not necessarily being interdisciplinary. They were all members of the Quebec Bar (this was a condition for participation), some of them from the private sector, practicing in different areas of expertise, and others working for the Government in law related areas but not necessarily practicing law.

Evidently, one feature they all had in common was skill in Spanish, though their knowledge of Legal Spanish differed: only a few of them had studied or practiced law in Spanish speaking countries. Actually, even their reasons for speaking Spanish were diverse. Some of them had had formal foreign language training, others learned it from personal life experiences and for yet others it was their mother tongue. Even here there were differences: some learned it in childhood at home in an otherwise French speaking environment, for others Spanish was their only language until they

the translators, and not in the revisors, who were experts in jurilinguistics. See Mackaay, supra note 26, at 542.

40. In practice, the division did not follow the demarcations of the Code as precisely as this, since some Books are longer than others. Approximately 300 to 350 articles were assigned to each revisor, while always keeping in mind the subject-matter of the articles. Some of the participants said they chose their set of articles with their area of expertise in mind while others, especially those who joined the project later, were assigned their articles.

41. Even though Wilson & Lafleur covered the expenses for this stage, this contribution was only a fixed amount which did not take into account hours involved in the work and which was far from the fees which would standardly have been charged by lawyers.
immigrated to Canada as adults. In general, the Spanish of each bore a strong influence from the Spanish speaking country related to the source of their knowledge.

The background and experience of each in translating legal texts or even revising legal translations was also very different; none of them had any training in legal translation and only a few of them had any experience in it at all. What they all definitely had in common was that they endorsed the project.

At this stage, there was still no support from the Quebec Government but there was a publisher. D. L’Anglais presented the idea to Hubert Reid, of the legal publisher Wilson & Lafleur, who was wholeheartedly enthusiastic. He had tried to initiate a project along the same lines in the past, yet it was now on hold because of the difficulties it involved. When he had discussed the idea with some translators in the past, he was asked “comment les gens pourraient s’entendre sur la traduction.” But, at this point, contrary to this apocalyptic vision of the impossibility of the translation, he had in front of him a complete Spanish translation of the Civil Code of Quebec.

With Wilson & Lafleur’s support, the revisers set to work on the assigned articles and they shared their comments in order to arrive at a consensus about the suggestions to be sent to the translators in Argentina. They had long phone conferences and periodic e-mail exchanges. Once there was agreement on the “problematic” terms, the latter were assembled by D. L’Anglais and sent to the translators in Buenos Aires.

There were a couple of exchanges between the revisers—always represented by D. L’Anglais—and the translators about the suggestions. Some of them were accepted, others not. This was a tense moment, natural to any joint effort, but the result had to be published and this exchange could not go on forever. So the publisher intervened and, as H. Reid said, there is one author.

42. Interview with Reid, see supra note 27.
43. For the impossibility versus the possibility of translating, See Didier, supra note 21, at 245-247; Gémar, L’interprétation du texte juridique, supra note 20, at 110-115.
44. For a study on the translator’s role as the author, see François Ost, TRADUIRE: DÉFENSE ET ILLUSTRATION DU MULTILINGUISME 179-191 (Paris, Fayard 2009).
C. Rivera,\textsuperscript{45} so the final decision belonged to the latter. However, the publisher asked J. C. Rivera to add notes describing some of the divergences of opinion.\textsuperscript{46} Once this discussion was closed, it was time to enter the Third Act: the publishing stage.

\textbf{D. Act III or the Cédulo Civil de Quebec-Civil du Québec-Civil Code of Québec}

After another year and a half of work, a Spanish version of the Civil Code of Québec was waiting to appear in its first edition. On the basis of the product of this work, Wilson & Lafleur managed to secure support from the Quebec Government to help cover the cost of preparing the book for publication.\textsuperscript{47} It was during this third stage that the Spanish translation of the Civil Code of Québec metamorphosed into the trilingual Code.

After many experiments, and drawing from the experience gained from prior publications, the format of the three columns side by side was settled upon. As has been already mentioned, the Spanish version formed the left column, the French version the middle column, and the English version the column on the right. Probably, the most logical place for the Spanish version would have been the right column (the end of the direction of reading) or the end of the book, since it has no official value. However, the goal was to make it “aussi agréable à lire” as the French version, given that the eye goes more easily from the center to the left side, than to the right.\textsuperscript{48} In the index, the Spanish text is placed last, with the understanding that the Spanish reading reader would instinctively look for the Index at the end of the book; the English index is kept in the middle and the French one is placed right after the last article.\textsuperscript{49}

\textsuperscript{45} J. C. Rivera explained during the interview that he had obtained non-exclusive copyright to translate the Civil Code of Québec from the Quebec Government. See supra note 27. This was confirmed by H. Reid during his interview, see supra note 27.

\textsuperscript{46} This will be the main reason for the translators’ notes.

\textsuperscript{47} See Preface, supra note 4.

\textsuperscript{48} Interview with Reid, see supra note 27.

\textsuperscript{49} It is noteworthy that the Index was entirely translated by R. Mercado and was not part of the translation directed by J. C. Rivera. In this case the process took place in the opposite direction; the translation was done in Quebec and supervised from Buenos Aires.
The metamorphosis from translation to trilingual Code is also emphasized by the title: “Código Civil de Quebec-Code Civil du Québec-Civil Code of Québec.” There is no mention in it of a translation, rather the Code presented in three languages.

The choices made at this moment offer interesting analytical perspectives on the value of the trilingual Code, starting from its physical appearance. This is particularly the case when it is taken into account that the publisher, in order to preserve the value of the translation, consciously chose not to include an indication of the lack of legal authority of the Spanish version. This was contrary to the revisers’ request.

E. Epilogue

This petite histoire shows that both groups had different approaches to legal translation. The relation between law and language was of most importance during the first stage. On the other hand, the translators did not have much experience with respect to Quebec law and its context. Neither did they have access to a lot of material consisting of Quebec scholarly works or cases. At this point, traditional concerns with respect to understanding law both in terms of its textual expression and of its context, always present in legal translation and particularly brought to light by comparative law’s struggles, seem somehow to have been a little neglected.

These genuine concerns led, in the second stage, to the requirement that the revisers be members of the Quebec Bar. At this stage, the focus on Quebec juridical training seems to have displaced the one on expertise in translation and on the relation between law and language.

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50. For the important influence of publishers’ formatting choices on perception of a work, see Nicholas Kasirer, Si la Joconde se trouve au Louvre, où trouve-t-on le Code civil du Bas Canada?, 46 C. DE D. 481 (2005).

These different approaches might have contributed to the sometimes tense exchanges during the second stage. As has been mentioned, in view of these divergences and following a request from the publisher, the trilingual Code ended up with seventy-eight translators’ notes. It can be wondered whether the presence of a jurilinguist, as a mediator between these two groups with different approaches, might have led to a different outcome. This question of a possibly different ending to the petite histoire leads to the next section (5. The translators’ notes or los escollos en el camino del Código civil trilingüe). The translators’ notes will allow an analysis there of the difficulties of the process, by employing the jurilinguistic perspective which is proposed here.

V. THE TRANSLATORS’ NOTES OR LOS ESCOLLOS EN EL CAMINO DEL CÓDIGO CIVIL TRILINGÜE

As a consequence of their origin, the translators’ notes do not conform to a common pattern.52 The interviewees gave many examples of issues that did not find their way into a translators’ note. Notwithstanding the interest of these examples, for methodological reasons only the translators’ notes will be examined here. However, the interviews helped in the choice of which examples should receive the greatest attention in this paper.

