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THE MÉLANGE OF INNOVATION AND TRADITION IN MALTESE LAW: THE ESSENCE OF THE MALTESE MIX?

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1 General remarks on the concept of "tradition". Maltese tradition and the foundation of the Maltese legal system

The issue of hybridity is pivotal in contemporary academic discussions about the future of European law (especially of European private law).¹ Although the eventual outcome of the process is not yet clear, what is certain is that European law will evolve as a "hybrid" resulting from the intermingling of diverse national legal traditions, among which civilian and common law will play a key role. The concept of (legal) tradition has been usually identified with "past", a set of elements and values belonging to the history of a system. In western thought, tradition has been usually linked with the idea of a static social order.² However, tradition does not have only a "static" and "closed" character, but it has also a "dynamic" meaning.³

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1 The words "hybrid" (as related to legal systems), and "hybridity" are not easy to define. Likewise, a clear-cut distinction among mixed systems and hybrid systems is not easy at all, and will not be tried for the moment. According to the Cambridge Learner's Dictionary, the word "mixed" has to be used as to what is "made of a combination of different things", whereas "hybrid" is applied as to something new "which is made using ideas or parts from two different things". On the distinction among "mixed" and "hybrid" legal systems see para 2. On the issue of the future of European private law see Reid 2003-2004 *Tulane Law Review* 17.

2 Marini 2010 www.comparazioneediritto.civile.it points out that notwithstanding the fact that tradition is usually seen as the result of a slow and spontaneous evolutionary process, it is rather the result of a selection of elements (and therefore has an artificial character): see *infra*. See also Marini 2011 *Comparative Law Review* 2-3, where the two different modes of understanding tradition, organic and semiotic, are clearly explained: in the organic perspective, "tradition means an entity that constitutes and is dialectically constituted by a whole national culture or spirit. Each entity is unique, a specific product of cultural features and of a national spirit and history" (Marini 2011 *Comparative Law Review* 2). According to the second perspective, "national traditions exist only as accumulated speech, a complex system of distinct and multiple elements (as a common conceptual vocabulary, a set of potential rule solutions, typical arguments pro and con, organisational schemes, modes of reasoning) as a list of elements that help us make the context more intelligible than it was before" (Marini 2011 *Comparative Law Review* 3). In this perspective, tradition is a set of elements which can be used by the "forces operating within the legal field". On the "structural" relationship between "law" (seen "as a means oriented to create a constructive order of the historical reality") and "narrative" ("as a means aimed to frame and explain the different looks of the historical existence") lying at the basis of the concept of legal tradition, see Costantini 2010 *Comparative Law Review* 1.

3 On the "traditional" dichotomy among tradition/change and on how this dichotomy has been overcome, see Glenn *Tradizioni Giuridiche Nel Mondo* 59; Rouland *Antropologia Giuridica* 378.

An interesting example of hybridity is represented by Malta, whose legal system is not well known, but is worth studying. One may better understand how, on a small scale, different traditions can give birth to a new legal order. The simultaneous presence, as will be explained more clearly *infra*, within the same legal order of several traditions affects separately the different legal areas which compose the Maltese legal system. Some legal areas are steered towards the British common law model, while others are affected by the continental one.

The approach suggested aims to analyse the Maltese "mixedness" in the light of the innovation/tradition dichotomy. The former word highlights the changes brought about by the British government to the law of the Island,⁴ while the latter is used with reference to past Maltese legal history, and may be employed with an "objective" or "subjective" meaning:

- (a) In a first meaning, "tradition" is "autochthonous law", pre-existing to (and autonomous from) the influences of foreign law. Maltese legal tradition would be a source of law resting on an "impure version" of Roman law, the one which was the backbone of *ius commune*.⁵ This latter resulted from the mingling of Roman law principles, feudal customs, Sicilian laws and Canon law. The presence and blending of these different legal traditions was the by-product of successive regimes on the Island. If Roman law may be seen as the fabric of Maltese law, the only law that may be considered authentically Maltese was enacted during the period in which the Knights of the

4 The origins of British sovereignty run from the end of French Rule to 1815. After the expulsion of the French as a result of a military alliance between the Maltese insurgents and British military forces, the British exercised *de facto* political control over the archipelago. The formal sovereignty continued to lie with the King of the Two Sicilies, given the British failure to restore the islands to the rule of the Knights as they bound themselves to do by the Treaty of Amiens. During this period Malta was effectively a British protectorate. Malta lost the status of protectorate and became a colony only after the 5th October of 1813, when Thomas Maitland took up the position of Governor and Commander of the island of Malta. In 1814, a VII of the Treaty of Paris recognised this change of status, providing that "the island of Malta with the dependencies thereof will be under the Sovereignty of the King of Great Britain". These are the essential historical facts concerning the transition of Malta under the control of Great Britain. The nature of this transition and of the British title over Malta are open to interpretation, as it will be seen *infra* in the text.

5 See Harding *History of Roman Law passim*.

Gerosolimitan Order governed the Island.⁶ The Knights acted as an efficient gateway for the penetration of the European legal tradition into the law of the Island. Also laws enacted during the Knights' period are based on Roman law. This is clear if one considers the Code de Rohan, never expressly repealed (and therefore to be considered still in force),⁷ which may be seen as the forerunner of modern Maltese codes.⁸ The influence on this code of Roman law taxonomies is remarkable. Not only does Maltese law owe to Roman law the greater part of the concepts and principles followed in the written law, but also Roman law has provided the supplementary law used as a source for ruling *casi omissi*⁹ (especially during the nineteenth century). Notwithstanding the fact that recourse to Roman law as a supplementary source has been notably whittled down in modern times, even nowadays judges look at Roman law. Its use, however, is different. Recourse to it is made to strengthen judicial reasoning, as a "rhetorical device" used by judges for its prestige and appeal, or as a source of interpretation of written law. The objective meaning of tradition will be made clear, as soon as attention will be focused on how continental law, which was the bulk of the traditional Maltese legal system, was suffused with a layer of British common law.

