ARTICLES

# Managing Legal Pluralism in the Maltese Legal System: Processes, Driving Forces and Effects

## A 'Loving' Marriage of Legal Systems or a Curse?

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**Abstract**

*This article seeks to discover whether a state who has ended up with a hybrid legal system, whether by choice or by history over time, is in a better position to face the new legal challenge posed by economics and politics or whether it makes sense to opt for a legal system that more or less follows one of the legal families which historically is a source of the current legal system. The approach is taken from a private law perspective. Hence, reference is made to both constitutional law and private law, and in the case of Malta, the former is mainly derived from the English common law while the latter applies to the main civil law and private law systems. The article refers to the Maltese legal system as a case-study. After independence, Malta opted out of a free choice to consolidate the mixedness in its system, and common law's influence became stronger than before. For the past two decades, there has been a strong influence from the European Union (EU) legal system, Malta being the smallest among the EU Member States. Reference is also made to how the Maltese legal system adapted itself to its 'marriage' with the EU legal order and how Malta reconciled the Westminster model of parliamentary supremacy with constitutional supremacy and later with EU law supremacy.*

**Keywords:** hybrid legal system, private law systems, Maltese legal system, EU law supremacy.

### A Introduction

This article seeks to discover whether a state who has ended up with a hybrid legal system, whether by choice or by history over time, is in a better position to face the new legal challenge posed by economics and politics or whether it makes sense to opt for a legal system that more or less follows one of the legal families which historically is a source of the current legal system. The approach is taken from a private law perspective. Hence, reference is made to both constitutional law and

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private law, and in the case of Malta, the former is mainly derived from the English common law while the latter applies to the main civil law and private law systems.

The methodology would reference the evolution of the Republic of Malta's legal system, which has been a purely civil system for centuries. Then when Malta was a British colony for a century and a half, common law was introduced. After independence, Malta opted out of a free choice to consolidate the mixedness in its system, and common law's influence became stronger than before. For the past two decades, there has been a strong influence from the European Union (EU) legal system, Malta being the smallest among the EU Member States. Reference is also made to how the Maltese legal system adapted itself to its 'marriage' with the EU legal order and how Malta reconciled the Westminster model of parliamentary supremacy with constitutional supremacy and later with EU law supremacy.

## B Hybridity as a Legal System

Legal families are hybrid/mixed because, in the Western world at least, they have been so strongly influenced by common and civil law traditions that one cannot classify them as belonging to one main tradition. They contain considerable elements of both traditions, but no particular element of a tradition is strong enough to merit classification under the traditional legal family. Generally speaking, hybrid systems tend to have a predominance of civil law principles when it comes to core private law principles and lean more towards common law when it comes to commercial law. Public law tends to follow more common law lines.[1] Judges tend to play a more important role than in civil law traditions but not necessarily to the same extent as they do with common law traditions. The same can be said about academics in mixed jurisdictions. In other words, the platform of influence is more shared between the two. Still, differences can be observed between mixed jurisdictions themselves, as the above is merely a general statement to understand the context of this debate.

In practice, diverse legal traditions are a reflection of their historical background. So common denominators among themselves are more general than those of legal systems belonging to a traditional legal family. The legal systems of Scotland, Malta and Québec defy the traditional classification by occupying a 'midway' position between the two Western traditions. For completeness' sake, one must mention that 'mixed systems' are flexible, and one can classify them differently over time while new mixed systems may come into being. As mixed systems are wide in scope, this article limits its analysis to the legal systems that owe their origin to the Western European legal civilization rather than looking at African, Asian or Islamic cultures. Yet even within this restrictive European group, one can observe some different elements.

1 Glenn H. P. 'Comparative Legal Families and Comparative Legal Traditions' in Reimann M. & Zimmermann R. (eds.), *Oxford Handbook of Comparative Law*, OUP, Oxford, 2006, p. 421.


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One can look at the origins of the 'hybrid' legal system and notice that the dominant spirit is still that of legal nationalism.[2] Mixed systems owe their origin to separate identity from their sources. Most hybrid systems emerge and then develop differently from the parent system, which probably belongs to a traditional legal family rather than a mixed nature. The separation from the parent may result from some form of neglect by the parent's legal system, which may well be that of a relationship between the colony's legal system and the colonial master's legal system. Mixed legal systems may have had siblings, but as they may be in different geographic regions, often far apart, they would have developed independently of each other.

