CML1000 COMPARATIVE LEGAL SYSTEMS & LEGAL PLURALISM

The European Law Students' Association

MALTA

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Comparative Legal Systems
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This is basically the application of Comparative law as a method, and not so much to the comparison of whole jurisdictions. By legal pluralism, we mean that we are thinking in terms of **exploring the varieties of laws which extend beyond the laws which are written but also including laws and norms which why abide by in everyday life.**
Malta is a mixed jurisdiction, and we have a kind of mixture between laws and principles which come from Civil Law and also those which come from the Common Law. There is this kind of mixing between legal systems which have formed our own legal system.
The point behind comparing legal systems is seeing how different aspects of a particular legal system are related to one another.
The aim is going to be to give a bird's eye view of these major systemic traditions.
Reading: 'An Introduction to Comparative Law'
'Comparative Legal Traditions in a Nutshell.' 3rd Edition.

1: INTRODUCING COMPARATIVE LEGAL HYBRIDITY AND LEGAL PLURALISM: BASIC DIFFERENCES BETWEEN CIVIL & COMMON LAW AND AN OVERVIEW OF LEGAL HYBRIDITY IN EUROPEAN HISTORY

Locating legal systems within a context where they are constantly being influenced by other legal systems. The idea being that we are studying something which is constantly changing. It is changing partly as a result of the contact with foreign legal influences.
Hybridity: the whole idea that **no legal system is pure but through mixing and absorbing different elements.**
Diffusion: a **process** by which **new elements diffuse into legal system**.

What is law?

Upon studying law from a comparative perspective, the question also arises as to what you understand by law. The definition can change depending on the context. Our current understanding of law, something which is the legislation of the State, is a particular concept of law which has a history. Going back 500 years, one would find a very different meaning as to what law is. You had an understanding of law which does not prioritise the law passed by the State but actually saw those rules as being something subsidiary. In fact, **the whole idea that the Head of the State can actually make laws is a very modern idea**. Go back 200 years and you find that it is beginning to develop. So, in the past, **the idea was that the lawmaker simply declares the law which is already present which is the law which was passed down from antiquity and therefore does not create law from scratch**.
Just as you can compare legal systems by comparing, for example, the French legal system to the British legal system, you can also compare legal systems by comparing, for example, the French legal system now to the French legal system before the Revolution. For the purposes of comparing, it is often helpful to engage in a broader definition of what law is.

If one were to pay attention to language, in our law we have the concept of liability for tort (the idea that if I engage in wrongful conduct and cause harm to others as a result then those others would be able to sue me for damages). In fact, in Malta, we use the expression 'it-tort tiegħek'. One must not limit themselves to looking at legislation also but must also look at **language** and how it draws upon legal concepts and contributes to them.

- Jurists almost invariably use state law and its rules as their standard (a *'substantive'* definition)

- Social scientists (anthropologists, geographers, sociologists, etc) often adopt a wider definition including other normative traditions and practices (a *'functional'* definition).

What is legal hybridity?

MIXTURES

When we are talking about legal hybridity, we are talking mainly about **mixtures** such as the mixing of civil law and common law. In our Criminal law, many come from continental law whilst on the other hand, our public law where many of the sources come from common law. This is a kind of legal hybridity. The idea is that hybrid systems which combine elements which are drawn from other systems in a way which works.

'Legal hybridity', and the *'plurality of laws*' – official or state laws

'Normative hybridity' or *'normative pluralism'* – other, less formal but meaningful unofficial or non-state norms.

What is a norm?

A norm is a rule which people **treat as binding and which they obey in practice**. So, when we are talking about unofficial norms, we are talking about ways in which people act because they think a particular conduct is binding upon them whether or not these norms are also found in the State legislation. For example, practising Jews are subject to around 700 rules which dictate every aspect of their behaviour, yet do not form part of the state law but the religious law, what we can call a **normative tradition**.

What is diffusion?

MOVEMENTS

Comparatists often discuss the movement of laws or legal institutions (rather than norms). These may be:

- Piecemeal 'transplants' of particular laws
- Large-scale 'receptions' of laws and institutions.

They may asl differ in the manner and mechanisms involved, i.e. they may be:

- Formal and informal
- Legislative, judicial, or doctrinal.

As the culture changes, new legal ideas come to the forefront. The idea of ideas and concepts travelling sometimes even through cultural changes. It is **more dynamic than merely foreign laws being integrated into our system**.

This is both internal to Europe as well as external, extending through much of the world. William Twinning called both legal (and normative) movements 'diffusion'. This is also a common usage in the social sciences.

Comparative law and legal movements

In addition to Twinning's 'diffusion' comparatists characterise legal movements in numerous other ways:

- Alan Watson's 'transplants thesis'
- David Nelken's preferred 'trasnfers'
- Esin Orucu's 'transmigration'

and so on

Most of these metaphors are used for the diffusion of laws rather than norms.

2: EUROPEAN LEGAL HISTORY

European legal history is a story itself of considerable hybridity. For centuries, there was significant *legal* hybridity with *multiple* overlapping '*jurisdictions.'*

- Different individuals might participate in different jurisdictions based on their status, occupation, or 'nation' (and later territorial location)
- Different legal *fora* could assert jurisdiction over the same claim.

Even in Malta, if you look at studies of the situation under the Knights, it is very interesting that the inquisitor, the Knights and the Bishop in Malta, all had **their own courts** and there was always an issue of which court should assert jurisdiction over a certain case.

The late Medieval and early modern periods witness the gradual expansion of law under the co-ordination of an emerging comparatively centralised 'state' and the slow elimination of legal – and normative – hybridity by ever wider common laws. Note, however, the difficulty of using the anachronistic 'state' for the past; it might be better to think of our focus as being on the gradual development of the state and, eventually, unified state law, from normative pluralism.

In a way, we are exploring the pre-history of the modern state. **With modernity, you end up with only one law which is recognised as the law of a particular territory**. This is the situation which has characterised our understanding of law at least in Malta since Independence. Since independence in Malta, it has become much easier to say what is Maltese law and what is not. The reason why we are looking backwards is because **nowadays it seems clear that we cannot continue to uphold this view of the world that each State has a different legal system**. We no longer have this situation where we can speak about legal systems and laws as being the exclusive source of legality within a particular territory. The aim of going back to the Middle Ages is not only to see how much we have advanced today but also to try and learn how it is possible to operate in a situation where there are so many different strata operating side by side one another.

This idea of being inter-legal gives us a concept in Comparative law which is no longer looking at law from the standpoint of States but from that of **people**.

From at least the 12th century, there were numerous *iura propria* (local, particular laws) and *iura communia* (common laws). The former included, customary laws, and legal customs resulting from elite interpretation of customary law and practices. The latter, on the other hand, included both the *ius commune*, the revived and revised Roman law merged with canon law, the *lex mercatoria*, arguably created in the process of trade itself and only slowly absorbed by the state. Moreover, various existing 'Germanic' folk-laws were developed by custom or customary law.

On the other hand, English law included Pan-European *iura communa*, including the *ius commune* and *lex mercatoria*, the English *iura communa,* including both the royal courts of 'common law' and the courts of equity, and English *iura propria,* including feudal, manorial, commercial, and urban laws. Here, the borders between official laws and unofficial norms were blurred. Welsh and Irish laws also included native and march laws until displaced by English law, Scotland was independent for much of this time and included a far larger amount of pan-European law.

In the modern period, especially from the 19th century, there is a strong shift towards nationalism and legal positivism, the centralisation or unification of jurisdictions, legal

monism (the uniformity of laws under the state) and the formal (and significant) marginalisation of other norms. This historical development still distorts our present understanding of the various legalities (law and norms) by which we organise our lives; this is especially true of legal theory itself. **Western legal history traces a long, slow movement, from the plurality of laws to unified state law.**

Diffusion occurred as a result of Western colonialism and hegemony from the late 15th century into the 20th century. This further complicated the plurality of laws with the additional of laws native to indigenous peoples. Diffusion also occurred beyond the West through considerable borrowing of its sophisticated legal development, especially the codes.

Since the end of the Second World War, there has been a meaningful shift away from the state sovereignty towards legal complexity, including international law, regional international law (European laws), devolution of different sorts away from the level of nation-state, and other non-state 'laws' or norms around the globe, both above and below the nation-state.

The whole general focus of last week's lecture was to introduce students to the idea that we are talking about a deeper comparison. We are looking at whole jurisdictions and whole families of jurisdictions. When we are talking about a comparison which is at this kind of mega-level, we can also conduct this exercise by looking at historical evidence and historical developments. This means, on the one hand, understanding how for example, the common law jurisdiction has ended up in a position where it gives so much **importance to the decisions of the court as a source of law**. In contrast with other jurisdictions, such as that of France which gives more importance to the **jurists as a source of law**.
1000 years ago, both England and France were more similar to one another than nowadays. **France took a different trajectory when the Roman law texts were discovered and when they started to develop a whole continental approach to legal scholarship**. By contrast, **in England you had a different trajectory**. History plays an important role by giving us a picture as it were of societies in which things, we take for granted as regards the law were completely different and also to contrast the past with the situation nowadays.

Modern Western traditions include the *'Anglo-American tradition(s)'* (or the common law) and this refers to any legal systems or traditions of English origin, and *'continental tradition(s)'* (or the civil law) which refers to the legal systems or traditions of continental Europe origin. In general, the latter draws more significantly on the Roman tradition than did the Anglo-American traditions. In much of Western and Eastern Europe, South and Central America, and the Near and Far East. Other legal traditions include the Asian traditions, Islamic traditions, Talmudic traditions, Hindu traditions and so on. These make up a very large part of the world's population.

Diffusion: Maltese law is constantly evolving as a result of the impact of foreign elements. Change can occur through a change in culture.
We also explored how in reality, we have brought to a conclusion a process by which the **laws of particular nation-states** have replaced the old common laws, one of which being the ***ius commune***. These common laws always existed at least going back thousands of years to the period of Roman Law itself and what has happened is that this has been nationalised so that **all the different countries all have their own civil code** (the French civil code, the German civil code and so on). By and large, these have similarities. In some cases, the rules are almost identical. This is because **in both countries you had the *ius commune***. **The common law itself owes its origin to being the *ius commune* of England** where it consisted

mainly of the rules which were considered to be common to the English and Welsh regions. It was common because it was **the law of the King**. The common law originally was simply the common law of England as opposed to the common law of Europe. Common law is opposed to *ius propria* which is specific to a certain territory.

As a result of colonialism many of the main principles of Western law have been exported to other countries of the world.

<u>World legal systems:</u>

1. Civil law
2. Common law
3. Customary law
4. Muslim law
5. Mixed systems

When you are going to access the system as a whole, you also have to look at how the system works. For example, in Malta we do not have a rule of precedent which is very important in common law. Other aspects, such as our Constitution, is written unlike the British but then it was given to us by the British parliament and in many respects, it is closer to the constitutions of those states which formed part of the British Commonwealth.

When you take all these rules together, it is difficult to decide whether the Maltese system is more similar to the Common Law system or the Civil Law system.

India has systems of customary law which are integrated within the common law. There is this mixture.

Another category is Muslim law which applies to large parts of the Middle East and Africa. Morocco is mainly Muslim law but has some civil law. This is Islamic law mixed with civil law. Algeria is mainly civil law but then you have a bit of Muslim Law. There is civil law mixed with Islamic law. Israel started off as a common law system since it was originally under British rule, however they wrote a civil code for themselves and transformed their system into a mixed system.

Another kind of hybridity has to do with religious law and the occupied territories and also with the interplay between the areas which are subject to different control. In the case of Israel, when it comes to marriage, it is completely dictated by the religious community and there is no chance of a civil marriage.

The whole idea here is that in a sense, you have these different communities. Then you have also this idea of the **occupied territories** having their own law and are definitely subject to different legal regimes.

The term ‘legal hybridity’ acquires a lot of interplay here. There is **classical hybridity** but also **cultural and religious hybridity**.

Mixed legal systems

The best known mixed legal systems are those combining continental private law with Anglo-American public and criminal law. these are the so-called *'classical mixed jurisdictions.'* Vernon Palmer has suggested they make up a 'third legal family.'

In the case, of the classical mixed jurisdiction, what we are talking about very often are countries which were originally ruled by a continental elite and then passed into the control of an Anglo-American power, such as Porto Rico. Because these systems have passed from being originally more continental in character and then passed under the rulership of more common law rulers, **the public law very often changed as a result and became much more common law in character**. By contrast, **the private law generally remained much closer to the civilian roots**. This kind of process resulted in systems where the constitutionally law might be very common law in appearance but then the actual substance of the private law would be much closer to private law.

Malta is perfectly within this family mainly because the law applied in Malta from the time of the Knights was basically the *ius commune* which was based upon roman law. When the British law took over, they could not easily change the basis of Maltese private law. What we see is that as a result, the core of our civil law remains very much based on Roman law. Other areas of civil law bit by bit are getting more influenced by common law such as contract law whose basis is civilian, but the contracts actually sued in practice are very often copied from common law. Similarly, when it comes to tort law, you get the same type of importation of concepts of common law. This overall relationship and tension creates a situation where the courts and parliament and the people at large are very often in a position where they are expected to translate concepts from one field or law to another. These concepts come from completely different worlds. Classical mixed jurisdictions are all families where you have this **mixture and tension between civil law and common law**. Then we have mixed systems which are like the classical but then extend beyond that to include mixtures of customary law, religious law, and so on.

The focus of work on mixed legal systems is actually legal hybridity and what is understood by this term. **In reality, all systems are hybrid**. Some suggest that comparatists should draw on both legal history and the social sciences to study both legal and normative hybridity. However, for the study of law, we tend to draw the line at culture and are interested solely in finding the law. Scholars of legal hybridity tend to divide into two groups: those interested in how culture develops & those who want to know and understand legal hybridity because they want to understand where they find the law and what authorities to look for. The former group of scholars give a lot of importance to language. So, this basically is the way in which the **language** is formed, and this can tell us a lot about the mentality of people, their way of thinking of justice, their way of reaching agreement and so on but **does not tell us much about how to interpret the law**. There we have to **move beyond culture and look at the legal system in its own terms**.
In reality, this is an area where both the comparative lawyers and the social scientists are beginning to converge. **Comparative lawyers start at families of States**, so their viewpoint is macro. **Social scientists in this field generally start at what is going on in small societies and even in those that do not have a state, trying to understand how law operates in that particular context**. Although they may not have law as we know it, nevertheless they have systems which are considered as **normative** and which are **enforced despite not having courts**, a police force and so on. So, there is this sense where you can talk about **law without a state**. This is also seen within religions traditions whereby despite

not having courts, nevertheless you do have rules which can bind every aspect of people's life. In this way, we cannot limit ourselves to the state-definition of law. **Legal pluralism initially was created to cater for these small societies that do not have states**.
Comparative lawyers start from the wide-angle but start saying that they must widen their definition of legality and cannot exclude customary law from our worldview and must also make space for other kinds of unwritten laws.

Legal pluralism can be:

- **Classical**: Usually refers to legal—and perhaps normative—hybridity in a colonial or post-colonial context (often with the purpose of criticising Western colonialism or hegemony)
- **Weak/State**: As above, but where the state has authoritative priority over non-state norms
- **Strong/Deep**: As above, but where state and other norms coexist without either having authoritative priority over the other
- **New**: Focuses on non-colonial situations, i.e. the West
- **Global**: Focuses on legal and normative hybridity at the global level
- **Critical**: Focuses on legal and normative orders not as coherent systems, but from the perspective of individuals who are seen as generating norms in their actions

Mixed marriages in Malta

In the past, you had a situation where on the one hand, the Catholic Church was very powerful despite the fact that Malta was under British rule. These were considered as being a kind of threat to the Maltese enjoyment of their religion because Maltese laws in marriage was considered to be the **Canon Law**. This itself reflected the fact that in our civil legislation there was a **lacuna** but there was a custom of applying the legislation of the Catholic church, in terms of that legislation, whereby there is a marriage and one of the parties is Catholic, the marriage was not considered valid unless it took place in church and followed the rules of a catholic marriage. The problem arose when many protestant men started marrying Maltese women. **The Maltese legal class was also in a way using this rule to protect and affirm Maltese identity**. The idea was you can't have a British man come and disrespect the law of the land. It is also served as a limit of inter-marriages. The other thing that happened is that the Attorney General of the time had come up with an opinion in writing called the 'Force of Custom' where he argued that when you are dealing with two people which are Protestant or Hindu and so on, it is part of Maltese customary law to recognise this marriage as valid so long as the parties are of the same religion. Therefore, **a marriage was invalid on the basis of mixed marriages**. This opinion was already contested by other lawyers saying no such rule of custom exists in Maltese law and it was not considered a sufficient solution. In this way, there was a sort of battle on Maltese identify and the role of religion in this.
At one point the British Privy council gave its own opinion as to how it would address this issue but was not legally binding. They said that even in mixed marriages, even if it is not conducted by the Catholic forms, it is nevertheless considered as valid. The opinion was published in the form of a pamphlet.

'The Bishop wrote to the Governor that he was glad to learn that the mentioned Report had not the binding force of a Law, but, after the oft repeated protestations of H.Mo's Government - that with regard to Marriage the Canon Law is the Civil Law of Malta - and after the agreement Rampolla-Simmons of 1890, he was surprised to hear of another 'Law', which was neither customary, nor written.'
Arthur Bonnici, Mixed Marriages in Malta (1800-1900).

Here you have an example of legal pluralism – you had canon law which is written law but nevertheless is accepted on a customary basis and then you have this pamphlet, which is unwritten law and it's not customary, but it was an indication on how the privy council wanted to decide future cases.

Lecture to refer to: https://www.youtube.com/watch?v=D_k7lFYd4PE

3: EUROPEAN LEGAL HISTORY – MEDIEVAL ERA

Here, we will be discussing the European law following the collapse of the Roman Empire. The end of the Roman Empire was long drawn out and when we are talking about the Eastern Roman Empire, that was a completely different entity and it continued for around 1000 years after the Western Roman Empire had ended. One could say that in Germany for example, there was a process by which Roman law was officially received into the legal systems of the German states which took place in the 19th century. There is this long process by which there were other kinds of law which were brought in by the Barbarian tribes and on the other hand, there was this inheritance of Roman law, which, in one way or another, continued to assert itself.

Rome and Roman law

Rome was the dominant European power in the ancient world and was important for western legal history. There is a big difference between the law of **the Twelve Tables** and the **post-classical law** where one the one hand, the Roman law was collected and on other hand, you had this process by which the Roman law started to be influenced by and started to accept elements drawn from Christianity and the law of the church. Roman law varies considerably: (1) seen to begin with The Twelve Tables, a declaratory redaction of customary law, (2) over time, there is a changing emphasis on different legal sources, especially on custom and legislation (as well as natural law), and then (3) it developed an important emphasis on the interpretation of texts by jurists (rather than focusing on jurisprudence). You have this idea where people say under roman law the situation was like this…One has to ask under which period of Roman law was the situation so and according to who? You had **different jurists and different schools of thought in Roman law**.

Roman law is a vast array of ideas, legal principles and so on which reflect different opinions and different time periods within the history of Rome itself. If you talk of Rome as an Empire that's one thing, Rome as a Republic is another and so on. The Roman lawyers had their own concept of natural law but that was very much influenced by Christianity which came up with a different interpretation of nature. Over time, Roman law tended to develop an important **emphasis on the interpretation of text by jurists rather than court judgements**. One can contrast this highly with the common law tradition. In Roman law, the idea was that law is found in the ideas and opinions of jurists. **'Redaction' may refer either to putting the law into writing** from an oral tradition (customary law into written law) or **gathering doctrine or law together**. The former is kind of what happened with the Maltese Constitution. In Malta, most of the conventions were written down whereby you have this process by which a convention becomes a written law. This raises the question *when a convention gets written down, does its nature as a convention seize to exist?* The other way is gathering existing doctrine or law together and there you are putting everything relating to a particular area of law together. For example, there was a process in the 19th century by which Malta's commercial laws were put together – both legislation & doctrine. Our Commercial Code at the moment co-exists with other important things such as judgements. Moreover, **the process of redaction is frequently followed by promulgation**; the process by which the compilation

of laws which have been put together are made enforceable law. **In the Ancient and Medieval world this was usually seen as declaring the law and making it public but not a process of making law**. This was part of a movement towards written and urban culture, with customary law being declared usually by elites. Therefore, there is this process by which the task of the legislator over centuries has changed. Before he was simply seen as someone who declares laws which existed in the remote past, whereas we now think as the legislator as someone who makes law, who can create a new law where no law existed before. This **change in the role of the legislator** is part of a general movement towards a written and an urban culture where the focus is much more on the written law as being the real law.

The Empire split (385) and the Eastern Empire became dominant while the Western Empire 'fell' in the 5th century. Historically, the Emperor Justinian operated the Eastern Empire and sought to revive the Western half of the Roman Empire, both militarily and legally. Justinian ordered the 'redaction' of Roman law. There were 4 parts of his collection with the most important two being the **Digest** (a collection of doctrine (scholarly writings) was of great importance) and the **Institutes** (a simplified student text, a sort of introduction to first principles of law). The Maltese law is itself based on the Roman law.

The 'Germanic' nations

With the fall of Rome, there were various **Germanic peoples** who took over and what they did is that they introduced new legal principles. Rome has been absorbed by these various 'Germanic' peoples. **They emphasised much more community, custom, tradition, and consent rather than legislative will or doctrine,** i.e. **law-finding rather than law-making**. Very often, these so-called Barbarians had also their own kingdoms/tribal monarchies in which the King was seen as being under the law. Moreover, they **created their own 'folk-law' and 'vulgar' (relating to the people) Roman law**. Moreover, this folk-law had certain characteristics. The law in that period was seen as **personal**; it was linked to the particular group you belonged as opposed to territory. There was an emphasis on **unwritten custom** and **general consent** where proof of custom became important and was not the subject of academic study. The 'Germanic' peoples created Roman law codes: at once a redaction, a reception, and a vulgarisation of Roman law. But **these would be significant in maintaining elements of Roman legal learning for future generations.**

Moreover, at this time, law was not studied academically since there were no universities. In Europe it was **the University of Bologna** which is considered to be the first university and **Bologna is very much associated with the re-discovery of Roman law**. The attempt to study law academically was the beginning of the academic study even of languages, philosophy, mathematics and so on in Western Europe. The law in that period was not the subject of academic studies however the Germanic peoples did create their own codes of law.

The church and church 'law'

With the 'fall', the unity of the Roman state was replaced by that of the Roman church. For a very long period, it was the Church who kept Latin alive which was the language of literature. Also, the proof of custom becomes very important. The Church **provided practical services**, **preserved classical learning**, **provided an alternative authority** and **promoted peace**. Its roles blurred the distinction between spiritual and secular spheres. It was initially weak but would become more important with the so-called 'Papal Revolution'; these debates drove both secular and spiritual authorities to attempt to base their arguments on law, this promoted legal study and a class of professional jurists. Church law provided an

ideal for other laws, especially in the reform of legal procedures, and a basis for some legal harmonisation.

To a large extent, the Roman Catholic church continued in a way the elements of the Roman state organisation and **with the fall of Rome, the unity of the Roman state was replaced by that of the Roman church**. The Roman church was organised territorially and was the only organisation for a long period which had an organisation stretching across Europe which was centralised. In this period, the church was also **a secular power**. The church initially was weak but would become more important with the Papal Revolution. Here, we are talking about the period from around the 6th century till around the 10th, also known as the Dark Ages. When you look at it from the perspective of church law, it was not so dark after all.

The inquisitorial procedure was a very methodical and structured way to arrive at a decision as to what was the truth. The whole idea behind it was to arrive at what really was the case. A lot of emphasis was placed on compiling evidence. When you compare it to the adversarial system, the adversarial system focuses more on God protecting the victim. Now, we consider part of this system for example, the whole idea that you are presumed innocent until proven guilty, the trial must occur in a public manner, the principle that you must hear the other side and so on. **All these which constitute a very important guarantee to the rights of the accused person developed out of this adversarial system** which **originally was a trial by battle**. The inquisitorial system went on to form the heart of civil procedure in most of the countries of continental Europe. There is the focus on evidence and coming to the truth. **Fact compilation owes its origin to church law.**

Charlemagne and the early Carolingians

Charlemagne or Charles the Great (c742-814) attempted to re-create the Roman Empire and redacted customary law and created some legislation, but little doctrine or jurisprudence. He came up with this ideal.

Charlemagne:

- Attempted to achieve a semblance of the Roman Empire, established the 'Holy Roman Empire'.
- Held most of Europe, limiting the expansion of the Moors and ensuring that Europe generally remained Christian.
- Crowned Emperor by the Pope on Christmas Day 800.

Feudalism and law

Another important aspect of this period is feudalism. Developing slowly from the 18th century, feudalism links to the decline of royal authority, the result, in significant part, of invasions of Europe.

Feudalism is essentially a system of governance which links together land and people and hierarchy. Its basis is trust; the whole idea is that you have a hierarchical relationship between a lord and vassal. It is based on a personal bond or free contract of mutual rights and obligations between lord and vassal. The whole idea is that the lord allows the vassal to work the land and in exchange the vassal is going to provide a surplus of food and service to the landlord. The knights for example, are themselves subject to the barons whereby they must come to the aid of the baron whenever this is requested of them, and they must come with their villeins. The King is the ultimate owner of all the land. Feudalism is important because feud concepts have emerged in the context of European law, linked very often to trust. **The whole idea of feudalism is based on trust and allegiance**; on people who can be trusted to be good vassals, for example, or who can be trusted to provide military services if necessary.

It is not based on commercial exchange but **everyone knowing their place and people having trust**. Feudalism had a lot of impact on property and also on court structures and jurisdictions.

European law (c 1000)

Around the year 1000, while there were legal 'orders', there was **little sense of law as a 'system'**, with little doctrine or scholarship, no educational texts or law teachers and no class of professional lawyers. Therefore, **'Folk law', in very diverse forms, dominated**. Europeans were familiar with Vulgar Roman law and the Corpus Iuris Civilis, but they were not familiar with the Digest which was far more sophisticated than contemporary European law. Legal procedures at this time varied but **included trials by ordeal and combat**: essentially called on God's judge and ironically, church procedures were, in comparison, much more rational and professional.

The rediscovery of Justinian's Digest

The 12th century was a time of profound change. Arguably, a new type of law was needed. While Europeans were familiar with vulgar Roman law and some parts of the *Corpus Iuris* Civilis, they were not familiar with the *Digest.* **The Digest was far more sophisticated than contemporary European law and was rediscovered in Bologna**, Italy. The Digest generated considerable study and scholarship. **Law was not just whatever the King said or whatever the ancient customs were but was something rational and something that could be studied**. Therefore, it encouraged the growth of European universities. Indeed, over a long period of time, this scholarship which led to the reviving and revising the Roman law, would eventually dominate without eliminating many of its legal rivals across Europe. Universities are suddenly becoming places you go to study law and not just theology. **This meant that jurists and doctrine become important again**. Suddenly, law became something you can discuss, something you can have opinions about and you can study. **There was considerable adjudication but that does not mean that there was a lot of jurisprudence (case law)**. You cannot have jurisprudence unless you have the written accounts of judgements written somewhere. In reality, the Roman law of the Digest was mostly civil law with little of it being public law. **Roman public law was not given that much importance with all the importance being given to the Digest and therefore, the civil law**. The professors studying it came to be known as the 'Civilians'. Here, there was the civil law mixed with the Canon law. These were thought at university and this was therefore essential to the development of both substantive and procedural law across Europe. Canon law also covered issues relating to property, for example.

Customary and local laws remain important in practice for centuries. At this time, jurists and doctrine become increasingly important but, there was little legislation or jurisprudence and while there was considerable adjudication, reports of judicial decisions were uncommon and of limited use in future adjudication. **Feudal law subsequently integrated into *Corpus Iuris Civilis.*** Moreover, because of their role in legal education in the universities, the revised **Roman law and canon law were referred to as the 'learned laws'.**

Canon law

Canon law regulated the clergy and church governance, but it also included many matters now characterised as 'secular'. These were famously compiled – or redacted – by the 12th century monk, Gratian. The Clergy served as advisors and diplomats and were important for record-keeping. Moreover, canon law was a significant part of the 'learned laws' or the universities, being essential to the development of both substantive and procedural law across

Europe as well as theories of government. As with revived Roman law, canon law **provided a more rational and equitable standard for Europe's other laws.**

Numerous overlapping jurisdictions (claiming authoritative ability to 'speak'—interpret and apply—the laws):

- ***Church courts with canon law.***
- ***Local courts with folk laws.***
- ***Manor courts with feudal and folk laws.***
- ***Urban courts with unique urban law.***
- ***Merchant or commercial courts with the lex mercatoria (merchant law)***

There was a slow, general shift to redacted, written law and the creation of 'common laws' of different sorts, especially through the royal courts.

Kings and Royal law

Kings and royal law were gradually beginning to assert themselves, however. From around 1000 onwards, Kings and royal law started to figure on the legal map. **Although kings did have the power to create laws, their power was significantly limited in both theory and practice.** Whenever they affectively legislated this was always on the assumption that they were stating the law which always existed. **The whole idea that a monarch or a legislator can create new law out of nothing is a very modern idea**. In the past, laws achieved their authority through stating past practice. Moreover, rather than creating new legal rules, new courts to hear claims (according to other laws) were created. Here, there was an increasing use of professional judges (often trained in learned laws) who will very gradually begin to replace local law and move towards common laws.

The *Ius Commune*

'Common law' is used in many different ways in that period and what the English call 'common law' and what on the European continent was called the *jus commune*, both **derived from the same idea**. They express the same concept that a **division was made between laws which were particular to a region and laws which are common because they are shared by all the people**. The learned laws, as revived and revised in the universities, it was 'common' across Europe's frontiers in contrast to *iura propria* (particular laws). **The *ius commune* refers to doctrine, both originally in the ancient world and when rediscovered in the medieval world.** Note, again, the importance of jurists and doctrine known as the ***jus opinio*** (common opinion). This, increasingly, over time, would displace customs and other laws.

You had the particular laws then in England, you had the development of the common law. The Scottish had their own legal system which remained distinct till today. **Scottish law never amalgamated into common law**. **The expression 'common law' in the context of England meant the law which was common to the people of England and Wales**. On the other hand, **the expression of *jus commune* when applied in Continental Europe meant the law which was common to all the countries which were subject to the authority of the Catholic Church and who embraced openly the Roman law**. From quite early on, you have the idea developing that the common law of England is somehow different from the common law of France. The point when it comes to the *jus commune* was that in a way it was the common law of all the continental European states. Moreover, there were other types of common law apart from the *jus commune* such as the iura communia.

The English common law was a law common across the English Kingdom. It is a characteristic of England that it acquired a certain degree of centralised authority very early on. **They began to think of their own system as being a kind of English national law and forgot its roots in the Roman law**. The *jus commune*, on the other hand, consisted of both **doctrine and legislative text** and increasingly both the doctrine and the legislative text came to be considered as law. This by virtue of its formal and informal reception. This *jus communia* **formed part of a set of other common laws** which were common to a particular region or nation. The common law of England is an example of one of these common laws which has survived to the present day.

Iura Communia

In addition to the *ius commune* itself, there were other *iura communia* or common laws throughout Europe. Little by little, there's the creation of laws 'common' to ever larger numbers of people. This is frequently regional rather than national, but often occurred through royal law as it envelops more and more of other jurisdictions. The *iura communia* will ultimately, with the growth of the modern state, replace legal pluralism with common national laws. It also includes the English common law.

Early English Law, Henry II, and a 'common law'

Note that England was 'invaded' or 'settled' several times:

- The Saxons established considerable political/legal unity in 10th/11th century.
- The Normans added administrative ability to already centralised kingship.

Henry II (1133-89) was a French-born, French-speaking king of England credited with creating a 'common' law through the establishment of:

- Royal courts (from the king's council (*curia regis*).
- Jury trials (eventually shift from witnesses to decision-makers; has an impact on the form of legal disputes).
- The 'writ' system (focusing on procedure, so providing some insulation against the learned laws.

A law 'common' across the English kingdom, rather than specific to a class or region, **arise in the royal courts**. Over time, the royal courts were seen to present a better forum for adjudication. By the end of the 13th century, they had absorbed considerable judicial business. Over time, this 'common law' will begin to be seen as **distinctly English national law**. In other words, over time, the phrase 'common law' will be used to refer to the whole of English law and the tradition arising out of it.

Recap of 'Common laws'

The *ius commune* refers to both doctrine and law, but increasingly 'law' by its formal and informal reception across Europe. 'Common' across Europe in contrast to *ius proprium* (particular law).

Common regional and national laws were created especially – but very slowly – through royal legislation and royal courts. This is 'common' in contrast to other particular laws.

The common law of England was created especially – but very slowly – through royal legislation and royal courts. 'Common' in contrast to particular laws.

• 1066: Norman invasion of England. • 1133-89: Henry II (important in creating the common law of England). • 1170: Anglo-Norman invasion of Ireland. • 1215: Magna Carta. • Late thirteenth century: The Inns of Court develop.	• c1070: Rediscovery of Justinian's Digest. • c1050-1125(?): Irnerius (the first great jurist who taught at the University of Bologna). • Twelfth century: Gratian and the canon law *Decretum* (c1140). • 1182-1263: Accursius (jurist and redactor of the work of the Glossators).

THE LEARNED LAWS WERE TRUE OF ENGLAND AND IRELAND, BUT EARLY CENTRALISATION OF ENGLISH LAW MEANT IT WAS COMPARATIVELY LESS INTENSE THAN ON THE CONTINENT.

Legal education

For centuries, the universities taught ***only*** the learned laws.

- There were also 'guild-type' schools that taught the various particular or local laws; these were practical, but far less systematic and sophisticated.
- Much later, beginning in the late 17th century, national law will begin to be taught in the universities.

English universities also taught the learned laws, but, around the late 13th century, **the 'Inns of Court' in London begin to teach English common law.**

- Taught by practitioner-jurists, education was vocational and practical.
- Largely focused on the procedures (the writs and pleadings) of the common law courts.

The source of law

In the early to late Medieval Period, we have the idea that the sources of law are mainly **doctrine,** either written or oral. By doctrine we understand **commentaries on the Roman law**, which at the time, was more important than written legislation. In the UK, the pride of place was given to the common law. When talking about doctrine about being so important in this period, there is this expression either written or oral. **The prestige of particular jurists was such as they were seen as having the knowledge of the law embedded within them**; **their word was more important than written legislation**. Then, you also had **judicial interpretation in the light of doctrine**. Judgements were not a really important source of law as doctrine was because in order for them to be a source of law, you have to have a good system for recording all the judgements given and also the doctrine of precedence. The technology and the concept would be needed that prior judgements are binding on you. **The approach to previous judgements of the courts in the Medieval period is very similar to that in Malta today where there is no doctrine of precedence**. England was centrally governed earlier than other nation states, still within the Medieval period. The idea developed that English law was something different from the *corpus juris civils*. **English law was comparatively less self-consciously influenced by this Roman law tradition**. Ultimately, the roots of law in Europe lie in the Roman law. English law was comparatively less influenced, and **it lacked its authoritative central text, so lawyers started to rely on law reports of judgments**. When lawyers were teaching young students what law was, they would refer to judgements. This is how the common law tradition developed its focus on

precent, which is its defining characteristic. The focus of precedence distinguished the common law and also **this idea that judges have a very special authority as opposed to jurists**. On the Continent, doctrine has been on top followed by legislation and then judgements. On the other hand, in the common law world, judgements were at the top, with case law being the heart of law, followed by legislation and doctrine. In England when they talk about doctrine, they understand textbooks and not so-to-speak scholarly merits for the practice of law. Therefore, there is a completely different order of priority.

English 'equity', prerogative courts, and the Anglo-Civilians

Another interesting aspect of English law is **equity**, prerogative courts, and the Anglo-civilians. In addition to the courts of common law, here were **royal courts created, on the basis of the king's prerogative power to do justice, to fill gaps in existing jurisdictions**.

What happened to the Roman law tradition? In reality, the Roman law resurfaced through these special courts, which were not the courts of common law. **The King was considered to have this prerogative to do justice when the common law contained gaps**. These were the courts of equity and the prerogative courts. **The ordinary courts apply the common law as it was seen as a 'heritage'**. The common law has certain deficiencies and so the King would be petitioned for a remedy. With time, the Kings decided that it would have more sense to have separate courts were this power of the King could be exercised by judges whereby the power is delegated. The persons whom the Kings chose to be judges in these courts were **people who were originally trained in the *Jus Commune***. Because of that, **the *jus commune* entered English law by way of this idea of equity**. **Equity, although it suggests a discretionary power, became another body of law based mainly on Roman law.**

Therefore, at one level, the common law of Europe was the *jus commune*. The common law of the UK came to acquire a meaning very particular to England. In a sense there is this development of legal nationalism which occurs after this Medieval period.

'***Equity Courts***' arose in the 15th century because of common law rigidity; the judges were originally clerics trained in the learned laws.

Prerogative courts filled by ***Anglo-civilians***, with university-education in the learned laws; these Anglo-civilians also:

- influenced substantive and procedural law and system and method.
- were often specialists in comparative, international, and natural law.

Over time, a fierce rivalry develops with common lawyers; the learned laws were increasingly seen as foreign.

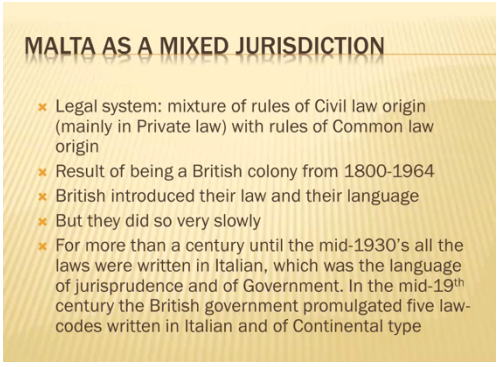
There were numerous types of each court

Summary

- Rather than clear, closed systems of law, European legal history is a story of considerable legal and normative hybridity.
- While we generally focused on legal hybridity, there was significant competition and conflict the different 'legalities.'
- Much of this took place between various *iura propria* and *iura communia*, including the regional and national common laws that would expand, alongside the state, into modern national laws.

4: MALTESE LAW AS A MIXED LEGAL SYSTEM

The Maltese legal system developed as a mixed legal system **when the British colonized Malta**. In so far as the Maltese legal system contains elements deriving from the common law and from the civil law, this mixture is something that developed along 201 years. The first thing to point out is **that British rule is the point where the legal system became a mixed one is because all the rules Malta had previously come from continental Europe**. According to certain scholars, some of the rules relating to property and so on found in Islamic societies are themselves quite close to those of Roman law. So, **even if Malta had been rules by Islamic law, that does not mean that the Roman law tradition did not continue**. Also, there is evidence of a period in time when Islamic law was central to the way we think of law. In particular in Malta, we have the concept of 'ħaq' which actually means justice. We still, in a sense, have at a popular level various concepts of justice which probably derived from a Semantic background. **Roman law appears to have been the basis of our laws at least from the 13th century until the 19th**. This continental inheritance is something the British had to deal with when they took over the Maltese state. **The Maltese legal system would not be subject to an aggressive attempt to transform it into a common law system**. You have this situation where **the British were actually involved at preserving Malta's continental inheritance**, legally speaking.



Why was legal anglicisation so slow?

Mainly, there was **resistance from Maltese lawyers and judges**. Also, the **impracticality** of transforming the system from one based on civil law to common law. Another explanation is that the British wished to placate the Maltese. At the end of the day, the British government was not in a hurry to fully anglicize Maltese law because it would have meant treating the Maltese as entitled to the same rights and liberties as English people. It is interesting to note that ultimately it was the British authorities who took the decision to dismiss Stoddart from office who argued that the codes should be based mainly on continental law and should be written in Italian and not in English.

5: HISTORICAL LEGAL HYBRIDITY II: FROM THE MEDIEVAL PERIOD TO THE PRESENT

The growth of the State

The concept of judging and of finding the law in order to apply it, was much broader and much more liberal than our modern concept. In the Medieval Ages, the idea of the sources of law was not as rigid and as hierarchical as it is today. The primary understanding about how a judge should go about his business has become very positivist. Judges don't see themselves as part of a system where their role is limited and circumscribed by the positive orders of the sovereign, they see themselves as being part of a system where the aim is to discover the law and the law can be found just as much in the law of nature as it can be found in the orders of the sovereign. How did this develop?

We are looking at what happened from the period of the Middle Ages to the present to change the way in which our understanding of how law operates and also to change the way in which legal systems function so that we have gradually moved away from a position of an institutionalised legal pluralism to one where **nowadays we consider it to be the norm that**

there should be a single legal system operating within a single nation state. All forms of legal pluralism are considered as exceptions. Until Medieval times, the rule was that you had legal hybridity and pluralism and the exception was where you had areas which were covered by a certain common law which was common to all the people in that region. **Nowadays, the rule is that you have the law of a single nation-state**. Malta is an interesting example of a system where in a way you continue to have this legal pluralism because it is a mixed legal system and therefore, we have both continental and common law elements coexisting side by side with one another.

The big development is that you have the growth of the nation state. Increasingly, the princes began to claim more power free from either internal or external interference; this included the claim to **make law**. There was increasing levels of centralisation, rationalisation, and administration. Moreover, there was a continuing, progressive movement towards legal unity (i.e. national common laws): there was a corresponding emphasis on law-making by a central legislator, but **these changes still took part within limitations of established laws**.

From 1500 onwards, you have the reformation which has a huge impact on the unity of what used to be called, 'Christendom.' There was **this idea that all of Europe was united on the basis of religion and Roman law rather than divided into different nations**. With the Reformation, you get the idea that there are different varieties of Christianity, and you enter a period where the **princes start to become more important even legally because the idea develops that the people should follow the same religion as their prince**. Thus, the prince here held great power, including that to make law, by virtue of his status of sovereign.

Both the (legal) humanists was well as the reformers sought a return to an earlier text – the Digest and the Bible respectively; this is the concept of 'purified of interpretation'. This encouraged an emphasis on law-making, specifically by God and Kings, as opposed to merely creating law. Here we had the State against the church and local or national laws against the *ius commune*. The Reformation was (i) both reactionary and radical and (ii) linked ideas on human nature and law as well. One should note also the Counter-Reformation which involved the continuing importance of canon law, and the importance of the 'late scholastics.'

The idea is that it is the prince or king who makes the text, and the jurists and church are not that important. In other words, at this time the idea was that **the *jus commune* as a whole is less important than written legislation**. By the mid-17th century, the church as a separate entity had shrunk to a minuscule shadow of what it was. In England for example, you have the development of the State which incorporated the national religion and therefore, an established state church. The political legal power moves to the 'national' level, therefore, with greater freedom from external (other states) or internal (within the state) interference.

In England, there was a slow movement towards legal unity (across its regions). Wales had already been legally and administratively absorbed in the 16th century. In Scotland, the crown was united with that of England and Wales in 1605. Scots law was protected, but a legal union was defeated (largely by common lawyers) and its laws remained (and remains) distinctive, a 'mixed jurisdiction'. In Ireland, English law would finally marginalise native law in the 17th century.

Towards sovereignty, legislation, and parliamentary supremacy

The **protestant Reformation/Thirty Years War** (1618-48) was also associated with the religious wars. After the Reformation started, there developed long decades of warfare

between protestants and Catholics. In 1648, there was an attempt to move beyond this state of warfare and that is the Treaty of Westphalia, **the Treaty which in fact declared that the religion of a particular country must be the same as that of the prince**. The power of the prince was much more than in the Medieval ages. **He became the source of the religion itself**. In England, there were similar debates that led to the 'War of the Three Kingdoms' (aka the 'English Civil War') leading to parliamentarians aligning themselves with the common lawyers against the king. This is all part of a slow movement towards the modern concepts of sovereignty, legislation, and parliamentary supremacy. The plurality of laws continued, but the various laws were being absorbed into common laws, often legislation from kings and legislators.

'Modern' natural law and 'institutional' writings

Another interesting development was the development of a **new modern natural law tradition** and also the development of **institutional writings**. **The idea develops that law is something which is confined to a particular nation and then you have the development of a modern natural law which sought a law being built on reason and not on a particular religion.**

'Modern' natural law: **sought a natural law that was built on reason** and not linked to a particular faith. This suggested that it was possible to redact natural law and, by legislation, to transform it into positive laws.
'Institutional' writings: these were works of doctrine written in the **vernacular** and following the simple and comprehensive approach of Justinian's Institutes. These were redacted from existing plural laws to create a harmonised national law and suggesting potential reforms.
Both developments further weakened the *ius commune* by focusing on national laws and the power to legislate. Consequently, this prepared a way for modern codification.

Colonialism and early modern codification

Western colonialism often required common laws for their colonies, often in secular or religious codes, but also added new pluralities with the use of native laws. Traditionally, codes were any official collection – or redaction or codification – of laws, usually having legal force. These did not eliminate (abrogate) or alter earlier laws nor did they necessarily create common law and legal unity.

When we are talking about codification, this is always something which is being carried out nowadays in the shadow of the French Civil Code and the reason for this is that the French Code is really considered as being **the first example of a modern code**. What makes it modern is that **it represented a fresh start**. The French Civil Code was really a completely new beginning. It meant that the French courts and lawyers could not go back to Roman law to make arguments in order to explain what the legal situation is. The idea developed that this code was a completely fresh start, any interpretation of that code should be ideally conducted in terms of the code itself. Therefore, you do not allow any references to custom, Roman law. **By contrast, codes before the French Code, do not represent a fresh start because they do not abrogate earlier laws**. The earlier codes did not necessarily create common law and legal unity. There is a kind of parallel between the institutional writings and codification in the way in which they worked. In the 18th century, you had these elements of both Reform and Radicalism. There was **a focus on reason, on criticising royal interreference, religion influence and intolerance**.

In brief:
The role of the sovereign changes from the person who simply declares pre-existing law to becoming the legislator. This is an idea which comes to full fruition in Modernity. You also have the Reformation which can be viewed for our purposes as being very much about part of the same movement towards purifying the text of the Roman law and of the Bible of the layers of interpretation which had accumulated in Medieval times. **The Reformation also means that the church reduces in importance and comes to be incorporated within State power**. The idea was that the religion of the prince should be the subject of his subjects. You cannot accept that, for example, a protestant prince would have catholic subjects or vice-versa. What we are saying is state powers being consolidated to the extent that the church seizes to exist as an independent entity form the State and **comes to be seen more and more as part of the overall set of institutions which the ruler controls**. Henry VIII became the Head of the Church of England which became part of the British state apparatus.

In the meantime, the other thing that started to happen in England was that parliament started to assert themselves as being the real legislators. In England, there was **a movement towards parliamentary supremacy** and also the creation of a constitutional monarchy, this process did not take the same shape on the continent. On the continent throughout the 18th century, France was still ruled by an all-powerful monarch, and it was only with the French Revolution that France and the rest of Europe started following the British model. All these changes also brought about **changes to legal doctrine; the development of modern natural law which is not based any longer on God.** The idea was let's try and base it on **human reason**. At the same time, this natural law was being **accompanied by a movement towards institutional writings which sought to explain the institutes** of English law, of German law and so on. These writings were written in the **Vernacular**, and they were part of this process by which a national law came to be developed and elaborated. **Writings being instituted in a way also prepared the root for codification**. Once you had texts of books which collected in them a statement of the laws of a particular region/country in the Vernacular, then they were preparing the way for codification of the laws of that country. However, codes were also created in the colonies. Therefore, you had these two processes occurring side-by-side one of institutional writings, such of those of Blackstone, and codification which was seen in the same way of bringing together different rules and laws which apply within a particular nation.

18th century

In the 18th century, you had elements of both Reform and Radicalism. This time generally sought more general happiness on the basis of reason. They criticised royal interference, religious influence and intolerance and inequality and restraints. In terms of law this period sought or encouraged greater clarity and more systematic law, reforms in criminal law, and legal equality and unity against the existing plurality of laws. In terms of politics, this time led to revolution!

Revolution and Public law

If we look at the American Revolution (1776-83), we can see how this process created a written constitution, a bill of rights and also a Supreme court with the power to conduct constitutional review. The American Revolution was moderate and resulted in the reception of English private law and the important changes in public law. The American Constitution (1787/8) created a workable government, a 'higher law' above legislation, and a 'Bill of Rights'. Over the course of the 19th century, the Supreme Court developed the power of 'constitutional review', the ability to interpret the Constitution with finality. The British

'constitution', on the other hand, is contained in numerous 'written' texts (i.e. legislation and jurisprudence) and 'unwritten' conventions and principles. There is no single text establishing fundamental law and there's no formal distinction between constitutional and ordinary law. moreover, there is no (modern) domestic Bill of Rights.

Anglo-American Criminal Law

Similar processes were occurring when it came to court procedure. Until late in the 28th century, Anglo-American criminal trials were dominated by inquisitorial style judges, and required the participation of the accused (as well as the jury). In the beginning at this time, lawyers become more involved in the process, altering the role of the judge, standards of proof and the law of evidence, and the quality of the legal records involved and the possibility of appellate review. The result of all that happened in the Anglo-American criminal law world was that you have **a movement to standardize the doctrine of precedent**.

The 'Revolution' in France

In France, the Revolution began in 1789. This Revolution is linked to the demands of the middle classes, to radicalism and (modern) natural law. It began in 1789, but the country swings back and forth from radical to reactionary governments for decades. This led to: changes in public and private law, i.e. the elimination of most feudal and customary rights, a national common law enshrined in a new type of codification and significant limitations on the judiciary in favour of legislators. It ultimately altered society, politics and law profoundly throughout Europe.

Here, you had governments which sought to build on the Revolution and governments which sought to build on the monarchy. France was going through all the different forms of government which were being experimented in the Revolution. In the end, this process in France will also produce durable changes on the legal system. **The idea becomes what is law is what is written down**. The idea became that **positivism is seen as an intrinsic part of the Revolution**. **The laws from now on will be written down and every person should be able to know them**. The idea develops that law should be knowable in advance, they should be compiled with reason, written in the Vernacular, and it derives its legitimacy from the fact that they are made by legislators on behalf of the people. **They sought to express the common will of the people**. This all comes together, and the results are that there is greater legal clarity and unity. The idea was not so much that you must obey a law because it binds you but rather that you must obey it because it persuades you. **From the 19th century onwards, the idea developed that State law is the only real law**. We don't expect any more jurist to cite books of authority which are not referring at some level to the written legislation passed by the Parliament. That written legislation has to be applied according to a hierarchy. You have to show in terms of the hierarchy of sources of law, that you are citing the most authoritative source possible for your argument. Therefore, there is a kind of coming together of 3 ideas in the modern nation state – one of them being nationalism. In principle, nationalism means the same nation should have their own State.

Here we had significant changes linked to ideas of popular sovereignty, nationalism, and liberalism (including *laissez-faire*). There was a movement towards active law-making by legislators on behalf of the people (including Britain's 'responsible government') and positivism, i.e. an emphasis on positive law rather than custom or natural law. The results were greater legal clarity and unity, frequently expressed, on the continent, in codification.

Furthermore, there were more clearly binding – rather than merely persuasive – law and **state law becomes seen as the only real law.**

'Substantive' codification

Codes may regurgitate, modestly reform of completely revolutionise the previous law.

'Formal' codification: merely collects or 'tidies up' law; is typical of early European and all common law codifications.
'Substantive' codification: attempts to create a set of laws that is authoritative, comprehensive, systematic, and harmonious. It eliminates (abrogates) previous or conflicting law, unifying the legal system. It is often seen as creating a fresh start (especially after a change in government). It is ideal civilian codification (although they also use formal codification).

Legal political centralisation and representative government. The latter being that government must be by the people, of the people and for the people. The modern nation state is so much different. **This kind of codification that was initiated mainly by the French Civil Code is different from the formal codification that took place before**. Formal codification collects the various laws perhaps grouping them by subject. The Code de Rohan in a way you have a whole so-to-speak set of different rules all put together in one text and this is not an example of substantive codification. **Substantive codification** puts the law in a more logical and harmonious form. In Malta, there is an attempt to divide up the different areas of private law. In modern codes, these will deal only with one subject matter, it will process all the rules relating to the subject in a manner that puts them in a systematic and harmonious form. This substantive codification eliminates previous law. In Malta, when it comes to our Civil Code, there is this particular characteristic which places its modern status into doubt – **our Civil Code does not eliminate Roman law nor the feudal laws which used to be applicable before our civil laws were compiled together**. There's no provision of the Civil Code which says that you cannot apply Roman law if there is a gap in our Civil Code. **In France, only the Code itself can be referred to**. Where there is a gap, the way they fill it up is by reasoning by analogy from another part of the Civil Code. Reasoning by analogy occurs a lot in France but not in Malta because **in Malta we are not obliged to stop at the Civil Code and can apply all our ancient sources of law**, particularly Roman law but even Canon and Feudal law. This is partly a source of strength of the Maltese system. It is also a source of weakness because it has the effect that **we cannot achieve legal certainty very easily**. Also, we lack the issue of precedent. Because **our codification is incomplete**, the areas which are not really well covered by our Civil Code are not very few but numerous. We have this issue with our system which makes it a pre-modern system in this respect and casts **doubt on whether we have achieved substantive codification**. It can be a source of strength because it makes our search for Maltese law **richer**. Codes may reform or completely revolutionize the previous law. **Our Civil Code did not really represent a fresh start**. In Malta, our Civil Code didn't even exist as a single entity until 1942.

Bonaperte (1769-1821) and the *Code Civil*

What we find is that the *Code Civil* was the result of the work of a Commission established by Napoléon. This established legal unity (a national French common law) and legal equality. It also confirmed a shift in power from jurists and judges to legislators and linked to changes in public law. **The *Code Civil* replaced the previous body of rules with a common national law for France and established equality**. Judges in the **Ancien régime** were often considered to be able to come up with new rules which nobody had heard of before. After the

French Revolution, the idea developed that **judges are simply functionaries of the state**. Judges should not interpret the law but simply apply it. The idea was you are a judge, our laws are transparent, they aim at achieving equality, therefore there is no more place for customary rules, for judges who consider themselves to be rival sources of law. The judge was simply a humble civil servant. **There is a shift in power from judges and jurists to legislators**. The Revolution did produce these changes in legal theory but, at the same time, most of law in the *Code Civil* was pre-revolutionary and ultimately rooted in Roman law. **The way in which it was presented was very new but the content itself wasn't.** Most of the law in the code was pre-revolutionary and rooted in the various French traditions, but its form marked significant change in legal and political thought. **The idea was also that this law should be accessible to the public**. Therefore, a very clear style of drafting and broad language. Its conciseness, clear style and broad language. Moreover, **while such formal codification was novel, its sections were divided in a traditional Roman manner.** Besides, there were numerous other French codes of civil and criminal procedure, commercial law and penal law.

The spread of codification

Codification spread throughout Europe, and it did so both by **legal prestige** and **experience** (Napoleon's armies). Napoleon eventually declares himself Emperor. In this period, the French revolutionary armies spread all around Europe. In a way, **Napoléon exported the French civil code through this military projection of French influence in most of Europe**. In Malta, the French only spent two months and the remaining two years of French rule the French were stuck in Valletta. When it comes to this French period in Malta, although certain rules were passed, nothing of them seems to have remained. With the only exception that the laws abolishing slavery. When the British came, it was the Code de Rohan which was the main instrument for Maltese legislation. This continued throughout the 19th century in the case of civil law. It was eventually ended and was **replaced by the Civil Code.** Therefore, in reality, in Malta although we have a Civil Code which was influenced by the French codification, nevertheless, **our code does not derive from the period of French rule over Malta. It was produced in the context of British rule**. **British colony rule in Malta was also a period when Malta's continental legal heritage was solidified and given more importance**. Both the common law and continental influences peaked in this time. The codification was originally in Italian. **The British were actually ready to accept to pass laws in Italian and to keep it as the language of administration**. Therefore, in a way the Maltese law became a mixed system in a context where the legislators themselves were happy to promote both English law principles in the area of public law, especially administrative law and criminal law, and also to introduced continental law institutes like codifying the laws.

One must note the reaction of the so-called 'Historical School' against codification, seeing it as 'inorganic' and premature, cutting the law off from the people and their culture. French influence continues throughout the century including the 'reception of the *Code Civil'* throughout Europe, Latin America, and French colonies. Such borrowing is often linked to independent statehood.

The German code is regarded of having a slightly different source from the Code de Napoleon. It reflects the work of German Roman law scholars who developed an abstract tradition of legal thinking.

Anglo-American reforms

19th century Anglo-American reformers but rather than being expressed through a desire of creating codes of law, this was expressed in **creating a more formal hierarchy of courts with clear appellate powers**. They aimed at achieving a more structured and logical system in the way the common law is applied. Here, legal unity was created by the fusion of common law and equity and elimination of other courts. There was also greater professionalisation which permits relaxation of the rigid writs, allowing more general legal actions, the role of the civil jury is relaxed, and only legally trained peers participate in the judicial decisions of the House of Lords.

In America, this urge for reform focuses on the Constitution. That is, at this time in the US, its constitutionalism became increasingly important. In addition, doctrine was also important and linked to new challenges and to greater university education in the law and the nation centralises considerably after the Civil War.

Therefore:
On the European continent – substantive codes
England – rationalising the hierarchy of the courts and also the judicial process.
USA – constitutionalism.

Stare Decisis

By the mid-century in England and the USA, **precedent has become the rule of stare decisis**. Precedent no longer remained a merely persuasive principle in Anglo-American jurisdictions. It becomes the rule of stare decisis, where a single judicial decision is binding on (at least) inferior courts. Arguably based on justice by providing greater legal clarity and certainty (for the people and the legislature). Even a single decision by a Superior court is sufficient to create a binding precedent which has to be followed. This was only possible because of more detailed, accurate, and accessible law reports as well as a clearer court hierarchy and appellate system. **It was less necessary on the continent because of the importance of a juristic tradition and, subsequently, modern codes; but adjudication was always important.**

This has not developed in Malta. The idea behind this doctrine is to produce greater legal certainty and clarity for the people and the legislature.

'Germany' and the BGB

- Moved from confederation (1815) to unification (1871).
- The Pandectists, a school of jurists, developed from the Historical School. They:
  - Focused on the principles within Roman law.
  - Were important to German codification.
- Drafts of a Civil Code existed from (at least) the 1870s; the Civil Code—*Bürgerliche Gesetzbuch* (BGB)—was finally approved in 1896 and promulgated (enacted) in 1900.
- The BGB was unique and innovative in its abstract and conceptual style, its structure, and the use of 'general principles'.
- Influenced the law of Brazil, Greece, China, Japan, South Korea, Taiwan.

Legal 'formalism' and its critique

Legal formalism **treated law as being like maths or science with definitive answers**. It attempted – or attempts – to separate law from policy or other values. Moreover, it linked to legal positivism and other social and political developments. It also frequently linked to political conservatism as it may inhibit judicial creativity (and favour the *status quo*). Examples of its critique include French Exegesis, the German Pandectists, and many common law judges; dreq criticism later in the century from François Gény (France), Rudolf von Jhering (Germany), and Oliver Wendell Holmes and 'legal realism' (United States). The reaction against legal formalism was evident in the Swiss Civil Code which was different from BGB in its language and structure and acknowledged its incompleteness. **The French code presents itself as being the complete codification whereas the Modern Swiss Civil Code starts out by acknowledging its incompleteness**.

The 20th Century

- World War I (1914-8), communism, fascism, depression, the failure of the League of Nations to settle international political and legal disputes, and World War II (1939-45).
- Followed by:
  - an attempt to strengthen international institutions and international law.
  - Cold War and the 'arms race'.
- Movement towards:
  - Liberal/social democracy.
  - Mixed/market economies.
  - International and supra-national legal institutions.
- This was especially true with the European Community and the 'fall' of communism.
- *These trends are continuing into our century ...*

What we are showing is how **legal hybridity was replaced** by a more efficient system, but at the same time, one which is much less hybrid. Here, we are saying that in a way, it's in this context that we have to understand even the legal education we are receiving. We are being trained in a very much 20th century context whereby the structure of the law course is ultimately designed to teach us Maltese law. Maltese law can be learnt best in Malta. The whole idea is you study here, and practice here. **It's very clear that our idea of what is law and what are the source of law is very much focused on written legislation**. **Adrian Dingli**, in the 1850/60s had issued a small book called *'The Force of Custom'* where he gave his opinion in relation to mixed marriages in Malta. You can see how bit by bit, the concept of what is law has changed and how it has narrowed. **The focus remains on the legislation** and then maybe in the judgements, nowadays. These are all signs of how our system has become much more common law but also how it is much more modern in the way we think of law.

Summary

- The late medieval and early modern periods witness
  - the gradual *expansion of law* under the co-ordination of an emerging, comparatively centralised, 'state'
  - the slow *elimination of legal—and normative—hybridity* by ever wider common laws
- In the modern period, especially from the nineteenth century, there is a strong shift towards:
  - *nationalism* and legal *positivism*
  - the *centralisation* or unification of jurisdictions
  - legal *monism*, the uniformity of laws under the state
  - the formal (and significant) *marginalisation of other norms*

6: PROCEDURE IN CIVIL & COMMON LAW TRADITIONS

Procedure is basically one of the biggest divergences between the common law and the civil law system. That is to say, when we are taking about common law systems, we are talking about a very different approach to procedural law and court procedure than when we are talking about civil procedure.

Donovan and comparative legal anthropology

'Legal anthropology looks at "law" from a cross-cultural, comparative perspective. The goal of the enterprise is to identify general principles that characterize this slice of sociocultural life so as to understand this aspect of what can be termed the normative regulation of society: those social forces generally working to create and maintain the ties of cohesion that hold society together against the tidal pull of individual interests (vii).'

'Here the goal is to map the different legal systems as points in conceptual space, hoping to tease out some patterns of cross-cultural validity that are both general enough to apply to a broad number of distinctive cultural contexts and specific enough to be intellectually interesting (21).'

'The goal of comparative anthropology is—or should be—rarely to find a rule of "law" that rises to the level of universal validity on the model of physical laws of the natural world. The more modest and achievable goal intends to derive not laws but generalizations that require only minor corrections or qualifications in order to capture the essential elements of any particular case. Comparison allows the special features of the local context to be more readily and meaningfully identified (161).'

We are looking at procedure from a perspective which is very broad when you think in terms of kinds of law. Rather than thinking about law in the modernist way, where we think if it as being a single unitary system, now we are trying to think of law in this much broader way. The modernist concept of law is not helpful for understanding the contemporary world. **One can see that we inhabit a world where not only space has been compressed, but also law**. This idea of conflicting and co-existing bodies of law really describes the world we live in today. We live in a world where we cannot assume that everyone around us belongs to a particular religion, knows Maltese and so on. We knowingly have become a hybrid-zone and in a way, very urban – conditions which in the past used to be found in big cities. **The whole idea of thinking about law as the written legislation of the State is clearly not enough**. So, in a way, **the idea of legal pluralism has become very popular with lawyers, namely European union law**. **In order to try and come up with a definition of what law is, which does not assume that law is simply written legislation of a nation-state, the legal scholars have imported a concept developed by anthropologists to make sense of law in societies where there is no real nation-state system.** Anthropologists are concerned mostly with the 'little people' and what happens in remote places, small villages, places occupied by tribes and so on, who's lifestyle is pre-modern. **The aim of anthropologists is to describe whereas lawyers want to make law**. Lawyers do not engage with academic scholarship simply to try and create new trends; they are focused on the question what is the law? Where do we find the law? So, when they engage with anthologists' concepts, they are going to harness them in a completely different way.

Modern comparative law

Western traditions: Anglo-American, Continental, Nordic.
There are other traditions such as Asian traditions and Hindu traditions. We are talking about a broad range of different traditions.

Three legal actors

In this context, it is really important to keep in mind who are the three legal actors: **legislators, judges and jurists** and the importance each one is given in the Anglo-American and Continental systems.

AALS	CLS
• Legislators: – Traditionally seen as secondary. – Very important since the nineteenth century. • Judges: – Traditionally seen as central. – Still important, both in reality and to the self-image of English law. • Jurists: – Traditionally, there was little written doctrine (compared to the continent). – Became important in the US in the nineteenth century, now very important there and increasingly important in England and Ireland.	• Legislators: – Traditionally perceived as less important than jurists or judges. – Since the nineteenth century, extremely important, especially in codification. • Judges: – Traditionally important, but seen as secondary to jurists. – Now important, but seen as secondary to legislators. • Jurists: – Traditionally seen as central. – Now important in proposing alterations in the law.

Procedure is really at the heart of actual lawyering. There is this big difference between substantive and procedural law. There's a big difference between the traditional continental approach to procedure and the traditional common law approach.

The difference revolves around a number of issues:

1. **Traditional common law/inquisitorial trial**: When it comes to trial procedures, what we find is that the roots of the continental approach are really to be found in the inquisitor's courts and inquisitorial procedure. The inquisitorial procedure was all about asking people a number of detailed questions and the judge/inquisitor trying to find out the truth. The focus was about creating a **detailed dossier** which would **contain as much detail as possible** to **allow the inquisitor to decide** whether the person actually committed the act or not. A lot of importance was given to **fact finding by the inquisitor**. He would try to question anyone who would possibly have any information on this. Consequently, this process would take a lot of time and would result in the amassing of a lot of documentation. The main characteristic of the continental approach to trial has to be understood as emerging from the practices of inquisitorial style courts. In the continental trial, the focus is on **the dossier creating this large file which will contain a lot of information**. More important than what is actually said during the trial is what gets filed in the dossier. Secondly, **speed was not important** in fact it was seen as something which might lead to hasty judgements. Within the context of an inquisitorial trial, the more time was spent was seen as a sign that the judge was carefully evaluating all the evidence. The approach always favoured truth and justice over time. Discovering truth took time and this was favoured over efficiency and speed. Therefore, so far, we mentioned **writing**, **delay** as a concern with justice and with truth. Something else is **the role of the judge inquisitor**. The inquisitor judge is the one who is compiling all of the evidence, and who primarily asks questions. This means that the **lawyers play second fiddle to the judge even when it comes to questioning witnesses**. These characteristics together show that there was a certain approach to court trails which continues to the present day.

2. **Traditional common law trial/adversarial trial**: the adversarial trial implies that **a trial is like a battle**. A court trial is like a battle/game/competition where you have two different parties, each one trying to prevail over the other. So, the first characteristic then is that while the inquisitorial trial emphasising the authority of the judge who is the one conducting the process of investigation, **this trial emphasises that the trial is a sort of competition between the lawyers of one side and of the other.** This meant that the judge's role was not the same as that of the inquisitor who was the one asking the questions and conducting the research. **The judge in the adversarial trial is more like a referee**. The referee is not competing himself within the adversarial trial. **The aim is not so much to find the truth but to win the case**. The judge is simply a referee; he has got to remind the parties what the rules are and penalise them if they break them. In a pure adversarial trial, **what happens in the court room is really important**. You win or lose the trial there and then in open court. The role of the jury can also be understood in this context. The old Latin writers used to say *vox populi vox dei*. **The judge should not question witnesses unless it is absolutely necessary** because he is not there to conduct the trial. It is the two players, the lawyers, who have the duty to 'play the game'. **The jury** will then decide who won and who lost. In the context of an adversarial trial, **time is very important**. It is not like an inquisitorial trial. The starting points of the adversarial system are very different to that of the inquisitorial. The adversarial has developed very complex rules relating to how the game is played, these are now known as **'due process'** and are regarded as being really fundamental throughout the world in order to have a fair trial.

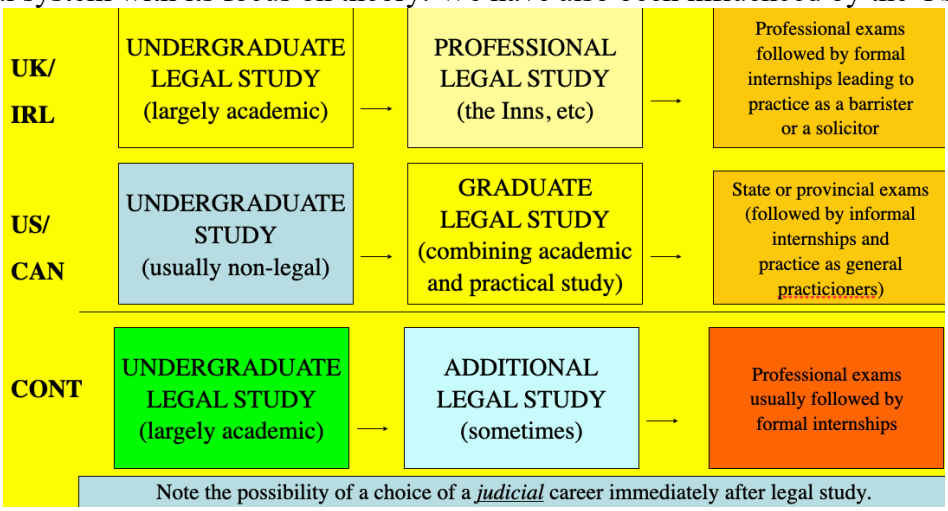
Malta

Bit by bit, there has been a lot of mixing of these trials. For example, **Malta, an originally an inquisitorial trial system, now has the jury**. Although on the surface, systems may appear to be very similar nowadays, you may still see the underlying inquisitorial culture, such as in Malta, when dealing with Civil Court proceedings. **In Malta, the focus is more on the dossier** for example. The PowerPoint by Raisa Busuttil brings out how **the Maltese system is a compromise between the adversarial and the inquisitorial system**. On the surface it looks like an adversarial trial, but you encounter a lot of things that are different such as the **court delays, judges often question witnesses themselves, the limited use of the jury, the focus is more on the written dossier rather than what happens in court**, etc. The focus is on a long-drawn-out process during which evidence is gathered very often with the help of the judge in order to find the truth. Just like in traditional inquisitorial systems, **we think that court trials should be about finding the truth rather than winning a game.** Busuttil makes clear that in the adversarial system it is the lawyers who controls what goes on during the hearing – they agree what will take place during the trial. They structure the case in agreement between themselves and the judge's consent. In the traditional continental approach, it is the judge who decides what is going to take place. In Malta the rules are structured in a way that very often, key decisions have to be taken by the judge together with the lawyers and in principle the judge can override the lawyers. This shows the judges powers. **In the case of the Maltese legal culture, it tends to be closer to the continental than to the British.**

Three legal actors = legislators, judges, jurists.

Legal education

We are already being socialised into a certain understanding about what studying law is all about. This is partly through past students, form lecturers, judges and professors and so on and also by the syllabus itself. Most of us will have the idea that we are in the process of becoming lawyers which is an interesting assumption to make. One may study law for various reasons not necessarily because one intends to become a lawyer. In order to understand why we give so much importance to practice, one must understand that within the Anglo-American world, practice was traditionally what turned a person into a lawyer. The idea of having to go to university to become a lawyer is founded in the Continental world. In Malta, when you are talking about practice that is what really counts for practitioners. In so doing, we apply a Common law understanding of what law is. What matters ultimately is what is practical for us. In the UK, pride of place is the training you get on the job. Although the systems have converged to a certain degree, you still have the idea in Italy that you will receive the most valuable training from the university. The American system is the result of gradual evolution over time – the general expectation that you would have first gone to university to study a subject which is not law as such. You start off by getting a B.A in something and then you can apply to be registered as a law student. Therefore, it is the norm to study it as a post-graduate. The different legal traditions have produced different understanding about what law is about and how to study it and a different trajectory for a law student. Malta is a hybrid system with its Anglo-American focus on practice and then the continental system with its focus on theory. We have also been influenced by the US.



Lawyers

AALS: In England, Ireland and Wales you have the distinction between barristers and solicitors. Traditionally, barristers were not in direct contact with the clients. In the USA, general practitioners who may represent clients in court as advocates.
CLS: this varies greatly from specialised advocates to lawyers providing more general legal advice. Note the move towards general practitioners and the importance of notaries.

Traditionally, the distinction between 'civil' and 'criminal' law determine (i) substantive and procedural law applicable and (ii) which legal actors and parties are involved; also includes burdens or standards of proof and rules of evidence.

The Judiciary

AALS: The idea in Anglo-American legal systems is that the judge was the embodiment of the law and makes the law. Becoming a judge is a separate career right from the beginning; they follow a separate career from lawyers. In Anglo-American legal systems, the figure of

the judge is very powerful. In Anglo-American legal systems, you have the legal training as already explained and then you have legal practice usually as a barrister and then you become a judge either because you are selected or elected which is also very often the approach in the US.
CLS: On the Continent, judges often make decisions as collegial bodies. That is the same in Malta. In the continental legal system, you have the legal training and practice but usually you have a separate course.

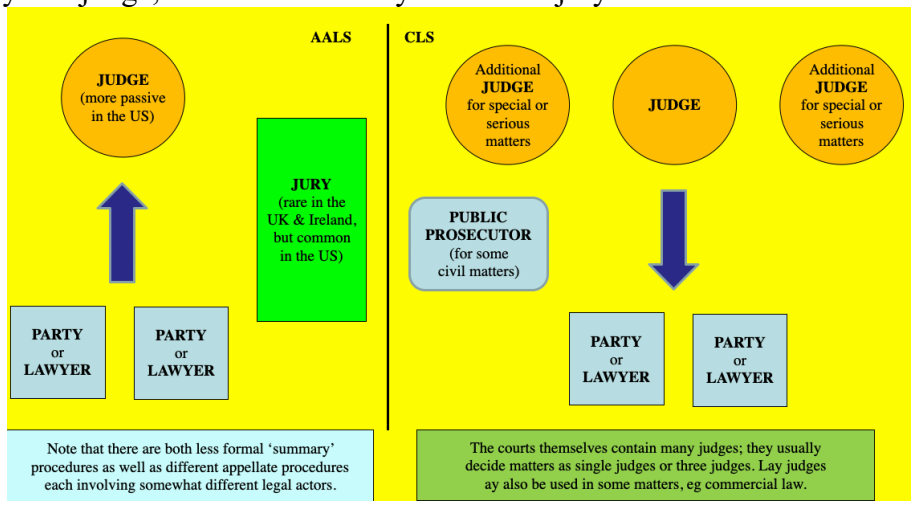
Juries and lay judges

AALS: Juries are basically considered to be a constitutional value. They are very important to the self-image of the Anglo-American law. There are also English lay judges. They assume this role which is judicial in nature.
CLS: Civil juries started to decline in use from the 19th centuries onwards but in the US, they remain more common. In continental legal systems, juries have also been introduced in many cases generally in criminal law cases which reflects the influence of common law.
Lay judges in some respects can be similar to jurors but with some important differences.

Here we are seeing **AALS versus CLS**. Here we see that the Anglo-American legal systems emphasis that a trial has to take the form of an oral proceeding in court which s continuous. If there is delay, that may be from one day to the next but won't be postponed to, say, 4 months, the while idea of continuity. While the court is dealing with one case, it cannot hear others. continental – written phase vs oral phase. The written dossier is really what is so central on the continent. The idea is that you are trying to stuff this dossier which all the information on the case. In Malta we are a mixed system so in principle the judge should allow the lawyers to ask questions to the witnesses and should be simply a referee. In practice, the judges do actually engage in a lot of questioning themselves. more than you would except in a strictly adversarial system. often the trial is something which is stretched out even over years, in a peace mean manner. Civilian courts because they are presided over by a judge, the judge can decide for himself what evidence is relevant and what is not important. There's traditionally there is no need for complex rules of evidence within an inquisitorial setting. But when you have a jury trial, the tradition in common law cases, then you have much more drama and theatre with the lawyers addressing the jurors who decide the facts. When the jury was introduced in Malta, it was specifically in relation to the crime of piracy. In Malta, in the past, the distinction between law and fact becomes critical when dealing with a jury trial. Question of fact – decided by the jury, questions of law- decided by the judge. There is a different approach developed which separates these two once you have a jury trial. One you have a jury trial the issue arises as to what facts the jurors can be exposed to. Are there certain facts which of their nature should not be presented before a jury trial? For example, a prohibition against rumours. Similarly, when you have witnesses who are related to the accused, to what extent is such evidence permissible? In common law, because the facts are decided on by the jury, you have the development of the law of evidence which is there to decide how the facts are to be filtered, which should be presented before the jury, and which shouldn't. the effort to try to professionalise the trial. The law of evidence is developed much more than it was traditionally in continental legal systems.

Civil (private) law actors

A comparison a private law court room within continental legal systems and a private law courts room in the Anglo-American system. having a jury in private law matters is still popular in the US. The traditional court room, which is still the case, in private law matters in continental legal systems. There is no jury in private law/civil law matters. We see that on the continent, you have a judge sitting without a jury however, you may also have additional judges for special/serious matters instead of a jury. You might also have for some civil matters, a public prosecutor who may take part in the proceedings. SO, in the common law system you normally only have one judge, while in the continental system you can have a panel of judges even at first instance. Quite often you would have other judges who are technical experts and not experts on the law necessarily but on particular technical issues. