

THE NATURE AND SOURCES OF THE MALTESE MIXED LEGAL SYSTEM: A STRANGE CASE OF DR. JEKYLL AND MR. HYDE?

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Abstract: This paper discusses the sources of the Maltese mixed legal system which are essentially two – civil law and common law – but observes that Maltese Law is also influenced by international law and, more recently, European Union Law. It notes that not all the sources of the common law system have infiltrated the Maltese legal system: for instance Malta does not abide by the doctrine of precedent. Nor does it recognise the judgments of the Constitutional Court as binding erga omnes but as binding only between the parties to the case. This has brought certain tensions within the legal system as the civilian Code of Organization and Civil Procedure is applied to a Westminster inspired constitution. The case law and doctrine on this point are examined with a view to proposing solutions to this legal quandary. The paper further recognises that with 164 years of British occupation of the archipelago, the nature of the legal system has changed: it is no longer a civil law system with a superimposed layer above it of common law – it has been turned on its head by developing as a common law system with a layer of civil law together with international law and European Union Law influences. The latter two legal systems are on the increase as well as autochthonous law which has developed since Malta obtained its independence in 1964.

I. INTRODUCTION

In 1886, the Scottish author Robert Louis Stevenson penned his famous novel known as *A Strange Case of Dr. Jekyll and Mr. Hyde*. This work is essentially about a lawyer investigating happenings between two personalities – Dr. Henry Jekyll and Mr. Edward Hyde who, in reality, are one and the same person. This same person has a split personality – a good and evil one – but each component of this personality is separate and distinct from the other. Like Stevenson's work, the Maltese mixed legal system has its counterparts in Dr. Jekyll and Mr. Hyde. Without entering into the merits as to who is whom, it is primarily the civil law and the common law legal traditions which have made up the Maltese mixed legal system. Nevertheless, contrary to Dr. Jekyll and Mr. Hyde, the Maltese mixed legal system can in no way be considered as a split personality disorder notwithstanding the tensions prevalent therein: on the contrary, it is more of a heterogeneous mixture of civil and common law legal families. This paper thus dissects the DNA of the Maltese legal system into its constitutive ingredients in order to identify its sources and nature.

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II. THE PHASES OF MALTESE LEGAL HISTORY

Malta has seen quite a number of colonizers during time. Sicilian farmers were the first to arrive in around 5,000 B.C. The islands moved from hand to hand: from the Phoenicians (700 B.C.) to the Greeks (600 B.C.); from the Carthaginians (550-218 BC) to the Romans (218 B.C. to 870); from the Arabs (870 to 1090) to the Normans (1090 to 1530); from the Order of the Knights Hospitallers of St. John of Jerusalem (1530 to 1798) to the French (1798 to 1800); from the British (1800 to 1964) to self-rule. All these colonizers have brought with them, to a larger or lesser extent, their legal influences on Maltese law.¹

III. GENERAL PRINCIPLES OF THE MALTESE MIXED LEGAL SYSTEM

Various reflections can be made on the above historico-legal periods which shed light on the hybrid nature of the Maltese mixed legal system. The first reflection concerns the main sources of the general principles of Maltese Law, these being the civil law for private law and common law for public law. However, new principles are entering into Maltese law which are influenced by the judgments of international and European courts and tribunals. For instance, the concept of proportionality much used by the European Court of Human Rights in its case law has made way into Maltese Law.² Other principles are also infiltrating the Maltese legal system through the case law of the European Court of Justice (such as the principles of direct applicability and direct effect of Community Law)³ or the identification of customary rules of international law by

¹ These nine legal phases of Maltese Law are discussed in Kevin Aquilina, 'Rethinking Maltese Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture?' in the *Journal of Civil Law Studies*, Vol. 4, No. 2, December 2011, 261-283.

² Cremona J.J., 'The Proportionality Principle in the Jurisprudence of the European Court of Human Rights', in *Selected Papers 1990-2000*, Volume II, Malta: Publishers Enterprises Limited, 2002, 31-42.

³ Steiner J., L. Woods and C. Twigg-Flesner, *European Union Law*, Oxford: Oxford University Press, 2006, 89-114.

international courts⁴ not to mention the categorisation of certain legal principles emanating from diverse legal systems as rules of *jus cogens*.⁵

IV. ESTABLISHING A HIERARCHY OF MALTESE LAWS: THE LEGAL TENSIONS PREVALENT IN THE MALTESE MIXED LEGAL SYSTEM

The highest law of the land – the Constitution of Malta – reigns supreme in the Maltese legal order. Article 6 of our Westminster modelled Constitution provides that: ‘... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.’ Furthermore, the European Convention Act⁶ provides in article 3(2) that ‘Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void.’ The European Union Act⁷ provides in article 3(2) that: ‘Any provision of any law which from the said date [of accession to the European Union] is incompatible with Malta’s obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable.’ Moreover, article 13 of the Diplomatic Privileges and Immunities Act⁸ provides that: ‘Where there is any conflict or inconsistency between any provision of this Act or of any order or notice made or issued thereunder and any provision of any other written law other than the Consular Conventions Act, then the provision of this Act or of the order

⁴ *North Sea Continental Shelf Cases*, ICJ Rep. 1969, p. 3 at p. 44 (para. 77) and *The Continental Shelf (Libya v. Malta) case*, ICJ Rep. p. 13 at 29-30 (para 27).

⁵ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, 22 July 2010, available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

⁶ Chapter 319 of the Laws of Malta.

⁷ Chapter 460 of the Laws of Malta.

⁸ Chapter 191 of the Laws of Malta.

or notice made or issued thereunder shall prevail, and the provision of that written law shall, to the extent of the conflict or inconsistency, have no effect.’

From an examination of the above, it is clear that the Constitution ranks first; the European Convention Act, the European Union Act and the Diplomatic Privileges and Immunities Act all three laws rank together in the second category – even if it is not clear which of these laws has the upper hand in this second category in the case of a conflict amongst themselves⁹ – and all other ordinary primary laws follow. From all these four laws, none of them is inspired by the civil law tradition. On the contrary, the Constitution follows English Law, the European Convention Act incorporates a regional treaty into Maltese Law, the European Union Act incorporates another regional treaty into Maltese Law and is modeled on the U.K. European Community Act 1972 whilst the Diplomatic Privileges and Immunities Act incorporates an international treaty into Maltese Law. In other words, the second category is essentially international law driven, rather than civil law or common law influenced. This clearly indicates that the common law as a source of Maltese Law has the upper hand: if any ordinary law (which, for instance, is civil law inspired) runs counter to the Constitution of Malta (which is common law inspired), then it is the latter which prevails on the former. All the five largely civil law inspired Maltese Codes are subject to the human rights provisions of the Constitution of Malta and the European Convention of Human Rights and Fundamental Freedoms and hence, over time, have had to give in to these human rights instruments.¹⁰ These five codes are the Criminal Code,¹¹ the Code of Police Laws,¹² the Code of Organization and Civil

⁹ Presumably the Roman Law principle *lex posterior derogat priori* will have to apply in such a case. Laws later in date are considered to abrogate prior contrary laws. The point however remains: is this nevertheless consonant with the Legislator’s intention?

¹⁰ Case law where the Maltese courts have declared a provision of Maltese Law to run counter to the European Convention on Human Rights is discussed by Chief Justice Joseph Said Pullicino in his paper entitled ‘Malta’ in Blackburn R. & Jorg Polakiewicz, *Fundamental Rights in Europe, the European Convention on Human Rights and Its Member States, 1950-2000*, Oxford: Oxford University Press, 2001, 559-594.

¹¹ Chapter 9 of the Laws of Malta.

¹² Chapter 10 of the Laws of Malta.

Procedure,¹³ the Commercial Code¹⁴ and the Civil Code.¹⁵ Public Law prevails on private law in so far as human rights and fundamental freedoms are concerned. European Union law also prevails on Maltese ordinary primary (and subsidiary) law. For instance, the Criminal Code¹⁶ and the Code of Organization and Civil Procedure¹⁷ have had to be amended to be brought in line with European Union law. The argument has, within this hierarchical context, shifted from one trying to establish the legal source of origin of Maltese Law to one based on legal hierarchy which subjugates the Maltese mixed legal system of civil law and common law to a superior or higher norm, a *grund* norm, being international human rights law, diplomacy law and European Union Law and, finally, to the *grund* norm *par excellence*, the Constitution of Malta.¹⁸

From a European Union Law perspective, it is the Treaty and the legislation made thereunder that prevails over the Constitution of Malta and ordinary Maltese Law. The same rule applies to public international law from an international perspective even though this might not necessarily be the case from the municipal law viewpoint. The Constitution tries to solve this *vexata quaestio* of the supremacy of law when it provides in article 65(1) that: ‘Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta’s international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16 April, 2003.’¹⁹ Whether this is a perfect solution to the problem is debatable and, surely from a legislative drafting viewpoint, leaves much to be desired.

¹³ Chapter 12 of the Laws of Malta.

¹⁴ Chapter 13 of the Laws of Malta.

¹⁵ Chapter 16 of the Laws of Malta.

¹⁶ See for instance article 328M and 435E of the Criminal Code.

¹⁷ See for instance articles 742(6) and 825A of the Code of Organization and Civil Procedure.

¹⁸ See Griffiths J. ‘What is Legal Pluralism?’ in *Journal of Legal Pluralism*, 1986, No. 24, 1-55, 3.

¹⁹ For a discussion of this provision, see Aquilina K. ‘The Parliament of Malta versus the Constitution of Malta: Parliament’s Law Making Function under Section 65(1) of the Constitution’ in *Commonwealth Law Bulletin*, Vol. 38, No. 2, June 2012, 217-249.

Article 742(6) of the Code of Organization and Civil Procedure, when dealing with the jurisdiction of the courts of civil jurisdiction, provides that: ‘Where provision is made under any other law, or, in any regulation of the European Union making provision different from that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision and shall only apply to matters to which such other provision does not apply.’ This provision clearly solves the problem of conflicting laws between Maltese national law and a provision of European Union Law in the latter’s favour. A similar provision is found in article 825A of the said Code which reads as follows: ‘Where regulations of the European Union provide, with regard to the matters regulated under this title, in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matters not falling within the ambit of such regulations.’ Hence the Code of Organization and Civil Procedure makes it quite clear that European Union Law always prevails over the domestic norm and that the latter has to be subservient to European Union Law.