Each of the seventy-eight translators’ notes is mentioned here, at least in a footnote, and the most relevant examples are briefly examined. Thus, this study is more oriented towards a quantitative analysis than a qualitative one. The analysis will focus on the two main questions driving this essay: one is whether the participation of a jurilinguist would have led to a different outcome; the other question is how this dialogue between the two

52. There are also some typos, e.g., art. 25’s footnote: “objecto” and, in particular, art. 132’s footnote: “1er,” “esta mas,” “projectos,” “Québec.” From the footnotes it is also possible to detect some typos in the text; e.g., where art. 27, when referring to a Quebec Act, does not write the word ley with capital “L” as is done in the rest of the text. Since this is the only instance of this lack of capitalization, compared to the many others where translators seem to have chosen the use of the capital L, “ley” seems to have been a typo and not a divergent choice. For the use of the capital in the word “Ley,” see MARÍA LUISA OLENS DE SERRANO REDONNET & ALICIA MARÍA ZORRILLA DE RODRÍGUEZ, DICCIONARIO DE LOS USOS CORRECTOS DEL ESPAÑOL (Buenos Aires, Estrada 1997).
official languages and a third language might provide useful material and insights for future research.\textsuperscript{53}

The translators considered the translators’ notes to be unnecessary and damaging to the translation because they “debilitan la traducción.”\textsuperscript{54} Therefore, the original idea was to limit them to a minimum, and it was only due to their being required by the publisher that the trilingual Code ended up with the notes, or at least with so many of them.

They are a rich first hand source of information on the difficulties encountered in the process. What seems unfortunate about these translators’ notes is that they do not reflect the particularities of the Quebec legal system. For instance, there is no reference in the translators’ notes to the role of the common law in Quebec. As for the Code’s bilingualism, even if the English version had an important role, the French version seems to have been considered the source text and the English version mostly as a translation of it. The interpretation\textsuperscript{55} should have passed between both versions, in order to arrive at a Spanish text, but instead it failed to follow the rules applicable to interpretation of the Code as a bilingual text.\textsuperscript{56}

In view of the lack of methodology in the translators’ notes, it is imperative to organize them. Therefore, the present study

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{53} See supra note 25.
\item \textsuperscript{54} Interview with Viegas, supra note 27.
\item \textsuperscript{55} For the link between translation and interpretation, see Ost, supra note 47, at 110-113; Paul Ricoeur, sur la traduction (Paris, Bayard, 2004). See Gémar, traduire, ou, l’art d’interpréter, supra note 18; Kasirer, franois génly, supra note 19; Macdonald, supra note 7. It is particularly interesting to note that the role as interpreter of the translator was nuanced somewhat by Pierre-André Côté. This author distinguishes the role of the jurist-interpreter from that of the translator-interpreter. See Pierre-André Côté, Le traducteur et l’interprète, ou le double sens de la loi, in yves poulet, patrick wery & paul wynants, liber amicorum michel copel 85 (Bruxelles, Kluwer, 2004). However, these nuances seem to refer exclusively to what he calls interprétation operative, where the translator has no role, and to translation from a monolingual source text or to cases of multilingual legal drafting. The questions posed here do not arise from translation between the languages of a bilingual text, but rather from translation of the bilingual source text towards a third language. In this sense, the ideas presented here still seem valid, since the translator of a bilingual text cannot ignore the equal authority of each of the two languages if he is to provide a faithful translation of it as a legal text.
\item \textsuperscript{56} For instruction on interpreting bilingual or multilingual legal texts in Canada and in Quebec, see supra note 29.
\end{itemize}
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divides them into two groups. The first contains translators’ notes which are necessary or at least very useful for any reader, not reflecting the debate between the translators and the revisers (A. Necessary translators’ notes). The second group contains notes reflecting these debates (B. Explanatory translators’ notes).

These two groups of notes are also sub-divided: the first one into two subgroups (1. Les intraduisibles and 2. Quebec Acts and Governmental Agencies), and the second one into three (1. Neutral Spanish, 2. Legal Institutions and 3. Bilingualism of the Code). The borders in this classification are not self-evident. The overlap increases with respect to the subgroups. Therefore, where a given example should best be placed can be a matter for discussion.

A. Necessary Translators’ Notes

This group contains translators’ notes that address difficulties which can be encountered in any translation or legal translation effort, apart from the debate between translators and reviser. Even if it is good translation practice to minimize the translators’ notes, sometimes these kinds of remarks are imperative. There are, for instance, cases where translation is impossible or ones that force the reader to look for information outside the text, along the lines of what Denis Tallon calls a *renvoi externe.⁵⁷* The translator then has no choice but to add an explanatory note. The following sections will present some examples of this in the trilingual Code.

1. Les Intratuisibles

In a Code of three thousand one hundred sixty-eight articles there is only one clear example⁵⁸ of impossibility of translation:

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⁵⁷. See the different *renvois* described in Molfessis, *supra* note 11, at 58.

⁵⁸. If we take the notion in a less technical sense, another example of impossibility of translation is found in article 1161. As its translators’ note explains, this article could be included in the category of *intraduisibles* because of the impossibility of translating *troupeau* with one word. The Spanish language has a set of terms, each of which is specific to a grouping made-up one of the types of animals (*i.e.*, *rebaño, piara*). In a case of impossibility of translation, a translators’ note is required. Thus, this note does not reflect the
the word coroner at article 47 (repeated in articles 49, 93 and 127). The Spanish version keeps the foreign word coroner. Where translation is found to be impossible, a note is evidently necessary.

The coroner is a typical example of the institutions of common-law systems not usually present in civil law traditions. It is thus easy to understand that a difficulty in translation appeared when it was necessary to make reference to a common-law institution (coroner) in a language (Spanish) usually linked with civil law traditions. This difficulty can be seen as an example of the well-known debate concerning the relation between a language and a legal system.

Unfortunately, the translators’ note does not explain the difficulty itself. It does not mention the influence common law has on Quebec’s civil law. It simply defines the office of coroner, explains its function and names the professions whose members can hold it.

59. Every time a translators' note is repeated with respect to one or more subsequent articles, the number of the latter will be given within parentheses. 60. There are two highly interesting examples in Canada of the coexistence of two languages and two legal traditions: la common-law en français and the use of English in civil law. See generally Gérard Snow, Le style législatif : question de droit ou de langue?, in MOLFESSIS, supra note 11, at 89; DIDIER, supra note 21. The first example—la common-law en français—is one of the main goals of the Faculty of Law of the Université de Moncton and its Centre de terminologie et de traduction juridiques. An interesting tool, on this subject, is the yearly publication of the Revue de la common-law en français, see UNIVERSITÉ DE MONCTON, FACULTÉ DE DROIT, available at http://www.umoncton.ca/umcm-droit/node/34 (Last visited November 2, 2010). Also, see generally MICHEL DOUCET & JACQUES VANDERLINDEN, LA RECEPTION DES SYSTÈMES JURIDIQUES: IMPLANTATION ET DESTIN (Bruxelles, Bruylant, 1994). For the use of English in civil law, see generally John E. C. Brierley, Reception of English Law in the Canadian Province of Quebec, in id. at 103; Kasirer, Le real estate existe-t-il en droit civil?, supra note 14; Kasirer, Portalis now, supra note 16; Levasseur & Feliú, supra note 21.
2. Quebec Acts and Governmental Agencies

Three translators’ notes, those of articles 92, 123 (941 and 1464) and 366, seem a case of renvoi externe. Without the note, a Spanish reader might have to do further research to properly understand an institution not described in the text itself. In this sense, these notes seem necessary for the reader’s comprehension and not related to the debate between translators and revisers. Therefore, they belong to the first group.

