

THE TULANE EUROPEAN AND  
CIVIL LAW FORUM

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2012

*Dedicated to preserving and advancing the  
civilian tradition and to strengthening  
Louisiana's links with Europe*

Contract Law in Europe and the United States:  
Legal Unification in the Civil Law and Common Law  
**HEIN KÖTZ**

*Mors Codicis:*  
End of the Age of Codification?  
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The Normative Basis of Subrogation and Comparative Law:  
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In Memoriam

TONY WEIR

The Forum notes in sadness the death  
of its dear friend and brilliant contributor

John Anthony Weir  
1936-2012

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**Contract Law in Europe and the United States:  
Legal Unification in the Civil Law and  
Common Law**

Hein Kötz\*

I.

Allow me first to say what a great honor it is to present the Eason-Weinmann Lecture at Tulane Law School. When it was announced that I would have the pleasure of giving this lecture I became a little nervous after a look at the formidable list of my predecessors. On the other hand, while comparative lawyers do of course have opportunities to speak to other comparative lawyers—usually any number over 10 is considered a large crowd—they are rarely given the chance to address a wider audience in a place so well known as Tulane Law School for its long-standing interest in comparative legal studies.

A title, I was always told by my German master at school, is no more than a clothes-hook upon which to hang whatever you have made up your mind to say. While this may be a questionable statement it did give me some comfort when I realized that the topic I want to address does not exist at all. There is no European contract law at this stage, nor is there an American contract law. In the United States, not only does each of the fifty states have its own contract law, but the rules of the law of tort, restitution and property and on family and succession law are all state law as well. Uniform federal law has never made a serious attempt to displace the conflicting legislation and case law of the individual states.

\* © 2012 Hein Kötz. Professor of Law Emeritus of the University of Hamburg Law School and formerly Director of the Max Planck Institute for Comparative and International Private Law and President of the Bucerius Law School in Hamburg, Germany. This Article is a modified version of the Eason-Weinmann Lecture given on September 13, 2011, at the Tulane University Law School.

flexibility that the *lex mercatoria* provided. That flexibility would also enable local traders to have similar standing with traders from other nations and US states.

Codification endeavours in Louisiana were undertaken by a small group of drafters. Names of protagonists tended to recur in the *laboratory* that Louisiana provided: they are now all easily identified with codification. Drafters not only occupied positions as law givers, but some of them occupied positions in the judicial and executive branches. In addition, the drafters were representatives of both continental European and common law traditions. Some drafters were trained in the common law, others received a civil law education, while others were proficient in both systems. Drafters were also familiar with several languages, mainly the ones used in Louisiana legal discourse. This variety of skills, formation, and backgrounds resulted in an eclectic work. Therefore, the legal system that was produced in Louisiana during the early American period was quite eclectic.<sup>331</sup> Notwithstanding, the drafters reflected in their texts for Louisiana, especially in the 1820s, that they intended to follow guiding principles. In their report of 1823, the drafters of the civil, commercial, and procedural codes said that they recommended: "stating and defining the rights of individuals in their personal relations to each other, for giving force and effect to the different modes of acquiring, preserving and transferring property and rights, and for seeking civil redress for any injury offered to either."<sup>332</sup>

331. Howe, *supra* note 49, at 79. This eclecticism may have provided grounding to the current system in Louisiana. Many consider Louisiana a traditional mixed jurisdiction where the predominant legal system is no longer pure, and the influence of the common law is sensed. See Vernon Valentine Palmer, *Introduction, in* LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 3, 4 (Vernon Valentine Palmer ed., 1999).

332. Livingston et al., *supra* note 264, at lxxxix.

## "A Happy Union"? Malta's Legal Hybridity

Seán Patrick Donlan\*

Biagio Andò\*\*

David Edward Zammit\*\*\*

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### I. INTRODUCTION

*Throughout history, all particular systems have absorbed foreign influences, and the end result would therefore seem to be that no individual system today derives purely from its own particular roots.<sup>1</sup>*

In this Article, we lay out the broad outlines of the Maltese legal tradition.<sup>2</sup> We first suggest approaching comparative research as the

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\*\* Lecturer in Comparative Law, Faculty of Political Science, University of Catania, Italy. While all parts of the text were researched and discussed jointly, Dr Andò wishes to note his role as lead author for sections III.B-III.C for Italian assessment of his published scholarship.

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1. UGO MIFFSUD BONNICI, INTRODUCTION TO COMPARATIVE LAW (2004), 11. "Some, however are more mixed, in that they contain a greater number of imported ingredients, than others." *Id.* at 36; see also *id.* at 38.

study of legal (and normative) mixtures and movements. This study of 'hybridity and diffusion' allows us to see the traditional taxonomies of comparative law in a new light. All legal traditions are hybrids created in large part by the diffusion of laws and related doctrinal models across time and space. Hybridity is, of course, especially obvious in the case of those jurisdictions identified as 'mixed legal systems'.<sup>3</sup> Malta's legal tradition remains little known, but deserves greater attention. It is, on its own terms, an interesting and informative instance of legal development and change. Malta is the sort of "extraordinary place" that Esin Örüçü has suggested allows comparatists to "best observe, analyse and understand the interaction between legal cultures and socio-cultures".<sup>4</sup> While we may occasionally speak of the Maltese legal 'system' in this Article, this will usually refer rather narrowly to the current collection of Maltese positive law and legal institutions. 'Legal tradition', as used here in line with the work of Patrick Glenn, is far more fluid and inclusive.<sup>5</sup> We recognize that legal traditions are neither closed nor static and include much more than the formal laws of the state. That said, our focus in this Article is rather modest and traditional. We will concentrate our attention on Maltese legal hybridity, its "happy union" of continental law ('civil law') and Anglo-American law ('common law').

2. J.M. Ganado, *British Public Law and the Civil Law in Malta*, in CURRENT LEGAL PROBLEMS 1950: VOLUME THREE (G.W. Keeton & Georg Schwarzenberger eds., 1950), 195. "It is said that 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." *Id.*

3. See generally Seán Patrick Donlan, *The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture*, 4 J. CIV. L. STUD. 355 (2011). The article is part of a special issue of the journal focusing on Mediterranean law, especially Maltese law. The journal is available at [www.law.lsu.edu/index.cfm?geaux=jcls.home](http://www.law.lsu.edu/index.cfm?geaux=jcls.home) (last visited 13 Apr. 2012). It includes Donlan, *Profacc*, 4 J. CIV. L. STUD. 233 (2011); Biagio Andò, *The Role of Judges in the Development of Mixed Legal Systems: The Case of Malta*, 4 J. CIV. L. STUD. 237 (2011); and David Zammit, *Maltese Court Delays and the Ethnography of Legal Practice*, 4 J. CIV. L. STUD. 539 (2011).

4. Esin Örüçü, *Comparatists and Extraordinary Places*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand & Roderick Munday eds., 2003), 489. Note, however, that it is in such "extraordinary places" that the comparatist of today is least equipped to work." *Id.*

5. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEEN'S L.J. 427 (2008); see also GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW ((4th ed.) 2010); *Legal Families and Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Matthias Reimann & Reinhard Zimmermann eds., 2006); and *Legal Cultures and Legal Traditions*, in EPISTEMOLOGY AND METHODOLOGY IN COMPARATIVE LAW (Mark van Hoeke ed., 2004). Cf. the use of 'tradition' in JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed.) 2007), 1-2.

Other jurisdictions have, of course, been studied in a similar manner. Twenty years ago, for example, Kenny Anthony attempted to establish criteria by which to judge the legal complexity of his native St Lucia.<sup>6</sup> After underscoring the importance of history to this analysis, he wrote that

ultimately identity may be ascertained by examining (1) the infrastructure of the legal system, (2) the substantive rules of law and their ranked sources, (3) the legal methodology employed in interpreting the substantive rules and their sources, (4) the legal style employed by the judiciary, and (5) the socio-legal culture within which the legal system thrives. Extant definitions are mere guidelines to identification, and may not therefore be utilized as authoritative criteria. In effect, the argument has been that, like all other legal systems, mixed systems have "not only an inner logic, but a history, a sociology, a psychology, and indeed a philosophy."<sup>7</sup>

It is true, of course, that such an approach may be applied to the study of *any* legal tradition, whether or not it is the product of an explicit mixing process.<sup>8</sup> This has, however, seldom been very successful.<sup>9</sup> In order to have more concrete measurements for our research, we have used the descriptive criteria first set out by Vernon Palmer a decade ago in his *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) and

6. He wrote:

Essentially, an attempt was made to suggest criteria by which the nature of mixed or hybrid legal systems may be determined. The criteria will help to explain whether the mixed system is a permanent phenomenon or it is in transition from one legal tradition to another or is sustaining a duality or plurality of legal traditions. In deciding these questions, it has been argued that the historical background of the legal system cannot be ignored.

K.D. Anthony, *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 (Gilbert Kodilinye & P.K. Menon eds., 1992), 217.

7. *Id.* at 217-18 (quoting A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Legal Systems of the World, Three Kinds of Legal Thought*, 9 CAMBRIAN L. REV. 11 (1978-81)).

8. See, e.g., the discussion of legal 'style' in KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE AND EUROPEAN LAW (3d ed. 1998), 68.

9. But see the comparison of British and American legal traditions in P.S. ATTYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987).

revisited in a number of publications since.<sup>10</sup> This will be discussed in greater detail below.<sup>11</sup>

The next Part of the Article briefly discusses comparative law as the study of legal mixtures and movements, or 'hybridity and diffusion'. It explores the meaning of 'mixed legal systems' and lays out some of Palmer's conclusions following his study of a number of 'classical mixed jurisdictions'. The third Part traces the complex background and development of the Maltese legal tradition: its diverse history, the arrival of the British and the diffusion of their laws and institutions, and more recent changes in the jurisdiction. The fourth Part looks more explicitly at the present Maltese system, especially its sources of law, its procedures, and its legal structures. Palmer's work is especially useful here. Our conclusion summarizes Maltese legal hybridity, but it also suggests that Malta and other jurisdictions would benefit from a deeper analysis that goes beyond both the traditional taxonomies of comparative law and more recent, nuanced scholarship on mixed systems to investigate what one of us has referred to elsewhere as "placing state law within wider normative orders".<sup>12</sup> Overall, this Article reveals the peculiarities of Malta's hybrid law and legal institutions. It suggests that Malta has much to teach us about the manner in which legal traditions are created and maintained. It also provides a foundation for the future study of both legal and normative hybridity in the archipelago.<sup>13</sup>

10. VERNON PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (2001); see Donlan, "A Thing Without Cohesion of Parts": *The Professional and Pedagogical Contribution of Mixed Jurisdictions: Review Article of VV Palmer (ed.), Mixed Jurisdictions Worldwide: The Third Legal Family* (2001); J Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law* (2002), 38 IRISH JURIST (new series) 383 (2003).

11. The work included reports on Israel, Louisiana, Quebec, the Philippines, Puerto Rico, Scotland, and South Africa. "[O]ther[s] of this type", he suggested, include Botswana, Lesotho, Mauritius, Saint Lucia, Seychelles, Sri Lanka, Swaziland, and Zimbabwe. Palmer (2001), *supra* note 10, at 4 n.3. Professor Palmer has, however, recently published a second edition. Indeed after work on this Article began, a new Chapter 9 entitled "Malta" was prepared by Biagio Andò, Kevin Aquilina, Jotham Scerri-Diacono, and David Zammit. See Vernon Valentine Palmer (ed.), MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Cambridge Univ. Press, 2d ed. 2012).

12. Donlan, *Comparative Law and Hybrid Legal Traditions: An Introduction*, in COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS (Eleanor Cashin-Ritaine, Donlan, & Martin Sychold eds., 2010), 18. This was referred to there as the "study of *hybrid legal traditions*". *Id.* (emphasis in original); cf. WERNER MENSKE, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2d ed.) 2006.

13. The article is rooted in joint teaching, collaborative research, and the organization of a conference on Maltese and Mediterranean 'hybridity' (Malta, June 2010) and various individual publications. See also *Interview with Seán Patrick Donlan & David Zammit on Malta's Mixed Legal System* (15 October 2009), [http://campusfin.um.edu.mt/pages/webcastspages/haqq\\_sewwa.htm](http://campusfin.um.edu.mt/pages/webcastspages/haqq_sewwa.htm) (Program 17: *L-istudju tal-ligi* (last visited 10 Mar. 2011)); Donlan, *Black Sheep of the Family?: Malta's Mixed Jurisdiction and Vernon Palmer's 'Third Legal Family'* (9 June 2011),

## II. HYBRIDITY AND DIFFUSION

### A. *Mixtures and Movements*

The approach to comparative law taken here might best be characterized as the study of both legal and normative mixtures and movements, of 'hybridity and diffusion'.<sup>14</sup> Hybridity and diffusion are, however, but two sides of the same coin.<sup>15</sup> The former is merely a rough, static snapshot of the dynamism of the latter. This is less a rigorous method than an enlightening perspective, a way of seeing things differently by looking critically at invented histories of 'pure' laws and discrete 'families' of 'closed legal systems'. Legal traditions are instead complex and dynamic. In our wider project, we draw on both (i) existing research on mixed legal systems, where diverse *state* laws emerge from different legal traditions, and (ii) so-called 'legal' or 'normative pluralism'. The latter is often rooted in empirical study in the social sciences, but usually focused on non-Western nations, especially former colonies. '*Legal hybridity*', then, refers to state laws and legal principles, those elements—usually highly formalized and institutionalized—of a legal tradition recognized as properly legal by modern lawyers. '*Normative hybridity*' is a far wider concept, largely synonymous with 'normative pluralism' and including both laws and wider patterns of normative ordering and non-state norms. This approach combines the work of mixed jurists, other comparatists, and social scientists. It doesn't prescribe hybridity, but sees it instead as a social fact that must be acknowledged in our work as comparatists. We have, however, limited ourselves here to Maltese legal hybridity, much of which is explicit, if unexplored outside of the jurisdiction. The investigation of its normative hybridity is a future, and necessarily interdisciplinary, project.

Neither the hybridity nor the diffusion of laws is new.<sup>16</sup> Within Europe, law predated the state and the creation of genuinely national

<http://ccweb.lsu.edu/Panopto/Pages/Viewer/Default.aspx?id=c0d88c19-d8f6-4f20-9ef4-c711b4ff0da7> (last visited 18 Mar. 2012).