V. SOURCES OF THE MALTESE MIXED LEGAL SYSTEM

Prior to the British period above-mentioned, Roman law was considered to be a supplementary aid to legislative construction. If there was a *lacuna* in the law, resort was had to Roman law. However, with the advent of the British in Malta, this rule became qualified. In so far as civil law is concerned, this rule – by and large – continued to apply. However, in so far as public law is concerned, another rule emerged. *Lacunae* are filled by reference to English Public Law.²⁰ But our legal hybridity in statutory law interpretation does not stop there. With the

²⁰ This point was made in *D. J. Low v M. Low*, Collection of the Decisions of the Superior Courts of Malta, *Aula Civile*, Volume XIII, 243 (decided on 27 June 1892), *Marquis James Cassar Desain v James Louis Forbes, C.B.E. nomine*, Collection of the Decisions of the Superior Courts of Malta, Part I, Vol. XXVIII, 43 (decided on 7 January 1935), *Anthony M Callus et v Dr Antonio Paris et*, Constitutional Court, (decided on 7 July 1966) published by the Law Students Society, *Decizjonijiet Kostituzzjonali 1964-1978*, Volume 1, Lux Press, 1979, 188, 195, and *Frank Pace et v Commissioner of Police et*, Court of Appeal (decided on 28 January 2005).

advent of independence, Malta began to incorporate several international and regional conventions into its national law. Hence, the *travaux préparatoires* and other international materials, including the case law of international courts and tribunals, are used as a legal gap filler. With Malta's membership of the European Union, it is the case law of the Court of Justice and of the General Court which is resorted to, particularly preliminary references. Consequently, whilst originally it was Roman Law which acted as an aid to construction prior to the British period (and still continues to do so in so far as Civil Law is concerned), this interpretative aid is supplemented by other aides depending on which legal system has influenced Maltese Law. In this case, it could be Civil Law but it could also be international law and European Law (Council of Europe Conventions and European Union Law) and, though to a very lesser extent, the laws of foreign Commonwealth states (other than English Law) and Mediterranean Law which have had a marginal influence on Maltese law.

Being influenced by the civil law legal family, the sources of Maltese Law are statutes, regulations and custom, in that order. Being influenced by common law, the sources of Maltese Law comprise English case law without the application of the doctrine of precedent. It also allows reference to judicial doctrine, that is, the writings of both eminent jurists of the civil law and common law traditions. A recent influential source that has entered into the Maltese Legal System is the case law of international courts and tribunals, including the European Court of Human Rights and the European Court of Justice. Such judgments are cited by Maltese courts as they are considered authoritative. However, even these foreign courts are not bound by their own case law. For instance, in the *Da Costa case*, the European Court of Justice maintained that it was not bound by its own previous decisions.²¹

Common law sources are precedent, custom, conventions, royal prerogative and legislation. Malta has not adopted precedent and the royal

²¹ *Da Costa en Schaake NV and Others/Nederlandse Belastingadministratie*, Joined cases 28, 29, 30/62; 27 March 1963.

prerogative as a source of Maltese Law. Constitutional conventions have also developed in Malta but strictly speaking they are political in nature and not binding at law.

Debates of the House of Representatives also constitute a source of Maltese law as they indicate what the intention of the legislator was when enacting a particular law or provision.²² Though this might not constitute a hard and fast rule in the United Kingdom, the situation in Malta is that parliamentary debates are sources of the law. In addition, in so far as parliamentary practice is concerned, the Standing Orders of the House of Representatives provide that, in the case of a *lacuna* in the said Standing Orders, reference should be had to the practice and procedure followed by the House of Commons in the United Kingdom.²³ Hence, for example, Erskine May's treatise on U.K. parliamentary practice becomes an indispensable source of Maltese Law.²⁴

VI. COMMON LAW JUDICIAL PRECEDENT VERSUS THE CIVIL LAW NON-BINDING NATURE OF THE MALTESE LEGAL SYSTEM

Notwithstanding the common law influences on Maltese law, the doctrine of precedent has never formed part of the Maltese legal system. In the civil law system 'Judges interpret the law and apply it. The courts are not bound by precedent, as the Courts do not establish what the law is for all cases, but for the particular case with which they would be dealing. Judgements have only a

²² See, for instance, *Il-Pulizija v. Emanuel Vella*, Constitutional Court, 28 June 1983, *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta* (Collection of Decisions of the Superior Courts of Malta), Vol. LXVII, 1983, Pt. I, 2-22, 20-21.

²³ Standing Order 197 of Subsidiary Legislation Const 02 reads as follows: 'In all cases not provided for by these Standing Orders, resort shall be had to the rules, forms, usages and practice of the Commons' House of Parliament of the United Kingdom, which shall be followed as far as they can be applied to the proceedings of the House with due regard to the special nature of the Constitution.'

²⁴ Mackay W. *et al*, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, London: Butterworths Law, twenty-third revised edition, 2004. For other British sources used by the Speaker of the House of Representatives in addition to Erskine May, see Mangion R. *Speakers Ruling in the Parliament of Malta, The Legislative Assembly, 1921-1924, Volume I*, Msida, Malta University Press, 2012 (forthcoming). See, in particular the Introduction.

persuasive function in other cases.’²⁵ They are therefore not binding *erga omnes* but bind only the parties thereto. On the other hand, ‘the fabric of the common law is its precedent...’²⁶ Indeed, in any legal system, ‘what judges have said in addressing issues in earlier disputes is likely to be of interest in subsequent cases with similar facts. If a judge assumes that earlier decisions in his court and in higher courts were dealt with competently, there is no reason to suppose, in the absence of changed circumstances, that a similar result would be inappropriate. Continuity and predictability of the law are positive attributes.’²⁷

VII. DO PRONOUNCEMENTS OF THE CONSTITUTIONAL COURT BIND
ERGA OMNES? THE COMMON LAW DOCTRINE OF *STARE DECISIS* VERSUS
THE CIVIL LAW DOCTRINE OF NON-BINDING CASE LAW

I will discuss the binding nature of judgments by reference to case law, doctrine and the jurisprudential debate which has ensued.

Case Law

In *Vincent Cilia v. Prime Minister et*,²⁸ the Civil Court held that the Constitutional Court had already on 30 November 2001 declared paragraph (c) of sub-article 4 of the Sixth Schedule of the Value Added Act, 1994 to be in breach both of the Constitution of Malta and of the European Convention of Human Rights and Fundamental Freedoms. The court further maintained that once the Constitutional Court had declared the said provisions of the 1994 enactment to be in breach of human rights, it was bound by that declaration of the Constitutional Court. The Civil Court, First Hall, then passed on to declare the said provisions of the Value Added Act, 1994 to be in breach of the Constitution of Malta and the European Convention of Human Rights and Fundamental Freedoms.

²⁵ Bonnici U. M., *An Introduction to Comparative Law*, Malta: Malta University Press, 2004, 58.

²⁶ Glendon M. A., Michael Wallace Gordon and Christopher Osakwe, *Comparative Legal Traditions, Texts, Materials and Cases*, St. Paul, Minnesota: West Publishing Co., 1985, 564-565.

²⁷ *Ibid.*, 565.

²⁸ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Gino Camilleri on 20 June 2003.

On appeal, the Constitutional Court²⁹ agreed that in the case of *Anthony Frendo v. Attorney General* of 30 November 2001, that same court had already declared paragraph (c) of sub-article 4 of the Sixth Schedule of the Value Added Tax Act, 1994 to be in breach of article 39(2) of the Constitution of Malta and Article 6(1) of the European Convention of Human Rights. But this decision bound only the parties to that suit, the court held, and did not bind *erga omnes*. However, the court noted that this did not mean that when the Constitutional Court or the Civil Court, First Hall, sitting in its constitutional competence, declared a particular provision of the law to contravene the human rights of a citizen in a particular case, it could not, in a similar even though not identical circumstances to the first case, make the same declaration with regard to another person.

In *John Buhagiar et v. Registrar of Courts et*,³⁰ the Civil Court, First Hall, had to decide *inter alia* whether to declare that a judgment delivered by the Rent Regulation Board on 19 January 1993 in the names *Josephine Mangion pro et noe v. Mary Louise Camilleri et* bound or not the parties to the suit before the Civil Court. In its judgment the court noted that after it had examined its records of the proceedings, the file of the Rent Regulation Board and the warrant of ejectment from immovable property referred to in the writ of summons, it came to the conclusion that the plaintiffs to the case under examination – John Buhagiar and his spouse Maryanne Buhagiar – were never parties to the proceedings before the Rent Regulation Board in the case *Josephine Mangion pro et noe v. Mary Louise Camilleri et*. Nor were John and Maryanne Buhagiar cited as parties in the proceedings before the Rent Regulation Board; nor were they part of the acts of the proceedings of the warrant of ejectment. The court thus concluded that the proceedings before the Rent Regulation Board did not bind plaintiffs Buhagiar and the court accepted plaintiffs' request on the basis of article 237 of the Code of Organization and Civil Procedure. The provision reads as follows: 'A judgment shall not operate to the prejudice of any person who neither personally nor

²⁹ *Vincent Cilia v. Prime Minister et*, decided by the Constitutional Court on 28 January 2005.

³⁰ Decided by the Civil Court, First Hall, per Mr Justice Noel Cuschieri, on 4 June 2004.

through the person under whom he claims nor through his lawful agent was party to the cause determined by such judgment.’ This provision is based on the Roman Law maxim of *res inter alios acta vel judicata aliis nec nocere nec prodesse potest* (translated as ‘things done between strangers ought not to injure those who are not parties thereto’). On the same lines, the court held, the warrant of ejectment cannot be executed against a third party. This principle was enunciated by the Court of Appeal sitting in its commercial competence in *Gulab Chatlani v. George Gixti*³¹ where it was decided that a warrant of ejectment issued against a tenant could not be enforced against a sub-tenant who was not indicated by name in the warrant and who was consequently a third party to those proceedings.

In *Mario Galea Testaferrata et v. Prime Minister et*, the Constitutional Court was hearing an appeal from a judgment delivered by the Civil Court, First Hall, sitting in its constitutional competence. The Constitutional Court pointed out in its partial judgment of 10 January 2005 that, whatever the final judgment in this case would be, the judgment will bind only the applicants Mario Testaferrata et, on one side, and the respondents Prime Minister et, on the other, and this on the basis of article 237 of the Code of Organization and Civil Procedure.