Another point may be that hybrid systems were generally not formed by free, autonomous selection from civil and common law. They may be the product of several different successive colonial masters. The pressure to conform to foreign influence may be a powerful determinant of change that balances weighing up the merits of rules from the respective traditions.[3] Closer to recent times, most states with a hybrid system would have acquired independence or more constitutional autonomy. The effects of globalization and/or regional integration would contribute further to the blending of civil law and common law.

Hence, one can conclude that hybrid systems enjoy a particular degree of autonomy.[4] This approach means that they can develop legal literature whereby a certain 'equilibrium' is achieved, which means that they are unlikely to proceed in the direction of any of their constituent systems.[5] A second possible approach has been discussed by Esin Oruçu, who explains that the existing classifications of legal systems into legal families may not be tenable to deal with hybrid systems.[6] She argues that one may adopt a new family tree approach rather than the more common classification of legal families. The advantage here is that legal systems do not live in a cocoon in today's globalized world, so there would be an element of influence from other systems that a family tree system can better depict. This brings a possible third approach. Du Plessis argues[7] that this approach acknowledges that certain systems cannot easily be located within established legal families but seeks to ignore them or establish new classification criteria. The answer is to recognize that the phenomena of the extensive mixture are such a distinctive feature of certain systems that they deserve to be regarded as a family in their own right with the different formulas of mixed legal principles drawn from different sources over time.

2 Du Plessis J. 'Comparative Law and the Study of Mixed Legal Systems' in Reimann M. & Zimmermann R. (eds.), *Oxford Handbook of Comparative Law*, OUP, Oxford, 2006, p. 477.
3 *Ibid*. p. 481.
4 Orucu E. & Nelken N. (eds.) *Comparative Law – A Handbook*, Hart Publishing, Oxford, 2007, p. 170.
5 *Ibid*. p. 171.
6 Du Plessis J. 'Comparative Law and the Study of Mixed Legal Systems' in Reimann M. & Zimmermann R. (eds.), *Oxford Handbook of Comparative Law*, OUP, Oxford, 2006, p. 481.
7 Orucu E. 'Family Trees for Legal Systems: Towards a Contemporary Approach' in van Hoeck M. (ed.), *Epistemology and Methodology of Comparative Law*, 2004, Bloomsbury Publishing, Oxford pp. 362-363.

It is important to remember that 'mixes' in a mixed legal system are like chocolate cake. Not only may the cake flavour differ, but some chocolate cakes can also have a stronger or less strong taste than other chocolate cakes. Ultimately, the taste depends on the mix, as do the players in a mixed legal system. To then mix, one must add the cook. In a legal system, the cooks are the legislators or political masters. The Scottish mix does not result from the imposition of common law upon a civil system as in Malta or Louisiana.[8] Reid argues[9] that the Scottish legal system can be regarded as 'mixed from the beginning' as Scottish jurists created the 'mix' by selecting the 'best' ingredients. However, the exact mix is controversial. The first 'mix' in the Maltese system resulted from a change of colonial masters from French to British. While this makes sense from a legal, historical point of view, it may not necessarily be extended to the last 50 years of independence during which the Maltese legal system has developed tremendously and has been a contributor to the EU for the past 20 years, and the 'mixing' currently is either by the imposition of an EU directive like before, or, very often, by a purely local decision taken by the local sovereign legislator, where the tug of war would be about determining what is best substantively as may be advised by experts in the fields such as professors, or else it may simply be matter of political convenience. The latter point brings Malta closer to the way the Scottish legal system evolved in the past.

Regarding the development of mixed jurisdictions, it may also be useful to look at the development of legal systems and rules in general. It is probably clear that the coming into being of a new *ius commune* implies an important change in the legal rules of the present national legal systems. The question about how legal systems and rules develop is also important to the venture of creating a European private law. It can be argued that Alan Watson was right in stating that "most changes in most systems are the result of borrowing". Therefore, one needs not only to look at mixed legal systems but also at what legal theory teaches us about the mergers of legal rules.[10] And the discussion within this framework should focus on using legal transplants to create uniform or harmonized laws.