The three notes define, respectively, Minister of Revenue, peace officers and Superior Court. Contrary to the former case—coroner—, a translation was found to be possible but doubts could arise about its actual comprehensibility in Spanish. They are, however, close to “coroner” in the sense that they refer to difficulties in translating among different legal systems.

There are also other translators’ notes regarding governmental agencies, services related to government or Acts that do not provide an explanation in the note but include an agency or Act’s name in French and a citation to an Act’s official publication. Even if the necessity of the notes might be arguable, they seem useful to any reader. The French name does not seem all that necessary, once the three versions were placed side to side and a comparative reading became so easy. However, the citation could indeed be relevant and useful in helping the Spanish reader to locate those Acts or institutions. Thus, these notes are placed in the first group, especially since they do not seem to reflect the debate between translators and revisers.

But these notes fail to deal with the Code’s bilingualism and Quebec’s particularities. Following Section 14 of the Charter

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61. MOLFESSIS, supra note 11.
62. See art. 21 (564, 699, 2807, 3055) for Gazette Officielle du Québec and art. 2799 for La Financière agricole du Québec and the Société d’Habitation du Québec.
63. These notes do not have the notation “N.T.”. An asterisk follows the Spanish translation of the Act’s title, referring the reader to a footnote which gives the Act’s title in French and citation. See arts. 27, 132.1 (with two different entries), 415 (with two different entries, one of which is repeated for art. 422), 563, 701, 1339 (with three different entries), 1619 (1883), 1749, 1888 (3042), 1899, 1984, 2714, 3021.6, 3028.1, 3055.
of the French Language, the French name is kept in English with reference to governmental agencies or services related to government (Gazette officielle du Québec–art. 21 (564, 699, 2807, 3055), Société d’habitation du Québec and Financière agricole du Québec–art. 2799). This is also true for Quebec governmental agencies named in Acts, for instance in the Act respecting the Régie du logement (art. 1899) or the Act respecting the Société d’habitation du Québec (art. 1984). A methodical reading of both versions would have probably led the translators to wonder why the English text kept the French designations. From there, it would seem relevant to raise a query as to the reach of Section 14 of the Charter of the French Language when it requires designation of the agencies “by their French names alone.”64 Considering that the trilingual Code is published in Quebec, even if the exception of Section 15 of this Charter65 were applicable, a point open to debate, it seems appropriate that these names be kept in French in the Spanish version. If the Government, its departments and other agencies are to be designated by their French names alone, this policy should apply in any foreign language and not just for French and English texts.

Perusal of the trilingual text leads the reader to wonder if employing a Spanish version when referring to governmental agencies or services related to government, as well as when giving the names of Acts, is not against the spirit of the Charter of the French Language. Still, the reasonability of such an approach, without even a clear exception for cases outside Quebec, can be open to debate. Thus the three versions, as they are, place the Spanish speaker in a better situation than the protected English minority. The Spanish reader is provided with the name of the institution in his language, but there is no such provision for the English-speaking reader. A debate could be waged here with respect to the appropriate way to designate these agencies and services inside and outside of Quebec and with respect to minority language rights.

64. “The Government, the government departments, the other agencies of the civil administration and the services thereof shall be designated by their French names alone.” Charter of the French language, supra note 28.

65. The use of French is not necessary when drawing up and publishing texts and documents for relations with persons who are outside Québec. Id.
B. Explanatory Translators’ Notes

The notes grouped here reflect the exchange between translators and revisers. Though not a necessity, they can be extremely useful for a reader interested in receiving more information from the translator than just the bare text. Unfortunately, these notes, which could interest the reader, seem incomplete. They usually only reflect a partial view of an issue.

It is worth recalling that the examples given here can have features which lead to an overlap between one group or sub-group and another. They are grouped by considering the main explanation provided by the note. In this sense, if the note mentions Latin American countries or raises issues of linguistic variants (i.e., autorité parentale) the example belongs to the first sub-group (1 Neutral Spanish) even if concerns a legal institution—second subgroup—(2 Legal Institutions). On the other hand, if the note mentions the English version, it is kept in the third sub-group (3 Bilingualism of the Code), even if the matter it addresses appears to be more of a linguistic issue (i.e., the examples mentioned in footnote 84).

1. Neutral Spanish

It was during the second stage that the difficulties raised by Spanish variants, that had not a priori been a concern, made their appearance. At that moment, the revisers’ different backgrounds in the Spanish and Legal Spanish of particular regions were confronted with the Argentine version of the translation. It was not easy for anybody (neither the translators nor the revisers) to let go of their Spanish, to “soltar nuestras expresiones y regionalismos.” This was the case as much for Spanish linguistic

66. It is interesting to remember that this was the first concern which was raised with H. Reid, as a fundamental factor rendering a Spanish translation of the Code impossible. Maybe the bold stroke of translating it into one variety of Spanish (the Argentinian one), and then trying to internationalize the result, had an important role in getting the work done.
67. See Interview with Gody, supra note 27.
constructions as for expressions of Legal Spanish. None of the former found their way into translators’ notes but some of the latter did.68

The Spanish “neutralization,” that appeared in the second stage, seems to have been more a search for a neutral Latin-American Spanish than an international Spanish.69 The notes evidently reflect a choice of translation made between different possible words or expressions. The revisers suggested internationalizing the language and the translators agreed. A choice of either possibility would have seemed justifiable, whether keeping a regional Spanish or internationalizing it. The translators were Argentines and they were visibly and expressly named in the Preface. This could have led to keeping the Argentine language and its particularities.70 It is important to insist here that this is not a case of dialects or errors, but rather of linguistic variants of the same language or legal language. On the other hand, it also looks like a reasonable choice to give a more neutral aspect to the trilingual Code.

Fourteen translators’ notes got their way, in the process of finding a Neutral Spanish.71 The notes have an element of

68. In the first case, the use of the past participle inscrito/a-inscripto/a and suscrito/a-suscripto/a was subject to discussion. Both are acceptable in Spanish. The dictionary refers to inscrito when defining inscripto: “inscrito,ta: p. p. irreg. inscrito,” “inscrito,ta: p. p. irreg. de inscribir.” A similar reference is found for suscrito “suscrito,ta: p. p. irreg. suscrito” and “suscrito,ta: p. p. irreg. de suscribir.” See REDONNET & RODRIGUEZ, supra note 52 (“inscrito and inscripto” and “suscrito and suscripto”). However, the first one is preferred. In this sense, see REDONNET & RODRÍGUEZ, supra note 52 (“inscribir and suscribir”). The converse is the case in Argentina, where the second one is preferred, so prevalently that a non-linguist could consider the first one a mistake. The Argentine version was kept in the trilingual Code, i.e., in the Spanish version of article 58 Civil Code of Quebec. See CODE CIVIL DU QUÉBEC, supra note 3, at 23.

69. The varieties of Spanish present in Spain, and Spain’s Legal Spanish, do not seem to have been taken into account much. However, the revisors may have paid a little more attention to the studies and works on translation with respect to Legal Spanish produced under the auspices of the European Union.

70. Even if the translators asked for a note in the trilingual Code mentioning their Argentinean origin, in the end the Code has no note that acknowledges this explicitly.

71. See translators’ notes on articles 25, 50, 523, 597, Section II of Chapter III, Title Two, Book Three (Section III of Chapter III, Title Two, Book Three) 878 (908, 910), 1012, 1041 (1052), 1053, 1470. These notes can also be analyzed from the perspective of equivalence issues in translation. However,
randomness. Sometimes, Argentina is mentioned; in other instances, the note presents a synonym also used in Latin America with no specific reference to Argentina; in still other cases the translators explain that they chose a literal translation instead of the better known Argentine or Latin American version. The first approach is present in the note on article 1053, where cargas was kept instead of the more Argentine expensas for charges/expenses. The second approach is present in the choice to keep the more neutral autoridad parental, instead of the probably more traditional patria potestad,\(^\text{72}\) for de l’autorité parentale/parental authority. An example of the third approach, literal translation, is found in article 878 (908, 910). In this case, even if one word frutos would be enough in Spanish (at least in Argentinean Legal Spanish) to translate fruits and revenues, the translators chose to keep two words frutos e ingresos.

This randomness in the notes leaves open at least two questions. First, how strong is the link between the law or a legal system and the language of its statues?\(^\text{73}\) Second, is a “neutral legal language” (in this case Spanish) possible or even necessary?\(^\text{74}\) These questions are common in translation and do not imperatively require a translators’ note. The notes are clearly the product of the publisher’s requirement. But once they are joined to the text of the Code, they seem partial and incomplete. There are no explanations as to the criteria employed in the choice of notes. A reader eager to obtain more information from the notes is bound to be disappointed. The involvement of a jurilinguist might have led to a more coherent and justifiable approach.

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\(^\text{72}\) It is notable that while in many other cases the translators' note is repeated for every occurrence, in this particular case the footnote is only present with respect to Title Four of Book II and not with respect to prior articles where the term is used (i.e., art. 14 et seq.).

\(^\text{73}\) Supra note 11, and particularly note 60.

\(^\text{74}\) Supra note 21.
2. Legal Institutions

There is a subgroup of translators’ notes, referring to legal institutions, which are clearly a product of the debate between the translators and the revisers. In many cases, the reason for the explanation, synonymy or source quotation seems too vague for a reader seeking information. None of these cases would have merited a note if it were not for that debate. They could have been considered choices of a standard term in a translation. Once again, as a source of further information to the reader the notes seem too partial and incomplete.

In this sense, *fiducie* is probably the best example found throughout the translators’ notes. It was repeatedly mentioned during the interviews and it brings out many very interesting aspects. Besides, *fiducie* has already been analysed in the jurilinguistics literature in Quebec. Here again the example is a product of difficulties that arose in the translation of a French word into Spanish, with no reference to the Code’s particularities.

Discussions as to the translation of *fiducie* are strongly related to difficulties in receiving common law institutions, in this case the trust, in languages usually more closely linked to civil law traditions. The Quebec legislator decided to include the trust in the

75. See the literal translation of *vérification* in Chapter VI of Title Four, Book Three. In art. 1145, why choose *depositario* among other possible options and then explain the risk of confusion? In art. 2387, why explain the meaning of collocation if the choice was accurate? In this case the choice made in the article is not kept later, see art. 2658 and 2680.

76. See article 1719 that uses *certificado de ubicación* and has a footnote which gives the synonym *certificado de catastro*. Article 2511 (2540) is even more intriguing as the expression *pérdida o no perdida* in the Spanish text is put in inverted commas and the footnote gives as its synonym the English “lost or not lost.” This could be explained by the fact that Argentinean Legal Spanish employs many English terms for modern institutions. As an example, see Act nr 25.248 on leasing, B.O., June 14, 2000.

77. Section IV of Chapter XI, Title Two, Book Five *Del secuestro de bienes* presents the only case (with perhaps the partial exception of article 1260) where the source of the translation is presented. Why this sole instance?


Civil Code; thus this had to be done in English and in French. The legislator chose to dedicate Book Four, Title Six, Chapter II to the *fiducie* and not to the *fidéicommis*. This way, the traditional civil institution of *fidéicommis* was distinguished in an original manner from the Quebec institution, which is closer to common law ideas of *fiducie/trust*. This was the revisers’ strongest argument to support their preference for the Spanish word *fiducia*, instead of *fideicomiso* which had been the term chosen by the translators. There were historical and linguistic reasons to prefer abandonment of the most traditional civilian word. The reasons for the choice of *fiducie* in French could have been taken into account *mutatis mutandi* when choosing the word to use in Spanish.

However, the translators seem to have found themselves in a well-known dilemma: they had to choose between their two *maîtres*. Respecting the source text by following the use of *fiducie/fiducia* seemed like treachery against the target text. In this sense, *fideicomiso* seemed to the translators a better description of the institution. According to the translators’ note, this latter term was used in other Latin American statutes inspired by the common law trust and it reflected the distinction between *fiducia* as generic and *fideicomiso* as a species. Choosing Spanish as *maître* can be a justifiable choice in the painful art of translation. The mysterious phrase in the note “[d]e modo que preferimos mantener la terminología propuesta en el original” should probably be read as a justified response of the *maître* Legal Spanish (the translators) to the genuine demands of the *maître* Legal French (the revisers). But this debate remains open.

80. Historical, political and legal reasons ruled-out the option of keeping the word *trust* in the French version, which would have thus categorized it among the terms impossible to translate, even though the term *trust* could perfectly well be considered an example of an *intraduisible*, see Kasirer, *Dire ou définir le droit?*, supra note 11, at 192.

81. The idea that a translator has to serve two masters is found in Ricoeur, *supra* note 55, at 9. See also Gémard, *L’interprétation du texte juridique*, supra note 20.


83. For the *tristesse* of translation see, id. at 179. For the difficulty of these choices see, Ricoeur, *supra* note 55, at Section III, Un “passage:” traduire l’intraduisible.
There were strong arguments in defence of a preference either for *fiducia* or for *fideicomiso*. The choice of *fideicomiso*, was difficult but valid. It surely was not the only choice made in this direction but it definitely was the most exhaustively explained one. This reinforces the question of why there is a note for this case and not for others, and supports the point concerning the incompleteness of the translators’ notes as a source of information to the reader. Unfortunately, the note only gives the justification for the choice but does not present the doubts that led to it nor the revisers opinion. Mention of the debate as to the choice of term would have enriched the note. This example can inspire the comparatist scholar, whether interested in the trust or in comparative legal linguistics.

3. *Bilingualism of the Code*

As was explained, where the English version is mentioned in the notes, they do not make clear what status the translators attributed to it. The idea of a translation is clearly present in the notes on articles 206 (222, 225, 267, 269), 339, 1534 (1570, 2959) referring to the English version as “versión inglesa de la traducción del Código” or “en su versión en inglés fue traducida.” In a different sense, there are the notes on articles 1022, 1219, 1271, 1374, 1646, the heading to Subsection 3, Section III, Chapter I, Title 2, Book Five and article 2368. These notes explain the use of the “versión en inglés del Código,” “término en ingles,” “versión en ingles” “texto en inglés” in the choice of a Spanish translation. They refer to the English text as a version, without any reference to the notion of translation, but still do not imply that the French and English would have the same status. The equivalence of the French and English versions timidly appears in the note on article 1470, which refers to “el original del francés . . . y en el del

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84. The last three notes mentioned in the text (art. 1646; the heading to Subsection 3, Section III, Chapter I, Title 2, Book Five and art. 2368) deserve a few extra comments. In the note on art. 1646 there is also an issue of Neutral Spanish, with a reference to Argentina. The note for article 2368 is particular to that article, but it should be linked to the one for the heading of Subsection 3, Section III, Chapter I, Title 2, Book Five. They both refer to *enajenación contra el pago de una renta/du bail à rente/alienation for rent*. However, the note for 2368 explains the choice of Spanish translation with much more detail.
But the note on article 3020 seems to be the only one which expressly recognizes the official status of the English version: “versión oficial en inglés.”

Some of these notes could be placed in other groups or subgroups, yet they mention the English version, and so they are all put in the second group, since they belong to the debate between translators and revisers. A general comment on all these notes can be made that if both versions were considered to have equal status, an explanation of which version seemed more useful would not seem necessary. On the other hand, if the notes were meant to provide more information to the reader, the choice whether or not to use expressions linguistically closer to English does not seem to be given a sufficient justification in the short comments which mention this issue. It is particularly difficult to understand why some cases found their way into a note and others did not. Also, in cases where the English version seemed to have been ignored, a thorough and systematic reading of both versions could have suggested alternatives when the translator and the revisers encountered difficulties or divergences. In short, the

85. This note also refers to the issue of Neutral Spanish with particular reference to Argentina.

86. For instance, the case of the word notamment was repeatedly mentioned during the interviews. The Spanish words principalmente or especialmente, used indiscriminately in the Spanish translation, were not found to be very satisfactory by the revisers. Their idea was that even if within common usage notamment conveys the idea of giving special emphasis to one or number of things, out of a larger set, in Quebec’s legal realm it means one thing among others, given just as an example. In its ordinary use in French, notamment means “d’une manière qui mérite être notée (pour attirer l’attention sur un ou plusieurs objets particuliers faisant partie d’un ensemble précédemment désigné ou sous-entendu),” see Le Nouveau Petit Robert, in Dictionnaires Le Robert (Paris, 1993). But, in accordance with the use prevalent in Quebec Legal French, the word notamment should be translated in Spanish by entre otros. When we look at the English version, from the nearly seventy articles pointed out by the revisers, the idea of one among others is only expressed five times: by using the expressions “such as” (art. 801 and 1270), “or otherwise” (art. 2586) and the verb “include” (art. 366, 535.1). The vast majority of the remaining articles use the expressions “particularly” or “in particular,” which seem closer to the dictionary definition of notamment. Does this mean that the translators interpreted the norms expressed in the articles by taking account of both versions? It does not seem that this was the case. At least one of the words chosen in Spanish, “principalmente,” conveys an even stronger idea of primacy than “notamment,” “particularly” or “in particular.” Principalmente conveys the idea of the first one, also of something “esencial o fundamental,” see Diccionario de la lengua española, XXI ed., s.v. principalmente. The
notes refer to the English version but missed the opportunity to properly address the bilingualism of the Code. Three examples of this are particularly relevant for the present essay.

The first example is found in article 206’s translators’ note for the corresponding terms *alliés*/persons connected by marriage. Here, the translators explain that the English version helped them to obtain a more precise translation. Once again, the concerns arose from the translation of a French word: *alliés*. The translators’ note explains that *alliés* “puede hacer alusión tanto a personas que son ‘allegadas’ como a ‘parientes afines.’” *Parientes afines* was chosen as a translation by taking into consideration “persons connected by marriage.” The English version helped to clarify for the translators what class of persons were addressed by the article. “Persons connected by marriage” does not include *allegados* but it doubtless refers to *parientes afines*. The translators’ choice coincides with the doctrinal interpretations and definitions in Quebec, as to the meaning of *alliés*, that refer to “personne unie à une autre par alliance.”

But, in their reading of both versions, the translators missed a possible discrepancy flagged in the Critical Edition. Reading the article in English gives the impression that the quality of closeness is only required of relatives and not of persons connected by marriage. In French, both *parents* and *alliés* seem to have to be *proche* or at least it is possible to argue this. The Spanish version

English version only uses the expression “especially” on one occasion (art. 1696). While in that case the Spanish version did choose the similar “especialmente,” this appears to have been more of a chance choice than a conscious one, considering that in those cases where the idea of one among others is present in English, the Spanish version still used “especialmente” and “principalmente.” If the English version of the Code had been followed, it might have helped achieve a more faithful rendering to use “en particular” or “particularmente,” which are closer to the terms most commonly used in the English, but this only occurs in two articles (36 and 1269) with no explanation. There may also be an error in the Spanish version of article 2814. The indication furnished by “notamment” or “particularly” is lost there, since the Spanish version of the article does not include a corresponding term; this might lead to reading the list of documents mentioned there as exhaustive.


88. *Note, supra* note 5.
expresses the same idea as the English one: *los parientes cercanos y afines* where *cercanos* qualifies exclusively *parientes* and not *afines*. But the note does not explain the reasons for this choice. Thus, the English version only helped to clarify a doubt, and it did so in a good way. However, the translators, while drawing on this version, missed the opportunity to point out the divergence or even to go further, reflect on the texts, propose an interpretation, and integrate all this into the Spanish.89

As the example shows, the translators’ approach to the English version is not one which considers the Code as a bilingual source text. They used the English version to clarify a vague term but the note does not show that they engaged in a thorough parallel reading. Besides, in this particular case, the ambiguity could have been dealt with by means of a unilingual reading which relied on Quebec jurilinguistics resources, such as the *Dictionnaire de droit privé de la famille et lexiques bilingues*.90 A jurilinguist at the first stage would have used Quebec lexical resources. A jurilinguist at the second stage would have highlighted the Code’s bilingualism and probably analysed the possible discrepancy between the texts.

The second example is found in the translators’ note on article 1534 (1570, 2959). The note points out a problem in the correspondence between *arrérages* and periodic payments. There is no explanation in the note, which only says: “Tener en cuenta que la locución *arrérages* en su versión en inglés fue traducida por *periodic payments*.” The translators chose to translate the corresponding terms *arrérages*/periodic payments with the Spanish term *pagos atrasados*. They briefly, and without much in the way of comments, draw attention to those terms, but do not clarify whether they relied on one or the other version, or on both. Neither do they explain exactly what needs to be taken into account for a comparison or contrast between the terms used in each language version. As a departure point, this essay will conceive of the translators’ note as a sign the third language makes to the two other languages, in order to initiate a dialogue; the essay will use this approach in an attempt to examine the sign itself, without aiming to provide an exhaustive analysis.

89. *Supra* note 58.
90. *Centre De Recherche*, *supra* note 87.
Entering upon this exercise requires some methodological remarks. The translators’ note was not repeated in article 1573, where the corresponding terms *arrérages*/periodic payments can also be found. This oversight could have probably been avoided by systematically reading both versions. The question of cross reference between existing translators’ notes is more complex. In article 2959 (the second article where the note is repeated) the corresponding terms are not *arrérages*/periodic payment. In this case, there are two different corresponding terms in two different sentences: *redevances*/periodic payments (translated by *ganancias*) and *arrérages*/arrears (translated by *pagos atrasados*). Thus, the problem of correspondence between *arrérages* and periodic payments was not present in this article; *arrérages* is made to correspond to arrears, and periodic payments is made to correspond with *redevances*. Therefore, the note does not seem relevant. However, the choice of term for the Spanish version seems to indicate that in article 1534 the translators relied on the French *arrérages* when choosing *pagos atrasados*. In article 2959, *pagos atrasados* corresponds to the term *arrérages* and not periodic payments. This then was probably also the choice the translators made with respect to article 1534.