In *Maria Azzopardi et v. Saver Sciortino et*,³² the court referred to the Mario Testaferrata judgment of the Civil Court, First Hall, of 3 October 2000, wherein the said court had declared article 12(4) and (5) of the Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta, to be in breach of article 37 of the Constitution of Malta. However, the court did examine whether article 12 (4) and (6) of Chapter 158 applied to plaintiff Maria Azzopardi.

In *Mary Anne Busuttill v. Medical Doctor John Cassar et*,³³ the court referred to article 237 of the Code of Organization and Civil Procedure and commented that although it was correct to state that the provision unreservedly

³¹ *Collection of the Decisions of the Superior Courts of Malta*, [1991] Vol. LXXV, II, 605.

³² Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Raymond C. Pace on 31 January 2007.

³³ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Joseph R. Micallef, on 18 September 2008.

stated that a judgment may not prejudice a third party, there is nothing in that provision which states that a judgment may be to the benefit or contribute to assist a third party to claim a right put forward by him/her. This applies to the situation where a court would have decided the issue whether a law is valid or invalid or, as in the case before that court, whether a provision of a law was in line with the Constitution of Malta. The court further noted that the applicants were not challenging the provisions of article 12(4) and (5) of Chapter 158 of the Laws of Malta but that their application gave rise to a breach of article 37 of the Constitution of Malta dealing with protection from deprivation of property without compensation and Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms dealing with the right to property.

In *Paola sive Pawlina Vassallo v. Marija Dalli*³⁴ the court was requested to decide a plea to the effect that once article 12(4) and (5) of Chapter 158 were declared null and void in so far as they ran counter to the Constitution of Malta in the *Mario Galea Testaferrata et v. Prime Minister et* judgment, the said provisions of Chapter 158 could not be applied any longer as they were not operative at law and that such judgment, therefore, applied *erga omnes* and this notwithstanding the fact that these provisions still formed part of the Maltese statute book. On the other hand, the court noted that the defendants' submission that the Mario Galea Testaferrata et judgment was *res inter alios acta* as it applied to the parties to those proceedings but not to the parties to the present proceedings and, therefore, on the basis of article 237 of the Code of Organization and Civil Procedure, did not bind third parties.

The plaintiffs in fact, the court noted, were not requesting it, to declare article 12 (4) and (5) of Chapter 158 as being in violation of the Constitution and therefore null and void at law once this provision had already been declared so by the Constitutional Court in the Mario Galea Testaferrata et case. The plaintiffs

³⁴ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Raymond C. Pace on 30 October 2008.

were instead requesting the court to apply the Mario Galea Testaferrata et case to the current proceedings in so far as this latter judgment had already found article 12(4) and (5) of Chapter 158 to run counter to the Constitution of Malta and that this judgment was *res judicata*.

The court noted that notwithstanding the Mario Galea Testaferrata et case, article 12(4) and (5) of Chapter 158 still remained operative on the statute book and Parliament had not taken any action on its part to have them amended or revoked. The court then examined article 6 of the Constitution of Malta³⁵ and stated that it had thus to inquire whether this said judgment, which was *res judicata*, bound *erga omnes* or not. The court referred to the Constitutional Court's judgment of Vincent Cilia where the latter court had answered this question by stating that its own judgments bound the parties thereto but not *erga omnes*. The Civil Court, First Hall, reexamined the whole issue afresh and did not rest on a previous declaration of unconstitutionality as though the provision under examination had not been declared by a previous judgment to be unconstitutional. The court thus concluded that in the light of the case law of the Constitutional Court it was bound to reexamine the merits afresh once the judgments of the Constitutional Court bound only the parties thereto. On the other hand, the court argued that once article 6 is applied and a law or provision thereof declared unconstitutional, that provision should not be enforced. The court thus concluded that once the provision under examination was declared null and void and that such judgment was *res judicata*, the court could not apply that provision which had already been declared unconstitutional once article 6 provided that the Constitution is supreme law the unconstitutional provision was null and void even if Parliament had not repealed or amended it. When a law is declared null and void that same law is no longer enforceable and this *erga omnes* in the light of article 6 of the Constitution. There should be no situation where there is one applicable law for some persons but not for others: there should be one law applicable to everybody.

³⁵ The text of article 6 is reproduced above, at p. 2.

In *Mario Galea Testaferrata et v. Prime Minister et*,³⁶ the court referred to article 6 of the Constitution of Malta and held that article 12 (4) and (5) of Cap. 158 were in breach of article 37 of the Constitution and were thus null and void. The appeal was declared abandoned by the Constitutional Court on 16 October 2006 and, therefore, the judgment of the Civil Court, First Hall, became *res judicata*.

In *Josephine Bugeja v. Attorney General et*,³⁷ the court held that the Mario Galea Testaferrata judgment of 3 October 2000 bound only the parties thereto and did not bind *erga omnes*. The Bugeja judgment was however revoked by the Constitutional Court in its judgment of 7 December 2009.

In *Ruth Debono Sultana et v. Department for Social Welfare Standards et*,³⁸ the court held that article 114(2) of the Civil Code was discriminatory and in breach of Article 14 of the European Convention of Human Rights and passed on to order that in each adoption procedure article 114(2) should be read in a particular way which was not discriminatory. Austin Bencini holds that this case came ‘closest to a declaration of invalidity *erga omnes*... Uniquely the court decided to amend the law in a virtual manner, by filling in the gap it created itself through its declaration of inconsistency, whenever such an inconsistency faces any application made by the applicants.’³⁹ The Constitutional Court in its judgment of 3 April 2009 confirmed this judgment *in toto* offering its own wording as to how article 112 (2) should be construed in the future. In this respect it can be stated that the court has adopted a legislative approach in the interpretation and amendment of article 114(2) of the Civil Code in the light of Article 14 of the European Convention of Human Rights.

³⁶ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Raymond C Pace, on 3 October 2010.

³⁷ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Tonio Mallia, on 3 October 2008.

³⁸ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Giannino Caruana Demajo on 14 October 2008.

³⁹ Bencini A. G, *The Supremacy of the Constitution of Malta*, Faculty of Laws, University of Malta, Ph.D. thesis, 2011, 393 (unpublished).

In *Conrad Axisa v. Attorney General et*⁴⁰ the court concluded that the right which the Attorney General enjoyed in terms of article 575A (2) and (3) of the Criminal Code to appeal a Magistrate's bail decision to the Criminal Court was in breach of the equality of arms principle once the accused did not enjoy such a remedy as the Attorney General did. The court ordered the Government to move a bill before the House of Representatives to guarantee the equality of arms by either replacing the said article 575A (2) and (3) of the Criminal Code or extending that right to the accused. Such amendment had to be affected within three months from the date of the court's judgment. Should no action be taken within the said three months, the court ordered that in terms of its judgment article 575A (2) and (3) had to be read and construed as giving to the accused *mutatis mutandis* the same right enjoyed by the Attorney General.

Doctrine

On this point Dr Austin Bencini states that an analysis of Maltese judgments indicates that the First Hall Judges 'have attempted to affirm the *erga omnes* interpretation, while the Constitutional Court seems quite determined to resist such an interpretation even though allowance needs be made to a few chinks in the appellate court armour'.⁴¹

Judge Giovanni Bonello takes a very critical approach to the case law of the Constitutional Court. He argues that 'Parliament has been allowed to arrogate unto itself the final say as to whether those laws declared void by the Constitutional Court, should still remain valid and binding, or should be repealed... The Constitutional Court has, by default, waved the supremacy of the Constitution goodbye... the Constitutional Court, after solemnly declaring a

⁴⁰ Decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Tonio Mallia, on 20 April 2012. For a critical study of this judgment from a European Court of Human Rights perspective, see Bonello G. 'Bailing out human rights', *The Times of Malta*, April 27, 2012, p. 44 and 'Illegal arrest and bail', *The Times of Malta*, May 16, 2012, p. 10. For a contrasting view see Debono F. 'Legal apples and turnips', *The Times of Malta*, May 8, 2012, 10 and 'No violation in Strasbourg – violation in Malta', *The Times of Malta*, May 11, 2012, 10.

⁴¹ *Ibid.*, p. 382.

provision of law to be null and void and anti-constitutional will, in a subsequent case, still consider that provision it has determined to be anti-constitutional and null, to be perfectly valid and legally binding – because ... Parliament has done nothing to repeal it.’⁴² Judge Bonello further criticises the two doctrines which the Constitutional Court has embraced – ‘that determinations of invalidity of laws only affect the parties to that particular law suit, and that a declaration of nullity of a law has no effect on that law unless Parliament repeals it.’⁴³ Bonello’s incisive criticism of the workings of the Constitutional Court hits the nail on its head!

Chief Justice Emeritus Professor Giuseppe Mifsud Bonnici takes the side of the Constitutional Court judgments above-cited when he distinguishes between the concept of validity and that of consistency. He argues that these two concepts are not synonymous. He opines that the ‘Constitution does not authorize any Constitutional Court to declare null any law – whether old or new. Nor does it authorize any Constitutional Court to declare “invalid” any law, whether pre-1964 or [post-] 1964. What the Constitution does is that it enables the competent courts to declare a law as being “inconsistent with or in contravention of” any one of the articles that list the fundamental rights.’⁴⁴ It is then up to Parliament to take the necessary legislative corrective measures.

The Jurisprudential Debate

From a jurisprudential point of view two schools of thought emerge:

(a) the Constitutional Court, which is of the view that when it declares a law unconstitutional that declaration binds only the parties to that judgment; and

⁴² Bonello G. ‘The Supremacy Delusion: Unconstitutional Laws and Neo-Colonial Nostalgias’, 4 (unpublished).

⁴³ *Ibid.*, p. 7. See also Bonello G. ‘Bad Law? Worse remedy’, *The Times of Malta*, May 2, 2012, 44.

⁴⁴ Bonnici G. M. ‘The Supremacy of Parliament’, *The Times of Malta*, June 2, 2012, 8; ‘Supremacy of Parliament’, *The Times of Malta*, June 16, 10; and ‘Supremacy: “What is” against “what should be”’, *The Times of Malta*, June 28, 10. For a criticism of this view see Bonello G. ‘Constitutional law obfuscation’, *The Times of Malta*, June 6, 2012, 10; ‘True and faithful allegiance’, *The Times of Malta*, June 20, 10; and ‘Constitution – a stretcher case’, *The Times of Malta*, July 4, 2012, 10; Aquilina K. ‘The Constitution’s is supreme’, *The Times of Malta*, 13 June 2012, 11; and Bencini A. ‘Upholding the Constitution’s values’, *The Times of Malta*, June 23, 2012, 48.