- (b) The subjective meaning attaches to the way in which the legal system in its present aspect is described by those who live within the system. In this meaning, tradition may be seen as a "narrative", as a by-product of an élite.¹⁰

6 The Knights of the Gerosolimitan Order, also known as the Knights Hospitaller, had gained control over Malta in 1530. Before their arrival, Malta was a political appendage of Sicily and the laws enacted by the Sicilian rulers also applied *ipso facto* to Malta. Their domination ended in 1798, with the arrival of French. On the Gerosolimitan Order, see Michalief *Riflessioni Storico-critiche Sull'isola di Malta passim*.

7 In a case of 1875, the Maltese Court of Appeal held that the Codice de Rohan was still observed by the Courts of Justice of these Islands and was never abrogated, expressly or impliedly ("è conservato in osservanza nelle corti di Giustizia di queste isole e non fu abrogato, né espressamente, né implicitamente"). On the Code de Rohan see Sammut 2009 *Id-Dritt Law Journal* 330.

8 A distinguished Maltese author has described this code as "una pietra angolare del nostro edificio giuridico"; see Cremona *Storia della Legislazione Maltese* 75.

9 A rule embodied in the Code de Rohan was that, in the case of a gap in the law, judges have to make recourse to Maltese common law. This rule was cited by De Bono *Sommario di Storia passim* and by Bonavita *Saggio Sulla Prova Giudiziaria passim*.

10 This idea has been clearly explained by Frankenberg 2011 *Comparative Law Review* 4: "Traditions [...] are stories that elaborate the way in which we see reality on the basis of what we have learned. Stories of traditions are told, perpetuated and shared by interpretive communities, by élites. The story of a tradition is usually an élite 'thing' which privileges and reifies a specific

Traditions do not only elaborate how we see reality, but also how we ought to see reality.¹¹ Traditions "naturalise", they may appear natural rather than constructed what might not otherwise be coherently legitimised.

Tradition in the meaning sub b) is important for understanding how the origin of Maltese "bijurality" was explained by the Maltese political and legal élites in the nineteenth century. The foundation of British sovereignty on Malta was rooted in an allegedly voluntary cession made by the Maltese people to the British Government.¹² This account, which perhaps could more appropriately be described as a myth,¹³ is not neutral. The political aim of those élites was that of obtaining for Malta a privileged status within the British Empire different from that of an ordinary colony, which would preserve the religion, laws, and customs of the Maltese people and

historical experience or learning process. Per definitionem the interpretive narrative weaving the texture of a tradition is selective. From the numerous events, issues, items, conflict resolutions of the past only a few are picked out to be recognised as worth remembering and sharing as a 'tradition'. On the importance of 'narrative', as a necessary background to frame correctly legal rules and on the importance of 'narrative' as a necessary background to understand legal rules, see Monateri 2003 *Transnat'l L & Contemp Probs* 575.

11 Frankenberg 2011 *Comparative Law Review* 5.

12 On this aspect, see Ganado "Malta" 229-230. See also the seminal judgment *Sammut v Strickland* 1938 3 All ER 693. This case stemmed from the question of the validity of customs duties imposed under an ordinance made by the Governor of Malta (who represented the Empire) on certain foreign articles. At stake, there was the legitimation on behalf of the Crown to make use of legislative power to rule the Island. The issue of the existence and the width of the Crown powers involved on behalf of the judges the necessity to deal with the issue of the origins of British sovereignty and with the fact that these powers were used notwithstanding the Crown had conferred representative institutions (established with letter patent in 1921) on the inhabitants of Malta. The dispute had two possible solutions. According to one interpretation of the British public law principles (the *British Settlements Act* (1887) and the *Foreign Jurisdiction Act* (1890) were expressly recalled in the judgment), endorsed from the First Hall, sovereignty could be acquired from the Crown through conquer, cession or settlement. Since Malta was not a settled colony (the inhabitants were not English), the Crown could continue to make recourse to legislative powers. According to another interpretation (endorsed by the Court of Appeal), a distinction had to be made between cession (occurring when one State transfers its sovereignty on a territory to another State), and voluntary cession (consisting in the spontaneous transfer of the sovereignty by the general consent of the inhabitants of one State in favour of another State). According to the Court of Appeal, since Malta was not acquired by the Crown by cession, but by "compact" between the inhabitants and the Crown, and this latter had acquired the right of legislating for the inhabitants of Malta by "uniformity of usage" from 1836, the Royal prerogative was surrendered with the grant of representative institutions. The Privy Council rejected the distinction between cession and voluntary cession, since it could not find support in the British public law textbooks nor in the statutes. Even the existence of representative institutions was not considered by the Council a hurdle to the Crown's use of its legislative powers.

13 On the importance of myth even in Western law, see Rouland *Antropologia Giuridica* 389. The word "myth" may seem too strong. This word aims to highlight the fact that not always what is defined as "tradition" is really rooted in the history of the system. A tradition may be "invented", i.e. it may be something new, which, for example, may deserve to give legitimacy to some conducts held by groups which hold political power. To this regard, see Hobsbawm and Ranger (eds) *L'invenzione della Tradizione* 3-19.

offer them a high degree of autonomy and self government, while allowing them to benefit from the commercial advantages resulting from integration within the British Empire.

As to innovation, it cannot be fully understood if one considers only legislative changes to the legal framework, since an important role in the development of the legal system has been and continues to be played by Maltese judges.