On the topic of the French term *arrérages*, two other articles without translators’ notes need to be mentioned. First, in article 596, *arrérages*/arrears was translated into Spanish with the term *atrasos*. Second, in article 2960, the same corresponding terms were translated as *pagos atrasados*. A terminological analysis would be possible with respect to the difference between *atrasos* and *pagos atrasados* and the degree of equivalence of each term to *arrérages*/arrears. But what seems beyond doubt, from the repeated use of the term *atraso*,91 is that the translators always considered the idea to be present of a date that had expired, in every case where *arrérages* appeared in the French text.

As a last element in this puzzle, another article, also without a translators' note, opens the issue even more. Article 2933 abandons the correspondence of *arrérages* with either periodic payments.

91. From the verb atrasar: “Fijar un hecho en época posterior a aquella en que ha ocurrido,” see DICCIONARIO DE LA LENGUA ESPAÑOLA, supra note 86 (“atrasar” see also s.v. “atraso,” “atrasado”).
payments or arrears; instead, the term “instalments” appears. Considering the synonymy this establishes between periodic payment and instalment,\textsuperscript{92} it is permissible to ask why there is no note pointing out the possible discordance, along the lines of the note on article 1534.\textsuperscript{93} In this last case–article 2933–in accord with the other occurrences in the French text of arrérages, for example article 596, the Spanish version uses the term atrasos.

The puzzle created by the exercise of translating these terms into Spanish could help to show how greater precision is required where the terms arrérages, arriérés, periodic payments, arrears, and instalments appear in the Civil Code of Québec.\textsuperscript{94} Indeed, the use of these terms seems a bit vague in light of the Code’s Spanish translation.

In Quebec private law, both the term arrérages and the term arrears have two meanings. Arrérages refers to “redevance

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\textsuperscript{93} Following-up the term instalment can add even more pieces to this puzzle and leads to another translators’ note mentioning the English version (art. 1374). In articles 411 and 2442, where instalment is made to correspond to versement, the Spanish version reads cuota. The Spanish cuota is also present in the Spanish version of article 1953, where arrears is made to correspond to arriérés. Besides this, the word cuota appears in article 2933, where arrérages is made to correspond with instalment, but it is not used there as a translation of those French and English terms, instead this Spanish term is used to translate quotité/amount. As if there were not enough pieces in this puzzle, the term quotité leads to a mysterious translators’ note with respect to article 1374. In this case cantidad was chosen for quotité/quantity. It is of note that the trilingual Code makes an error in its French version of this article: it has “quantité” instead of the “quotité” which is in the official French text. A reader who is not aware of this error will find the translators’ note mysterious since there can be little confusion in a correspondence between cantidad-quantité-quantity. However, if the reader is aware of the correct French text, the translator’s preference for cantidad as a translation of the legal terms quotité/quantity seems to be a too literal translation. Cuota could have been a better option as when it was chosen for article 2933, where quotité was present. However, it seems that monto would have been the best choice, in line with the idea of amount and montant given by the dictionary in reference to quantity and quotité. See id. (“quantity”); CENTRE DE RECHERCHE EN DROIT PRIVE ET COMPARE DU QUÉBEC, DICTIONNAIRE DE DROIT PRIVÉ ET LEXIQUES BILINGUES: LES OBLIGATIONS, (Editions Yvon Blais, Cowansville, 2003) (“quotité”).

\textsuperscript{94} This could also be the case for versements and even quotité-amount-quantity. QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, supra note 92.
périodique d’une rente” and it is a synonym of “arriéré.” 95 In the same sense, arrears are the “periodic payments of an annuity” or “payments for which the due date has expired.” 96 These definitions should not be confused with each other. 97 The first definition does not necessarily include the notion of a date that has expired. These two meanings, that could lead to ambiguity when translating in Spanish, do not seem present in Legal French or Legal English outside Quebec. 98 Consulting dictionaries from France and the US shows that the idea of a period of time which has expired is always present in their definitions of arrérages and arrears. In line with these understandings of them, using these terms interchangeably with periodic payments does not seem reasonable. So, the translators might have detected a situation worth taking note of between both versions, by taking into account the meanings of the terms arrérages/periodic payments given by definitions from outside Quebec.

This exercise shows that the Code’s use of terminology in this area could be improved and that translation into the third language, due to the difficulties which it brings out, could lead the way for this task. The translation can bring ambiguities to light and show the need for a more precise term.

The third example relates to the translators’ dilemma of how to express fait/act or omission in Spanish. The note on article 3020 explains that the translators’ choice was acto u omisión considering “como base su versión oficial en inglés.” The Spanish

95. See supra note 93 (“arrérages”).
96. QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, see supra note 92 (“arrears”).
97. In this sense, “la redevance est également désignée sous le nom d’arrérages, lesquels ne doivent [pas] être confondus avec les arriérés, qui sont des dettes dont l’échéance est passée” and “the dues payable under an annuity may also be called arrears, which must not be confused with another meaning of arrears, debts whose due date has expired.” See supra note 93 (“rente - Rem. 3”); QUEBEC RESEARCH CENTRE OF PRIVATE & COMPARATIVE LAW, supra note 92 (“annuity” - Obs. 3-5”).
98. In France arrérages implies the idea of “termes échu” and it is not considered a synonym of arriéré. See CORNU, VOCABULAIRE JURIDIQUE, supra note 18 (“arrérages”). In English, the idea of a time which has expired is present in the three definitions of arrears. See BRYAN A. GARNER, BLACK’S LAW DICTIONARY (St. Paul, West Group, 7th ed., 1999) (“arrear”). Thus this example can also be included in the debate on differences between legal languages within the same language, supra note 21.
version followed the nuance of the English text, and the need it revealed that there be a clarification of both positive and negative aspects of the more generic French term \textit{fait}. 99 Hence, the inclusion of \textit{omisión}.

But, once again, the loneliness of this note reflects the lack of systematic parallel reading. In another five articles (876, 889, 1151, 1462, 1624) where the same corresponding terms–\texttt{fait}/\texttt{act} or omission–are present, the translators chose \textit{hecho(s)} instead of \textit{acto} \textit{u omission}. 100 The translations of these articles forget the nuance between positive and negative.

Moreover, the discussion about including the positive and the negative aspects of \textit{fait} in the English version can be enlarged to several other articles 101 where \textit{fait} was mirrored by \textit{act} and not by \textit{act} \textit{or omission}. 102 Unfortunately, the note is only present for one article, as opposed to the approximately thirty other cases where this might have been considered an issue worth analyzing.

Reflecting on the need (or lack of need) to indicate in Spanish the positive and the negative aspects of the concept expressed in French by the term \textit{fait} might have opened an interesting dialogue among the three languages. Spanish could have “prêté l’oreille” 103 and thus might have enriched the interpretation of these provisions of the Civil Code of Québec. Even if this exercise might be considered to exceed the legal

\begin{itemize}
\item[99.] The French word \textit{fait} can express either of two concepts, one of which is expressed in English with the word fact, the other, “dans le droit de la responsabilité civile,” with the expression \textit{act} \textit{or omission}, see CENTRE DE RECHERCHE EN DROIT PRIVÉ ET COMPARÉ DU QUÉBEC, supra note 93 (“\textit{fait}”). The latter concept is what the English version is referring to in these examples.
\item[100.] This lack of uniformity, besides reinforcing an impression that the notes are incomplete, can open up a discussion on the differences between \textit{hecho} and \textit{acto}, which could itself be the subject of a study with respect to legal language. In Quebec, See Benoît Moore, \textit{De l’acte et du fait juridique ou d’un critère de distinction incertain}, 31 R.J.T 277 (1997).
\item[101.] See Preface, supra note 2, art. 874, 1020 (this article is not mentioned in the Critical Edition but the corresponding terms \textit{fait}-doing seem subject to similar considerations), 1457, 1459, 1460, 1461, 1465, 1480, 1514, 1531, 1562, 1732 (in this case the terms are “hechos personales,” “faits personnels” “personal fault”), 1860, 2072, 2365, 2386, 2396, 2474, 2499, 2704, 2885, 3125, 3126, 3148.3, 3168.3.
\item[102.] See Preface, supra note 2, art. 1457.
\item[103.] Ost uses this expression when referring to the importance of translation. See Ost, supra note 44. See also Levasseur & Feliú, supra note 21.
\end{itemize}
translator’s task, at least there should be an indication to the reader that an issue exists, in a note for each article where the issue arises, and not merely in an isolated note.

VI. Conclusion

It seems important not only to refer to the history of the trilingual Code but also to its future. There are two aspects that seem relevant when thinking of the future of this work: its improvement and its updating.

Regarding the first aspect, D. L’Anglais called the trilingual Code a “work in progress.” As becomes clear in light of the examples, it is true that the Spanish version can be improved. There is no concrete project to revise the published Spanish version, but many interviewees considered this to be necessary and expressed their willingness to participate in this work. They also suggested ways to go further in the analysis by completing a glossary or even a bilingual or trilingual civil law dictionary. Some of the unpublished translators and revisers’ research could be a solid start.

As for the second aspect, updating, J. C. Rivera is engaged in translating into Spanish any changes to the Code. If the revision work were in progress, future reforms or linguistic revisions could present a good opportunity to enhance the Spanish version in future, revised, editions.

Last, but not least, the idea of “to be continued” implied by the present conclusion reinforces the goal of opening avenues for research. The jurilinguistic approach proposed here showed how ongoing debates could find new examples from the translation of a bilingual legal text into a third language. Also, it presented in a preliminary fashion some lenses for analysis and avenues for

104. Supra note 58.
105. It is of note that the Minister of Justice now has the power to make “minor corrections [to legislation] with a view to reconciling, among other things, the French and English versions,” if the corrections do not alter “the substance of any text.” See An Act respecting the Compilation of Québec Laws and Regulations, R.S.Q. c. R-2.2.0.0.2, S. 3(4).
research which have yet to be pursued by professionals focused either in the legal or the linguistic pillar.
BOOK REVIEW

GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS
(Rev. ed., The Lawbook Exchange, Ltd., Clark, New Jersey, 2009)
Reviewed by Agustín Parise*

This work by George Dargo is unique in explaining the political, legal, and above all, socio-historical events that took place in Louisiana during the early nineteenth century. The events Dargo brilliantly describes and analyzes help us better understand the current legal system in Louisiana. Further, this revised edition by The Lawbook Exchange shows that the celebrations of the enactment of the Digest of 1808¹ did not end in the year of the bicentennial. The new edition of this work originally published in 1975 by Harvard University Press, continues providing a useful tool for a new generation of scholars on Louisiana legal history.

The book is divided into three parts. From the very beginning, Dargo is able to reveal that the main debate in Louisiana was between the adoption of legal traditions and not between which Continental European or civil law system should be adopted. Part One consists of one chapter, which makes readers look into the diverse geography and demography of lower Louisiana during the early 1800s. By doing so, readers are provided with a background that is necessary for the understanding of the remaining chapters. Dargo is able to highlight the “singular attractions”² that the region provided to American immigrants after the Purchase and how those attractions resulted in a melting pot of cultures and interests. That melting pot reflected a bipolar product formed by ‘ancient inhabitants’ and Anglo-Americans. As expected, that melting pot also reflected a bipolar attitude in the

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inclinations towards the adoption of the civil or common law systems. The author illustrates with examples how the substance of the legal systems offered different solutions to legal matters, assisting readers to quickly identify how the adoption of one system could affect the ‘ancient inhabitants’ or the Anglo-Americans. Here, the clash of legal traditions to which Dargo refers throughout his book starts to be visible: a clash that “encompassed the interests, the value system, and the very identity of a diverse people who now, for the first time in their history, had to unite in defense of the common elements of their heritage.”

Part Two, on the problems of colonial rule, starts in chapter two, which is dedicated to the vicissitudes of William C. C. Claiborne as governor of lower Louisiana, who due to the importance of the region and his duties was “one of the most important public officials in all of the United States.” At that time, Claiborne had been appointed by Thomas Jefferson to deal with the vulnerability of New Orleans, a problem that the President found acute and persistent during his presidencies. Jefferson felt the ‘ancient inhabitants’ had an unclear allegiance to the Union. Working with primary sources, and reflecting his skills as both a historian and a jurist, the author then brilliantly highlights that Claiborne had a position that was “great in theory but modest in fact.” Also in the second chapter, the initial isolation of the governor and his gradual blending with the inhabitants is explained by depicting his tension when facing federal and local requests and by summarizing the different public controversies to which he was associated (v.gr., opposition to early statehood, appointments of officials, conflicts with local press, veto of bills). Among the most relevant controversies of that time, is the one that developed around the ‘reign of terror’ and successive events that surrounded the conspiracy by Aaron Burr, which Dargo approaches clearly in chapter three of the book. The attitude of the governor in this

3. Id. at 34.
4. Id. at 43.
5. Id. at 44.
6. Dargo explains the activities and motivations of Burr in the following words:

   Historians have never finally established the meaning of Burr’s movements in the southwest. His defenders have argued that he intended nothing more than to revolutionize the
aspect reflected that he had slightly inclined towards the interests of locals. Another public controversy, which Dargo develops extensively in chapter four of the book, mainly by looking again to newspapers and epistolary records, is the one that took place with the New Orleans Batture. To the understanding of the reviewer, that is the most important controversy and a key element to understand the clash, because it formally ignited the debate on which legal system would be applied in the region. The Batture represented significant immovable property interests for Edward Livingston, in opposition to the interest of the city of New Orleans, and generated decades of litigation before courts in Louisiana and in the East coast. In words of the author: “the questions raised by the Batture stimulated a social awareness of the importance of legal issues in general and a hostility to common law in particular. The Batture controversy was crudely perceived as a conflict

Spanish colonies in West Florida and Mexico—ends which most Jeffersonian Republicans would have applauded. Burr’s critics have asserted that he purposed treason and subversion, that he hoped to detach all of the southwest and Louisiana from the Union and then establish an empire with Mexico and Wet Florida as tributary states. Burr himself probably never had a fix design. He had many brands in the flames and hoped that at least one would catch fire.

Id. at 89-90.