(b) the view of some of the judges of the Civil Court, First Hall, sitting in its constitutional competence, who are prepared to consider a judgment of the Constitutional Court or of the said Civil Court where no appeal has been lodged to the Constitutional Court or where the Civil Court's judgment has become *res judicata* as being binding *erga omnes*.

Unfortunately there is not much certainty in this field and bearing in mind that Malta does not accept the doctrine of precedent, the judgments of the Constitutional Court – though highly authoritative – are not binding neither on itself nor on inferior courts.

VIII. THE IMPACT OF CIVIL LAW INFLUENCES OVER COMMON LAW INFLUENCES

The main difficulty posed in this jurisprudential debate is that our courts have to apply the law of civil procedure to constitutional procedure in the absence of provisions in the Constitution of Malta dealing with constitutional procedure. The law of civil procedure is intended to apply to civil cases and not to constitutional cases. Hence, the institutes of the Code of Organization and Civil Procedure such as those of *res judicata*, retrial and judgments binding only the parties thereto might not necessarily or always be applicable within a public law context such as in the case when a court declares a law null and void. This is the crux of the whole problem. Indeed, if *res judicata* were to apply to *erga omnes* pronouncements of the Constitutional Court then this would mean that if today the Constitutional Court has delivered a judgment stating that a particular provision of law conforms to human rights, then that judgment cannot ever be challenged in the future. I have argued elsewhere that in so far as administrative law is concerned, sometimes it is essential to depart from the rules laid down in the Code of Organization and Civil Procedure as these can well be inappropriate in the circumstances and, if applied, may lead to a

travesty of justice.⁴⁵ I am also of the same view with regard to other branches of Public Law, Constitutional Law included.

What is needed in the realm of constitutional law is finality of action and certainty of the law. In the case of declarations of nullity of laws, one cannot have the Constitutional Court first declaring a provision null to have that same judgment contradicted, say on retrial, by a subsequent judgment of the same Constitutional Court or else by the same Court but where the plaintiffs happen to be two or more different persons yet the merits and defendants are identical.⁴⁶ This is the problem that we are faced with. The courts have to apply provisions which originate from a civil law tradition – the Code of Organization and Civil Procedure – to regulate the procedure of substantive provisions deriving from a common law tradition – the Constitution of Malta. This is therefore creating tension between the two sources of Maltese Law within one and the same legal system and this tension cannot be really solved judicially but needs to be addressed legislatively. The law is, in this respect, in a mess and no tweaking by the Constitutional Court will rid us of this impasse. The issue is not just article 237 of the Code of Organization and Civil Procedure but the various institutes of that Code which are in disharmony with the Constitution purposely because the Code of Organization and Civil Procedure was never intended to regulate constitutional procedure. The Code has been badly grafted upon the Constitution producing monstrous results. To show how much the Constitution has given in to the Code is not only evidenced by case law but also by the provisions of the Constitution themselves so much so that the Constitution has had to take on board, for instance,

⁴⁵ Aquilina K. 'The Plea of *Res Judicata* in Administrative Law, with Special Reference to Development Planning Legislation: The Maltese Experience', *Id-Dritt Law Journal*, 2009, Vol. XX, 19-43.

⁴⁶ I have here in mind the case of *Joseph Muscat v Prime Minister* of 6 September 2010 and *H. Vassallo & Sons Ltd. v. Attorney General et* of 30 September 2011. In less than one year, the Constitutional Court in the Muscat judgment decided that mandatory arbitration was in conformity with the right to a fair trial but in the Vassallo case the Constitutional Court came to the opposite conclusion. *Untours Insurance Agency Limited noe et v. Victor Micallef et*, decided by the Civil Court, First Hall, sitting in its constitutional competence, per Mr Justice Tonio Mallia, on 25 May 2012 has followed the Vassallo judgment in declaring the provisions in Maltese Law on compulsory arbitration as being in breach of the right to a fair trial.

in article 116 (dealing with a right open to any person to bring an action on validity of laws), the doctrine of juridical interest which is case law driven under the Code.

In the same way that there is substantive constitutional law, Malta should have a separate law regulating constitutional procedure. No reliance of the Code of Organization and Civil Procedure would be needed and the issues of *res judicata*, retrial and the binding nature of court judgments, would not arise within such a context. When one examines the case law of the Constitutional Court one is surprised to see how much effort throughout the years has had to go into Constitutional Court case law simply to address matters of constitutional procedure.⁴⁷ This has happened simply because there is no law obtaining in Malta setting out the rules of procedure to be followed by the Constitutional Court when hearing and determining cases (apart, of course, from the Code of Organization and Civil Procedure!). Were this to be the case, issues such as that the Code of Organization and Civil Procedure is superior to the Constitution of Malta would never arise. One has to bear in mind that when the Constitution came into force in 1964 it had a provision in article 48(7) which stated that the five codes, including the Code of Organization and Civil Procedure, had nothing contained therein which contravened the human rights and fundamental freedoms in Chapter IV of the Constitution. It was only on 1 July 1993 that this provision was repealed and the Constitution regained – though not fully at least it seems with regard to article 237 of the Code – its supremacy over the five Codes.⁴⁸

Four possible solutions to this conundrum emerge:

⁴⁷ Procedure matters arising out of the Code of Organization and Civil Procedure which the Constitutional Court has had to address in its case law comprise the following: letters of request; appointment of acting judges; staying of proceedings; desertion of causes; challenge of judges; death of the applicant; authentication of judgments; retrial; the proper defendant to be sued; hearsay evidence; decrees and appeals therefrom; contents of an application; formalities of judicial acts and written pleadings; joinder; security of costs; provisional enforcement of a judgment of the Civil Court, First Hall; subrogation of judges; judicial review of administrative action; privileged documents; judicial terms; parties to a suit; contempt of court; judicial sequestrator; judicial sale by auction; offensive words in a judicial act; expunging acts from the records of the proceedings; deletion of words from a judicial document; and proceedings for debts due to Government.

⁴⁸ See Act XIX of 1991, section 4.

(a) *Mr. Justice Caruana Demajo's solution* – judges should be empowered to amend the law when they find a provision to be unconstitutional as was the case with the Ruth Debono Sultana judgment. However, in certain instances, sometimes more than a cosmetic amendment is needed: take the case when the Civil Court, First Hall, declared the provisions of the Civil Code on legitimacy and illegitimacy to be in breach of human rights. In this case not only one amendment was needed to the Civil Code but a systematic review of several of its provisions on the law of succession. Again, a situation may arise where a constitutional amendment is required. In such case, the court cannot do really much, the Stoner case apart;⁴⁹

(b) *Judge Giovanni Bonello's solution* – all *res judicata* judgments finding a law invalid for reasons of its unconstitutionality, once delivered, are binding *erga omnes* and Parliament has no function in repealing them. This would not require an amendment to article 237 of the Code of Organization and Civil Procedure, as that article already makes judgments binding on *both* parties to a lawsuit – viz., on the applicant and *on the defendant government*. Once the judgment of invalidity is *res judicata* and applies *erga omnes*, then no retrial can be allowed as, otherwise, the court may come to an opposite contradictory conclusion. The law has been erased by operation of its unconstitutionality certified by the Constitutional Court, and not because it has been repealed by Parliament;

(c) *Mr. Justice Tonio Mallia's solution* – to order the Government to move a Bill before the House to take the necessary corrective measures provided that if such amendment is not affected within a specified period in the judgment itself then the law has to be applied not as it is written but as interpreted by the court even if the court's interpretation runs counter to the written law;

⁴⁹ *Paul Stoner et vs. Prime Minister et* decided by the Constitutional Court on 22 February 1996. In this judgment, the Constitutional Court declared article 44(4)(c) concerning freedom of movement to be discriminatory even though this provisions is contained in Chapter IV of the Constitution of Malta which sets out human rights and fundamental freedoms. The Constitution states that the wife of a Maltese citizen enjoys freedom of movement but the situation is not the same with regard to the husband of a Maltese wife. The court thus declared this provision to be discriminatory, unconstitutional and in breach of the applicant's fundamental rights.

(d) *the proposed Administrative Code's*⁵⁰ solution – in terms of which unconstitutional laws and illegal laws no longer are to be operative once a pronouncement is made to that effect by a Maltese court. Unconstitutional laws are defined as provisions in a law which run counter to the Constitution of Malta whilst illegal laws are explained to be laws which run counter to the provisions of:

- (i) the European Convention Act;
- (ii) the European Union Act;
- (iii) the Diplomatic Privileges and Immunities Act.

Subsidiary laws which run counter to primary laws are also considered to be illegal laws.

The procedure which the first version of the draft Administrative Code is proposing is that where a court has declared in a definite judgment which has become *res judicata* that a provision of a law or a whole law is null and void, the court shall order the Registrar of the Civil Courts and Tribunals to serve a true copy of its judgment on the Law Commissioner. The Law Commissioner shall, not later than three working days from the date of service of the said judgment upon himself, enter an annotation in the Revised Edition of the Laws of Malta by way of an asterisk next to the number of the said provision or law declared null and void in the aforesaid judgment and a corresponding asterisk in a footnote to the said provision or title of the law, that the said provision or law, as the case may be, has been so declared null and void setting out the relevant details of the court judgment. It is further proposed that the court shall serve upon the Law Commissioner a true copy of the final decision of its judgment within twenty-four hours in case of a court of second instance and within twenty-four hours from the date following the expiration of the time limit to lodge an appeal where no appeal has been so lodged. Once the Law Commissioner enters the said annotation in the Revised Edition of the Laws of Malta, the provision or law in question shall cease

⁵⁰ Aquilina K. *First Draft of an Administrative Code*, presented to the Select Committee on Recodification and Consolidation of Laws of the House of Representatives, on Monday 7 May 2012. The text of the First Draft is available at <http://www.parlament.mt/sc-codification?l=1> (last accessed on 9 May 2012).

to be operative from the date of judgment and the said provision or law shall have no legal effect. Should the Law Commissioner be of the view that the cessation of operation of a provision or of a law be insufficient to bring that provision or law in conformity to the court judgment, the Law Commissioner shall draft a Bill which gives effect to such judgment. The Law Commissioner shall submit such Bill to the Standing Committee for Recodification and Consolidation of Laws and that Bill shall be discussed by the said Committee and, when agreed upon, it shall be read in the House of Representatives. The Bill shall then be debated in the House of Representatives or in such Committee of the House as the House may direct.

It is this fourth option proposed in the First Draft of the Administrative Code which the present author favours as, if implemented as proposed, it will provide legal certainty.

IX. LEGISLATIVE DRAFTING STYLE OF THE MALTESE MIXED LEGAL SYSTEM

When Malta began for the first time to produce its own legislation under the Knights of St. John and in the early years of British rule, codification was seen to be the best way how to write laws. Subsequently, when the British gained roots in Malta, this style of legislative drafting very much common in civil law jurisdictions, including in the Catholic Church which produced its own variant of a code – the Code of Canon Law – began to be set aside in favour of single enactments addressing specific subject matters as is characteristic of the British style of statutory law-making. If one were to look at legislative drafting during both the British and Maltese periods, that is, from 1800 to date, it is the English model of statutory law-making which has been adopted. Only 5 Codes have been promulgated during these 212 years. Since Malta obtained its independence from the United Kingdom in 1964 no Code has been enacted; our laws have a short title, long title, marginal notes, headings and parts, the interpretation section (even if, in our case, it is found at the beginning not at the end of the statute – as is the

situation in English statutory law – except in the case of the Constitution),⁵¹ and schedules. The drafting style is purely English Law inspired. Since independence very few and far between are those laws based on Italian Law. One such notable exception is the Condominium Act⁵² which is, to a very large extent, a translation of the condominium law provisions contained in the Italian Civil Code.⁵³ But even the Condominium Act – like the English style of legislative drafting – is enacted not as part of the Civil Code but as a separate and distinct law in very much British legislative drafting style.

X. THE MALTESE LANGUAGE AND THE MALTESE MIXED LEGAL SYSTEM: COMMONALITIES IN MIXTURE

The Maltese language, like the Maltese mixed legal system, is a mixed language. Originally derived from Semitic it has romance elements superimposed on it. Hence the Maltese language began as a pure Semitic language but with the advent of time began to be contaminated by other languages, mainly the romance family of languages. What makes the Maltese language rich is therefore its mixed linguistic nature. This phenomenon applies also to the English language which has adopted words from Greek and Latin even though it is not a romance language. In our case the Maltese language has adopted the Semitic language from the Arabs but a lot of European words have over time infiltrated into the language from Sicilian and Italian and to a lesser extent from the languages of the Order of St. John such as Spanish, Portuguese and French. The Maltese language is rich in vocabulary because it has received various foreign words into its fold. Joseph Aquilina, when writing on ‘Maltese as a Mixed Language, states that: ‘A mixed language presupposes a mixed history. When I say mixed history, I mean the history of a people which has had a variety of social and historical environments

⁵¹ The Constitution of Malta was given to the Maltese by means of a United Kingdom Act, the Malta Independence Act, chapter 86 of the laws of the United Kingdom for 1964. The Constitution of Malta is contained as a Schedule to the Malta Independence Order, 1964 made by the Queen in terms of section 1(1) of the Malta Independence Act 1964.

⁵² Chapter 398 of the Laws of Malta.

⁵³ See Italian Civil Code, articles 1117-1139.

each of which moulded the texture of the language spoken in the island. This process of linguistic admixture is universal... A mixed language is a fused language and if one may speak of a fused language one may speak of a fused society. The fusion in both cases results from the harmonious combination of originally heterogeneous elements into an organic homogeneous whole. Maltese ... basically Semitic, superstructurally Romance, is an organic linguistic whole.'

The same can be said for the legal system. The Maltese mixed legal system forms part of society and reflects its richness in its legal mixture. Anthropologically, sociologically and culturally the Maltese psyche has historically lived and used such mixture both for the purposes of the Maltese language and the legal system. The Maltese legal system has benefitted from the laws of the predominant empires which were at their apex at the relevant period in history and this has augmented incrementally the richness and diversity of the homogeneous legal system obtaining in Malta through such legal grafting of the common law over the hitherto existing civil law tradition.

XI. LEGISLATIVE CONSTRUCTION IN THE MALTESE MIXED LEGAL SYSTEM:

THE INTERPRETATION ACT

The Interpretation Act⁵⁴ is modelled on English law. It is a law which applies to all laws: this law interprets all Maltese law including the Constitution of Malta.⁵⁵ The Interpretation Act defines key terminology which is used throughout all laws, irrespective of whether such laws derive their origin from the civil law system or the common law system. Nevertheless, although the Interpretation Act is inspired by English law it applies also to those Maltese laws which are modelled on the Civil Law legal system. The Interpretation Act is a hybrid law

⁵⁴ Chapter 249 of the Laws of Malta.

⁵⁵ Article 124(14) of the Constitution of Malta reads as follows: 'Where Parliament has by law provided for the interpretation of Acts of Parliament, the provisions of such law, even if expressed to apply to laws passed after the commencement thereof, shall apply for the purposes of interpreting this Constitution, and otherwise in relation thereto, as they apply for the purpose of interpreting and otherwise in relation to Acts of Parliament as if this Constitution were an Act of Parliament passed after the commencement of any such law as aforesaid...'

not in its origin, nor in its drafting style but in its effects. Its long title is quite clear on this point: ‘To make provision in respect of the construction and application of Acts of Parliament and other instruments having the force of law and in respect of the language used therein.’ Although the Interpretation Act was enacted in 1975, it had repealed the application in Malta of the United Kingdom Interpretation Act 1889. Indeed, section 126(14) of the Constitution of Malta of 1964 read as follows: ‘The Interpretation Act 1889 as in force on the appointed day shall apply, with the necessary adaptations, for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting, and in relation to Acts of Parliament of the United Kingdom.’ It was only in 1975, when the Interpretation Act was enacted, that the United Kingdom Interpretation Act 1889 no longer applied to Malta. But before such date, all our laws – whether civil law or common law inspired – had to be interpreted on the lines of the 1889 enactment. Hence, Malta continued to apply United Kingdom statutory law in the form of the United Kingdom Interpretation Act as well as other British Public Law even after it became an independent state. Nonetheless, this time round, it was not the British Parliament which extended the application of an Act of the United Kingdom Parliament to Malta but the Maltese Parliament which extended the lifetime of a British enactment to Malta.

The Statute Law Revision Act 1980⁵⁶ establishes a Law Commission entrusted with the duty of preparing, printing in hard copy or publishing electronically, revised editions of the Laws of Malta. The Commission has prepared a Revised Edition of the Laws of Malta in print form in 1984 and a previous edition under the enactment of 1936⁵⁷ which preceded the 1980 enactment. The way how a Revised Edition is structured – that is, how every law is assigned a separate chapter number, irrespective of whether it is influenced by civil law or common law – and the drafting style of the laws contained therein – except, of course, the five Codes mentioned above, clearly indicates that the source of the Statute Law Revision Act

⁵⁶ Act No. IX of 1980.

⁵⁷ The Malta Statute Law Revision Ordinance, 1936.

is inspired from English common law.⁵⁸ The following extract from the 1942 Revised Edition of the Laws of Malta indicates that the

‘general plan for the arrangement of the laws was approved by the Secretary of State for the Colonies: As to the general plan of the arrangement of the laws in the Edition, the chronological method of the chapter revision was considered to be the one best suited to local conditions and to the special nature of the present revision. The views of the Commissioner in this respect were confirmed by the then Attorney General, Sir Philip Pullicino Kt., B.Litt., LL.D., and the then Legal Adviser Mr. Cyril C. Gerahty, K.C., and were duly submitted for approval to the Secretary of State for the Colonies. According to that arrangement, the sequence followed in the Edition is the chronological one, but each law has a serial number (chapter).’

XII. DISSECTING THE MALTESE MIXED LEGAL SYSTEM INTO ITS CONSTITUTIVE INGREDIENTS

Max Ganado writes that:

History has determined who we are and what our legal system is. Maltese Law falls within the family of legal systems, of which there are not many, called *mixed* legal systems.⁵⁹ This is because the Maltese legal system draws on both the Roman/Napoleonic law as well as the English law. Until the British came to Malta it was a purely civilian system and so all the laws of property, ownership and contract were civil law sourced. However, since the early 1800’s Maltese law has had major injections of English law. This was particularly in the statutory format, as that was easily implemented by the external governmental authority, although the general common law of England has also seriously taken root in large areas of legal regulation, particularly where there are gaps in the existing legal system.

On the same vein, Ugo Mifsud Bonnici considers that in ‘no country today could one say that there exists a legal regime that has not been influenced by

⁵⁸ The Hon. Mr Justice William Harding, Preface, *The Revised Edition of the Laws of Malta in force on the 31st day of December, 1942*, Malta: Law Commission, 1943, Volume I, vi.

⁵⁹ Although historically speaking this is undoubtedly true, in our day and age we are witnessing a move towards a mixed system of law in various jurisdictions. See the classification of world legal systems at the University of Ottawa’s website on *World Legal Systems* at <http://www.juriglobe.ca/eng/sys-juri/intro.php?print=true>.

systems outside that of origin. No language is “pure” and no Law can be said to derive solely from its original roots.’⁶⁰

From an examination of the historico-legal periods of Maltese Law, it can be concluded on this point that although Malta started off as a pure Civil Law legal system, from 1800 onwards it changed its nature to a mixed legal system as Maltese (Roman) law began to mix with English (Common) Law. Not only so but the 164 years of English rule over Malta have turned the Maltese legal system over its head: it is now more of a system of English (Common) Law intermixed with Civil (Roman) Law rather than vice-versa and the future course of action continues to move in the direction of adopting English Common Law as a model for Maltese legislation. In this respect, I disagree with any classification of the Maltese mixed legal system as being a predominantly civil law system mixed with a common law flavour. Taking Maltese Law in its totality (that is, including both private and public law), Maltese Law is today more appropriately classified as being to a large extent based on English statutory law with a smaller extent of civil law. The predominance of Civil Law as contained in the five Codes (although even in the British period these Codes contained elements of English law embedded within them) has diminished considerably during the British period to such an extent that the part of our private law which is still inspired by civil law is the Civil Code. As time goes by, Maltese Law is becoming more autochthonous in nature but its predominant influences are more European Union and International Law rather than common law and to a lesser extent civil law. At least, this seems to be the current trend following European Union accession in 2004.

XIII. THE CHANGING NATURE OF THE FIVE CIVILIAN CODES

The five Codes give Malta its civil law characteristic feature. But even some of the Codes – with the outstanding exception of the Civil Code⁶¹ – when

⁶⁰ Bonnici U. M. *supra*, note 25, 75.

⁶¹ Victor Caruana Galizia and Joseph M Ganado state that: ‘The formulation of our Civil Code was considerably influenced by the provisions not only in the French Civil Code, but also in the

originally promulgated, were not all pure civil law breeds. An analysis of the five Codes indicates that the civil law system has also been subject to pollution by alien common laws.

For instance the Criminal Code – like the Commercial Code and the Code of Organisation and Civil Procedure⁶² – is a hybrid in its own right, even if it is predominantly civil law in origin. The Criminal Code – which is based on the Penal Code of the Kingdom of the Two Sicilies⁶³ – has been supplemented by various laws of a criminal law nature which are based on common law.⁶⁴ Not only so, but the Criminal Code – on promulgation – had already common law concepts embedded in it. Such is the case with the jury system,⁶⁵ the law of evidence⁶⁶ and certain crimes such as those dealing with treason and sedition.⁶⁷

Civil Codes of many countries, as for example, the Italian Code and the Codes of the various Italian States prior to the unification of Italy and the Code of Louisiana, as well as the works of many legal commentators, some of whom, like Pothier, Domat and Voet, preceded the enactment of the Napoleonic Code which others, such as Troplong, Duvergier, Duranton, Marcade and Laurent followed it.' Professors Caruana Galizia and Ganado, Notes on *Civil Law, Laws II Year*, Malta: Faculty of Laws, University of Malta, Revised Edition, 1988, 3. On the history of the Civil Code see Ganado J.M. and JA Micallef concerning Sir Adriano Dingli, *Law Journal*, Vol. 1, No. 2, 9-19 and Sir A. Mercieca, 'Sir Adriano Dingli, sommo statista, legislatore, magistrato' *Melita Historica*, Part 2, Vol. I, No. 4, 1955: 221-260.

⁶² On the history of the Code of Organization and Civil Procedure see Ganado J. M. on Sir Ignazio Gavino Bonavita, *Law Journal*, Vol. 1, No. 5, 19-33.

⁶³ On the historical evolution of the Criminal Code see Ganado A. *Law Journal*, Vol. II, No. 4, 211-231; No. 5, 258-277; No. 6, 355-375; and Mangion R. ed., *Minutes of the Council of Government, 1835-1849 At The House of Representatives*, Msida: Malta University Press, 2009, xxxvi-xxxix.

⁶⁴ For instance, the Official Secrets Act – Chapter 50; White Slave Traffic (Suppression) Ordinance – Chapter 63; Public Meetings Ordinance – Chapter 68; Seditious Propaganda (Prohibition) Ordinance – Chapter 71; Conduct Certificates Ordinance – Chapter 77; Immigration Act – Chapter 217; and the Extradition Act – Chapter 274.

⁶⁵ J.J. Cremona states that: 'In Malta trial by jury was an English importation and was introduced gradually and to some extent also grudgingly. It was feared at first that this typically English institution, perilously engrafted upon an essentially Roman legal system with very ancient traditions, might not thrive. Cremona J.J. 'The Jury System in Malta', *American Journal of Comparative Law*, Volume 13, No. 4, Autumn 1964, 570-583. See also Debattista C. 'The Historical Development of the Jury in Malta and Abroad, in *Id-Dritt Law Journal*, Volume VI, September 1975, 12-23.

⁶⁶ Jameson A. *Report On The Proposed Code of Criminal Laws for the Island of Malta*, Malta, 1844. For a study on Andrew Jameson, see Gourlay D. 'Andrew Jameson and the Origins of the Criminal Code of Malta' *Melita Historica*, Vol. XV, No. 2, 2009, 109-134 and 'Andrew Jameson in Malta' *Melita Historica*, Vol. XV, No. 4, 425-432.

⁶⁷ Aquilina K. *Treason and Sedition in Maltese Law*, Malta: Faculty of Laws, University of Malta, LL.D. thesis, 1988.

The 1857 Commercial Code was based on the French Code but the part dealing with Maritime Law was inspired by English Law and practice. Since its promulgation, this Code has been supplemented by at least 57 separate enactments of a commercial law nature.⁶⁸

The Civil Code was promulgated in 1873 and was based on the civil law tradition mainly the Italian and French Civil Codes even though it also incorporated elements of the Municipal Code of De Rohan, the Austrian Civil Code and the Civil Code of Louisiana.⁶⁹ Sir Adriano Dingli, when drafting the Civil Code, had also included autochthonous provisions intended to settle then controversial legal issues which gave rise to different doctrinal debates and

⁶⁸ Prisoners on Board Merchant Ships Ordinance – Chapter 21; Coal Owners (Protection) Ordinance – Chapter 43; Encouragement of New Industries Act – Chapter 53; Public Lotto Ordinance – Chapter 70; Racecourse Betting Ordinance – Chapter 78; Director of Public Lotto (Constitution of Office) – Chapter 122; Director of Public Lotto (Powers and Functions) Act – Chapter 137; Aid to Industries Ordinance – Chapter 159; Trading Stamps Schemes (Restriction) Act – Chapter 182; Cargo Clearance and Transport Act – Chapter 203; Merchant Shipping Act – Chapter 234; Cargo Clearance and Transport Act – Chapter 203; Central Bank of Malta – Chapter 204; Malta Membership of the International Monetary Fund Act – Chapter 209; External Transactions Act – Chapter 233; Merchant Shipping Act – Chapter 234; Barclays Bank (Transfer of Business) Act – Chapter 257; Membership of International Financial Organisations Act – Chapter 235; Malta Government Savings Bank (Winding Up) Act – Chapter 307; Trade Descriptions Act – Chapter 313; Doorstep Contracts Act – Chapter 317; Business Promotion Act – Chapter 325; Malta Financial Services Authority Act – Chapter 330; Malta Freeports Act – Chapter 334; Multilateral Investment Guarantee Agency Act – Chapter 335; Local Manufactures (Promotion) Act – Chapter 336; Financial Markets Act – Chapter 345; Malta Membership of the European Bank for Reconstruction and Development Act – Chapter 347; Oil Pollution (Liability and Compensation) Act – Chapter 351; Ports and Shipping Act – Chapter 352; Investment Services Act – Chapter 370; Banking Act – Chapter 371; Financial Institutions Act – Chapter 376; Consumer Affairs Act – Chapter 378; Competition Act – Chapter 379; Companies Act – Chapter 386; Small Enterprises (Loan Guarantee) Act – Chapter 397; Gaming Act – Chapter 400; Insurance Business Act – Chapter 403; Intellectual Property Rights (Cross-Border Measures) – Chapter 414; Oil Pollution (Liability and Compensation) Act – Chapter 412; Copyright Act – Chapter 415; Trademarks Act – Chapter 416; Patents and Designs Act – Chapter 417; Malta Crafts Council Act – Chapter 421; Product Safety Act – Chapter 427; Lotteries and Other Games Act – Chapter 438; Trading Licences Act – Chapter 441; Special Funds (Regulation) Act – Chapter 450; Malta Enterprise Act – Chapter 463; Prevention of Financial Markets Abuse Act – Chapter 476; Set-off and Netting on Insolvency Act – Chapter 459; Securitisation Act – Chapter 484; Insurance Intermediaries Act – Chapter 487; Enforcement of Intellectual Property Rights (Regulation) Act – Chapter 488; Services (Internal Market) Act – Chapter 500.

⁶⁹ See Sir Adriano Dingli's *Appunti di Sir Adriano Dingli*, undated, available at the University of Malta Library, Msida. Other laws consulted by Sir Adriano Dingli – a comparativist in his own right – were those of Sicily, Parma, Sardegna, Albertino, Tichino (Switzerland) and Holland as well as the works of Marcade, Toullier, Addison, Troplong, Pothier, Borsari, Domat, Ricci, Cattaneo, Rogron, Duvergier, Delvincourt, Heimberger and other authors as well as case law of Maltese and Italian courts.

jurisprudential interpretations.⁷⁰ Joseph M Ganado states that: ‘the reorganization of our entire civil law system forged on Roman Law and the Code Napoléon, but at the same time reproducing our ancient laws and customs, thus respecting our national sentiments – a legal system which is entirely and essentially our own and of which everyone must needs be proud.’⁷¹ Even the Civil Code has been supplemented by specific legislation. I have identified 30 such separate laws.⁷²

In so far as the Code of Organization and Civil Procedure is concerned, there are 14 separate laws which supplement its provisions.⁷³

With regard to the Code of Police Laws, its provisions have been shifted, in an altered form, to various ordinary laws and this Code is moving in the direction of being abrogated.⁷⁴

⁷⁰ See Sir A. Mercieca, ‘Sir Adriano Dingli: sommo statista, legislatore, magistrato’ in *Melita Historica*, Vol. 1, No. 4, 1955, 221-260, 228. See also the *Appunti di Sir Adriano Dingli*, note 69.

⁷¹ Ganado J. M. ‘Maltese Law’ in *Journal of Comparative Legislation and International Law*, Third Series, Vol. 29, No. 3/4, (1947), 32-39, 33.

⁷² Marriage Legacies Law – Chapter 3; Promises of Marriage Law – Chapter 5; Old Privileges and Hypothecs (Registration and Renewal) Ordinance – Chapter 27; Maintenance Orders (Facilities for Enforcement) Ordinance – Chapter 48; British Judgments (Reciprocal Enforcement) Act – Chapter 52; Notarial Profession and Notarial Archives Act – Chapter 55; Public Registry Act – Chapter 56; Reletting of Urban Property (Regulation) Ordinance – Chapter 69; Marriage Legacies (Gozo) (Administration and Election) Ordinance – Chapter 109; Developed Land (Valuation) Ordinance – Chapter 110; Rent Restriction (Dwelling Houses) Ordinance – Chapter 116; Housing Act – Chapter 125; Entailed Property (Disentailment) Act – Chapter 130; Housing Decontrol Ordinance – Chapter 158; Agricultural Leases (Reletting) Act – Chapter 199; Disentailment of Property (Extension to Fiefs) Act – Chapter 212; Maintenance Orders (Reciprocal Enforcement) Act – Chapter 242; Immovable Property (Acquisition by Non-Residents) Act – Chapter 246; Marriage Act – Chapter 255; Manoel Island (Special Provision) Act – Chapter 259; Land Registration Act – Chapter 296; Partition of Inheritances Act – Chapter 308; Home Ownership (Encouragement) Act – Chapter 328; Trusts and Trustees Act – Chapter 331; Housing (Extension) Act – Chapter 360; Condominium Act – Chapter 398; Notarial Acts (Temporary Provisions) Act – Chapter 408; Child Abduction and Custody Act – Chapter 410; Foster Care Act – Chapter 491; Adoption Administration Act – Chapter 495.

⁷³ Investment of Certain Monies Ordinance – Chapter 26; Judicial Proceedings (Regulation of Reports) Act – Chapter 60; Commissioner for Oaths – Chapter 79; Witnesses (Fees) Ordinance – Chapter 108; Judicial Proceedings (Use of English Language) Act – Chapter 189; Electro-Magnetic Recording of Proceedings Act – Chapter 284; Children and Young Persons (Care Orders) Act – Chapter 285; Juvenile Court Act – Chapter 287; Inferior Courts (Re-designation) Act – Chapter 340; Commission for the Administration of Justice Act – Chapter 369; Small Claims Tribunal Act – Chapter 380; Arbitration Act – Chapter 387; Legal Procedures (Ratification of Conventions) Act – Chapter 443; Mediation Act – Chapter 474.

⁷⁴ See Dr Bruno V. and Ms. Marilu’ Gatt, *Report on the Code of Police Law*, Malta: Justice Unit, Ministry of Justice and Home Affairs, presented to the House of Representatives Select Committee on the Recodification and Consolidation of Laws during its sitting of 7 April 2010.

XIV. COMMON LAW INFLUENCES ON THE MALTESE
MIXED LEGAL SYSTEM: EXAMPLES FROM SOME
MALTESE LEGISLATIVE ENACTMENTS

From the advent of the British in Malta in 1800 onwards, Common Law, notably through English statutory law, has dominated the Maltese legal system. Some examples follow below.

Commercial Law: The Maltese Law on bills of exchange, promissory notes and drafts or cheques is based on the French Commercial Code.⁷⁵ Nevertheless, Ganado notes that the regulatory aspects of banking law in the Central Bank of Malta Act and the Banking Act are English law inspired⁷⁶ and since European Union accession, European Union Law influenced. On the other hand, Felice Cremona – when discussing the now repealed Commercial Partnerships Ordinance 1962 – states that: ‘The two main sources of this Ordinance are the English Companies Act, 1948⁷⁷ and the Italian Civil Code, 1942.⁷⁸ Dissolution and liquidation of companies continued to follow the civil law system.⁷⁹ The Commercial Partnership Ordinance’s predecessor – Ordinance XIII of 1857 – was inspired by the French Commercial Code 1807⁸⁰ whilst its successor – the Companies Act, 1995 – is also a hybrid piece of legislation; conceptually, it has roots in English, Italian, French and European law.⁸¹ Andrew Muscat also states that the unfair prejudice provision in the Maltese Companies Act, 1995 was drawn from the New Zealand Companies Act, 1993.⁸² The Companies Act, 1995 is thus a hybrid in its own right.

⁷⁵ Randon P. F. *Aspects of Maltese Law For Bankers*, Malta: The Institute of Bankers (Malta Centre), 1983, 128.

⁷⁶ Ganado J. M. ‘Malta: A Microcosm of International Influences’, *Studies in Legal Systems: Mixed and Mixing*, Esin Örüçü, Elspeth Attwooll and Sean Coyle eds. The Hague: Kluwer Law International, 1996, 244.

⁷⁷ 11 & 12 Geo. 6, c. 38.

⁷⁸ Cremona F. *The Law on Commercial Partnerships In Malta*, Malta: Malta University Press, 1984, 21.

⁷⁹ Ganado J. M. *supra*, note 76, 243.

⁸⁰ Muscat A. *Principles of Maltese Company Law*, Malta: Malta University Press, 2007, 7.

⁸¹ *Ibid.*, p. 27.

⁸² *Ibid.*

Trusts Law: Ganado, Cassar Torreggiani and Crockford opine that the Trusts and Trustees Act⁸³ is based on the Jersey Trusts Law, which is considered to be one of the best statements on the English Law of Trusts.⁸⁴ Indeed, trust law – a common law concept of private law – has still, nonetheless, been grafted successfully into Maltese civil law.⁸⁵

Maritime Law: Felice Cremona and George Schembri state that the Maltese Merchant Shipping Act is modelled mainly on the United Kingdom Merchant Shipping Acts, 1894 onwards, and in the interpretation of the local Merchant Shipping Act it is useful to refer to the United Kingdom Act.⁸⁶ The bill of sale, mortgages and liens are all taken from English Law.⁸⁷ Moreover, Maltese law has since British times recognised an action *in rem*.⁸⁸ Such proceedings form part of the Code of Organization and Civil Procedure.⁸⁹ In addition, the Maltese Carriage of Goods by Sea Act, 1954⁹⁰ is a carbon copy of the UK Carriage of Goods by Sea Act, 1924.⁹¹ Moreover, shipping Law is one of those areas of the law which is heavily influenced by English law and international law, especially the Conventions of the International Maritime Organization.

The Law Regulating Governmental Liability: The law regulating governmental liability constitutes a case where legal hybridity has produced monstrous results. The doctrine that ‘the Public Law of Britain is the Public Law of Malta where the latter has a *lacuna*’ evolved in Maltese case law with great

⁸³ Chapter 331 of the Laws of Malta.

⁸⁴ Max Ganado, Rachael Cassar Torreggiani and Ian Crockford, *Maltese Cases & Materials on Trusts & Related Topics*, Malta: Institute of Financial Services Practitioners, 2004, Volume I, p. 9.

⁸⁵ Ivan Sammut, ‘The EU and Maltese Legal Orders: What Kind of Marriage Between Them?’, in Peter G. Xuereb (ed.), *Malta in the European Union: Five Years on and Looking to the Future*, Msida: European Documentation and Research Centre, 2009, pp. 97-111 at p. 105.

⁸⁶ Felice Cremona and George Schembri, Notes on Maltese Maritime Law, Faculty of Laws, University of Malta, 1974, Part I, p. 7.

⁸⁷ See paper by Jotham Scerri-Diacono, *The Hybrid Nature of the Merchant Shipping Act*, delivered at the conference on Mediterranean Legal Hybridity: Mixtures and Movements, the Relationship between the Legal and Normative Tradition of the Region, Malta, June 11-12, 2010, unpublished.

⁸⁸ See Malcolm R. Pace, ‘Arrest of Vessels in Malta’, *Id-Dritt Law Journal*, Volume XI, Spring 1984, No. 1, pp. 15-36.

⁸⁹ See articles 742B, 742C, 742D and 855 of the Code of Organization and Civil Procedure.

⁹⁰ Chapter 140 of the Laws of Malta.

⁹¹ 14 & 15 Geo. V. c. 22. See Joseph M Ganado, note 75, p. 233.

difficulty.⁹² This happened because Maltese Courts continued to apply for several decades civil law concepts (*jure imperii* and *jure gestionis*) to governmental liability introduced by the civil law doctrine of the dual personality of the state within a public law context. The first judgment applying such concept dates back to 15 February 1894⁹³ and it was only on 14 August 1972⁹⁴ that this doctrine was definitively laid to rest by Maltese courts.

Income Tax Law: Francesco Masini is of the view that the proposed Income Tax bill ‘was based on the laws of Palestine and Cyprus and such laws were considered by him to be incompatible with Malta’s civil law system’.⁹⁵

Private International Law: Joseph M Ganado makes the point that: ‘Private international law principles as accepted by the English Courts were followed by our Courts, with the notable exception of questions relating to validity of marriages’ and – prior to 1 October 2011⁹⁶ – ‘divorces, in view of the religious and public policy issues involved. More recently there was specific legislation with regard to civil marriages and recognition of foreign divorces and one can say that, in general, English Conflict of Laws Rules are followed in Malta.’⁹⁷

Although the above is very much correct, it has to be observed that the European Union is harmonising private international law rules and this is having a bearing on the Maltese legal system. The more time passes the more these rules

⁹² Wallace Ph. Gulia, *Governmental Liability in Malta*, Malta: Malta University Press, 1974, p. 11. See note 20 for a list of pertinent case law.

⁹³ *Paolo Busuttil v. Clement La Primaudaye nomine et*, delivered by Her Majesty’s Civil Court on 15 February 1894 per Mr Justice Baron A. Chapelle, and confirmed by Her Majesty’s Court of Appeal on 28 May 1894 per the Hon. Chief Justice Sir Adriano Dingli and judges the Hon. Sir Salvatore Naudi and Luigi Ganado.

⁹⁴ *John Lowell and Maurice Portelli noe et v. the Hon. Dr. Carmelo Caruana, Minister of Buildings and Public Works*, delivered by the Civil Court, First Hall, per Mr Justice Maurice Caruana Curran. For a study of this judgment see Wallace Ph. Gulia, note 91, pp. 1-21; and Kevin Aquilina, ‘Rationalising Administrative Law on the Revocation of Development Permissions’, *BOV Review*, Autumn 2006, No. 34, pp. 19-38.

⁹⁵ Attard R. *An Introduction to Income Tax Theory*, Malta: Media Centre Publications, 2005, 15.

⁹⁶ Divorce was introduced in Malta with effect from 1 October 2011 by means of Act No. XIV of 2011, the Civil Code (Amendment) Act, 2011.

⁹⁷ Ganado J. M., *supra*, note 76, 231.

are being regulated at European Union level and then applied to European Union member states.⁹⁸

Efforts at harmonisation at private international law are also taking place through the International Institute for the Unification of Private Law (UNIDROIT). Malta became a member of this Institute on 5 June 1970.

Mental Health Act: The Mental Health Act, 1976⁹⁹ follows on the same lines as the United Kingdom Mental Health Act, 1959.¹⁰⁰

Customs Legislation: Although customs legislation under the Order of St. John was civil law inspired, current customs law¹⁰¹ – the Customs Ordinance¹⁰² – is modelled on the United Kingdom Customs Consolidation Act 1876.¹⁰³

Citizenship Legislation: The Constitution of Malta contains a chapter on citizenship.¹⁰⁴ The constitutional provisions are further elaborated upon by the Maltese Citizenship Act.¹⁰⁵ Both enactments are based on British Law.¹⁰⁶ The pertinent source is the British Nationality Act, 1948.¹⁰⁷

European Union Act: The Maltese European Union Act,¹⁰⁸ as stated above,¹⁰⁹ is modelled on the UK European Community Act 1972.¹¹⁰

The Law of Adoption: The Law of adoption is based on English Law.¹¹¹ Yet it is incorporated in the Civil Code.¹¹²

⁹⁸ See, for instance, the Court Practice and Procedure And Good Order Rules, Subsidiary Legislation 12.09, rules 15, 16, 17, 18 and 19.

⁹⁹ Chapter 262 of the Laws of Malta.

¹⁰⁰ 1959 Chapter 2.

¹⁰¹ See Camilleri Y. *Customs Law: 1814 to 1921 with emphasis on the Customs Ordinance of 1909*, Faculty of Laws, University of Malta, LL.D. thesis, May 2010, in particular, 68.

¹⁰² Chapter 37 of the Laws of Malta.

¹⁰³ 1876 c. 36. 39 and 40 Vict.

¹⁰⁴ Chapter 3 of the Constitution of Malta.

¹⁰⁵ Chapter 188 of the Laws of Malta.

¹⁰⁶ In so far as the Maltese Citizenship Act is concerned, see Said V. *The Law of Naturalisation and Citizenship in Maltese Law From 1921 Onwards*, Faculty of Laws, University of Malta, LL.D. thesis, May 2008. See, in particular, 77.

¹⁰⁷ 1948 c 56. 11 and 12 Geo 6.

¹⁰⁸ Ganado J. M. *supra*, note 76, 237.

¹⁰⁹ See above 2-3.

¹¹⁰ 1972 Chapter 68.

Public Registry Act: The Maltese system of registration of births is based on the United Kingdom law.

Investment Services Act: In the field of investment services, the Investment Services Act, 1994¹¹³ follows closely, though in a much shorter form, the United Kingdom Financial Services Act, 1986.¹¹⁴

Broadcasting Act: The Broadcasting Act¹¹⁵ is based on the English Broadcasting Act 1981 and previous English broadcasting laws.¹¹⁶

Development Planning Act: Development Planning Law in Malta is contained in the Environment and Development Planning Act¹¹⁷ and is largely based on the English Town and Country Planning Act.¹¹⁸

Reletting of Urban Property (Regulation) Ordinance: The Reletting of Urban Property (Regulation) Ordinance¹¹⁹ is inspired by the laws enacted in England between 1925 and 1931 after the First World War.¹²⁰

The Law of Evidence: Both our law of procedure – civil and criminal – is mixed in nature. Whilst in the case of precedent, this is not applied in Malta, the same cannot be said with regard to the law of evidence which is based on the English system.¹²¹

Press Law: The first Press Ordinance dates back to 1839. It was drafted by John Austin and G.C. Lewis. As they wrote, ‘the structure of the Ordinance, that in substance, though not in form, its provisions correspond, for the most part, to those of the English criminal law of libel. It appeared to us, however, that some of

¹¹¹ Adoption Act, 1958. 1958 Chapter 5.

¹¹² Ganado J. M. *supra*, note 76, 236.

¹¹³ Chapter 370 of the Laws of Malta.

¹¹⁴ Financial Services Act, 1986. 1986 Chapter 60.

¹¹⁵ Chapter 350 of the Laws of Malta.

¹¹⁶ Broadcasting Act 1981. 1981 Chapter 68.

¹¹⁷ Chapter 504 of the Laws of Malta.

¹¹⁸ Town and Country Planning Act 1990. 1990 Chapter 8.

¹¹⁹ Chapter 69 of the Laws of Malta.

¹²⁰ Ganado J. M. *supra*, note 76, 241.

¹²¹ Ganado J. M. *supra*, note 76, 246.

the provisions of the English law were intrinsically inconvenient, or, in relation to Malta, inapplicable or unimportant; and, consequently, there are some provisions of the English law, to which there are not in the Ordinance any corresponding provisions.¹²² Subsequent, and the latest, law on the press – the Press Act¹²³ – continue to retain English Law as its inspiration.

Trade Descriptions: The Trade Descriptions Act¹²⁴ has its source in English law.¹²⁵

Consumer Affairs: The Consumer Affairs Act¹²⁶ is inspired by various laws: certain definitions such as those of ‘consumer’ and ‘trader’ are based on European Union Law¹²⁷ whilst the regulatory set-up of the Director of Consumer Affairs and the Consumer Affairs Council is influenced by the Tasmania Consumer Affairs Act of 1988. The enforcement tools of the Consumer Affairs Act are largely owed to the New South Wales Fair Trading Act of 1987, South Australia’s Fair Trading Act of 1987 and Quebec’s Consumer Protection Act 1978.¹²⁸

Public Health Legislation: During the British period, originally there was one Ordinance which had been drafted to deal with public health issues but then it was subsequently agreed that it had to be divided into 4 separate Ordinances.¹²⁹ All

¹²² Copies or Extracts of Reports of the Commissioners Appointed To Inquire Into The Affairs Of The Island Of Malta And Of Correspondence Thereupon, Part I, 16 February 1838. London: House of Commons, 1838, 73.

¹²³ Chapter 248 of the Laws of Malta.

¹²⁴ Chapter 313 of the Laws of Malta.

¹²⁵ Micallef P. E. ‘The Future of Consumer Law: Reflections on a Regulatory Framework for a Small Island State’, *The Yearbook of Consumer Law*, 2008, 236.

¹²⁶ Chapter 378 of the Laws of Malta.

¹²⁷ Micallef P. E. ‘The Impact of the European Union on Consumer Policy in Malta: A Mixed Blessing’, *The Yearbook of Consumer Law*, 2009, 109-146.

¹²⁸ Micallef P. E. ‘The Malta Consumer Affairs Act 1994 – Setting up the Foundations for a Comprehensive Framework to Protect Consumers’, 1997. *Consumer Law Journal*, Volume 5, Number 1, 22 and ‘Analysis of Consumer Claims Tribunals in Malta with Reference to Other Jurisdictions’, 1996, *Consumer Law Journal*, Volume 4, Number 2, 13-21.

¹²⁹ See Cutajar A. *Four Sanitary Ordinances 1900-1908: a History 1900-2000*, Faculty of Laws, University of Malta, LL.D. thesis, 2003 and Dorianne Arapa, *The Study of Quarantine Under Maltese Law: From 1800 to World War I*, Faculty of Laws, University of Malta, LL.D. thesis, May 2005.

were modelled on English law.¹³⁰ The two remaining Ordinance are: the Medical and Kindred Professions Ordinance¹³¹ and the Prevention of Disease Ordinance.¹³²

Census Legislation: The Maltese Census Act¹³³ is modelled closely on the United Kingdom Census Act 1920.¹³⁴ Previous legislation on the same subject was also United Kingdom inspired.¹³⁵

Military Law: The Armed Forces of Malta Act¹³⁶ is modelled on the British Army Act, 1955.¹³⁷

XV. A NEW PHASE FOR THE MALTESE MIXED LEGAL SYSTEM

Since independence and, more so, since European Union accession, Law has diversified itself into several branches and has become global. New branches of the law have and are emerging; they are not necessarily national in character. On the contrary such laws have assumed planetary significance and dimensions; they cover a far-reaching geographical range. These new branches of the law together with the cross-boundary implications of traditional branches of the law, foremost amongst which is Criminal Law, all pose new challenges to law-making. Such novel branches comprise the Law of Sustainable Development, Cultural Heritage Law, Environmental Law (including climate change, pollution law, the law on international trade in endangered species, biological diversity law and energy law), ICT Law, Communications Law, Technology Law, Biolaw, Media Law, Intellectual Property Law, Gaming Law, Statistics Law, Electronic Commerce Law, Multimodal Transport Law, new aspects of Criminal Law such as Terrorism Law, Money Laundering Law, Trafficking in Persons, Drug Trafficking, etc.

¹³⁰ These were the Public Health Acts of 1848 and 1875.

¹³¹ Chapter 31 of the Laws of Malta.

¹³² Chapter 36 of the Laws of Malta.

¹³³ Chapter 118 of the Laws of Malta.

¹³⁴ 1920 Chapter 41. 10 and 11 Geo 5.

¹³⁵ See Debono J. C. *The Law of Census Taking in Malta, 1891 to date*, Faculty of Laws, University of Malta, LL.D. thesis, May 2008. See, in particular, 72.

¹³⁶ Chapter 220 of the Laws of Malta.

¹³⁷ See Spiteri V. *The Legislative History of Regiments and Militiae in Malta 1800-1970*, Faculty of Laws, University of Malta, LL.D. thesis, June 2004. See, in particular, 117.

Maltese legal hybridity is surely not a Dr Jekyll and a Mr Hyde. The Maltese mixed legal system is a cross-breed not only of civil law and common law but contains also other elements which have influenced its development: the civilian canon law, European Union law, European Law in its broader context, international law, elements of Mediterranean regional law as well as the laws of various Commonwealth states such as New Zealand, Australia, Canada, and Cyprus, not to mention other states such as the United States of America and Palestine. It is all this healthy grafted legal mixture that has enriched Maltese law transforming it into a well blended European hybrid legal system.

XVI. CONCLUSION

Perhaps the best word to describe this legal process is the Roman Law notion of *confusio*, not in the English sense of the term ('confusion' which has totally different and undoubtedly negative connotations) but in the sense of uniting, or better still amalgamating, that is, mixing together two or more legal systems into one in the same way that when two different liquids are mixed together they form one distinct liquid. Its opposite in Roman Law – *commixtio* – is the mixture of two solids together where the particles of the different substances do not amalgamate together. If there is no *confusio*, no amalgamation of two or more distinct and separate legal systems together into one, no togetherness, then one cannot really contemplate a healthy grafted mixed blended legal system. Malta's mixed legal system cannot therefore be reduced to one where two or more legal systems cohabite side by side without any interaction between them.