To introduce legal transplants, reference can be made to Watson's book devoted to legal transplants which elucidates his understanding of the rule.[11] He refers to a statement by a former Scottish Law Commissioner. Watson explains that endeavours to achieve unified solutions in the field of contract law have, in particular, revealed what has been assumed to be a common-ground approach adopted by members of the Scottish and English Contracts Terms through conceptually opposed habits of thought. Whereas English comparative research relied particularly on American and Commonwealth sources, the background of some Scottish proposals derived from French, Greek, Italian and Netherlands

8 Reid K. (2003) 78 *Tulane LR* 20.
9 *Ibid*.
10 Watson A. *Legal Transplants*, 2nd ed., University of Georgia Press, Athens – London, 1993, p. 95.
11 *Ibid*. pp. 96-97.


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sources – and from the Ethiopian Civil Code, which was, of course, drafted by a distinguished French comparative lawyer. In his own words, Watson says:[12]

> Now, this, to me, is rather too academic. Suppose the rules of contract law of the two countries are already similar (as they are). In that case, it should be no obstacle to their unification or harmonization that the legal principles involved come ultimately from different sources or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical facts and habits of thought. Commercial lawyers and businessmen in Scotland and England do not in general perceive differences in habits of thought, but only – and often irritation – differences in rules.

Thus, laws are rules, and rules are bare propositional statements. It is these rules which travel across jurisdictions, which are displaced, which are transplanted. Because rules are not socially connected in any meaningful way, differences in 'historical factors and habits of thought' do not limit or qualify their transplantability.

Alan Watson is at the forefront of those who argue in favour of the success of transplants whose success can be measured by what they achieve, that is, uniformity. The aim is to establish a new private law for Europe, and the comparative law's main role is to answer how this can be established. Watson, supported by Smits, argues the claim that uniformity can be achieved in an organic, bottom-up way by the competition of legal rules, transplanting rules through a 'market of legal culture', for which national courts would be responsible.[13] Others, such as Pierre Legrand, disagree and argue that this stance is simplistic and provides an inadequate explanation of interactions across jurisdictions – resulting from an impoverished apprehension of what law is and what rule is. Legrand argues that rules are not what Watson and Smits represent them.[14] He argues that because of what they are, rules cannot travel, so he concludes that legal transplants are impossible.

While getting completely immersed in this debate at this point is outside the scope of this article, it is a fact that if one accepts Legrand's thesis as a fait accompli, then there is no reason to continue exploring the Europeanization of private law. Thus, while accepting that some of Legrand's thoughts are relevant for this study and will be developed subsequently, it has to be observed that Smits and Watson are probably right with reservations regarding legal transplants, which are important ingredients to achieve closer Europeanization. So while transplants contribute towards uniformity, their use would be more promising for a future *ius commune* if national courts were allowed to choose more suitable rules. However, diversity of law will remain in Europe, and any centralist imposition will include diversity. Mixed legal systems present a mix of national mentality and European

12 *Ibid*.

13 Smits J. 'On Successful Legal Transplants in a Future *Ius Commune Europaeum*' in Harding A. et al (eds.), *Comparative Law in the 21st Century*, Kluwer, The Hague, 2002, p. 137.

14 Legrand P., 'What Are Legal Transplants?' in Nelken D. et al (eds.), *Adapting Legal Cultures*, OUP, Oxford, 2001, p. 55.

uniformity. For example, transplants have been more successful in the contract law field than in the law of property. This may be one of the reasons why there is more uniformity in the former as opposed to the latter.

Another example is the recent acceptance of trust-like arrangements in civil law countries.[15] It should be said that the transplant of trust could also be given as an example of an unsuccessful transplant as the institution of trust changed while it moved to civil law.[16] However, this proves that transplants need not necessarily be 100% transplants; they can also evolve into something different. However, concepts would still have been borrowed so legal systems could 'learn' from each other.