14. The approach grew, in part, out of discussions in *Juris Diversitas*, an international legal community dedicated to (i) the study of legal and normative mixtures and movements and (ii) the encouragement of interdisciplinary dialogue between jurists and others. See [www.jurisdiversitas.blogspot.com](http://www.jurisdiversitas.blogspot.com). For more information on 'hybridity and diffusion', see Donlan (2011), *supra* note 3.

15. See Örüçü, *Mixed and Mixing Systems: A Conceptual Search*, in STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Örüçü, Elspeth Attwooll, & Sean Coyle eds., 1996), especially 341-344.

16. See Donlan, *Remembering: Legal Hybridity and Legal History*, 2 COMP. L. REV. (2011), available at <http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/13>;

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. Similar patterns of hybridity occurred with the diffusion of European law, often through colonialism, around the world.<sup>17</sup> Similarly, the exceptional legal 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. Malta's legal tradition explicitly reflects this complexity. The recognition of historical and comparative hybridity allows us both to better understand nominally 'pure' legal traditions and to better contextualize modern traditions identified as mixed.

The crude classifications of much past and present comparative study—positivist, centralist, monist—have often resulted in pushing contemporary legal traditions designated as '*mixed legal systems*', those explicitly joining elements of different pan-national legal traditions, "into a marginal and uncertain position".<sup>18</sup> But such legal hybridity is not especially unique. The ubiquity of hybridity reveals the significant limitations of traditional comparative taxonomies.<sup>19</sup> Explicitly mixed systems are merely the most obvious hybrids. Indeed, the mixture of laws is so common that Palmer has suggested that "[a] useful

*Histories of Hybridity: A Problem, a Primer, a Plea, and a Plan (of Sorts)*, in Cashin-Ritainc et al., *supra* note 12, at 21-34.

17. 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 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 69, 277 (2008).

18. Luigi Moccia, *Historical Overview on the Origins and Attitudes of Comparative Law*, in THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION (Bruno De Witte & Caroline Forder eds., 1992), 619 n.14; see also Åke Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 SCAN. STUD. L. 129, 148 (1969).

19. See generally Jaakko Husa, *Legal Families*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan M. Smits ed., 2006).

classification scheme ought to begin with their centrality as a point of departure."<sup>20</sup> Even if we focus only on overtly mixed systems, we find that hybridity is not the exception, but "the rule".<sup>21</sup> An inventory of the world's jurisdictions recently compiled by the University of Ottawa lists over ninety legal systems that explicitly contain components drawn from different pan-national legal traditions.<sup>22</sup> Indeed, for two decades Esin Örüçü has pressed the expansion of research to more exotic, often non-Western, hybrids.<sup>23</sup> But while all traditions are mixed, there is a meaningful division to be made "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 . . ."<sup>24</sup> While the dividing line between these might be better seen as a fuzzy border between implicit and explicit mixes, it nevertheless remains useful.

The marginal status of mixed legal systems within comparative law has begun to change. In the last decade, scholars have increasingly focused on mixed systems or, at least, the explicitly European hybrids among them. It has also been suggested that these explicitly mixed systems can serve as models or guides for other systems in the century to come.<sup>25</sup> This is especially true in Europe, given the development of a modern pan-European law with roots in Anglo-American law, continental legal systems of various types, as well as various Nordic and Central European legal traditions.<sup>26</sup> More specifically, it has been argued

20. Palmer, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 LA. L. REV. 1205, 1211 (2007).

21. Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in Reimann & Zimmermann, *supra* note 5, at 481; see also Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN L. 723 (2009, part of a special issue on Histories of Legal Transplantations).

22. *Classification of Legal Systems and Corresponding Political Entities*, available at [www.juriglobe.ca/eng/sys-juri/index-syst.php](http://www.juriglobe.ca/eng/sys-juri/index-syst.php) (last visited 10 Mar. 2011).

23. See most recently, Örüçü, *What Is a Mixed Legal System: Exclusion or Expansion?*, in MIXED LEGAL SYSTEMS AT NEW FRONTIERS (Örüçü ed., 2010). See generally Cashin-Ritainc et al., *supra* note 12.

24. Joseph McKnight, *Some Historical Observations on Mixed Systems of Law*, 22 JURIDICAL REV. (new series) 177, 186 (1977); see also Ignazio Castellucci, *How Mixed Must a Mixed System Be?*, 12 ELEC. J. COMP. L. (2008), available at <http://www.ejcl.org/121/art121-4.pdf> (last visited 10 Mar. 2011)). See generally Örüçü (1996), *supra* note 15.

25. See, e.g., Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZONA STATE L.J. 737, 748 (1999); Jean-Louis Baudouin, *Mixed Jurisdictions: A Model for the XXIst Century*, 63 LA. L. REV. 983 (2003).

26. See Hein Kötz, *The Value of Mixed Legal Systems*, 78 TUL. L. REV. 435 (2003); Ivan Sammut, *The EU and Maltese Legal Orders: What Kind of Marriage Between Them?*, in MALTA IN THE EU: FIVE YEARS ON AND LOOKING TO THE FUTURE (Peter Xuereb ed., 2009); cf. MARTIN W. HESSELINK, *THE NEW EUROPEAN LEGAL CULTURE* (2001), 68-69.



that mixed systems suggest what a future European common law, a *novum ius commune Europaeum*, might look like.<sup>27</sup> Malta, a jurisdiction in which Anglo-American, or rather Anglo-British, laws and institutions were superimposed on a wider continental base, is most usefully approached through contemporary scholarship on mixed legal systems. As a member of the European Union (E.U., 2004) and a signatory of *The European Convention of Human Rights* (E.C.H.R., 1987), it is also experiencing an additional overlay of hybrid pan-European laws that make its legal sources still more varied. The explicit nature of these developments in the Maltese legal tradition and the relatively early and continuous interaction between Anglo-American and continental traditions in its colonial history makes Malta a useful exemplar of legal hybridity, at least for other hybrids of predominantly European or Western laws.<sup>28</sup>

But the discussion of mixed systems can be confusing.<sup>29</sup> 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.<sup>30</sup> It remains a residual, catch-all category for those traditions that cannot be assigned elsewhere and can cover any mix, whether Western or non-Western. 'Mixed jurisdictions' may also sometimes be used in this general manner or for any mixture of Anglo-American and continental laws.<sup>31</sup> It is most often, however, applied to a

27. See SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM (2002); Smits, *Introduction: Mixed Legal Systems and European Private Law*, in THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW (Smits ed., 2001).

28. Cf. the divisions in Mark van Hoeke & Mark Warrington, *Legal Cultures: Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495 (1998). The authors divide legal traditions into 'cultural families', including: African, Asian, Islamic, and Western. *Id.* at 502 *et seq.*

29. The vocabulary of 'mixity' is "basically an accident of history." Palmer, *Mixed Jurisdictions*, in Smits (2006), *supra* note 19, at 467 (referring to 'mixed jurisdictions'). In two articles, Palmer has traced the genealogy of this terminology. See Palmer, *Two Rival Theories of Mixed Legal Systems*, in Örüçü (2010), *supra* note 23, and Palmer's concise, but detailed synopsis in *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L.J./REVUE DROIT DE MCGILL 321, 324-32 (2009). Note that the former is also available in 3 J. COMP. L. 7 (2008) and (2008) 12 ELEC. J. COMP. L. (2008, <http://www.ejcl.org/121/abs121-16.html> (last visited 10 Mar. 2011)).

30. 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'. See [www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php](http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php) (last visited 10 Mar. 2011).

31. See Smith, *Mixed Jurisdictions*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: VOLUME 6—PROPERTY AND TRUST (Konrad Zweigert & Ulrich Drobnig eds., 1974), 115, no. 228; Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 L.Q. REV. 228, 228 (1998). By this latter definition, however,

narrower subset of Western mixes that dominate scholarship. Used in this way, 'mixed jurisdictions' refers to situations in which (i) continental laws are "overlaid" or "suffused" with Anglo-American laws later in time<sup>32</sup> or where (ii) continental private law is joined to Anglo-American public and criminal law. For 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 significant scholarship has long existed.<sup>33</sup> Palmer sees these 'classical mixed jurisdictions' as largely synonymous with what he has more recently called the 'third legal family' (between the well-known Anglo-American and continental legal 'families').<sup>34</sup> His thesis, and the extended jurisdictional reports he has commissioned, has proven extremely useful in the analysis of legal hybridity. A recent, concise formulation of this deserves to be quoted at length:

I offer the concept of the third legal family as a way of highlighting the common traits, shared issues, and basic resemblance of this collection of systems. The existence of the following commonalities, which at the same time constitute individualities from a group standpoint, form the empirical core of my claim.

- (1) In each situation, a civil law that was shared by Roman and canon law was implanted in a far-flung province of the old *jus commune*, a tide of common law influence later ensured, and a neo-civilian reaction to that influence occurred in the twentieth century. . . .
- (2) In each system, prototypical Anglo-American judicial institutions were in charge of applying the civil law, meaning that judges with more creative mindsets and greater inherent powers at their disposal

seemingly pure Anglo-American jurisdictions might be classified as mixed given their past borrowing from pan-European legal traditions. Cf. Donlan, "All This Together Make Up Our Common Law": *Legal Hybridity in England and Ireland, 1704-1804*, in Örüçü (2010), *supra* note 23, at 265-91. There is also ongoing borrowing, through European law, in Britain and Ireland.

32. Smith, *The Preservation of the Civilian Tradition in 'Mixed Jurisdictions'*, in CIVIL LAW IN THE MODERN WORLD (Athanasios N. Yiannopoulos ed., 1965), 1; FREDERICK P. WALTON, THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA (1980 [1907]), 1. Note that, 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 10, at 448-68.

33. This terminological plasticity arguably impedes more accurate classification and effective communication. See Donlan (2010), *supra* note 12, at 12-18.

34. Note, however, that, used in this manner, 'classical mixed jurisdiction' seems to be an historical classification, whereas the 'third legal family' is conceptual. It would be possible to belong to one group but not the other. If, for example, a general consensus developed that Louisiana had become a reasonably 'pure' Anglo-American jurisdiction, it would remain the former but not the latter. On the other hand, if a contemporary jurisdiction were to meet, for the first time, the requirements of the 'third legal family', they would still never be 'classical mixed jurisdiction'.

interpreted the civil law. In the process of judicial interpretation, the substance of the law was insensibly reshaped by actors and institutions which did not pretend to be neutral conduits. . . .

- (3) Everywhere in the mixed jurisdiction world, civil procedure is adversarial along Anglo-American lines. The emphasis of that procedure is upon the remedy rather than the right, and this has left a visible imprint on substantive civil law, which emphasizes the right rather than the remedy.
- (4) Whether the mixed system was codified or not, court decisions in mixed jurisdictions are accorded more precedential value than in traditional civilian jurisdictions. Indeed, in three mixed legal systems, court decisions are openly accepted as an official source of law, second only to legislation.
- (5) Quebec aside, common law influence on the civil law follows a discernible and predictable pattern, penetrating the most porous points of entry, such as general clauses in the law of delict, while leaving resistant institutions like property law relatively unaffected. The phenomenon of the second reception of common law and its higher forms of creativity (original or autonomous law) is restricted to this group. . . .
- (6) Commercial law follows market dynamics. Anglo-American commercial law has everywhere replaced the law of merchants originally in place, partly because of relatively weaker cultural attachment to commercial rules, but more decisively because of pressure to conform to the dominant surrounding economy.
- (7) Special cultural forces shape the jurists and the legal literature they produce. Categories of jurists called purists, pollutionists, and pragmatists are, or once were, apparent. The orientations are closely tied to national descent, maternal tongue, and legal education. Internal legal history and historical periods are delineated by the fortunes and fervor of these cultural alignments.
- (8) Mixed systems resemble each other in the circumstances of their birth and in the ultimate reasons for their existence.<sup>35</sup>

While we have not followed this approach slavishly, Palmer's conclusions have been of considerable importance to this work. Indeed, it began as an attempt to compare Malta to the members of the 'third legal family'.

### B. *Malta's Happy Union?*

The Republic of Malta covers a small archipelago consisting of three inhabited islands, the most important being Malta and Gozo. The islands cover only some three-hundred square kilometers. Sicily sits less

35. Palmer (2009), *supra* note 29, at 343-44.

than one-hundred kilometers to its north and has long played an important part in Maltese history. But Tunisia to its west and Libya to the south are not much farther away. Malta's population is approximately 412,000 and overwhelmingly Catholic. This fact is another important element of its past. In its present form, Malta fits neatly into contemporary European political patterns. It has only been independent of the United Kingdom, however, since 1964 and remains a member of the 'Commonwealth of Nations' (formerly known as the 'British Commonwealth'). Politically, Malta is a constitutional republic with a formal, codified (and quite lengthy) constitution. It has a parliamentary system of government with a President selected by a unicameral legislature (the House of Representatives or *Kamra tad-Deputati*). Two parties—the Nationalist Party (*Partit Nazzjonalista*) and the Labour Party (*Partit Laburista*)—have dominated the House of Representatives. As in most parliamentary systems of government, the powers of the Maltese President are largely ceremonial. Real authority resides with the 'Government', the executive, in a Westminster-style system. The division of state responsibilities, the 'separation of powers', is generally consistent with parliamentary government. Malta is, however, with the Channel Islands, Cyprus, and Scotland, one of a handful of explicitly 'mixed legal systems' within the E.U. This experience with both of the dominant Western legal traditions has, as Mifsud Bonnici put it, "forced Maltese jurists to become natural comparatists".<sup>36</sup> But the comparative sensitivity of Maltese jurists has not often resulted in published scholarship that places its law in comparative context.<sup>37</sup> The significance of Maltese hybridity has instead remained largely implicit in legal education. If the mixed nature of the legal tradition has been recognized in passing outside of Malta, the explicit study of mixed systems has also, until relatively recently, largely bypassed the island. As with other traditions, determining its appropriate taxonomical classification—if such classifications make sense at all—is complex.<sup>38</sup> As Palmer has

36. Mifsud Bonnici, *supra* note 1, at xiii.

37. For recent publications on Maltese law, see, e.g., ANDREW MUSCAT, PRINCIPLES OF MALTESE COMPANY LAW (2007); Max Ganado (ed.), AN INTRODUCTION TO MALTESE FINANCIAL SERVICES LAW (2009), and SIMONE BORG & LOUISE FARRUGIA, ENVIRONMENTAL LAW IN MALTA (2010). There are, however, rumors of other projects in the works.

38. Cf. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 7, 7 n.1 (2003, describing the Channel Islands, Cyprus, and Malta as 'mixed jurisdictions'). Each of these is, in fact, quite distinct, both from one another and the 'classical mixed jurisdictions'. Cyprus, for example, mixes Anglo-American private law with continental public and criminal law. See also Symeon C. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, 78 TUL. L. REV. 441 (2003).

noted, classification of a system as mixed is subjective.<sup>39</sup> There is no simple and objective formula. Indeed, William Tetley has written that “[f]acetiously, one might . . . define a mixed jurisdiction as a place where debate over the subject takes place.”<sup>40</sup> There’s neither much debate nor anxiety about Maltese hybridity in Malta.

Indeed, this may be true because Malta is arguably a “weak tradition” that has experienced numerous powerful external influences in the past.<sup>41</sup> Such a situation is perhaps unavoidable in small jurisdictions.<sup>42</sup> In discussing the Channel Islands, George Gretton and Kenneth Reid wrote that “[s]mall legal systems, not generating enough law of their own, must borrow to survive.”<sup>43</sup> Alternatively, of course, we may see this less as a rational response to limited options as the imposition of dominant models by elites of various types. The question as to whether there is, beneath the borrowings from numerous external sources, a ‘deep structure’ native or natural to the Maltese is a complex question that cannot be answered here.<sup>44</sup> As noted, in Malta, it’s generally accurate to say that, in substantive law, continental private laws were overlaid with Anglo-British public law. But this statement does not do complete

39. Palmer (2001), *supra* note 10, at 17; see also Palmer (2006), *supra* note 29, at 468.

40. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 680 (2000).

41. Pier Giuseppe Monateri, *The ‘Weak’ Law: Contaminations and Legal Cultures*, in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW BRISTOL (1998); see especially *id.*, 97 *et seq.* (discussing Italy). For Monateri, legal complexity is common and occurs through a very fluid, fragmented, and “decentralized” borrowing of laws and legal institutions or “contamination”. *Id.* at 107; cf. Monateri, CARDOZO ELEC. L. BULLETIN (2005, www.jus.unin.it/cardoza/review/home.html (last visited 10 Mar. 2011)). On Italy as a ‘weak tradition’, see also Monateri & F.A. Chiaves, *Shifting Frames: Law and Legal ‘Contaminations’*, in INTRODUCTION TO ITALIAN LAW (Jeffrey S. Lena & Ugo Mattei eds., 2002). On ‘contamination’, see also Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9 (2010).

42. Andrew Grossman, *Finding the Law: The Micro-States and Small Jurisdictions of Europe: Andorra, Cyprus, Northern Cyprus, Iceland, Liechtenstein, Luxembourg, Malta, Monaco, Montenegro, San Marino, Vatican State; UK European dependencies: Channel Islands, Gibraltar, Isle of Man; Faroe Islands and Greenland*, available at www.nyulawglobal.org/Globalex/Microstates.htm (last visited 10 Mar. 2011). Over twenty years ago, Michael Bogdan wrote that “[a]mong the many interesting research problems of a general nature found within the area of comparative law, two complex issues are particularly fascinating, . . . : the problem of mixed (hybrid) legal systems and the problem of the so-called ‘small jurisdictions.’” THE LAW OF MAURITIUS AND SEYCHELLES: A STUDY OF TWO SMALL MIXED LEGAL SYSTEMS (1989).

43. George Gretton & Kenneth Reid, *The Civil Law Tradition: Some Thoughts from North of the Tweed*, JERSEY & GUERNSEY L. REV. (2007, available at www.jerseylaw.je/Publications/jerseylawreview/Oct07/JLR0710\_Gretton.aspx). “To plan the future, therefore, one must first map the past.” *Id.*

44. KAARLO TOURI, CRITICAL LEGAL PLURALISM (2002), 150. Touri contrasts the ‘surface level’ of the law and the ‘legal culture’ with the ‘deep structure’, which represents the *long durée* of the law. *Id.*

justice to Maltese mixity. The jurisdiction combines an essentially continental substantive private law, particularly as expressed in modern codifications in the French manner, with significant French and Italian influence and some British borrowings.<sup>45</sup> The impact of British law is especially strong in certain areas, including company and maritime law. Commercial law originally owed much to French and Italian law, but has seen significant reception of Anglo-British concepts in the last half-century. Canon law, submerged but essential to all Western legal traditions, plays a more obvious role in Malta. There, canon law remains “part of the civil law . . . in the matter of the celebration and dissolution of marriage.”<sup>46</sup> The decisions of Maltese Ecclesiastical Tribunals have civil effects. Maltese procedural law is also quite complex. Its civil procedures are still in important respects ‘investigative’ (or ‘inquisitorial’) in the continental manner, while its criminal procedures owe more to British law, not least the use of a jury in serious matters. Malta’s criminal justice system is, or so it has been argued, “a felicitous fusion of continental and English elements.”<sup>47</sup> Its substantive criminal law is probably also best seen as a unique blend of continental traditions, especially the Italian, with British influence. Public law is more clearly British in both form and substance.<sup>48</sup> Even here, however, elements of continental and European law have been important. The latter includes the laws of both of the E.U. (and its predecessors) and the E.C.H.R.. Indeed, E.U. law was important before Malta’s accession. Since the British joined the E.U. in the 1970s, its law has acted as the gateway for European law to enter Malta. Finally, linguistic factors have, both in the past and in the present, played an important role in Malta. While Maltese was widely spoken, Italian was, for centuries, the language of learning and the law. Today, Maltese—or a legal Maltese heavily influenced by

45. J.M. Ganado, *The Contribution of the Privy Council on Questions of Maltese Civil Law*, in LAW, JUSTICE AND EQUITY: ESSAYS IN TRIBUTE TO GW KEETON (R.H. Code Holland & G. Schwarzenberger eds., 1967); cf. Maurice Sheldon Amos, *The Common Law and the Civil Law in the British Commonwealth of Nations*, 50 HARV. L. REV. 1249, 1249 (1937).

46. Edwin Busuttill, *Malta*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: VOLUME I—NATIONAL REPORTS (Viktor Knapp ed., 1981), M-48. For a more recent overview, see also Sylvia G. Maier, *Malta*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA—VOLUME III: M-R (Herbert M. Kritzer ed., 2002).

47. J.J. Cremona, *The Jury System in Malta*, 13 AM. J. COMP. L. 570, 572 (1964). The Criminal Code has been called a ‘happy blend of continental philosophical thought and the liberal principles of English common law.’ Albert Ganado, *Homage in Venice to the Maltese Criminal Code of 1854—Part I*, SUNDAY TIMES OF MALTA, Dec. 7, 2003, at 56. The same author said that these were “applied in keeping with Maltese customs and traditions.” Albert Ganado, *The Maltese Criminal Code of 1854—Part II*, SUNDAY TIMES OF MALTA, Dec. 14, 2003, at 54, 55.

48. CREMONA, THE MALTESE CONSTITUTION AND CONSTITUTIONAL HISTORY SINCE 1813 (2d ed. 1997); see also WALLACE PH. GULIA, GOVERNMENTAL LIABILITY IN MALTA (1974).

Italian—is the language of the courts and jurisprudence while English is widespread and the primary language of legal education. Italian is still widely known and important to Maltese legal history, but has no official status as such. As with other traditions, large and small alike, the precise character of Maltese hybridity is not static, but changing in the face of new influences and novel challenges.<sup>49</sup>

### III. THE PAST

#### A. *Before the British*<sup>50</sup>

The comparatist Maurice Tancelin wrote, in discussing Quebec, that “[i]f a system is attached to two families . . . the question is one of genealogy, and thus of historical research first of all.”<sup>51</sup> Maltese history is complex. It reveals a rich variety of legal and social influences. Leaving aside early settlements before the first millennium BC, the island was settled in turn by the Phoenicians and the Carthaginians, the latter the heir and previous colony of the former. The Maltese fell under Roman control in 218 BC as a result of the Punic Wars (264-146 BC) between the Carthaginians and the Romans. With the division of the Roman Empire in Western and Eastern halves in the late fourth century, Malta remained under the authority of the Greek-speaking Byzantine Empire for almost four centuries (395-870). The island later fell, with Sicily, to the Arabs in the tenth century as a result of long-running Byzantine-Arab Wars (780-1180). Arab rule lasted for two centuries until the Normans took Malta, again with Sicily, in 1090/1. Indeed, from the Roman period, Malta had been closely linked to legal and political developments in the Italian peninsula and Sicily. Within the limits of its local laws and the juristic development of the Romano-canonical *ius commune*, the laws enacted by Sicilian rulers applied to Malta. Both laws and legal documents were drafted in Latin rather than in Maltese, a Semitic language much influenced by Sicilian. With Sicily, Malta was brought under the rule of the Swabians (the House of Hohenstaufen, 1194-1266,

49. Örüçü includes Malta as a “simple mix”, but distinct from Palmer’s ‘mixed jurisdictions’. Örüçü, (2010) *supra* note 23, Annex, 75. Using her terminology, the Maltese mix is ‘overt’, ‘structured’, ‘simple’, and ‘blended’. See also Örüçü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPISTEMOLOGY AND METHODOLOGY IN COMPARATIVE LAW (Mark Van Hoecke ed., 2004), 367 (citing J.M. Ganado, *Malta: Microcosm of International Influences*, in Örüçü et al., *supra* note 15, at 225-47); Örüçü (2010), *supra* note 23, at 64-65.

50. Cf. the ‘nine distinct legal epochs’ of Maltese legal history in Kevin Aquilina, *Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture?*, 4 J. CIV. L. STUD. 261 (2011).

51. Maurice Tancelin, *How Can a Legal System Be a Mixed System*, in Walton, *supra* note 32, at 3.

part of the Holy Roman Empire of the German Nation) and briefly the Capetian House of Anjou (1266-82) until the War of the Sicilian Vespers (1282) brought both under the Aragonese (1282-1409). Both Sicily and Malta were ruled by the Crown of Aragon and later that of Spain with the Aragonese union with the Crown of Castile. In 1530, Charles I of Spain (Charles V of the Holy Roman Empire) presented the islands to the *Order of Knights of St John* in exchange for the presentation of one falcon each year. Only a generation or so later, in 1565, Malta would withstand a large Ottoman army in the ‘Great Siege’. A similar assault had earlier dislodged the Knights from Rhodes. The victory in Malta secured the islands for Christendom.

The Knights, foreigners to Malta, were divided into several ‘langues’ or divisions based on language and national identity. As elsewhere across the continent, they applied laws that increasingly relied on conceptual structures and supplementary rules of the ‘learned laws’ or ‘*ius commune*’. Especially in its Italian forms, the revived and revised Roman law of the universities plus canon law and even feudal law, was important in Malta, though altered by contact with local laws and customs.<sup>52</sup> Malta’s pre-modern codifications reflect these influences as well as the commercial common laws of the *lex mercatoria* (the ‘Law Merchant’). In the eighteenth century, the *Codice Manoel* (1723) was followed by the *Codice Municipale di Malta* (1784). The latter is better known as the *Code de Rohan*, as it was redacted or compiled by the French Grand Master De Rohan-Polduc (1725-97). Although the *Code* was subsequently replaced by other legislation in the nineteenth century, it is still seen to be of special importance for contemporary Maltese law.<sup>53</sup>

52. See HUGH W. HARDING, *HISTORY OF ROMAN LAW IN MALTA* (1950); see also M. Borg Olivier, *A Maltese Legal Library in the XVIth Century*, 7 MELITA HISTORICA 282 (1971).

53. See, e.g., PAOLO DE BONO, *SOMMARIO DELLA STORIA DELLA LEGISLAZIONE MALTESE* (1897), 75; see also DE BONO, *IL FALLIMENTO NEL DIRITTO MALTESE* (1907). The contemporary status of the *Code de Rohan* is unclear, but “it has been argued that [the Code] is still residually operative today” and “[i]t would seem that this opinion has not been refuted.” Mark A. Sammut, *The Place of the Codice Municipale di Malta in European Legal History*, 20 ID-DRITT 330 (2009), 330, 330 n.505 (citing H.W. HARDING, *MALTESE LEGAL HISTORY UNDER BRITISH RULE 1801-36* (1968) at 2 et seq.). This opinion is also held by noted contemporary jurists in Malta. In essence, lacunae in the modern Maltese Civil Code may lead to the *Code de Rohan*, at least where other subsequent, extra-codal statutes—and perhaps even jurisprudence, though formally non-binding—doesn’t apply. Indeed, because the *Code de Rohan* was a pre-modern code rooted in the *ius commune* as applied in Malta, such lacunae provides a gateway to the wider medieval traditions. These pre-modern codes or ‘digests’ served as restatements of law; they need not abrogate prior law and doctrine or appear as comprehensive and gapless. For the importance of the difference between a ‘digest’ and a ‘code’, not least in a mixed system, see VERNON PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* (2005).

In these pre-modern codes, where they were silent on a matter of law, reference was made to the wider scholarship of the *ius commune*, at least as applied in the jurisdiction.<sup>54</sup> This existing legal hybridity was to be reduced by the clarity of legal sources demanded by legal nationalism, centralism, and positivism in the nineteenth century. In the same period, however, Anglo-British law would be overlaid on this broad and varied continental foundation.<sup>55</sup> The portrait of Maltese judges is this period is not, on the whole, positive.<sup>56</sup> The Italian jurist Giandonato Rogadeo, invited by de Rohan to visit Malta in the interest of law reform, found “covert and stealthy opposition to his proposals for reform from a conservative legal establishment which had substantial vested interests to defend.”<sup>57</sup> The publication of Rogadeo’s *Ragionamenti sul regolamento della giustizia in Malta* (1780) touched off a war of words between him and Maltese jurists.

In 1798, Malta was seized by Napoleon Bonaparte, not yet First Consul of France, en route to his Egyptian campaign. This brought two-and-a-half centuries of the rule of the Knights to an end. The French republicans were hostile towards Catholicism and began to confiscate the island’s wealth. In addition to coordinating native resistance, a Maltese National Congress appealed, through ‘His Sicilian Majesty’, to the British fleet for assistance.<sup>58</sup> The National Congress also issued a *Dichiarazione dei Diritti degli abitanti di Malta e Gozo* (the Declaration of Rights of the inhabitants of Malta and Gozo) in the same year.<sup>59</sup> The French surrendered in 1800. In requesting British assistance, the Maltese appear to have wanted a “protector rather than [a] sovereign”.<sup>60</sup> Piecing together an accurate historical account of the period is not easy. Formal legal documents are insufficient on their own. Other factors, not least both British and Maltese nationalism, also color the historiography of British rule. In the context of public law, Hilda Lee argued:

54. Sammut, *supra* note 53, at 334-35.

55. As Patrick Glenn has noted, the “concept” of a mixed system is “very recent”. *Persuasive Authority*, 32 MCGILL L.J./REVUE DE DROIT DE MCGILL 261, 271 (1987). This is the “hidden temporal dimension” in the categorization of mixed systems. Glenn, *Quebec: Mixité and Monism*, in Örüçü et al., *supra* note 15, at 1.

56. Ganado (1996), *supra* note 49, at 228.

57. Giovanni Bonello, *Notes for a History of the Judiciary at the Time of the Order*, in HISTORIES OF MALTA: CONFESSIONS AND TRANSGRESSIONS—VOLUME NINE (Bonello ed., 2008), 151.

58. See Ganado (1996), *supra* note 49, at 229.

59. Included as *Appendix B*, in Cremona (1997), *supra* note 48, at 123-25; see also J.J. CREMONA, *SELECTED PAPERS 1946-1989* (1990).

60. CARMEL CASSAR, *A CONCISE HISTORY OF MALTA* (2000), 146.

The constitution cannot be seen simply as a politico-legal institution; reference must be made to the general Colonial policy to which Britain was committed at the time, to the character of the Colonial Secretary, to the power and influence of his permanent officials in the Colonial Office, to the personality and policy of the Governor and his officials, to the economic and social conditions on the island which they governed, to the degree of political education of the Maltese people; and over and above all these factors, providing as it were the framework into which they must all conform, the historian must be aware of the essential character of the island as a strategic base. A study of the Malta constitution, therefore, presents a task which is complex and fascinating.<sup>61</sup>

The study of Malta’s private and criminal law, both substantive and procedural, is no less ‘complex and fascinating’.

### B. After the Diffusion of British Law

After the expulsion of the French, the British exercised *de facto* political control over the archipelago.<sup>62</sup> Given the British failure to restore the islands to the rule of the Knights, as they had bound themselves to do by the Treaty of Amiens, *de jure* sovereignty seems initially to have continued to vest in the King of the Two Sicilies. From 1800 to 1815, Malta was effectively a British protectorate. It was subsequently administered as a British colony. As a result of this British connection, lasting another century and a half, Malta does “resemble” the jurisdictions of the ‘third legal family’ both “in the circumstances of their birth and in the ultimate reasons for their existence.”<sup>63</sup> The complexities of Anglo-British law were superimposed on the existing *bricolage*—or *mescolanza*—of continental traditions in Malta. The precise nature of the transition to British rule, however, remains contentious and has been subject to different historical and legal interpretations.<sup>64</sup> The Maltese historian Carmel Cassar has written, for example, that the island “was given to Britain as a possession by the Treaty of Paris in 1814, a measure that was ratified in June 1815 at the Congress of Vienna and confirmed in Paris in November 1815. The Maltese had absolutely no say in this

61. Hilda I. Lee, *The Development of the Malta Constitution 1813-1849*, 1 MELITA HISTORICA 7, 7 (1952).

62. See JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE* (2000).

63. Palmer (2009), *supra* note 29, at 344.

64. Given the treatment of the Maltese people both by the Grand Masters and subsequently the British, the cession may fit the “intercolonial transfer” Palmer finds in many of the members of the ‘third legal family’. See Palmer (2001), *supra* note 10, at 19-29.

matter.”<sup>65</sup> The British started to administer Malta as if it had been conquered. Indigenous representative institutions were dissolved. Maltese political and legal elites contested this account of the transition, claiming that it was the Maltese people that had reclaimed sovereignty over the islands in the uprising against the French and voluntarily ceded it to the British as part of an agreement which included an undertaking by the British government to respect Maltese autonomy and self-governance. They sought to use this claim in order to obtain a privileged status within the Empire, along with the preservation of the religion, laws and customs of the islands, thus combining considerable autonomy and self-government with the commercial advantages resulting from their association with Britain. Broadly consistent with these arguments, the Maltese constitutional scholar J.J. Cremona has suggested that “[i]n the dawn of the nineteenth century the Maltese freely and voluntarily determined to place their Island home under the protection of Great Britain and to recognize the King of that country as their sovereign.”<sup>66</sup> The limited claim that there had been a voluntary cession by the Maltese people was also endorsed by the Judicial Committee of the Privy Council in the well-known case of *Sammut v Strickland*.<sup>67</sup> However the understanding that they were under a legal obligation to respect the islands’ autonomy was not accepted by the British Authorities. Preservation of the islands’ laws and norms did, however, intersect with the imperial policy of placating the Maltese to ensure their allegiance and avoid the practical disadvantages of change.<sup>68</sup>

The British ‘rationale’ for this cautious approach may be seen then to be “to preserve the structure of Maltese political and economic life to avoid the Maltese being required to make a sudden adjustment to an unfamiliar legal, political, administrative or social structure.”<sup>69</sup> Specifically in regard to law, the peculiarities of English law, not least the

65. Cassar, *supra* note 60, at 150.

66. Cremona (1997), *supra* note 48, at 1; see PATRICK STAINES, *ESSAYS ON GOVERNING MALTA (1800-1813)* (2008); HARDING, *supra* note 53.

67. [1938] AC 768. Cremona writes, *supra* note 48, at 1 n.1, that the Judicial Committee “acknowledged” this view. It is important, however, both here and elsewhere, not to confuse judicial pronouncement with historical fact.

68. See H.I. Lee, *British Policy Towards the Religion, Ancient Laws and Customs in Malta 1824-51—Part I: Principles of Policy, and Appointment to Ecclesiastical Office*, 3 *MELITA HISTORICA* 1, 1 (1963). Indeed, this acquiescence was not unusual for the time. A similar concession to French-speaking and catholic Quebec took place a half-century earlier. See also Palmer’s discussion of mixed systems as “the product of compromise and mutual self-interest” in Palmer (2001), *supra* note 10, at 18.

69. BARRY HOUGH & HOWARD DAVIS, *COLERIDGE’S LAWS: A STUDY OF COLERIDGE IN MALTA* (2010), 66.

critical role played by its extensive jurisprudence, would have made it difficult, though not impossible, to immediately transplant the existing body of English law onto Maltese soil. While the interaction between the British and the Maltese traditions seem to have resulted, in the words of Örüçü, in a marriage of broadly “socio-culturally similar and legal-culturally different legal systems”, the British also viewed the Maltese as very different from themselves.<sup>70</sup> The British Commission of Inquiry sent in 1812, for example, advised caution on any alterations to the legal system since the Maltese “habits, customs, religion and education, are in direct opposition to our own.”<sup>71</sup> Some Maltese laws were tolerated, in part at least, because English law was considered to be inappropriate for them. As a result, Maltese private laws remained in force, in particular the *Code de Rohan*. This indigenous—if not autochthonous—law was well-tested and familiar to the Maltese. Moreover, the local legal profession strenuously objected to the imposition of British law. More generally, given its roots in continental legal developments, the continuing importance of an Italian-speaking elite, and the limited Anglophone population in Malta, it is unsurprising that its existing tradition of private law was largely maintained. Indeed, changes in private law can be difficult to accept.<sup>72</sup> Especially in the nineteenth century, private law was more important to most people than public law. The former could be seen to be linked to the way of life, or at least the self-image, of a people. It was a personal law that determined family law, property law, and the law of obligations (contracts and torts). It was arguably part of an already complex Maltese identity. It was also, initially at least, the monopoly of the local bar and judiciary.<sup>73</sup> With some exceptions, e.g. maritime law, private law would remain significantly continental in substance. Criminal and public law were not seen in the same terms and were, as a result, more easily altered.<sup>74</sup> The contest of

70. Örüçü, *A General View of ‘Legal Families’ and ‘Mixing Systems’*, in *COMPARATIVE LAW: A HANDBOOK* (Örüçü & David Nelken eds., 2007), 180. On the diffusion or “transmigration of laws”, see Örüçü (2010), *supra* note 23, at 69-71.

71. Cassar, *supra* note 60, at 147.

72. Palmer (2001), *supra* note 10, at 21.

73. See Daniel Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 78 *TUL. L. REV.* 41 (2003); Nir Kedar, *Law, Culture and Civil Codification in a Mixed Legal System*, 22 *CAN. J. L. & SOC’Y* 177 (2007).

74. Note “the difficulties . . . encountered when jurists of different mentalities and accustomed to different systems of law try to combine their efforts to propose legislative chances acceptable to both.” Ganado (1996), *supra* note 49, at 231.

legal and imperial elites was, in the context of coloniality in Malta, weighted in favor of the latter.<sup>75</sup>

Within the framework of this broadly cautious approach, it is possible to discern various shifts and changes in the British agenda for legal reform. Under the autocratic, if often absent, rule of Sir Thomas 'King Tom' Maitland (1813-24), various procedural reforms were introduced, including the reorganization of the courts and the establishment of judicial independence. He introduced the principle of a public, *viva voce* and adversarial form of trial and the oral questioning of witnesses in open court. A lay jury was introduced in some criminal trials. Maitland seems, in fact, to have intended to completely replace the prevailing investigative procedures with those of English law. This project lapsed on his death. As will be discussed in further detail below, Maltese civil procedure did not become fully "adversarial along Anglo-American lines."<sup>76</sup> In the 1830s, British policy shifted. Local law was left intact in areas where the introduction of Anglo-British principles was not felt to be absolutely necessary. This policy shift was reflected in the appointment in 1834 of a Commission composed exclusively of Maltese jurists in order to draft the five new law-codes: the Civil Code, the Code of Organization and Civil Procedure, the Commercial Code, the Criminal Code, and the Code of Criminal Procedure. The Commission was instructed to draft the codes in Italian. They were to be modeled on the most accredited foreign continental codes. The policy was also reflected in the dismissal, in 1839, of the English chief justice, Sir John Stoddart (1773-1856), who had agitated too aggressively in favor of the introduction of English and English criminal laws and procedures. Through this policy shift the colonial government hoped to avoid antagonizing the local legal profession. The English language, too, only slowly and fitfully competed with Italian as the language of law and

75. On the role of competing legal and social elites in the creation of legal complexity and in legal diffusion, see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991), and *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991). See also P.G. Monateri & Sacco, *Legal Formants*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 1998).

76. Palmer (2009), *supra* note 29, at 343.

government.<sup>77</sup> The result was a complex balance of living and legal languages.<sup>78</sup>

The creation of Maltese legal hybridity included a complicated and sometimes controversial process of codification.<sup>79</sup> For example, in the period following the dismissal of Stoddart, two distinguished Maltese jurists, Judge Ignazio Bonavita and Dr Antonio Micallef, published three commentaries on Maltese procedural law and the law of proof and evidence.<sup>80</sup> Written in Italian, these treat Maltese civil procedure as a seamless mixture of rules firmly rooted in Roman law and supplemented by Sicilian procedures, canon law, and Anglo-British law. Bonavita referred to Anglo-British authorities, for example, when discussing the laws of proof and evidence. He also insisted, however, that these rules must co-exist with other procedural rules, the proper interpretation of which requires an understanding of Romano-canonical law. These commentaries provided a template for the Code of Organization and Civil Procedure subsequently drafted by Micallef and promulgated in 1855.<sup>81</sup> In fact, the enactment of codes only began at mid-century, during the heyday of British rule over Malta and over five decades after the French *Code civil* (1804). The Criminal and Police Codes (1854) were the first to be promulgated. The former "was modeled on the contemporary Italian and French Codes as far as substantive law is concerned, but incorporated the English and Scottish rules for purposes of criminal procedure."<sup>82</sup> These also followed a circuitous and

77. See Palmer (2001), *supra* note 10, at 41-44; Palmer (2006), *supra* note 29, at 470-71. Palmer also argues that English serves as the "international lingua franca" of mixed jurists. *Id.* at 470; cf. Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283 (1997).

78. "In no place of equally circumscribed extent is the confluence of strangers greater than at Malta." *Malta and the Maltese.—No. I*, in 462 THE PENNY MAGAZINE OF THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE (1839), 229. This essay is the first of four curious pieces on Malta in this curious magazine.

79. H.I. Lee, *British Policy Towards the Religion, Ancient Laws and Customs in Malta 1824-51—Part II: The Revision of the Codes of Law*, 4 MELITA HISTORICA 1 (1964).

80. These include ANTONIO MICALLEF, TRATTATO DELLE PROCEDURE CIVILI NEL FORO DI MALTA (1839); IGNAZIO BONAVITA, RACCOLTA DELLE LEGGI DI PROCEDURA DELLE CORTI SUPERIORI ORDINARIE DI MALTA PUBBLICATE DAL 1814 AL 1840 COME SONO ATTUALMENTE IN VIGORE (1841); and SAGGIO SULLA PROVA GIUDIZIARIA CONSIDERATA IN RAPPORTO ALL'ATTUALE LEGISLAZIONE MALTESE (1844).

81. Judge Paolo De Bono wrote that the form of the trial mainly follows canon law whereas common law rules determine matters of proof and evidence. De Bono (1897), *supra* note 53, at 322.

82. Nancy C. Grosselfinger, *Malta*, prepared for the World Factbook of Criminal Justice Systems, <http://bjs.ojp.usdoj.gov/content/pub/ascii/WFBCJMAL.TXT> (last visited 10 Mar. 2011).

contentious path.<sup>83</sup> After the codes of Organization and Civil Procedure, a Commercial Code was enacted in 1857. Most importantly, the Maltese Civil Code was promulgated—in an unusual piecemeal fashion—from 1868 to 1874. Only in 1942 did it “come into existence as one entity.”<sup>84</sup> This code was redacted by the Maltese jurist Adriano Dingli (later ‘Sir’ Adriano Dingli). Through his work, the Code both reflected past Maltese law, especially the *Code de Rohan*, and showed borrowing from other contemporary codes.<sup>85</sup> The French *Code civil* was especially important. Various Italian codes, as well as those of Austria and Louisiana, were also consulted.<sup>86</sup> Each of these codes combined in different ways the inheritance of the *ius commune* and local legal developments, not least those rooted in European folk-laws.

Not surprisingly, the imperial authorities oriented public law and colonial institutions towards an Anglo-British model. There is some small irony, common to other mixed systems, in the effective adoption of a private/public law division of continental (Roman) provenance. And if British public law was justly seen as progressive by contemporary standards, the Maltese often experienced only the rhetoric of Anglo-British exceptionalism rather than receiving tangible benefits in practice. As Governor, Maitland delivered a moving address in 1815, singing the praises of British constitutionalism, the ‘rule of law’ and the ‘separation of powers’. Then, “[a]fter this memorable speech the Governor proceeded to concentrate the three powers of the State upon himself.”<sup>87</sup> This was not limited to Maitland. Over the course of a century and a half of imperial rule, British policy appears schizophrenic. As Cremona writes:

83. See Douglas Gourlay, *Andrew Jameson and the Origins of the Criminal Code of Malta*, 15 MELITA HISTORICA 109 (2009); Jean Paul Grech, *Malta*, in CRIMINAL JUSTICE SYSTEMS IN EUROPE AND NORTH AMERICA (2006, available at [www.heuni.fi/uploads/2rg2e.pdf](http://www.heuni.fi/uploads/2rg2e.pdf) (last visited 10 Mar. 2011)), 8-14.

84. Bonello, *The Maltese Civil Code: A Brief Historical Introduction*, in HISTORIES OF MALTA: REFLECTIONS AND REJECTIONS—VOLUME FIVE (Bonello ed., 2004), 194. The two ordinances covered the whole field of private law except (i) citizenship and intellectual property rights which were governed by English law and (ii) marriage governed by canon law. The original text of the modern Code was promulgated in Italian, but later translated into English and Maltese. “[T]he English text prevails for the bulk of the Code (enacted before 1964) while the Maltese text should be the authoritative one for amendments made after Independence.” *Id.* at 195-96.

85. See Arturo Mercieca, *Sir Adriano Dingli [Part I]: sommo statista, legislatore, magistrato*, 3 MELITA HISTORICA 164 (1954); *Sir Adriano Dingli [Part II]: sommo statista, legislatore, magistrato*, 1 MELITA HISTORICA 221 (1955); see also Joseph M. Ganado & Joseph A. Micallef, *Sir Adrian Dingli*, 1 THE LAW JOURNAL 9 (1945).

86. Dingli note his sources “in painstaking manuscript explanatory notes”. Bonello (2004), *supra* note 84, at 194.

87. Ganado (1950), *supra* note 2, at 199.

The vicissitudes of the constitutional development of Malta from that time is remarkable. . . . “It would be almost possible,” wrote the Royal Commissioners of 1931, “to plot the graph of the constitutional history of Malta during the last hundred years showing the rise and fall of constitutions modelled alternatively on the principle of benevolent autocracy and that of representative government.” If such a graph were to be plotted, it would have to start at the lower point in the chart, with gubernatorial autocracy. Indeed until 1835 all power, executive and legislative, was concentrated solely on the hands of the head of the Government, whose enactments took the form of Proclamations and Notifications or *Bandi*.<sup>88</sup>

In the century and a half before Maltese independence, the Maltese had eleven constitutions (1813, 1835, 1849, 1887, 1903, 1921, 1936, 1939, 1947, 1959, 1961). British rule was, in fact, complex and often contested. In a sense, the British powers were continuous with the powers of the Knights before them. The safeguards of the British constitution were ignored. The ‘rule of law’ was often violated. There was no meaningful ‘separation of powers’. There was also, for decades, no freedom of the press. Malta was “viewed as an island fortress and too much liberty was considered potentially dangerous.”<sup>89</sup> Even so, the defense of continental legal links was such that there was less influence from Anglo-American judicial institutions than in other modern mixed systems. And, if Maltese judges had “creative mindsets”, this may not have been an import.<sup>90</sup> It might instead have represented a long-standing Maltese tradition of judicial authority. It might also reflect the power of continental judges under the *ius commune*, a power only slowly altered outside of France.<sup>91</sup> In addition, while a process of legal anglicization did occur, especially in public law, it was less the result of “judicial

88. Cremona (1997), *supra* note 48, at 1.

89. Ganado (1996), *supra* note 49, at 229.

90. Palmer (2009), *supra* note 29, at 343.

91. This is consistent, for example, with the work of Gino Gorla. He argued that what ‘appears to be unique in the English legal system . . . was during the sixteenth and eighteenth centuries shared to a large extent in common between Continental and English law.’ Gorla & Luigi Moccia, *A ‘Revisiting’ of the Comparison between ‘Continental Law’ and ‘English Law’ (16th-19th Century)*, 2 J. LEGAL HIST. 143, 153-54 (1981). This might be especially true where the revolutions of the period never had a significant impact. This is as true for Malta as for mixed systems outside of Europe. See also Gorla & Moccia, *A Short Historical Account of Comparative Law in Europe and in Italy During Modern Times (16th to 19th Century)*, in ITALIAN NATIONAL REPORTS TO THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1986). For a related discussion in a ‘classical mixed jurisdiction’, see also William Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1 (1973).



interpretation" than of imperial will and legislative change.<sup>92</sup> In sum, this period marks the 'founding' of the mixed system (in its modern usage).<sup>93</sup> British laws and legal institutions steadily became more influential. In general, however, Malta's experience "illustrat[ed] two things: *firstly*, the great difficulty of making a nation change its own private law; *secondly*, the possibility of having a perfectly compatible public law system of foreign origin."<sup>94</sup>

### C. Subsequent Developments

These Maltese changes took place against a background of significant political and legal revolutions across the West.<sup>95</sup> Over the course of the nineteenth century, the plurality of laws that had characterized Europe for centuries was largely eliminated. The focus on legal positivism, on law-making and legal clarity, was linked to both the new powers of the state and demands for popular accountability. While the process was not uniform, in continental law, this was expressed in legislation, often codal, and subsequently in exegetical interpretation.<sup>96</sup> Many nineteenth-century codes were attempts to create a set of laws that was authoritative, comprehensive, systematic, and internally harmonious. They were intended to abrogate previous or conflicting law and to unify the legal system into a national common law. While reflecting the laws of the *ancien régime*, both Roman and Germanic in origin, this movement was exemplified in the *Code civil* (1804).<sup>97</sup> Modern nationalism and codification marked an important change from Europe's earlier plural, juridical culture. It was a shift from European *iura communia* and local *iura propria* to national law, from persuasive to binding authorities, from open to closed legal systems, and from judges and jurists to legislators.<sup>98</sup> The British equivalent, exemplified by the

92. Palmer (2009), *supra* note 29, at 343.

93. Palmer (2001), *supra* note 10, at 17; cf. Palmer (2006), *supra* note 29, at 468-69.

94. Ganado (1950), *supra* note 2, at 195. This "sectorial" division "was a deliberate political choice." Palmer (2001), *supra* note 10, at 20.

95. See the interesting story told in Albert Ganado, *A Book Printed in Malta on the Sicilian Revolution of 1848*, 2005 PROCEEDINGS OF HISTORY WEEK 175 (2005).

96. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762 (1969).

97. James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994); see also Mario Ascheri, *A Turning Point in the Civil-law: From Ius Commune to Code Napoleon*, 70 TUL. L. REV. 1041 (1996); Rudolf van Caenegem, *The National Codes: A Transient Phase, in EUROPEAN LAW IN THE PAST AND THE FUTURE* (van Caenegem ed., 2002).

98. See Gorla & Moccia (1981) and (1986), both *supra* note 91; John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996); Peter Stein, *Judge and Jurist in the Civil Law: An Historical Introduction*, in Stein, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* (Stein ed., 2003, also in 46 LA. L. REV. 241 (1985)).

legal philosophies of Jeremy Bentham and John Austin, was linked to British parliamentary supremacy and the rise of statute law.<sup>99</sup> It can also be seen in the hardening of precedent into *stare decisis*, where a single judicial decision is binding, rather than merely persuasive, on the basis of the court's authority alone.<sup>100</sup> Legal education and law reporting improved, often with official reporters. A clearer appellate hierarchy of courts was established with, by mid-century, professional law lords at their head. The writ system was relaxed in favor of general pleading, bringing a new focus on substantive, rather than procedural, law. Finally, common law and equity were fused; England's multifarious jurisdictions were enveloped by the courts of common law.<sup>101</sup> If this did not entirely eliminate, in fact, either legal or normative hybridity, "[b]y the end of the nineteenth century law can hardly be thought of except in its formal or professional sense."<sup>102</sup>

In fact, changes in Maltese law were consistent with what Patrick Glenn refers to as a shift from an "unstructured" to a "structured" *mixité*.<sup>103</sup> This more clearly compartmentalized hybridity maintained some legal diversity, but created a 'system' in Malta "composed of a number of clearly distinguished compartments."<sup>104</sup> In this form, the Maltese legal tradition achieved a certain consistency into the twentieth century. Stability was, however, often missing in Maltese politics.<sup>105</sup> In the early twentieth century, for example, a letter was written by the elected members of the Council for Government to Alfred Lyttelton (1857-1913), MP and Secretary of State for the Colonies, stated:

Sir, you must be well aware that the present constitution is looked upon by the intelligent and independent class of these Islands as one of the narrowest and most oppressive oligarchies that ever mocked the form of free Government. Why, then, refuse to take any action concerning these

99. Note that a British Commission of Inquiry in 1836 included Austin.

100. Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in PRECEDENT IN LAW (Laurence Goldstein, ed., 1991); Stein, *Civil Law Reports and the Case of San Marino*, in Stein (2003), *supra* note 98.

101. Donlan (2010), *supra* note 12, at 290. This brought a new focus on substantive, rather than procedural, law, and an attempt to limit judicial subjectivity. See Glenn, *The Civilization of the Common Law*, in ESSAYS ON EUROPEAN LAW AND ISRAEL (Alfredo Mordechai Rabello ed., 1996), 72.

102. Harry W. Arthurs, "Without the Law": *Courts of Local and Special Jurisdiction in Nineteenth-Century England*, 5 J. LEGAL HIST. 130, 140 (1984); see also ARTHURS, 'WITHOUT THE LAW': ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND (1985); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

103. Glenn (1996), *supra* note 55, at 2-8.

104. Ganado (1996), *supra* note 49, at 247.

105. Note the opposition, in the 1860s, of the so-called 'Four Lawyers'. See Cassar, *supra* note 60, at 165.

Islands, in accordance with the sound constitutional principles that should govern a Crown Colony as laid down by you.<sup>106</sup>

In the aftermath of the Great War, and in the context of European revolutions and extremism, threats to British rule in Ireland, and the high cost of living and inadequate food supply, civil unrest increased in Malta. So did pressure for greater autonomy.<sup>107</sup> The post-war National Assembly pressed for self-rule. More significantly, in the midst of riots on 7 June 1919, British soldiers fired into Maltese crowds, killing four. The event radicalized the Maltese and '*Sette Giugno*'—Italian for the seventh of June—remains a national holiday. A subsequent diarchic British constitution for Malta, that of 30 April 1921, gave the Maltese control of internal affairs while retaining British control over external matters. The complex issue of language also acquired new vitality in this period. The attempts to introduce English as the primary language of education, starting from the later nineteenth century onwards, generated the so-called 'language question' or conflict between the upholders of Italian as the language of culture, law and education in Malta and the proponents of English. The origins of the language question can be traced to the controversy in the early nineteenth century regarding the language to be used in the law codes and the Maltese legal profession long provided the backbone of the pro-Italian 'Nationalist' political resistance to anglicisation. Italian was long dominant, though English became increasingly important from the 1870s given its promotion by the colonial authorities and its use in education. With Italian, it was recognized as an official language in the Constitution of 1921. The Maltese language was slowly introduced in legal proceedings in 1929, but only acknowledged as an official language in 1934.<sup>108</sup> In 1936, it became the official language of the courts. Italian remained an official language until 1939; the following year marked the beginning of the Italo-German 'Siege of Malta' (11 June 1940-20 November 1942).

The Axis assaults marked an important turning-point in Maltese politics. Prior to the war, the British had moved much of their fleet to Alexandria in the 1930s. The war made Malta's position vital to the British, their allies, and their enemies. The bravery of the Maltese in enduring the siege, enabled by considerable British effort, led to the

106. *The Elected Members of the Council of Government to Lyttelton, 13th, April 1904*, in Cremona (1997), *supra* note 48, at 157.

107. There are numerous parallels between Ireland and Malta, especially in this period. For Ireland, see, e.g., ALAN J. WARD, *THE IRISH CONSTITUTIONAL TRADITION: RESPONSIBLE GOVERNMENT AND MODERN IRELAND, 1782-1992* (1992).

108. Constitution (Amendment) Letters Patent 16 August 1934.

collective award of the 'George Cross' from Britain's King George to the Maltese people on 15 April 1942.<sup>109</sup> Italian attacks also had the effect, at least for the larger part of the population, of undermining long-standing Italian political sympathies. However,

[i]n expectation of attack scores of staunch Nationalist supporters . . . were arrested and interned on suspicion of disloyalty as a precautionary measure. When the attack finally came, on 11 June 1940, the Governor put into operation the instruction sent to him from London a week before. Civil servants suspected of disloyalty to the Crown were arrested and interned, the most prominent of these being the Chief Justice, Sir Arturo Mercieca. Eventually those arrested . . . were later deported to Uganda without trial or charge, under special emergency powers, until the end of the war.<sup>110</sup>

While these illegal actions must be understood in their historical context—compare, for example, the American internment of Japanese-Americans—it hardly inspired confidence in the British 'rule of law'.<sup>111</sup> The post-war years were a period of political and economic uncertainty. In the 1950s, many Maltese, on the proposal of their Labour Party, even appeared ready to accept the integration of the island into the United Kingdom. This proposal ultimately failed and the Maltese Legislative Assembly unanimously passed a resolution to break with Britain. Malta eventually received independence on 21 September 1964 with the British Queen remaining, formally at least, as head of state.<sup>112</sup> A decade later, on 13 December 1974, Malta was declared a republic, becoming fully

109. The George Cross now appears on the Maltese flag.

110. Cassar, *supra* note 60, at 212-13.

111. Indeed:

Both the [Maltese] Civil Court and the Court of Appeal ruled against the Governor and held that the deportation order was illegal under both Maltese and Imperial law. Unfortunately in between the first decision and the decision by the Court of Appeal the internees had been placed in the hold of a steamship and transported to Alexandria, from where they continued their journey overland to Uganda. The decision of the Court of Appeal was very much a Pyrrhic victory for the deportees.

Vincent A. De Gaetano (then Chief Justice of the Constitutional Court of Malta), *The Constitutional Guarantees of Rights and Freedoms*, available at <http://www.judiciarymalta.gov.mt/file.aspx?f=564> (last visited 31 Mar. 2011). *Cf.* De Gaetano's account of the British arrival in the nineteenth century in *id.*, 2 with our own.

112. See TIM (THIGMEN) KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* (2003), on the tendency of former British possessions to adopt codified constitutions and to establish courts with the power of binding constitutional review rather than follow the British tradition of a (so-called) 'unwritten' constitution and parliamentary supremacy. On comparative public law generally, see also Aalt-Willem Heringa & Philipp Kiiver eds., *CONSTITUTIONS COMPARED: AN INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2009).

autonomous but a member of the Commonwealth of Nations.<sup>113</sup> Following the end of the British military presence in 1979, the Maltese government sought to remain non-aligned in the 'Cold War'. While this led to some curious friendships, not least with the Chinese, Malta was the site of the first meeting between the American President George H.W. Bush and the Soviet leader Mikhail Gorbachev in 1989. Following a referendum in 2003, Malta became a member of the E.U. in 2004 and joined the Eurozone in 2008.

#### IV. THE PRESENT

##### A. *The Sources of Law*

In his *Mixed Jurisdictions Worldwide* (2001), Palmer argued that within mixed jurisdictions there exist divisions between 'purists' determined to defend the continental legal traditions, 'pollutionists' eager to incorporate additional Anglo-American law, and 'pragmatists' who deal with the law before them practically, often generating new legal creations or hybrids in the process. This division is reflected, too, in Maltese law. These "orientations" have been and remain "closely tied to national descent, maternal tongue, and legal education."<sup>114</sup> It is related to both ethnic-linguistic divisions of the past and present loyalties towards—and familiarity with—the specific area of law on which Maltese jurists work. Broadly speaking, Maltese private lawyers are more likely to be purists; public lawyers are more likely to be, in this terminology, pollutionists. In general, however, the contemporary Maltese legal mind is generally recognized as pragmatic. As Joseph Ganado concludes in his overview of Maltese law:

To avoid confusing legal principles deriving from different sources, it is natural that caution is to be exercised. I would say that it is necessary to view the system as composed of a number of clearly distinguished compartments. The approach was a pragmatic, rather than a theoretical one, and, therefore, the combination cannot be described as being on a doctrinal basis.<sup>115</sup>

113. For an interesting analysis of legality in former British colonies and its link to legislative representation and judicial integration, see Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in former British Colonies*, 59 AM. J. COMP. L. 111 (2011).

114. Palmer (2009), *supra* note 29, at 344.

115. Ganado (1996), *supra* note 49, at 247. "This type of mixing leaves neither system intact and finishes with a hybrid system. Care must be taken to apply such a system logically and consistently with a full appreciation of the origin of particular rules, for the purpose of avoiding a confused development." *Id.* at 234.

We agree with Palmer, too, that the legal choices made between borrowed traditions in these mixed systems are not merely exercises in logic, but clashes of legal culture.<sup>116</sup> They frequently reflect bias and ignorance rather than reason. This may be true of other, nominally 'pure', jurisdictions as well, but has more significance in mixed systems where the "fantasies" of judges "are more than idle dreams. The uses and abuses of comparative law that they engage in are . . . a significant part of legal development."<sup>117</sup> Indeed, in addition to combining continental private law with Anglo-American public and criminal law, Palmer notes that in each of these jurisdictions he studied Anglo-American law penetrates, to varying degrees, both (i) judicial institutions and procedures and (ii) substantive (private and commercial) law.<sup>118</sup> The former is significant; the latter varies in a reasonably common "pattern of penetration and resistance".<sup>119</sup> This Part of the Article will suggest how Maltese's unique legal system meets these criteria.

As a consequence of its complex past, the modern sources of law in Malta are varied.<sup>120</sup> They are also not very clearly laid out.<sup>121</sup> In addition to European laws (those of the E.U. and the E.C.H.R.), Maltese enacted law consists of several hundred 'chapters' arranged chronologically. The Constitution was originally passed and promulgated by the British Parliament. It is now entrenched, requiring a two-thirds majority of the Maltese Parliament to amend it. The Constitution is quite long and reflects the precision and detail of English statutory drafting. British public law is a subsidiary source in public law matters. As in continental jurisdictions, however, Malta's written law includes 'true' continental codes (in contrast to mere restatements of law) as well as narrower, special legislation.<sup>122</sup> Custom remains a binding source of law, but its

116. "Unsurprisingly, the mixed jurisdictions become intellectual battlegrounds where passions, prejudices and considerable learning occasionally took to the barricades." Palmer (2001), *supra* note 10, at 31.

117. *Id.* at 57.

118. Indeed, his inclusion of public law was an important shift from the traditional narrow focus on comparative law on private law. Palmer (2001), *id.* at 6 n.8; *see also* Özücü, *Public Law in Mixed Legal Systems and Public Law as a 'Mixed System'*, 5 ELEC. J. COMP. L. (2001, available at [www.ejcl.org/52/abs52-2.html](http://www.ejcl.org/52/abs52-2.html) (last visited 10 Mar. 2011)).

119. Palmer (2001), *supra* note 10, at 57; *see id.* at 53-59; Palmer (2006), *supra* note 29, at 471-72; *see also* José Trias Monge, *Legal Methodology in some Mixed Jurisdictions*, 78 TUT. L. REV. 333 (2003).

120. Busuttill, *supra* note 46, at M-47.

121. This is true, of course, of most jurisdictions. Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, in Reimann & Zimmermann, *supra* note 5, at 869-98.

122. The latter have proliferated and arguably tend to undermine the centrality of the codes. For the distinction between 'true' or 'substantive' codes and other, 'formal' codifications,

role is limited in practice. Even Roman law may be relevant. Most importantly for our purposes, Maltese jurisprudence appears to follow a continental pattern. Judicial decisions are not formally binding, though their "persuasive weight steadily increases as the courts progressively establish a uniform course of decisions, a *jurisprudence constante*, on a particular point."<sup>123</sup> Of course, Anglo-American *stare decisis* is rarely pure. There are significant differences between, for example, the contemporary American and British systems.<sup>124</sup> Similarly, continental legal ideology to the contrary, *jurisprudence constante*, a consistent pattern of legal interpretation by the courts, often works in practice in much the same manner.<sup>125</sup> There has arguably been considerable convergence over the last few decades.<sup>126</sup> In the 'third legal family', however, the question of the status of precedent are often seen as very important, "rai[sing] a defining issue in the quest for the 'soul' of the system", i.e. is it predominantly Anglo-American or continental in orientation.<sup>127</sup> While there are some elements associated with Anglo-American judicial methods—for instance the *ratio decidendi/obiter dictum* distinction is sometimes invoked—the Maltese judiciary adheres more generally to a European model.<sup>128</sup> Only collegial opinions are expressed. Individual judges are not identified and dissents are not issued.<sup>129</sup> In practice, then, it may be true that Maltese "court decisions

see Jean-Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988).

123. Busuttill, *supra* note 46, at M-47. "[W]hatever a judge may say, can always be described as an *obiter* . . . . The *ratio decidendi* does not figure as a different concept." Ganado (1950), *supra* note 2, at 206. On '*jurisprudence constante*', see James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1 (1993). Note, too, the irony that Anglo-American *stare decisis* can maintain continental 'purity' by making the civilian elements difficult to change.

124. See Atiyah & Summers, *supra* note 9, especially at 118-27.

125. See, e.g., Stein (2003), *supra* note 100, at 241; see also Neil MacCormick & Robert S. Summers eds., *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (1997).

126. Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 665-66 (1984).

127. Palmer (2001), *supra* note 10, at 45; see *id.* at 44-46; Palmer (2006), *supra* note 29, at 471.

128. Maltese courts often distinguish between the '*parti dispozittiva*' (the dispositive part) of a judgment, which contains the decision and is considered to have most authority and the reasoning which led to it. The terms '*ratio decidendi*' and '*obiter dictum*' are also sometimes used. Whether referred to as the '*parti dispozittiva*' or '*ratio decidendi*' however, the principle still lacks, in a strict sense, binding force. Cf. Palmer (2001), *supra* note 10, at 49.

129. A deeper layer of Maltese 'common law' may also exist, though its content is unclear. In an important case in Malta, that of *Sammut v Strickland*, (138) A.C. 678, Lord Strickland stated that "[t]he Roman law is no doubt our common law." Cited in Ganado (1950), *supra* note 2, at 204. This seems to mean that outside of the written or enacted legislation that Roman law, or,

. . . are accorded more precedential value than in traditional civilian jurisdictions", though they are not "accepted as an official source of law".<sup>130</sup> This fact may also owe something to the virtual absence of indigenous 'doctrine' (legal scholarship) in Malta.

As elsewhere, doctrine is not, strictly speaking, binding in Malta, but is "treated by the judges with considerable respect."<sup>131</sup> If this appears to reflect a continental alignment, the paucity of modern Maltese doctrine means that the vital role of developing Maltese law is often played by its judiciary, notwithstanding the absence of binding precedent.<sup>132</sup> This is arguably linked to both Maltese legal education and a certain level of legal pragmatism. The jurisdiction's sole law faculty is based in the University of Malta. The language of instruction there is English rather than Maltese. The law faculty consists largely of part-time lecturers simultaneously engaged in legal practice; there are only a dozen full-time lecturers. This focus reflects and/or contributes to pragmatism, but it also arguably inhibits legal theory in the jurisdiction. Legal education combines the reading of (i) the lecture notes of leading (past) jurists and (ii) foreign texts, often British, that were not written specifically for the jurisdiction. The notes remain unpublished, to be collected by students from the University library. They are often many decades old and effectively function as glosses on the written law.<sup>133</sup> As noted, there are very few native texts. Largely parallel to continental legal education, law students complete an undergraduate in law (LLB) followed by a graduate degree (LLD) required for legal practice.<sup>134</sup> This differs from both (i) the British and Irish combination of university followed by professional study and (ii) the three-year graduate study of law in North American law schools. LLD students usually apprentice with practitioners during the latter stages of their study. Students train as general practitioners or 'advocates'. There is neither an English-style distinction between barristers and solicitors nor continental-style training for a judicial career. There are also, however, 'legal procurators', who assist advocates and have some rights of audience in the lower courts, and notaries who, on the continental model, remain important in legal

more accurately perhaps, the tradition of the *ius commune*, could continue to exist as a resource for background principles. This is, however, a complex question.

130. Palmer (2009), *supra* note 29, at 343.

131. Busuttill, *supra* note 46, at M-47.

132. Doctrine in the sense of legal scholarship is also, however, significant in American law and, especially over the last few decades, increasingly important in British law.

133. See, e.g., Mifsud Bonnici, *supra* note 1, at 41-42.

134. This is currently being harmonized in line the Bologna Process of the E.U. Having completed their LLD studies, Maltese advocates are commonly addressed as 'Doctor'.

practice. Receiving the LLD requires a lengthy academic dissertation (35,000 words) by the students. Stored at the Law Faculty, these make up a considerable body of native scholarship.<sup>135</sup> A student-edited journal (*Id-Dritt*) also exists, but its publication has sometimes been sporadic and it is aimed at a largely local audience.<sup>136</sup> The 'Chamber of Advocates' also publishes a short publication entitled *Law & Practice* (formerly *De Jure*). The Chamber is the elected body which represents Maltese lawyers as a whole, particularly in relations with the Government and regulatory bodies. Since it was set up in 1877 it has played an important role in professional self-regulation, ethics and development.<sup>137</sup>

As in a number of other mixed systems, the judiciary may properly be seen as "the real authorities of the civilian law."<sup>138</sup> In Malta, this is rooted in long practice, as well as institutional factors like the security of tenure of the judiciary.<sup>139</sup> The Maltese judiciary is made up of 'magistrates' who sit in the inferior courts and 'judges' who sit in the superior courts. While the qualifications for each differ slightly, both will be referred to here as 'judges'.<sup>140</sup> As noted, Maltese is the language of the courts. English is an official and important language, but where there is conflict between Maltese and English texts, the Maltese usually prevails. In general, Maltese judges look in some respects like those in

135. These dissertations may prove invaluable to foreign scholars. Since 2010, the theses have begun to be digitized by the University of Malta's Library, making it possible to search theses by free text. Unfortunately, these remain inaccessible online. A list of titles available in the Law Library of the Law Faculty is available at [www.ghsl.org/content/view/19/37/](http://www.ghsl.org/content/view/19/37/) (last visited 4 Apr. 2011).

136. The journal began publication in 1944 as the quarterly *Malta Law Journal*. Another student journal, the *E.L.S.A. Malta Law Review*, was launched last year (see <http://www.elsamalta.lawreview.com/> (last visited 2 May 2012)).

137. See *Chamber of Advocates*, [www.avukati.org/chamberofadvocates/home.aspx](http://www.avukati.org/chamberofadvocates/home.aspx) (last visited 8 Mar. 2011).

138. Kenny D. Anthony, *The Viability of the Civilist Tradition in St. Lucia: A Tentative Appraisal*, in *ESSAYS OF THE CIVIL CODES OF QUÉBEC AND ST. LUCIA* (Raymond A. Landry & Ernest Caparros eds., 1984), 61. Quoting Jean-Gabriel Catel on Quebec, he adds, "Their judgments are considered as doctrinal essays of great persuasion in subsequent cases. They, and not the commentators and law professors (as in France), are the heroes of the Québec civil law." *Id.* (citing CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* (1962), 232). *Cf.* the more complex role of judicial 'navigation' in Turkey's more complex mixed system in Örüçü, 'Judicial navigation as official law meets culture in Turkey', in Örüçü (2010), *supra* note 23, especially 179-80. Note that the dominance of judges may change as the Law Faculty of the University of Malta employs more full-time law professors.

139. See the discussion of the English, French, German, Spanish, and Swedish judiciaries in JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* (2006).

140. A *Judicial Studies Committee* is responsible for training of both and both are assisted by a 'Judiciary team' or staff. See generally the Judiciary Malta Site, <http://www.judiciarymalta.gov.mt/home> (last visited 31 Mar. 2011). The *European Justice* site is also useful; see <https://e-justice.europa.eu/home.do?lang=en&action=home> (last visited 6 Apr. 2011).

Anglo-American jurisdictions or indeed like those of the 'third legal family'. They tend to be drawn from senior practitioners rather than following the continental division, educational and professional, between magistrate and lawyer. Reflecting their Anglo-American inheritance, judges in the jurisdictions Palmer studies see themselves as possessing inherent, rather than delegated, powers.<sup>141</sup> They may see themselves, as in Louisiana's 'mixed jurisdiction', "as being law-creators as well as law appliers."<sup>142</sup> This is arguably true of Maltese judges and adjudication. Their opinions, too, at least since 1945, generally resemble more the discursive pattern of the common law than the more abbreviated form associated with the Franco-Romano (rather than Germanic) continental tradition. As Palmer noted for the 'third legal family', Maltese codal and statutory interpretation can follow continental and Anglo-American approaches respectively.<sup>143</sup> That is, in codal interpretation, the broadly-phrased articles suggest a liberal, teleological or purposive, approach. Where there are lacunae in the code, the judge can deductively analogize through its implicit principles in much the same way that a common lawyer might analogize inductively between cases. Judges find the law not in, but through, the codes. With detailed 'special' statutes or common law-style legislation, judges will adopt a narrower, more literal approach.<sup>144</sup> Finally, in Malta, "constant reference is made by Maltese judges to parliamentary debates, and what is said in Parliament in regard to the interpretation of laws is given considerable weight."<sup>145</sup> This is consistent with both continental and American practice. It is very different, however, from the so-called 'exclusionary rule' that prohibits the use of parliamentary history in Britain or Ireland.<sup>146</sup>

### B. Civil and Criminal Procedure

All Western legal traditions have adversarial elements, especially with regard to the requirement that parties to a dispute have a fair and reasonable opportunity to present their case. In modern parlance, however, Anglo-American procedures are generally referred to as 'adversarial' while continental procedures are labeled 'investigative' or

141. *Cf.* Palmer (2001), *supra* note 10, at 35-40; Palmer (2006), *supra* note 29, at 469-70.

142. Palmer (2001), *supra* note 10, at 269.

143. In practice, this may be little different from the continental approach to codal interpretation, on one hand, and the interpretation of special statutes on the other.

144. See generally Neil MacCormick & Robert S. Summers eds., *INTERPRETING STATUTES: A COMPARATIVE STUDY* (1991).

145. Ganado (1950), *supra* note 2, at 201-02.

146. See Donlan & Rónán Kennedy, "A Flood of Light?": *Comments on the Interpretation Act 2005*, 6 *JUD'L STUD. INSTITUTE J.* 92, especially 99-104 (2006).

'inquisitorial'. These are probably better seen as 'party-centered' and 'judge-centered' respectively. But such terms, like many in comparative law, serve only as a rough and simplified shorthand, a kind of ideal type, for the substantive and institutional complexity of legal systems. They also generally focus on the most formal legal procedures and ignore minor matters and summary trials. In general, Anglo-American procedures are characterized by the antagonism of active parties (or counsel) before a largely passive judge and, in some instances, a lay jury. Because of the historical role of the jury, trials are continuous, orality is emphasized, and an elaborate body of laws relating to the admissibility of evidence is employed. Finally, experts on subjects relevant to a particular case are chosen by the parties and reflect their interests and arguments. In contrast, continental procedures are marked by a more central role for judges and the absence of a jury. The result is that 'trials' need not be continuous and may focus to a much greater extent on written documentation rather than oral argument. Simple guidelines on evidence suffice for the professional judges involved. Experts in investigative systems are also frequently court-appointed.<sup>147</sup> But these generalizations mask considerable complexity in practice. For example, unlike the situation in the United States, where civil juries are reasonably common, the civil jury largely disappeared from British and Irish law over a century ago. Anglo-American judiciaries have also recently taken on greater responsibilities for case management than was true in the past.<sup>148</sup> And some continental jurisdictions, most notably Germany, employ lay judges, usually specialists in a specific area elected for a term of office (in commercial, family, and employment courts) rather than for a single legal dispute. So a distinction between 'party-centered' and 'judge-centered' procedures remains meaningful, but complicated.

Within the jurisdictions of the 'third legal family', continental legal procedures were quickly replaced by those of Anglo-American origin.<sup>149</sup> In Louisiana, for example, this has been described as the "suffocation" of

147. Palmer (2001), *supra* note 10, at 62-66; Palmer (2006), *supra* note 29, at 473-74; see Chapter 8 of Ugo A. Mattei, Teemu Ruskola, & Antonio Gidi eds., SCHLESINGER'S COMPARATIVE LAW ((7th ed.) 2009); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) at 835-41.

148. See, e.g., Judith Resnick, *Composing a Judiciary: Reflections on Proposed Reforms in the United Kingdom on How To Change the Voices of and the Constituencies for Judging*, 24 LEGAL STUD. 228 (2004).

149. Palmer adds that 'one can observe differences between those countries with procedural systems which were once civilian and have been thoroughly anglicized [South Africa, Puerto Rico, and the Philippines], those only partly anglicized [Quebec and Louisiana], and those which have never known civil law procedure in the first place [Scotland and Israel].' Palmer (2006), *supra* note 29, at 473.

their French and Spanish procedural roots.<sup>150</sup> More generally, it has been explained by "the emotional, almost religious attachment of the adherents of . . . common law procedure to their system."<sup>151</sup> This movement towards Anglo-American procedures is an important development in the 'third legal family'. Its impact is not limited to procedural law. As Palmer notes, Anglo-American procedures can actually "leave a visible imprint upon the civil law. . . . [S]ubstantive law may be subtly modified, without further judicial or legislative will, at the practical stage of law realization."<sup>152</sup> In Malta, while there is considerable judicial discretion and flexibility in practice, the form of trial in civil matters remains significantly more judge-centered than in either the 'classical mixed jurisdictions' or Anglo-American law.<sup>153</sup> This is clear in the rules of the Code of Organization and Civil Procedure, most of which have continental origins.<sup>154</sup> It is also obvious in the episodic practice of ordinary civil trials.<sup>155</sup> During a single sitting a witness may be examined or a document presented. There is little of the courtroom drama or histrionics associated with Anglo-American—or, more accurately perhaps, American—law. In Malta, the parties tend to focus on the written case file or dossier rather than on the oral hearing. There is no Anglo-American discovery system. There is no jury. The rules of

150. Kent A. Lambert, *The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—The Corruption of Louisiana's Civilian Tradition*, 67 TUL. L. REV. 231 (1992).

151. Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 293 (2003).

152. Palmer (2001), *supra* note 10, at 63. "The old maxim that civil law subordinates the remedy to the right is thus turned on its head in jurisdictions where common-law procedure controls the right." *Id.* at 66. Note the idea that "civil law can be seen as "a jewel in a brooch . . . [which] glitters in a setting that was made in England." Reid, *supra* note 38, at 21 (quoting H.R. HAHLIO & ELISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* (1991), 585).

153. Zammit, *Examining Our Assumptions When Developing Clinics Abroad: Some Reflections Based on the Maltese Experience* (unpublished paper presented to the American Association of Law Schools (AALS) Workshop on Clinical Legal Education (New Orleans, 2-6 May 2007), especially 4-5); see also Zammit, *Professional Ideals in Maltese Legal Practice*, 18 *JD-DRIT* 165 (2002).

154. Various amendments to the Code of Civil Procedure and the civil trial were made in the twentieth century. In particular, one should note the amendments made by Ordinance XV of 1913, following the report of the Mowatt Commission, which allowed the plaintiff and the defendant to give testimony in their own cases. See REPORT OF THE ROYAL COMMISSION ON THE FINANCES, ECONOMIC POSITION, AND JUDICIAL PROCEDURE OF MALTA (1912).

155. In fact, numerous adjournments and deferrals of the hearing are usually given and it is normal for such a civil trial to take years to be concluded. Government statistics for 2010 show that 39% of the cases pending before the Civil Court (First Hall) have been pending for more than 4 years (see *Published Age Analysis*, available at <http://www.justiceservices.gov.mt/courtservices/Statistics/civil.aspx?year=2010> (last visited 10 Mar. 2011)).

evidence are little utilized and largely unnecessary given the jury's absence. In addition, judges often assume an active role in the overall direction of proceedings. Moreover, as the same judge decides both legal and factual aspects of a case, lawyers tend to be conservative in their objections to the use of testimony and any judicial examination of witnesses. To access technical evidence, Maltese courts also tend to rely on written reports produced by court-appointed experts, though parties may also appoint *ex parte* expert witnesses.<sup>156</sup> None of this should obscure the fact that Malta has adversarial elements in its procedures. The requirement that parties fairly and reasonably present their cases is a legacy of its legal tradition, both of its parent traditions, and, more recently, of the E.C.H.R.

Maltese criminal trials are more party-centered, though even here there are continental influences. Maltese criminal law has been described as "eclectic".<sup>157</sup> The Criminal Court in Malta typically uses a jury. While even modern continental traditions use juries, the Maltese institution is recognized as an instance of Anglo-American borrowing. Indeed, the criminal jury "merged so completely into the Maltese legal system that it has long been regarded as an essential and living part of it."<sup>158</sup> Its use has meant that, unlike in civil matters, the principle of a single continuous hearing was adhered to in criminal trials given the impracticality of dissolving a jury once summoned to postpone the continuance of the hearing to another date. Continental elements are present, too. For example, an inquiring magistrate exists to gather evidence in the pre-trial phase of criminal trials, at least in the case of offences whose punishment exceeds a ten-year term of imprisonment.<sup>159</sup> The magistrate presides over a Court of Criminal Inquiry with wide-ranging powers to summon and question witnesses.<sup>160</sup> This court does

156. There is a rule prohibiting witnesses from being questioned in the presence of other witnesses in the same case. Act XXIV of 1995 also introduced far reaching changes to the civil trial, particularly the introduction of a pre-trial hearing aimed at clarifying the facts in dispute and more widespread use of affidavits for purposes of presenting testimony. Cf. Mattei et al. (2009), *supra* note 147, at 783-85 (on the French tradition of 'attestation'). There was also an abortive attempt in the mid-1990s, spearheaded by the judiciary, to introduce the Anglo-British post of the Master to ensure better case management in pending cases.

157. Ganado (1996), *supra* note 49, at 232; see J.M. Ganado, *Maltese Law*, 29 J. COMP. LEGIS. & INT'L L. (3d series) 32, 38 (1947).

158. Cremona (1964), *supra* note 47, at 572.

159. Cf. Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527 (1997).

160. Criminal Code § 397 states:

The court may order the attendance of any witness and the production of any evidence which it may deem necessary, as well as the issue of any summons or warrant of arrest against any other principal or accomplice whom the court may discover. The court may

not have any adjudicative function. Evidence gathered is sent to the Attorney General for his decision as to whether to issue a bill of indictment before the Criminal Court. To repeat, no legal system is purely investigative or adversarial.<sup>161</sup> Continental jurisdictions are also accusatorial to different degrees.<sup>162</sup> Many include juries of different sorts, often borrowed and adapted from the Anglo-American traditions, or involve the participation of lay judges for the prosecution of serious crimes.<sup>163</sup> In sum, Maltese civil procedures and criminal laws and procedures are mixed, but in a manner distinct from the leading members of the 'third legal family'.

### C. Legal Structures

The Maltese courts are more centralized than most continental jurisdictions. Except for the division between civil and criminal matters, there are no specialized separate court hierarchies. Unlike many jurisdictions, Anglo-American and continental, there is no single superior court over both the ordinary civil and criminal courts. There are, however, some specialized courts within the ordinary court structures. No Anglo-American courts of Equity have ever existed in Malta.<sup>164</sup>

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likewise order any inquest, search, experiment or any other thing necessary for the fullest investigation of the case.

See also Vincent de Gaetano, *Attorney-General, Magistrates and the Police: The Maltese System*, 15 COMMONWEALTH L. BULL. 301 (1989).

161. Considerable differences exist between even American and British law. See William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027 (1996).

162. See generally CRAIG M. BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* (1999).

163. See, e.g., Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the Cour d'Assises*, (2001) U. ILL. L. REV. 791; Yue Ma, *Lay Participation in Criminal Trials: A Comparative Perspective*, 8 INT'L CRIM. JUSTICE REV. 74 (1998). But note also that comparativists have often noted that the baroque rules necessitated by jury trials—especially in the cynical, if cinematic, American variant—do not guarantee truth or justice. John Henry Merryman noted (of another unnamed scholar):

He said if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. This is, in effect, a judgment that criminal proceedings in the civil law world are more likely to distinguish accurately between the guilty and the innocent.

Donlan, *The Jury and the Common Law: Review Article of JW Cairns and G MacLeod (eds), "The Dearest Birth Right of the People of England": The Jury in the History of the Common Law* (2002), (2003) 25 DUBLIN UNIV. L.J. (new series) 277 (2003, quoting JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* ((2d ed.) 1985), 133). The unnamed scholar appears to have been Rudolf B. Schlesinger. See Mattei et al. (2009), *supra* note 147, at 855.

164. Palmer (2001), *supra* note 10, at 36-37, 53; Palmer (2006), *supra* note 29, at 469-70.

Simplified, Malta's 'ordinary' courts may be divided into civil and criminal jurisdictions in the following manner:

COURTS <sup>165</sup>	
Civil jurisdiction	Criminal jurisdiction
Constitutional Court	
Court of Appeal	Court of Criminal Appeal
Civil Court	Criminal Court
Court of Magistrates <sup>166</sup>	

As in many jurisdictions, Maltese judges and magistrates may formally sit, or belong to, several courts at the same time. Judges and magistrates are drawn from the 'Bench of Judges' and the 'Magistrature' respectively. In most of the lower courts, a single decision-maker presides over the court. This is a magistrate in the Court of Magistrates and a judge in the Civil Court. The Criminal Court, however, usually sits with a single judge and a jury of nine. The Court of Magistrates exercises both civil and criminal jurisdiction (as a Court of Criminal Judicature or a Court of Inquiry, where it conducts a preliminary investigation in respect to criminal offences). The Civil Court includes:

- (i) A 'First Hall' with responsibility for civil and commercial matters exceeding the jurisdiction of the Court of Magistrates. It also has jurisdiction over administrative matters and human rights causes.
- (ii) A Family Section that handles family-related litigation, mostly separation cases.
- (iii) A 'Voluntary Jurisdiction Section' that handles applications of a civil nature relating to matters such as adoption or tutorship.

The Court of Appeal and the Court of Criminal Appeal hear appellate matters in two ways. In their 'inferior jurisdiction', individual members of those courts exercise appellate jurisdiction over civil and criminal matters respectively from the Court of Magistrates. In their 'superior jurisdiction', the courts sit with its three judges to exercise appellate jurisdiction over the Civil Court and the Criminal Court respectively.

165. A more detailed chart is available at [www.judiciarymalta.gov.mt/file.aspx?f=508](http://www.judiciarymalta.gov.mt/file.aspx?f=508) (last visited 6 Apr. 2011). For a good overview of the comparative organization of justice, see Mattei et al. (2009), *supra* note 147, at 490 *et seq.*

166. Magistrates also sit in Juvenile Courts for people under the age of sixteen. These are separate from the ordinary criminal courts and the magistrate is assisted by two lay people—one of whom must be a woman—with whom he may consult. Note that there is also a *Court of Revision of Notarial Acts* responsible for disciplining notaries for any transgression of the law they commit. It is established by the Notarial Profession and Notarial Archives Act, Chapter 55 of the Laws of Malta, available at <http://www.mjha.gov.mt/DownloadDocument.aspx?app=lom&itemid=8608> (last visited 6 Apr. 2011).

The Maltese appellate courts are courts of 'revision' rather than 'cassation'. That is, their decision is substituted for that of the lower court. This is true, of course, of Anglo-American and most continental appellate courts as well as those of the 'third legal family'. Finally, there also exists a system of judicial and quasi-judicial tribunals which deal with civil, administrative and public law matters as is the case with the Rent Regulation Board, the Rural Leases Control Board, the Administrative Review Tribunal, the Small Claims Tribunal, the Consumer Claims Tribunal and the Commissioners for Justice.

The Constitutional Court is also unique in some respects.<sup>167</sup> Its original jurisdiction is confined to deciding matters related to the election to and membership of the House of Representatives.<sup>168</sup> Its appellate jurisdiction is limited to appeals from the Civil Court, First Hall and includes matters regulated by the Constitution or the European Convention Act which incorporated the E.C.H.R. into Maltese law.<sup>169</sup> While Maltese public law is largely Anglo-British in substance, the creation of a centralized court of limited jurisdiction over public law matters more closely resembles continental courts of public law. And, unlike the 'Supreme Court' of the United States and, more recently, the United Kingdom, the Maltese Constitutional Court is not the highest appellate court for civil, criminal, *and* public law matters.<sup>170</sup> Instead, the Court of Appeal is the highest appellate court for ordinary civil matters. Constitutional or 'judicial' review in the Maltese Constitutional Court is centralized, a posteriori, and concrete. That is, it is the only court entitled to interpret the Constitution. It does so only after the promulgation of a law and on the basis of a real legal dispute. There is no a priori or abstract review, such as exists in both continental jurisdictions and some Anglo-American systems such as Canada and Ireland. And, unlike British public law, in which parliament was neither bound in the past by

167. The Maltese Chief Justice normally presides as President of the Constitutional Court, as well as of the Court of Appeal and the Court of Criminal Appeal in their superior jurisdiction. The Chief Justice is appointed by the President on the advice of the Prime Minister from suitably qualified advocates, magistrates, or judges. In practice, the Prime Minister also consults with both the Minister for Justice and the Chief Justice in making judicial appointments.

168. *See also Malta, in* CONSTITUTIONAL LAW OF 10 NEW EU MEMBER STATES (Constantijn A.J.M. Kortmann, Joseph Fleuren & Wim Voermans eds., 2007).

169. Note that this was done by ordinary statute. *See generally* Vincent de Gaetano (then Chief Justice of the Constitutional Court of Malta), *The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice—Report of the Constitutional Court of the Republic of Malta*, from the Conference of European Constitutional Courts—XIIIth Congress, available at [www.judiciarymalta.gov.mt/file.aspx?f=425](http://www.judiciarymalta.gov.mt/file.aspx?f=425) (last visited 31 Mar. 2011).

170. American and British constitutional structures are, of course, also quite distinct from one another. *See* Atiyah & Summers, *supra* note 9.



the decisions of the Judicial Committee of the House of Lords nor is bound in the present by the current Supreme Court, the judgments of Malta's Constitutional Court bind its parliament as well as the parties involved and the other institutions of the state. Whenever the Court declares a law, or any part of a law, unconstitutional or in violation of the E.C.H.R., the Maltese Parliament is meant to take immediate action to alter the law accordingly.<sup>171</sup> In practice, this doesn't always happen. There are provisions which have not been repealed by Parliament notwithstanding a declaration of unconstitutionality by the Court. Of course, even without such legislative corrections, subsequent litigants are unlikely to find the Court eager to alter its earlier decisions. In addition, as a member of the E.U. and a signatory of the E.C.H.R., European judicial institutions are also important. Appeals may, as a result, be available to either the Court of Justice of the European Union or the European Court of Human Rights respectively.<sup>172</sup>

Although Malta's civil procedure, its hybrid criminal law, and perhaps even its public law set it apart from many classical mixed jurisdictions, it nevertheless shares much in common with Palmer's 'third legal family'. As noted, he maintains that a common pattern of "penetration and resistance" exists in the jurisdictions he examined.<sup>173</sup> Here Malta is little different. Palmer suggests that in the 'third legal family', the Anglo-American influence on obligations, especially *delicts* or torts, is significant while property law is largely unaffected.<sup>174</sup> Indeed, he argues that areas like tort reveal how the brevity and economy of continental principles can act as gateways for the introduction of Anglo-American doctrines.<sup>175</sup> In Malta, too, *delicts* or torts have been

171. For a slightly dated discussion of the Constitutional Court and human rights, see Carmel A. Aguis & Nancy A. Grosselfinger, *Malta*, in THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995), 399. See more generally CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES (Cheryl A. Thomas (English ed.), 2002).

172. See Ivan Sammut, *Malta and European Union law*, in THE APPLICATION OF EU LAW IN THE NEW MEMBER STATES: BRAVE NEW WORLD (Adam Lezowski ed., 2010).

173. Cf. Palmer (2009), *supra* note 29, at 344.

174. Palmer (2006), *supra* note 29, at 472. "Tort is the area *par excellence* of common law penetration." Palmer, *The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana*, in Smits (2001), *supra* note 27, at 105.

175. His

thesis is that the mixed-jurisdiction mind instinctively seeks to narrow and reduce broad civilian tort principle into smaller focused liability categories. . . . This *mentalité* resists the logic of open-ended syllogistic development, preferring a cautious, pragmatic case by case expansion of liability. A general clause in these surroundings was not destined to be an exercise in detached reason but in large measure the self-portrait of a dominant culture.

significantly influenced by Anglo-British models. The trust has also been introduced, though relatively recently. Palmer also argues that, in the 'third legal family', succession law is somewhat resistant, though pressure for freedom of testation has altered the laws of some jurisdictions.<sup>176</sup> In Malta, continental succession law has largely survived.<sup>177</sup> For practical reasons, Anglo-American commercial laws were also adopted with little resistance in the 'third legal family'.<sup>178</sup> Maltese commercial law was drawn from a variety of pan-European sources, not least Roman law, and redacted into a Commercial Code (1857) modeled on the French Commercial Code (1807). Over time, especially since the mid-twentieth century, first legislation, then judicial development, brought about a major shift towards British models. Anglo-British commercial laws now coexist, or compete, with a shrinking Commercial Code. The ease with which Anglo-American laws, such as trusts, have been adopted in the present day owes much to the flexible and pragmatic mindset developed by local jurists on the hybrid base created in the early nineteenth century. As in many legal traditions, whether mixed or nominally pure, it may also be partly explained by the cultural, political, economic hegemony of Anglo-American laws and legal institutions. As Palmer wrote:

Commercial law follows market dynamics. Anglo-American commercial law has everywhere replaced the law of merchants originally in place, partly because of relatively weaker cultural attachment to commercial rules, but more decisively because of pressure to conform to the dominant surrounding economy.<sup>179</sup>

This is no less true for Malta.

## V. CONCLUSION

All legal traditions are hybrids created in significant part by the diffusion of laws. Indeed, as H.D. Hazeltine wrote some eight decades ago,

[n]o body of law is ever, even for a single moment, in a state of absolute repose; for it is of the nature of law to be restless. Law is continually

*Id.* at 109.

176. Palmer (2001), *supra* note 10, at 57.

177. The earlier institution of the *società coniugale*, possibly of Germanic origin, had established a community property system in which a third of family property belong, respectively, to the father, mother, and children.

178. Palmer (2001), *supra* note 10, at 53-59, 66-76; Palmer (2006), *supra* note 29, at 471-72, 474.

179. Palmer (2009), *supra* note 29, at 344.

moving, changing, in response to the pressure of the forces that arise in the inner life of the community or that penetrate from outside; and one of the most important of these external forces is the introduction of foreign legal influence. Whenever a body of law comes into contact with other systems, it ceases to preserve its native character intact; it takes on new colours of form and content derived from foreign law. In all of the periods of legal history, from early antiquity to the present day, the play of these foreign influences and counter-influences has produced systems of mixed origin; and it would seem, indeed, that no system of civilised law known to history has ever been strictly pure, in the sense of being based solely on indigenous growths.<sup>180</sup>

Even so, Malta is an 'extraordinary place', the site of the commingling of diverse pan-national legal traditions that continue to thrive side-by-side. We have briefly explored the background and broad outlines of Malta's "happy union".<sup>181</sup> We have done so, in part, through the use of Vernon Palmer's scholarship on a select number of 'classical mixed jurisdictions' that he designates a 'third legal family'. Our analysis shows that Malta shares much in common with those jurisdictions. The balance between continental private law and Anglo-American criminal and public law is, for example, much the same. Other aspects of the Maltese experience, however, differ from those of Louisiana, Quebec, Scotland, etc. For example, Maltese criminal law is itself a hybrid: its substantive law reflects both Anglo-American and continental influence while its procedures are more thoroughly anglicized. On the other hand, Maltese civil procedure is significantly 'investigative' or 'inquisitorial'. The strongly adversarial approach of Anglo-American law was not adopted. More generally, there does not appear to have been any perceived need for a "neo-civilian reaction" against Anglo-American legal influence. Maltese law remains a distinct legal hybrid where both Anglo-American and continental legal traditions have arguably flourished alongside one another.<sup>182</sup> Malta's relationship to other European mixes is complex. As with all mixed systems, Malta suggests the significant limitations of the traditional taxonomies of comparative law. But Malta, with related mixed systems, may help, too, to sensitize comparatists to the deeper currents of legal complexity and to a more explicitly hybrid legal future, including the developing *novum ius commune Europaeum*. This will be limited, however, unless something can be done about "the lack of

180. H.D. Hazeltine, *The Study of Comparative Legal History*, J. SOC'Y PUB. TEACHERS L. 27, 33 (1927).

181. Ganado (1950), *supra* note 2, at 195.

182. Palmer (2009), *supra* note 29, at 343.

adequate legal material on Maltese law" available.<sup>183</sup> More generally, Malta reminds us that a jurisdiction may fuse different influences into a reasonably just and well-functioning legal order. Of course, if we recall that all traditions are hybrids, this should seem obvious.<sup>184</sup>

This assessment of Malta's legal tradition, largely limited to traditional comparative law and formal sources, ideas, and institutions, is, however, only a first step. In order to better understand the deeper character of Maltese law, its 'law in books', additional scholarship is necessary on its 'law in action', on the manner in which the law is applied in the courts. This division has often been noted since the work of the American legal realists a century ago. In Roscoe Pound's classic formulation, he wrote that

if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.<sup>185</sup>

Indeed, this gap is no less real in continental jurisdictions, whatever the theory of the bureaucratic and robotic civilian judge.<sup>186</sup> But we also suggest that understanding the Maltese *legal* tradition would be considerably advanced by "placing state law within wider normative orders".<sup>187</sup> As noted, this 'normative hybridity' is a far wider concept than legal hybridity, including both laws and wider patterns of normative ordering and non-state norms.<sup>188</sup> It is essential context for understanding the laws and legal institutions. It represents a move beyond Pound's 'law in action' to Eugen Ehrlich's 'living law', the lived normative orders of social life.<sup>189</sup> As Ehrlich wrote:

183. Sammut, *supra* note 26, at 110.

184. Where problems exist, they may owe more to internal problems, for example particular political and socio-economic tensions which find expression in assertions of cultural incompatibility, rather than to ingrained cultural oppositions engendering political conflict.

185. Roscoe Pound, *The Law in Books and the Law in Action*, 44 AM. L. REV. 12, 15 (1910).

186. See, e.g., Mitchel de S-O-L'E Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995); see also DE S-O-L'E LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY, CONTROL, DEBATE AND LEGITIMACY* (2004).

187. Donlan (2010), *supra* note 12, at 18.

188. John Griffiths, *The Idea of Sociology of Law and its Relation to Law and Society*, in *LAW AND SOCIOLOGY: CURRENT LEGAL ISSUES—VOLUME 8* (Michael Freeman ed., 2005).

189. See David Nelken, *Law in Action or Living Law?: Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157 (1984); Eugen Ehrlich, *Living Law, and Plural Legalities*, 9 THEORETICAL INQUIRIES IN LAW 443 (2008). This arguably tracks a difference between American and European understandings of 'legal consciousness'. See Marc Hertogh, *A*

A social association is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them. These rules are of various kinds, and have various names: rules of law, of morals, of religion, of ethical custom, of honor, of decorum, of tact, of etiquette, of fashion.<sup>190</sup>

With specific reference to Malta, such an approach is clearly needed to bring out, for example, the extent to which formally adversarial civil procedure is fused with an inquisitorial legal culture or how judgments in the field of tort law can end up acquiring the sort of precedential value they should not strictly possess. However such an approach will make new demands on comparatists, requiring that they familiarize themselves with the methods of the social sciences or that they find ways to work with anthropologist, geographers, and sociologists. We look forward to such a "rapprochement" and active collaboration between jurists and social scientists.<sup>191</sup>

"European" Conception of a Legal Consciousness: Rediscovering Eugen Ehrlich, 31 J. L. & Soc'y 457 (2004).

190. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (2002 [1936]), tr. W.L. Moll, 39 (from the original German edition of 1913).

191. Annelise Riles, *Comparative Law and Socio-Legal Studies*, in Reimann & Zimmerman, *supra* note 5, at 777; see also Roger Cotterrell, *Comparative Law and Legal Culture*, in Reimann & Zimmerman, *supra* note 5, at 729; T.W. Bennett, *Legal Anthropology and Comparative Law: A Disciplinary Compromise?*, 2010 STELLENBOSCH L. REV. 1 (2010). This is discussed in greater detail in Donlan (2011), *supra* note 3.

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