7. One of the earliest works on the Batture, which also provides one of the best and most elegant explanations, reads:

New Orleans is situated on an alluvial plain, evidently formed, like the surrounding country for a great distance, by the transporting and creating power of the Mississippi in the course of centuries. This plain, which constitutes a portion of the Delta of the Mississippi, contains a soil of incomparable fertility, through which the current of the majestic river winds its way with resistless impetuosity, sweeping along in large, graceful and singularly regular curves, which mould its channel, and make the shores, which limit and restrain its water, conform to their meanderings. Hence the shores of the Mississippi present every where bends or points, of which, the bends, or curves, being exposed to the more immediate and direct action of the current, are constantly excavated or abraded, while the points, under the influence of the countercurrent generally increase in extent by the alluvial accretions formed around them. These alluvial deposits, which are often of great extent and value, are called battures.

between two diverse legal traditions.” 8 This controversy would pave the way for the awareness of a need to preserve the civil law system, at least in the area of private law. The controversy included not only the U.S. President and local officials, but also those who would contemporarily or shortly after codified the laws (i.e., Livingston, Moreau-Lislet, Derbigny). The Batture also ignited early debate on the laws applicable in the region: were they Spanish? Were they French? Dargo correctly sees the Batture as a ground-leveler for the future adoption of the Digest of 1808.

Part Three of the book continues examining the clash of legal traditions that took place at that time in the region. It focuses, however, on the Digest of 1808 and the events that preceded its adoption: perhaps the best exponents and most visible results of that clash during the territorial period. Chapter five of the book addresses a visible clash. Jefferson advocated for a Union with “people speaking the same language, governed in similar forms, and by similar laws,” 9 and thought he could find in Claiborne the suitable person to help him achieve that objective. The chapter relates specifically to the operation of the courts in the region and the need to decide which system of law they would follow. The author correctly indicates that the operation of courts in Louisiana could not wait until matters on substantive law would be decided. A solution to and facing of daily matters was paramount in order to smoothly administrate the new territory. Procedure would have to advance, while substance could be kept on hold. In addition, Dargo reflects on the accounts he provides that it was clear that in the area of criminal law the Spanish system was not well received by local inhabitants. The latter found the Spanish system corrupt and brutal. 10 Therefore, Claiborne faced again a debate: adoption of the civil or the common law institutions and procedures. Who to please? From this chapter, and from the reading of references by Dargo to plays, pamphlets, memorials, newspapers, and essays, it is made clear that the debate was not free of tension. In addition, the ultimate adoption of common law institutions and procedures

8. DARGO, supra note 2, at 144.
9. Id. at 188 (emphasis added).
10. Id. at 192.
seemed to indicate that the next expected step would have been the adoption of substantive common law principles.

Chapter six proves the contrary. The advocates of the civil law system found a threat in the recent events. Hence, in May 1806, the legislature adopted a bill, also referred to as the Project of 1806, by which the pre-existing Spanish and Roman laws would govern in the territory. Claiborne did not approve this initiative and vetoed the bill, generating in the legislative body an immediate claim for dissolution. Further, the local newspaper *Le Telegraphe* published a manifesto, signed by members of the legislative body, in which the latter explained the reasons why they preferred the civil law system. In that same chapter Dargo clearly explains the repercussions of the manifesto and the repealing movements that arose from the defenders of the common law system. But that aborted bill would not be the last stand of the advocates of the civil law system: they would later appoint two counselors to draft a civil code for the territory. This appointment would culminate in the Digest of 1808, the main star of chapter seven and where the clash of traditions is visible at its best. This chapter raises and answers many questions that relate to the study of the Digest of 1808: Firstly, was it a digest or a code? With our current understanding, a digest would simply provide a recollection of existing and applicable Spanish laws, and solutions would be available outside of the text, if answers were not provided therein. A code would definitively produce a cut with previous Spanish legislation, would be exhaustive, and all solutions would have to be looked for within its articulation. Secondly, a wide array of questions related to sources: which were the materials the drafters used when completing the Digest of 1808? Were these materials of Spanish, French, or Roman origin? What is the value of the edition of the Digest of 1808 with manuscript notes entitled de la Vergne volume? What is the Batiza-Pascal debate on sources of the Digest of 1808 that has been ongoing in Louisiana since the 1970s? While answering this set of questions, Dargo correctly states that the debate in Louisiana did not limit to which civil law system would be adopted (i.e., French or Spanish), but that it went further and related to which legal tradition would prevail (i.e., Continental European or Common Law). Accordingly, in that same chapter the
author informs the readers of the “gradual erosion”\(^\text{11}\) that he sensed in the civil law of Louisiana back in the 1970s, which is still a valid feeling during the publication of this revised edition. Corollary to this chapter, and to the book as a whole, Dargo sees the Digest of 1808 as the political compromise by which the settled ‘ancient inhabitants’ accepted the dictates of the Union.\(^\text{12}\)

This revised edition includes several positive additions. Firstly, the book includes illustrations, making them another useful way of sharing information. The use of maps, reproductions of book covers, and pamphlets help in the building of knowledge on time and place. Secondly, the original endnotes have been converted into footnotes, making access more user-friendly. Some footnotes have been revised to attain a better pinpointing, while few were updated with references to works published after the publication in 1975. The best companions to this new edition of the work of Dargo would be the studies by Richard Kilbourne\(^\text{13}\) and Alain Levasseur.\(^\text{14}\) Both books, also recently republished, help in understanding the events that relate to the clash of legal traditions. The work by Kilbourne is precise in explaining the legal history of the adoption of the Louisiana Civil Code of 1825, successor of the Digest of 1808. It picks up the developments of the clash of legal traditions contemporaneously to the adoption of the Digest of 1808, and continues exploring that phenomenon in Louisiana, bridging both legal bodies. The work by Levasseur provides a better understanding of the life and work of Louis Moreau-Lislet, the main drafter of both the Digest of 1808 and the Civil Code of 1825, and an important player in the clash of legal traditions.

The main addition to the revised edition of the work by Dargo is the new introduction provided by the author. The introduction excels in showing what Dargo summarizes by stating that: “the history of Louisiana and its law is no longer a subject of interest only to local legal scholars; it has broadened out to become

\(^{11}\) Id. at 300.
\(^{12}\) Id.
\(^{14}\) ALAIN LEVASSEUR (with the assistance of Vicenç Feliú), MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808 (2008) (Rev. ed. of Alain Levasseur, Louis Casimir Elisabeth Moreau-Lislet: Foster Father of Louisiana Civil Law (1996)).
a subject with profound implications toward an understanding of American history and of America’s place in the world today.” 15
This expression of the author is supported by the compilation and in-deep analysis that he makes of the main writings that were published since the printing of the first edition in 1975. An insider’s look is given to readers on the developments of the modern historiography of Louisiana. The introduction also provides a fresh and updated look into the debate on the sources of the Digest of 1808. Above all, the author reflects that the debates and studies on Louisiana law exceed the geographical boundaries of the state and are studied by scholars from different corners of the world who are interested in civil law or mixed jurisdictions. The work of Dargo is able to position Louisiana as a treasure-trove region for scholars interested in the steadily developing area of comparative legal history.

Post Scriptum
George Dargo passed away on January 5, 2012. The Editor-in-Chief of this Journal had the privilege of attending a lunch organized in his honor by Ms. Georgia Chadwick, Director of the Law Library of Louisiana, and Mr. Greg Talbot, The Law Book Exchange, on the occasion of the publication of the revised edition of Jefferson’s Louisiana. This was at Antoine’s, in New Orleans, in January 2010. The reviewer could not attend but had met George Dargo on a previous occasion.
The new edition of this book was indeed a great event in Louisiana, where George Dargo will be missed by friends and colleagues. He leaves us a major contribution to the history of our state, covering events that had a large significance for the United States and other parts of the world.
O.M. and A.P.

15. DARGO, supra note 2, at xxvii.