Attention will be focused in particular on specific cases which are not expressly provided for by written law. In these cases a creative function played by judges is more evident; it is therefore interesting on the basis of which rules and principles the gaps in law are filled. This allows us to understand in depth which factors influence courts in the adjudication, and sheds light on the Maltese judicial mindset.

Before delving into the Maltese legal system in order to understand how different legal traditions have affected the legal system, the main approaches to the concept of mixed jurisdictions will be briefly sketched, in order to see if Malta may be properly considered "mixed" according to the most important doctrines formulated about the concept of the "mixed legal system" and how these taxonomies may be usefully applied to Malta.

2 Malta as a mixed legal system? Short survey of leading theories on mixed legal systems

Scholars dealing with this issue may be split into two groups. On one side are those who think that some legal systems in which two or more legal traditions operate simultaneously share some features. The sharing of these common features on behalf of specific legal systems would justify grouping them into a distinct "legal family", that of mixed jurisdictions.¹⁴

According to this model, a legal system should be considered mixed if it has three characteristics. The first characteristic is what has been called "the specificity of the

¹⁴ The leading scholar of this group is Palmer. This approach is also followed by Reid.

mixture", ie the fact that the system is built on dual foundations of civil and common law; the fact that the presence of these dual elements is obvious to an ordinary observer (inside that system); finally, that this "bijurality" affects separately distinct areas of law: public law is oriented towards the Anglo-American model, whereas private law is shaped along the continental one.¹⁵ Another approach, different from Palmer's, has been proposed which is worth considering.¹⁶ According to this latter, the simple presence within the same legal system of different legal traditions (other than those of civil law and common law) would be sufficient to speak of a mixed system. However, mixed jurisdictions could not be considered as a specific group with specific characteristics, as the kinds of mix which may be encountered are very different.

The different kinds of mix would depend on legal-cultural and socio-cultural affinity among the systems.¹⁷ When there is a high level of legal-cultural and socio-cultural affinity, the constituent elements of the new compound will be undistinguishable and inseparable. A clear example of this group is the Dutch legal system. When there is

15 Palmer *Mixed Jurisdictions Worldwide* 7, who looks at these three characteristics as the lowest common denominators of a mixed jurisdiction.

16 Özücü "Family trees for legal systems" 359 clearly explains her approach in the following passage: "what is necessary is an assessment of individual legal systems according to the old and new overlaps and blends and of how the existing constituent elements have mingled and are mingling with new elements entering these legal systems. Hence, the scheme proposed here regards all legal systems as mixed and overlapping, overtly and covertly, and groups them according to the proportionate mixture of the ingredients. Therefore, it is essential to look at the constituent elements in each legal system and to regroup legal systems on a much larger scale according to the predominance of the ingredient sources from whence each system is formed. Both horizontal and diachronic analyses are called for at all times. The starting point is that all legal systems are overlaps and mixes to varying degrees" (Özücü "Family trees for legal systems" 363). Fragments of Özücü's approach are developed in other works of the same author. See also Özücü 1987 *Legal Studies* 310; Özücü 2002 *Int Comp L Quart* 205.

17 Since Özücü's survey is not limited to systems which are the result of the mixing of common law and civil law, the more general (in comparison to "mixed") word "hybrid" is preferred henceforward, since it describes better her approach. According to Özücü's approach, hybrid systems result from the diversity between the model and the recipient: "when transmutations occur and elements from different internal logic come together, differences are as to structure, substance or culture. Where there is a mismatch between model and recipient, history tells us that the result is usually a 'mixed jurisdiction'" (Özücü 2002 *Int Comp L Quart* 212). This diversity imposes on the recipient the burden of what is called by Özücü "transposition", a term which is imported from the field of music, and aims to refine Watson's theory of legal transplants. The bulk of this proposal lies in the necessity of adapting the model to the culture and needs of the recipient: "the term 'transposition' is more apt in instances of massive change based on competing models, in that here the pitch is changed. In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the transposition being made to suit the particular instrument or the voice-range of the singer. So it is in law. Each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient)" (Özücü 2002 *Int Comp L Quart* 207).

socio-cultural affinity but legal cultural diversity, the elements of the different traditions mix, but retain their separate identity. In this case a lower degree of mixing is shown, such as in Scotland where a combination of common law, civil law, and indigenous law may be found.

When the legal systems coming into contact show diversity under either the legal-cultural or the socio-cultural aspect, the result is a system characterised by legal pluralism. A clear example is Algeria.

The approach Örüçü proposes is the so-called "family trees approach", consisting mainly in a work of deconstruction and reconstruction of "the conventionally labelled pattern of legal systems".¹⁸

Legal systems would be classified according to their parentage, their constituent elements and the resulting blend, and then grouped on the principle of predominance.

This scholar specifies that¹⁹

the strategy for the family trees approach would be to look at the picture as objectively and neutrally as possible with a view of discovering the ingredients and historical antecedents of each legal system together with its present blend. One methodological problem of comparative law research in determining where legal systems sit, is how to decide on what to ignore as accidental rather than vital and what as changeable rather than constant.

Hybrid systems may be the result of "cohabitation", may be "life-long", or may be "passing"; they may be also the result of the crossing between "adjacent trees". Mixture may be overt, or covert. The diversity of cases of hybridity would not allow the construction of a theory. Malta is explicitly considered as an example of "complicated cross".

Notwithstanding that Örüçü's proposal may lead to significant results under a comparative perspective, since it is able to deal with the internal complexity of the phenomenon of hybridity, Palmer's approach seems more fit for understanding the

18 Örüçü "Family trees for legal systems" 359.

19 Örüçü "Family trees for legal systems" 371.

Maltese legal system, since this latter is grounded on a sectional balance between continental and Anglo-American law similar to that shown in the jurisdictions Palmer studied. Therefore, his approach will be followed. However, the Maltese legal system is distinguished by some features which are not common to other "classical" mixed jurisdictions. This fact will be considered.