## C The Case of Malta – Maltese Legal System

The Maltese legal framework reflects its history. Malta has been a traditional civil law country. The British introduced common law, especially in the domain of public law. After independence, Malta became a hybrid jurisdiction keeping the traditional civil law notions in its private law but adopting modern common law influences, especially regarding its commercial law. Public and administrative law remains mainly modelled on English law. In the run-up to the EU's accession and after, Maltese law also became heavily influenced by EU law. The Maltese legal order is a microcosm of hybrid legal traditions.

The Maltese legal order is at the crossroads of civil and common law. Malta has a long legal history tied to continental Europe. This strong connection strengthened during the period of the Knights from 1530 to 1798 and continued well beyond the arrival of the British in 1800. When the Maltese Civil Code was first enacted in 1868,[17] the major source was the Code de Napoléon. As a result, Maltese substantive private law is based on the Roman/Civil law system. Nevertheless, the British period which lasted more than a century and a half did leave a powerful impact on the Maltese legal order. British influence is mostly found in procedural and administrative law, whereby the Maltese system is much closer to the British common law system than the continental civil system.

Nevertheless, unlike the common law system, the Maltese legal system is a codified system whereby even though the administrative and procedural law is based on common law, it is yet codified. The Maltese Code of Organisation and Civil Procedure (COCP) dates back to 1865.[18] Although the laws of Malta include codes as their continental counterpart, common law influence can still be seen as codification is not complete. While a good part of private law is found in the Civil Code and Commercial Code, other laws of private law nature are scattered across

15 Smits J. 'On Successful Legal Transplants in a Future *Ius Commune Europaeum*' in Harding A. et al (eds.), *Comparative Law in the 21st Century*, Kluwer, The Hague, 2002, pp. 148-150.

16 *Ibid*.

17 Laws of Malta, Chapter 16, www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono (accessed on 5 June 2020).

18 Laws of Malta, Chapter 12, www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono (accessed on 5 June 2020).



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various chapters of the more than 600 chapters of laws that make up Maltese law. While the courts adopt the adversarial system similar to common law, the doctrine of precedent, essential for a 'pure' common law system, is absent from Malta. From a constitutional point of view, the Maltese Constitution follows the British model with one major difference. Under the British system, parliament is supreme, and a parliament can never bind a future parliament. Under the Maltese Constitution, parliament sovereignty is limited by the supremacy clause of the Maltese Constitution.[19]

The above can be appreciated in Maltese law as it belongs to a 'mixed' legal family where concepts from the two major legal families exist side by side. European law is also evolving on a 'mixed family' line. While as a system, it originated on civil law grounds. Given that the original six countries were civil law jurisdictions, common law principles started leaving their marks following the UK's accession. An example would be the Second Company Directive.[20] In a way, the Maltese legal system could serve as a laboratory to prove how EU law could evolve, bearing in mind certain obvious variables, such as the Maltese legal order being a national legal order. In contrast, the EU legal order is a *sui generis* legal order that exists alongside the national legal order.

Malta's independence from the UK in 1964 was marked by legal continuity at constitutional and private law levels. The advent of independence did not bring any significant changes. Malta opted to continue with its pre-independence legal regime as before, and there was no attempt to shift back to a civil law system as before the British colonial period. The change from monarchy to republic did not alter the status quo concerning private law and public law. Malta followed the old civil law tradition regarding pure civil law principles, while procedure and new commercial law were modelled from common law traditions. Between 1987 and the start of EU negotiation accessions after 1998, Malta continues to develop current legal initiatives, particularly in commercial law and financial services, mainly drawing inspiration from common law traditions. One can mention the introduction of trust legislation as an example.[21]

Following the EU's accession negotiations and subsequent accession in 2004, Malta seems to have lost the initiative to develop local legal initiatives. Over the past decade, Malta has been busy transposing EU legislation, namely directives, across various chapters of the laws of Malta rather than through codification. The way transposition takes place is usually through enacting an Act of Parliament or subsidiary legislation without any thought as to the origins of the legal tradition of the EU legal instrument and how it would best suit the Maltese legal order.

19 Article 66 of the Maltese Constitution, www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono (accessed on 5 June 2020).

20 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L26/1.

21 Laws of Malta, Chapter 331, www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono (accessed on 1 September 2020).