For our purposes, it seems correct to identify the most significant features of the Maltese system in the following manner: (a) the codification of law; (b) the absence of the doctrine of binding precedent; (c) the absence of a theoretical approach to law in the sense that a doctrinal formant²⁰ nowadays is basically non-existent.²¹

Among these features, only the issue of codification will be examined in more depth in the following pages.

3 The 'mixedness' as a basic character of the Maltese legal system

Although the main focus of this paper is on the features and the sources of private law, a thorough description of the Maltese legal system also has to concern fields of law other than private law.

As to Maltese public law, it is commonly acknowledged (from Maltese scholarship²²

20 Through the use of the word "formant" this writer makes reference to Rodolfo Sacco's theory of legal formants expounded in Sacco 1991 *AJCL* 1. In this essay, the author deals with the fundamental issue of the way of selecting the objects to compare. According to him, the comparative law scholar should do away with the notion of legal rules which is linked with the idea of the unity of the legal system. He challenges the assumption that every legal issue can be dealt with through a single rule, which is the same for every constituent part of the legal system (constitutions, legislatures, courts, scholars who formulate legal doctrine, etc.). According to Sacco, there is no such thing as a single rule. At the outset of their search, comparative law scholars will not find a single rule, but a variety of legal material: "thus even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognises implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges – elements that he keeps separate in his own thinking" (Sacco 1991 *AJCL* 22). This variety of legal formants is called "legal formants".

21 The absence of a modern doctrinal formant makes it more difficult for a foreign observer to penetrate the internal logic of the system. Law journals (devoted basically to practitioners, and one, *Id-Dritt* run by the students of the Faculty of Law) are very few. Maltese scholarship gave a more important contribution during the nineteenth and the first thirty years of the twentieth century.

22 See Ganado 1950 *Current Legal Problems* 195; Ganado "Malta" 225.

and several Maltese judgments²³) that British common law is its backbone. This was not the result of the formal acquisition of sovereignty over Malta (which occurred in 1813, when Thomas Maitland took up the position of Governor of the Island²⁴, and was acknowledged in 1814 on an international footing by the Treaty of Paris²⁵), but the formal acknowledgement of Malta as a British colony since the very beginning of the presence of the British on the Island.²⁶

Other legal areas, such as criminal law and criminal and civil procedure, unlike those of other mixed jurisdictions,²⁷ are not ruled in full from English law.

Criminal substantive law, which was codified,²⁸ may be defined as the "eclectic" result of the influence of blended Italian and British legal traditions.

23 A significant acknowledgement of the influence of British public law on the homologous Maltese field may be found in the area of governmental liability towards private persons. This area has been characterised by the relinquishment of the doctrine of the dual personality of State grounded on continental law principles, acknowledged for the first time in *Busuttil vs La Primadauys* (Prim'Aula 15 February 1894), which distinguished between acts "iure imperii" (for which the State was not liable) and acts "iure privatorum" (for which the State could be liable), and challenged afterwards in *Cassar Desain v Forbes* (Court of Appeal 7 January 1935) insofar as the doctrine of act "iure imperii" has been clearly rejected since it is "alien and diametrically opposed to the Public law of England", in favour of a stricter doctrine, based on British law, of "acts of State". The actual difference among these two doctrines is that the separation of powers, rooted in continental legal tradition, not only sets out the independence of judges, but also the freedom of the government and its officials from the jurisdiction of the ordinary courts. In *Cassar*, the issue at stake was if the Crown can be held liable in tort for a wrong committed by its servants. This last judgment is particularly significant since, "as the matter of the personality of State is a matter of public law, it is to be regulated of British public law and not of continental jurisprudence" (see *Gulia Governmental Liability in Malta* 11). According to English public law principles summarised in the judgment, the State is subject to the same law of private citizens, i.e. the "common law". The interesting point developed in *Cassar* is that "common law" was identified in the Maltese but not in the English common law. This conclusion has been grafted on the ground of the allegedly different status of Malta from that of the other colonies (on this point, see what I said above under s 1). Due to the fact that Malta was neither conquered nor ceded, the principle according to which any law seriously opposed to the principles of English law was repugnant to the law of England and therefore invalid could not find application. A different rule (for further details, see above in the text) should have to be obeyed - one providing that pre-existing laws (previous to British Rule) should remain in force unless changed by the competent authority; with the result that the common law of England has no authority on the Island.

24 See fn 4.

25 The Treaty provided that "the Island of Malta with the dependencies thereof will be under the Sovereignty of the King of Great Britain".

26 The origin of British sovereignty on Malta has been explained by Maltese élites as the result of a voluntary cession made by Maltese people to the British government (on this issue, see Mifsud *Origine della Sovranità Inglese* VI). This explanation of the origin of British Rule aimed to claim a wider independence of Maltese from the British government than that enjoyed from ordinary colonies. The reception of British law was therefore depicted not as the result of an imposition, but as the outcome of a free choice; whence the possibility of adaptation of the principles rooted in British law to a context strongly permeated from a civilian culture.

27 This is one of the peculiar characters of the Maltese system to which I was referring at the end of the previous section.

As to the field of procedure, according to a well known generalisation, the fundamental distinction in the field of procedure among common law and civil law systems is that which opposes "adversarial" and "investigative" models.²⁹ The first is typical of common law systems, and is characterised by active parties, a rather passive judge (as he renders a decision based only on what has been produced in the proceedings) and a lay jury, while the second is marked by a more important role for judges and the absence of a lay jury. This latter element shows that in civil trials the principle of a single continuous hearing is rejected. In civil cases it is the norm to have an "episodic" trial, marked by a number of hearings. In Malta, the trial in civil law matters is more oriented towards the investigative model than in the other mixed jurisdictions. However, there is no discovery system, no jury, judges play an active role, and the procedure is based on the written rather than on the oral form. This reveals that civil law influence on civil procedure did not completely disappear soon after the beginning of the British Rule. In fact most of the rules of the Code of Organisation and civil procedure have a civilian origin. Although the inquisitorial model is even nowadays at the roots of civil procedure,³⁰ some features of the "investigative" model have been received. The adoption of common law procedure and evidence was brought about primarily by statute. The result of the joint influence

28 On the criminal code, see Gourlay 2009 *Melita Historica* 109; on the issue of the model and the language for the codification of criminal law, see Ganado 1949 *Law Journal* 211.

29 On the distinction among adversarial and inquisitorial procedures, *ex multis*, see Mattei, Ruskola and Gidi *Schlesinger's Comparative Law* 789-790: "by 'adversarial proceedings' civil-law attorneys refer to the fact that the court is limited by the parties's claims, allegations of facts, and presentation of evidence. This does not mean, however, that the judge is a passive bystander or a mere umpire, as the traditional common-law judge. Although limited in the merits of the proceeding, the civil-law judge plays an active role with respect to the procedure. Among other things, the judge supervises the orderly evolution of the proceedings and compliance with procedural rules, making decisions within a reasonable time. This active role also implies that, in some civil-law countries, if the parties do not succeed in producing sufficient evidence, the judge may request *sua sponte* the production of any admissible evidence, whenever necessary for a decision on the merits" (Mattei, Ruskola and Gidi *Schlesinger's Comparative Law* 790). There would be a systemic difference between common law and civil law procedures concerning the role of judges to be found primarily in the coordinate-hierarchical dichotomy

30 During his Governorship, Sir Thomas Maitland had the aim of substituting the prevailing inquisitorial model with the investigative. His death stopped the process of reforming the existing law with norms rooted on English common law, and its replacement with a policy that local law would be left intact in areas where the introduction of common law principles was not felt to be absolutely necessary. This policy is well witnessed by the most important commentaries on the procedural law and the law of proof and evidence written among the 30s and 40s of 19th century by two leading Maltese lawyers, such as Antonio Micallef and Ignazio Bonavita who stressed the fact that the Maltese civil procedure is a mixture of law flowing from Canon law, Sicilian law, and English common law.

of these two legal traditions is that this area is a mixed one. This is true also for criminal procedure.³¹

4 The roots of the Maltese private law

As to the field of private law, even after the beginning of British Rule, the existing system was retained. This was the result not only of a political concession made by the British government to Malta, but it can also be explained as the outcome of pragmatic calculations. In fact, even though it may have been considered advantageous to imperial interest to replace private law based on Roman law with English common law, the colonial authorities realised soon that this substitution would have involved considerable practical disadvantages. Not only would the peculiarities of English private law have made it difficult to transplant it into a foreign context, but also autochthonous private law based on the continental system was well-tried. Furthermore, the substitution of English common law would have encountered opposition from the Maltese legal profession. All these factors inspired the first proclamation of British Commissioner Cameron on the 15th July 1801 which acknowledged the protection of the rights of the Maltese people, expressly religion and property.³²

On one side, therefore, there was the retention of private law pre-existing British Rule; on the other, the process of codification of this area began. This process was not without hurdles. First of all, the issue of the language of code needed to be decided: if at the very beginning of British rule the position supported by the first commission charged with the task of codification favoured English as the official language (which would have made possible the introduction of English law concepts into the fabric of private law), soon a different position was upheld, according to which the drafting of the code should be in Italian. The process of codification was taken to its conclusion by Sir Adrian Dingli, a Maltese lawyer appointed Crown

31 According to Cremona 1964 *AJCL* 570: "the whole criminal system of the Island [...] represents a felicitous fusion of continental and English elements. [...] the substantive criminal law of Malta is based on the Code Napoléon [...]" (Cremona 1964 *AJCL* 572). A significant trace of continental influence is the existence of an inquiring magistrate having the function of gathering evidence in the pre-trial phase of criminal trials in the case of offenses whose punishment exceeds a ten-year term of imprisonment.

32 See Harding *Maltese Legal History* 7 ff; Ganado "Malta" 228 ff; Hardman *History of Malta passim*.

Advocate in 1854, who drafted the civil code by enacting single ordinances in line with the most modern civilian codes of that time. These ordinances were afterwards consolidated in the Ordinances VII of 1868, concerning the law of things, promulgated on the 11th February 1870, and I of 1873, concerning the law of persons, promulgated on the 22nd January 1874.

These two ordinances covered the whole field of private law, with the exception of citizenship and intellectual property rights which were governed by English law, and marriage, which was governed by Canon law. The backbone of Dingli's civil code is the Code Napoléon that was the most important model among those employed for its drawing up. 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.³³

Dingli documented in his notes (entitled "Appunti", written in Italian) the foreign sources of law he looked at, such as Roman law, the Code Napoléon, the Austrian Code, and the codes of various Italian states.³⁴ This manuscript which is not included in the civil code gives a precious insight on Dingli's laboratory since it allows an understanding of the conceptual background of the civil code.

Some provisions are completely new while others are deeply rooted in Roman law, which is the essence of the Maltese legal tradition.³⁵

33 Harding *History of Roman Law* 40 ff.

34 Apart from the French code, other codes were consulted such as the Civil Codes of Austria, Parma, the Two Sicilies, Canton Ticino, and Albertino.

35 See Dingli *Appunti passim*. *Ex multis*, the part concerning the contract of sale is interesting, since it includes numerous examples of provisions which are taken from French code, from French scholarship, and provisions which are created *ex novo* by Dingli.

From those days until today, the Maltese code has been and is still one of the most faithful codes to the original Code Napoleon in comparison with the civil codes of other civil law systems which have undergone revisions. The Maltese Code has in fact remained fairly stable.

The influence of the code Napoléon on Maltese private law cannot fully explain this field of law. There is another powerful force which acts beyond the level of private law written rules: that of courts.

4.1 *Precontractual liability and moral damages as significant examples of the Maltese "law in action"*

In this section, I will deal with two relevant issues within the realm of private law, which seems to support the assumption that judges have played an essential role in driving the development of the Maltese legal system and that, for this reason, have contributed to its mixed nature.

The issue of moral damages is a significant example of the Maltese judicial attitude to having recourse to equity. The term "equity" may be used in the Maltese legal context in a double meaning:³⁶ as a device used to fill the gaps, but also as a tool to correct the injustice or unfair results flowing from a literal application of law. As to moral damages, the word will be used in the latter meaning.

The rule which has always been followed by Maltese judges is that moral damages are not generally recoverable, notwithstanding the general rule of article 1031 of the Civil Code in force, which provides that "every person shall be liable for the damage which occurs through his fault". This provision does not hinder the recoverability of a specific kind of damage, as long as the legislator did not make any distinction among damages whose award is admitted and damages not recoverable. The divergence between the written law (which does not put boundaries as to the recoverability of damages) and the rule applied (restrictive as to the compensation of moral

36 Accordingly to what has been done by Palmer 1994 *Tulane Law Review* 7, as to Louisiana. These powers have been grounded by Palmer on a 21 of the Louisiana Civil Code of 1870 which allows judges to formulate a legal rule "on the basis of its fairness and social utility, as would a legislator" (Palmer 1994 *Tulane Law Review* 9).

damages) has been explained using three different arguments, which have often been used jointly:

(a) The first, which could be called the "historical" argument, consists in invoking Roman law which seemingly adopted a restrictive approach very similar to that followed by the Maltese judges. Through the concept of "iniuria" Roman law acknowledges what modern scholars call "moral damages" only in few cases. The recourse to Roman law to explain the foundation of a restrictive rule concerning moral damages is made with the aim of narrowly interpreting the written provisions of the Maltese code.

(b) The second finds the *rationale* of the restrictive rule in the influence exerted by common law in the realm of non-pecuniary damages.³⁷ If this influence even in the field of private law is not controversial nowadays, it is more difficult to state that since the nineteenth century the common law restrictive approach in the realm of tort liability would have affected the Maltese law of tort. One should demonstrate that in the writing of tort law provisions Dingli was affected by English common law culture. This conclusion does not seem so easy to support. In the nineteenth century, and especially in the field of private law, the appeal of continental culture was strong. Therefore, founding the *rationale* of the restrictive rule of recoverability of moral damages on English common law cannot explain persuasively the origin of the rule.

(c) The third way is grounded on article 1045 of the Civil Code, stating as to the measure of damages, according to which

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

37 This is the assumption of Micallef-Grimaud 2011 *JCLS* 481. Micallef-Grimaud argues that the "pigeon-hole approach" typical of the English legal tradition has affected the Maltese system of civil liability since the beginning of British Rule. He invokes as evidence of his thesis Dingli's notes and the *Promises of Marriage Law Act* (1834). This assumption can be challenged: see the text above. On the influence of English principles on the calculation of *lucrum cessans*, see Cilia 2011 *JCLS* 331. As to the quantification of the loss of earnings, Maltese law imported since the case *Butler v Heard* (Court of Appeal 22 December 1967) the multiplier formula from British law. This criterion however was not applied to the letter by Maltese courts, but has been reinterpreted since it was used also in cases in which it is not applied in English law, i.e. to compensate for loss of ability to work in the abstract. As to the cases in which the recoverability of moral damages is expressly provided, see Micallef-Grimaud 2011 *Id-dritt Law Journal* 109.

impelled 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 provision derives from the joining of two provisions of the Ordinance 1868, namely articles 751 and 752, respectively ruling the cases of damages caused without malice and damages caused maliciously. The first stated that

the damage however which is to be made good by the party who has caused it without malice, consists in the real loss that the act has directly occasioned to the injured party; in the expenses which the latter may have been compelled to incur in consequence of the damage; and, if the party injured be a person who works for wages or other payment, in the loss also of such earnings.

The second provided that

the damage however which is to be made good by the party who has maliciously caused it, extends, besides the losses and the expenses mentioned in the preceding article, to the earnings which the act hinders the party injured from obtaining for the future regard being had to his condition. The Court shall fix for the loss of such earnings, according to circumstances, a sum not exceeding one hundred pounds sterling.

It is interesting to consider Dingli's comment to this latter provision made in his above mentioned notes, in which it is explained why a ceiling was fixed to the recovery of damages. The reason was the fear that otherwise the wrongdoer would be exposed to an indeterminate liability. Therefore, the recourse to the provision of article 1045 to ground a restrictive rule as to the recovery of moral damages is not convincing, since this provision deals with an issue different from that concerning the recoverability of moral damages. Rather, the recourse to article 1045 conceals the judicial creation of a new rule aimed at avoiding supposedly unfair results (the impoverishment of the wrongdoer) which would flow from applying the general provision of article 1031 to the area of moral damages. The argument used by Dingli as a *rationale* of the restrictive rule reveals that this latter is presumably rooted in Maltese legal tradition pre-existing the codification of private law. It is hard to say in fact that this rule is created *ex novo* by Dingli for two main reasons: Dingli expressly admits when he introduces a brand new rule created by him which is not grounded on foreign legal

provisions; furthermore the rule preventing the recoverability of moral damages has been followed by courts as a well-established principle of law up until today.³⁸

After having considered an example of judicial equity consisting in a rule created by judges to correct unfair results flowing from the literal interpretation of a written law provision, an example of equity as a normative gap filling activity will be considered, that of pre-contractual liability whose admissibility is still highly controversial.³⁹

It is interesting, therefore, to see how Maltese judges cope with the issue of awarding damages incurred during the negotiations stage. The most frequent case dealt with by Courts is that of the abrupt interruption of negotiations.

Maltese judgements have adopted several solutions, none of which currently prevails.⁴⁰

In some cases, courts do not admit pre-contractual liability since they apply the doctrine of the freedom of will, according to which before the conclusion of contract no obligation can arise on behalf of the parties of a negotiation. Damages can be claimed only if a contract is concluded.⁴¹ According to the rationale underlying these decisions, no one would negotiate for fear of being held liable for damages, if individuals could claim damages against the party who had interrupted negotiations.⁴²

In other cases, Maltese courts decide in favour of the victim of pre-contractual unfairness. These judgments are justified in different ways. In some cases, courts

38 The evidence of the existence of an implicit rule stating the non-recoverability of moral damages is given by some specific provisions which acknowledge the award of this kind of damages in specific cases.

39 See *Attard v Xuereb* (First Hall Civil Court 13 October 2003); see also Bisazza *Precontractual Responsibility*; Xuereb 1978 *Id-Dritt Law Journal* 806; Scicluna *Pre-Contractual Liability*; Vassallo *Principle of Good Faith*.

40 For a clear analysis of the two approaches, see Mallia 2000 *Law & Practice* 25.

41 Mallia 2000 *Law & Practice* 26: "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".

42 This is the *rationale* underlying *Cassar v Campbell Preston Noe et* (Commercial Court 19 November 1971); and *Busuttil Pro et Noe et vs Muscat Noe et* (First Hall Civil Court 28 October 1998): this latter case is mentioned in Mallia 2000 *Law & Practice* 27.

argue for the existence of pre-contractual agreements,⁴³ 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.

Alternatively, Maltese courts have recourse to tort law, qualifying unfair conduct held during negotiations as an abuse of rights, which is expressly forbidden by article 1030.⁴⁴ 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 damage which may result therefrom.

The owner of a right is liable when he exceeds its boundaries. Pre-contractual liability therefore arises because the party who acts in bad faith infringes upon the other party's legitimate expectations.

Finally, the courts extend the ambit of the provision of article 993 of the Civil Code, which states that contracts must be carried out in good faith, to the issue of pre-contractual liability arguing that the duty of good faith also binds the parties during the stage of negotiations. Therefore, the unjustified interruption of negotiations should be considered as an infringement of this duty. Several judgements support this view.⁴⁵

43 Mallia 2000 *Law & Practice* 26 explains clearly this approach: "a new general principle was introduced in the law. Not only should contracting parties perform their obligations in good faith, but the protection of the other party's legitimate expectations became paramount. Thus, an agreement could be inferred from deeds and attitudes, independently if consent, if the other party legitimately and in good faith interprets those deeds and actions as meaning an agreement has been reached".

44 This provision is very wide. 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 12 October 2006) that awards damages to the victim to the extent of expenses incurred during negotiations (the so called negative interests).

45 Ganado *Introduction to Maltese Financial Services* 50 quotes a number of judgments which support this position: *Debattista v JK Properties Ltd* (Court of Appeal 7 December 2005); *Baldacchino v Chairman of Enemalta* (First Hall Civil Court 11 October 2006); *Scicluna Enterprises (Gozo) Ltd v Enemalta Corporation* (Court of Appeal 25 May 2007).

Presently, none of these approaches regarding the issue of pre-contractual liability has widespread prevalence, and the approach first discussed - based on the theory of the will - has not yet been definitely abandoned. This approach based on the theory of the freedom of will may presumably be seen as a sign of the influence of the English traditional way of dealing with the issue of pre-contractual liability, summarised in the "all-or-nothing" approach. As is well known, according to this approach only interests grounded on contract would be protected, whereas negotiations would not give rise to any interest relevant at law.

The other solutions, grounded on the principle of the protection of reliance interests,⁴⁶ adopted by Maltese judges in favour of allowing an action for pre-contractual damages, may be considered as the result of the influence of continental theories.

Pre-contractual liability may therefore be seen as an interesting example of the 'pragmatic' attitude⁴⁷ of the Maltese judges who have recourse, in filling the gaps in their system, to solutions drawn from different traditions.

Within the Maltese legal system, the judicial mindset cannot be seen as a unitary whole. Although in some periods "purists", ie judges who were strongly oriented towards the continental culture, were influential, the trend which has to be considered dominant through the different ages is that of "pragmatists", ie those who do not have a specific legal orientation, but blend features of the common law and civil law world. According to a terminology used by Palmer, and which can be applied to the Maltese situation, there is a third category of jurists, the so called "pollutionists", who are strongly oriented towards British culture, especially those who work in the fields which have been more exposed to English common law influence, i.e. public and commercial law.⁴⁸

46 This shift from the legal principle of the freedom of the will of the individual to the theory of reliance has been explained by Mallia 2000 *Law & Practice* 26: "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".

47 On this attitude see *infra* in the text.

48 Examples of pollutionists are Felice Cremona (1905-1980), JJ Cremona, Andrew Muscat. The first two were involved in the drafting of the Commercial Partnerships Ordinance and in the Malta

"Purists" were influential especially in two periods, from 1814 to 1834 and from 1878 to 1939. The "purist" trend was significant after Maitland's reforms until 1834 when the project of Anglicisation of Maltese law was abandoned by the British.⁴⁹ The other "purist" wave started in 1878 with the publication of the Keenan Report, through which the British Government aimed to replace Italian, which was at that time the official language of law and legal education, with English and Maltese. This second wave did not consist only in the defence of the civilian heritage from the interference of common law principles, but also had the character of a nationalist political movement whose main battle was the so called "language" question in the attempt to preserve the Italian language and culture in Malta against local Anglophiles and imperialists. The political project of these "purists" was the union of Malta with Italy.

The group of "pragmatists", however, has been largely predominant in Malta.⁵⁰ There are several reasons for their prevalence. Two in particular are worth being considered here.

Firstly, the presence of disparate sources of law at the start of British Rule. The above mentioned Code De Rohan was made of provisions deriving from various sources (statutes enacted by the Knights, Canon law, Roman law, rules imported from foreign legislative sources, and local custom). Therefore, the legal system was complex before the start of the British rule.

Secondly, the fact that British did not change suddenly the Maltese legal system, preferring to modify it gradually and only in those areas where they had an interest in so doing, fostered the "pragmatic" attitude of Maltese courts.

independence Constitution, based on common law principles. The third is Professor of commercial law and author of an important book, Muscat *Principles of Maltese Company Law*, with a clearly dominant common law focus.

49 One of the most influential "purist" was Carlo Mallia. He was Professor of commercial law in 1920 and Minister of Justice in 1932. In 1926, as a member of Parliament, he presented a bill of Commercial Code drafted along continental patterns.

50 Sir Arturo Mercieca (1898-1969), Sir Adrian Dingli (1817-1900), Sir Antonio Micallef (1810-1889), Sir Ignazio Bonavita (1792-1865), Professor Victor Caruana Galizia (1898-1968), Professor Anthony Mamo (1909-2008), Professor Joseph M. Ganado have to be considered as the most influential exponents of this group.

5 Conclusion

The notion of Maltese "mixedness" cannot be captured merely at the level of written rules, but also depends on the way courts adjudicate on cases. It can be said that the judicial mindset is mixed. That probably is due to a strong inclination in the Maltese legal system towards "mixedness" which precedes British arrival. The law which governed the Island then had a mix of different sources: Roman law, Canon law, and local customs. Therefore, having unveiled the constituents that form the background of the mindset of the judges was important in order to try to understand Maltese mixedness.⁵¹

An interesting focus on the judicial *mentalité* may be offered from the field of *lacunae*. In Malta, there is no provision similar to the Italian article 12, paragraph two, of preliminary provisions to the Civil Code, which states that when a case is not ruled from a specific provision, regard has to be given to provisions ruling similar cases or matters; if also these provisions are missing, judges have to adjudicate according to general principles of the legal system.⁵² The lack within the Maltese legal framework of a provision similar to article 12 may be explained by saying that, while article 12 aimed at "closing the gates" to the possibility of adjudicating on claims on the basis of foreign legal principles and rules,⁵³ the silence of the Maltese legislator on the criteria of interpretation of law and on the ways of filling the gaps (and, furthermore, on the sources of law) may perhaps be intentional, since it makes possible for Maltese courts to have recourse to foreign legal materials. This assumption may be supported by specific provisions of the ancient Code of Rohan, such as section XXXVII, in which it is provided that in the adjudication on cases judges have to decide according to the laws of the Island; when a case cannot be decided according to (Maltese) common law, regard has to be given to the judgments of the Supreme and reliable Courts.⁵⁴ This judicial "paranormative" power allowed by the Code of

51 On the importance of judicial mindset to assess the circulation of foreign legal principles and rules, see Markesinis and Fedtke *Giudici e Diritto Straniero* 21-90.

52 Article 12 reads that "se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato".

53 Gorla *I Precedenti Storici Dell'art. 12* 443.

54 Section XXXVII stated (in Italian) that judges could not "servirsi di veruna potestà arbitraria, quante volte non sarà regolata da quello che si dispone dalle leggi municipali, ed in loro difetto

Rohan found significant applications in Maltese law.

What seems peculiar to the Maltese system is the fact that codification did not completely replace previous legislation. According to the continental way of looking at codification, codes rest on the basis - and have the effect - of making "tabula rasa" of pre-existing law; they have the objective meaning of a clear-cut rupture with the past.⁵⁵ In Maltese law, on the contrary, modernity and tradition coexist side by side and are both relevant to have an insight on the identity of the Maltese legal system.

The description of the way Maltese courts adjudicate on issues not expressly provided by statutory law aimed to explain how a mixed jurisdiction actually works and may possibly be widened to other mixed jurisdictions.

This comparative analysis may disclose similarities between the approaches followed by these jurisdictions, and possible convergences at the level of applied law may result from a comparison among the mixed systems.⁵⁶ This approach may shed light on characteristics shared among the mixed legal systems "in action", other than the criteria usually employed, and give directions for predicting their evolution. Perhaps we will discover, to use Palmer's words, that "*Mixitania rules the waves*"?⁵⁷

dalle leggi comuni, e ne'casi controversi e dubbi dalle opinioni abbracciate ne'Supremi e più accreditati tribunali".

55 The codification process is depicted as a clear rejection of the 'juridical particularism' which was considered as inextricably linked to the past and valued negatively. On this issue, see Tarello *Storia della Cultura Giuridica Moderna* 28.

56 According to Reid 2003-2004 *Tulane Law Review* 7 "a striking characteristic of mixed jurisdictions, viewed historically, is their mutual isolation".

57 Palmer 2007 www.ejcl.org 23.

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List of abbreviations

AJCL	American Journal of Comparative Law
Int Comp L Quart	International and Comparative Law Quarterly
JCLS	Journal of Civil Law Studies
TECLF	Tulane European & Civil Law Forum
Transnat'l L & Contemp Probs	Transnational Law & Contemporary Problems