Therefore, one can say that EU transposition is done in a way that is more convenient to satisfy the EU Commission than any local legal tradition. The result is that while Malta generally complies with the *acquis communautaire* and the EU Commission is generally satisfied with Malta, Malta now has laws spread over more than 600 chapters, and by choice and for political convenience with its European obligations, it is a 'purely' hybrid system. 'Purely' because little thought is given to creating and respecting local legal traditions, but the aim is to comply with EU law in the shortest possible time and avoid EU infringement proceedings.

Furthermore, one could argue that over the past decades since independence, Malta has created diverse legal traditions where ideas can be drawn from various legal systems. Still, the English system and legal tradition are easily adjusted to the local scenario. Basically, one can say that it is very difficult to experience legal 'irritants' as it is easy to accept legal 'transplants'.

Malta's legal system synthesizes the various legal cultures that influenced it during long years of colonial rule. British rule was officialized in 1814, but the British refrained from imposing common law in Malta. The Code de Rohan, promulgated in the dying days of the long rule of the Knights of Malta, was substituted by a local version of the Code Napoleon in 1852. Other codes were enacted in the same period, most notably the Code of Organisation and Civil Procedure, the Criminal Code and the Code of Criminal Procedure. A Maltese legal luminary, Sir Adrian Dingli, was instrumental in promulgating these codes, which though extensively amended over the years, still form the backbone of Maltese legislation. He drew extensively from continental codes, such as those of the Italian city-states and the Two Sicilies. However, the Code of Criminal Procedure departed somehow from the continental models, and the accused were given rights already prevalent in the UK, and trial by jury was also introduced.

Over the long years of British colonial rule, British legal influence became increasingly apparent. Fiscal and company legislation follows the British model closely. Since independence in 1964, UK legislation is often mirrored in legislation enacted by the House of Representatives, which is run on rules followed by Westminster. The Maltese Constitution, enacted in 1964, closely reflects British constitutional principles. Still, it also promulgated a bill of fundamental rights which the European Convention on Human Rights very much influenced.

The European Convention on Human Rights was subsequently incorporated into domestic legislation in 1987. However, since Malta's accession to the EU in 2004, the *acquis communautaire* and future EU regulations prevail over domestic legislation, and EU directives must be incorporated into domestic legislation.

The table below summarizes the evolution of the Maltese legal system and explains how it became a hybrid system.

| Period | Years | Legal Family |
|---|---|---|
| 1 Roman Malta | 218 BC-870 AD | Civil |
| 2 Arab Malta | 870-1090 | Civil with Arab influence |
| 3 Norman Malta | 1090-1530 | Civil |
| 4 Hospitallers Malta | 1530-1798 | Civil |


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*(Continued)*

| Period | Years | Legal Family |
|---|---|---|
| 5 French Malta | 1798-1800 | Civil |
| 6 British Malta | 1800-1964 | Civil with some common law in public law |
| 7 Independent Malta | 1964-2004 | Hybrid |
| 8 European Union Malta | Since 2004 | Hybrid |

## D Malta's Assimilation of the EU's Acquis Communautaire

Mixed legal systems like the Maltese one owe their *mixité* mostly to legal transplants, that is, the borrowing of legal institutions and rules by one country from another, often initiated by the national courts. Reid and Zimmermann, in their introduction to an important book on Scots law, state:[22]

> If, therefore, the establishment of an intellectual connection between civil law and common law is regarded as an important prerequisite for the emergence of a genuinely European legal scholarship, it should be of the greatest interest to see that such connection has already been established [...] in a number of 'mixed' legal systems. Such systems provide a wealth of experience of how civil law and common law may be accommodated within one legal system.

This statement is closely related to the idea that Scots law and the other mixed jurisdictions are an optimal mix of the best that both civil law and common law can offer. Moreover, hybrid legal systems present a mixed national mentality and European uniformity. Thus, Malta, with a mixed legal system, is in an excellent position to adopt and integrate the workings of the EU legal order with the Maltese one. This reduces the possibility of legal irritants and therefore increases the success of applying EU law.

Taking advantage of this mixed legal heritage, over the past years since independence Malta has, in certain instances, successfully adopted a comparative approach in its formulation of new legislation. Comparative law could give an insight into how more, and to what extent, legal integration of private law could take place. Indeed, legal families have similarities, which may facilitate the adoption of legal principles from the other family. Watson controversially argues that a society's laws do not usually develop from within but are borrowed from other societies.[23] One could agree that comparative law would ease borrowing from other societies. However, it could also be argued that the Europeanization of private law is also an opportunity for European law to develop. Strictly speaking, Watson refers to adopting legal principles from one national legal system to another.

22 Reid K. & Zimmermann R. 'The Development of Legal Doctrine in a Mixed System' in Reid K. & Zimmermann R. (eds.), *A History of Private Law in Scotland*, Vol. 1, OUP, Oxford, 2000, p. 3.

23 *See* Watson A. *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh, 1974.


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However, referring to the subject under evaluation, European private law building goes a step beyond that. While a unifying private law at the European level would encourage the borrowing from the national legal systems, because such a project may be supported by the need to fulfil the proper needs of an internal market, one should not rule out the creation of new rules at the European level from within the existing fragmented European private law.

The above places Maltese law in an excellent position to continue to adopt the ongoing developments in substantive European private law. The Maltese Trusts Act has been successfully integrated into Maltese law.[24] Trust law is a common law concept of private law that does not tally with the civil law concept of Maltese private law in general. The possibility of legal irritants in the Maltese legal system is infrequent; thus, it is easier to adopt reforms or new concepts. Following the Communication on European Contract Law,[25] the European Commission adopted a further Communication in February 2003 entitled "A More Coherent European Contract Law – An Action Plan".[26] This is considered a further step in the ongoing discussion on developments in European contract law. One of the key measures proposed in the Action Plan is the elaboration of a Common Frame of Reference (CFR). To increase coherence in the contract law *acquis*, the CFR should provide a common terminology (e.g. contract, damages) and rules (e.g. nonperformance of contracts). The CFR serves two different aims: (a) it should serve as a tool for improving the *acquis*. The addressee of this tool is, in the first place, the EU institutions, above all the Commission, to increase the quality of drafting provisions; (b) it could be the basis for the so-called optional instrument on European contract law. In both scenarios, Maltese law could adapt to European developments. From a substantive point of view, no serious problems can be envisaged in the relationship between Maltese and European laws.

In 2010, the European Commission published the Green Paper on policy options towards a European contract law for consumers and businesses.[27] The Green Paper proposes several options for developing the European contract law, including an optional contract code through a regulation, a directive on European contract law and a regulation for a new European contract law or a European Civil Code, among other options. From the wording of the Green Paper, one can conclude that the European Commission will likely continue pursuing the option of an optional European contract law. Therefore, while not entering the merits of this discussion, it is clear that the Maltese legal order will be able to adopt any of the proposals. Furthermore, if the optional code is pursued, it will likely influence Maltese contract law positively.

EU regulations and directives are the most important legal instruments which would have to be examined to see the effect of EU law on Maltese law. Regulations are binding upon all Member States and are directly applicable within all such States. On accession, all EU regulations became binding in Malta unless a transitory

24 Chapter 331 of the Laws of Malta.
25 COM (2001) 398 final.
26 COM (2003) 68 final.
27 COM (2010) 348 final.


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provision or derogation covers them in the Accession Treaty. This means that EU regulations should be considered primary law and should not be transposed. They are the law. Member States may need to modify their law to comply with a regulation. This may be the case where EU regulations have implications for different parts of national law. However, this does not alter the fact that the EU regulation itself has legal effect in the Member States independently of any national law and that the Member States should not pass measures that conceal the nature of an EU regulation. In case national law is not amended, the EU regulation would prevail. In the *Variola* case,[28] the CJEU was asked by a national court whether the provisions of a regulation could be introduced into the legal order of a Member State so that the subject matter is brought under national law. The CJEU explained that under the obligations arising from the Treaty and assumed on ratification, Member States are obliged not to obstruct the direct applicability inherent in regulations and other rules of Community law.[29] The CJEU explains:

> Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it.[30]

As regulations need no transposition, there is no need to elaborate further. However, analysis of the implementation of directives proves to be a more effective way to gauge the effectiveness of the transposition of EU law into Maltese law. Directives have been generally transposed either by an Act of Parliament into primary legislation such as the Company Directives[31] or the VAT Directives,[32] or through a legal notice such as most of the Labour Directives,[33] or by a combination of both primary and secondary legislation. The best method of implementation would depend on the objectives of the particular directive. An Act of Parliament is usually reserved for the implementation of a directive which is either a framework law on which subsidiary legislation can be enacted or a matter of high national importance. Being transposed through an Act of Parliament would often mean that a national debate is held on the subject matter, and the law would be better publicized.

On the other hand, transposition through a legal notice is faster though less publicized. However, it may be a better way of transposing European law, mainly if the directive is technical and needs to be transposed in a very short time. In practice, it would be impossible to use Acts of Parliament every time, given the number of directives that must be transposed and the time needed to pass through

28 *See* Case 34/73 *Variola v. Amministrazione delle Finanze* [1973] ECR 981.
29 *Ibid*. para 10.
30 *Ibid*. para 11.
31 Chapter 386 of the Laws of Malta.
32 Chapter 406 of the Laws of Malta.
33 Regulations 78 to 100 under Chapter 452 of the Laws of Malta.

parliament. Combining primary and secondary legislations to implement EU directives allows an economy of scale in parliamentary time.

## E The Need for a Regulator or a Proper, Functioning Law Commission

From the above, one can conclude that the integration between Maltese law and EU law has to some extent, been a success, while more can be done to improve the relationship between these two legal orders, which now exist side by side. Improvement can come if the state invests more in legal resources for the civil service, including the judiciary and the office of the Attorney General/State Advocate, as well as the University. Maltese lawyers cannot keep up to date unless they have access to the various legal resources mushrooming in Europe, making comparative law more accessible and widespread. Also, the utility of studying the development of Maltese law as a laboratory for European law mentioned earlier in this chapter is being lost as the lack of adequate legal material on Maltese law makes the Maltese legal order inaccessible to foreign jurists. As a result, it remains unknown and without any influence in the European sphere.

One of the major challenges still to be tackled seriously facing the 'marriage' between these two legal orders comes not from the legal sphere but from the public sphere. Educating the Maltese public about the relationship between the two legal orders is essential as the public at large is its ultimate consumer. The vast majority of Maltese look towards the EU as a rebirth of the now-defunct 'Privy Council', which will have the supreme authority to put right whatever happens to be wrong in the Republic of Malta. Unfortunately, certain politicians and journalists do not help this cause by giving the wrong impressions, such as that the European Court of Justice is a Court of Appeal, which it is not, and that one can go to it whenever local redress is not obtained, which is not the case. Putting matters into context and a proper information campaign could help save a future tragedy. The Maltese public's confidence in the EU institutions could hit rock bottom if it is based on false pretences. Perhaps it is time to realize that EU law is not a superior foreign law but part of domestic law, which the Maltese state has enacted in partnership with the other Member States through the EU institutions. Both legal orders exist for the benefit of the individual, who must not be afraid to fight for his or her rights should it be the case. Considering the hybrid nature of the Maltese legal order, legal irritants are also highly unlikely.

The above brings up the idea that a Maltese Law Commission is needed as a regulator to ensure the bills presented in parliament are of a certain coherent standard and that a careful academic study is made before new proposals are presented in Bills. While EU law needs to be transposed, there is often a certain level of discretion which the national Member State can make. Also, local initiatives must be made to respect the Maltese judicial system. The fact that Malta is a hybrid jurisdiction does not mean that all concepts can be assimilated and that legal irritants do not exist. The primary task of the said Commission is to ensure the consolidation of laws. However, in practice, the Commission has been very


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ineffectual in this job, and Maltese law remains spread out in more than 600 chapters; various special legislations and the traditional codes such as the Civil Code end up being longer chapters of the laws of Malta than a pure code in the civil law sense. Yet, in these various chapters, the coherence of legislation does not exist. For example, the Marriage Act was introduced in 1975, after the Civil Code was enacted.[34] The new marriage law found itself in Chapter 255, while the Civil Code is in Chapter 16. This meant that the separation provisions remained in the Civil Code while the marriage provisions found themselves in Chapter 255. When the divorce legislation was introduced in 2011, it was put in the Civil Code. You get married through Chapter 255 but are separated and divorced through Chapter 16.

The above deals with how the laws of the land are promulgated, but the same analogy can be extended to the legal concept themselves. For example, Maltese courts are based on the same notion as ordinary courts in the common law. The First Hall of civil jurisdiction hears mainly civil cases, but it is also a court of constitutional jurisdiction dealing with fundamental human rights and administrative issues, including judicial review. In the past years, there have been mentions of administrative courts. But how can administrative courts function properly if the state's culture is the opposite of having specialized courts? In the same way, how come most EU directives are transposed into Maltese law by a copy-and-paste exercise without adequate checks on how they can be integrated with the legal culture? Are legal irritants possible, and if the answer is probably negative, is this such a good thing?

A good way of ensuring coherence in the hybrid legal system as the Maltese one is constituted would be perhaps to come up with a regulatory authority in the form of a powerful, resourceful, independent Law Commission whose task would be not just to consolidate laws but to scrutinize bills of parliament and advise the same parliament about how to enact bills that fit the current legal framework and how to go about technically doing any legislative amendments the parliament of the day wishes to make. The aim is not to control parliament but merely to help parliament come up with bills that respect the legal culture and help with the evolution of the legal culture should parliament wishes to make such changes.

A possible regulatory Law Commission may take the following shape and functions:

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|---|---|
| **Composition** | A body of five legal experts chaired by a person with qualifications to serve as a judge of the superior courts, to serve for five years renewable |
| **Appointment** | The President of the Commission is appointed by the President on the advice of the Prime Minister and supported by a two-third majority to ensure bipartisan support |

34 https://legislation.mt/eli/cap/255/eng (last accessed on 15 June 2022).

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|---|---|---|
| **Consolidation of legislation** | 1 | Consolidating and reorganizing the laws of Malta to ensure that there are no redundant laws |
| | 2 | To ensure uniformity in existing legislation |
| | 3 | The laws are coherent and consolidated in one place |
| | 4 | To undergo a proper codification exercise |
| **Scrutinization of new bills** | 1 | Check that bill fits the Maltese legal system and that they do not provide inconsistencies with existing legislation |
| | 2 | Set standards and parameters for coherent legislative drafting |
| | 3 | Define legal terms and where they can be used, and in which laws |
| | 4 | Ensure linguistic coherence in both the official Maltese and English versions |
| | 5 | Translation of bill into English or Maltese |
| | 6 | Offer legal linguistic and drafting services to government departments and authorities |
| **Advisory function** | 1 | Advise all Maltese authorities, including the Advocate General and State Advocate office, regarding legislative drafting and techniques |
| | 2 | Offer any advice to ensure consistency in the Maltese laws, including suggesting proposals for any technical amendments that may be needed |
| | 3 | Outreach to the legal profession about matters that fall with the remit |
| | 4 | Advise the courts to ensure consistency in the drafting of judgements |
| | 5 | Write commentaries on Maltese law |
| **Law reform** | 1 | Taking a leading role in major legislative reforms that may be needed |
| | 2 | Monitoring and influencing the hybridity of the Maltese system to ensure that it works and that it delivers a good product to the citizen |

## F Conclusion

Common law systems are normally known for the doctrine of precedent. On the other hand, civil law systems are known for their well-written legislations and commentaries. While hybrid systems are flexible, the Maltese legal system has none of the above points. As a result, it is a system where the lawyers and the judges are jacks of all trades and masters of none! However, the fact that there is no precedent may not be bad as it is not unheard of when two similar cases are decided differently by different judges.


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Moreover, it is not unheard of that some judges are very good at assimilating new laws and concepts while others are more interested in their egos. Also, as a practising lawyer, one can appreciate that there is also a generation gap between lawyers and judges. While exceptions exist, most judges and lawyers of advanced age are less eager to assimilate EU law concepts than younger generations. Therefore, for a hybrid system such as the Maltese legal system to work better and to ensure that the national legal system is a 'loving' marriage of legal systems or a curse, a Law Commission in the form and shape suggested above may be a blessing.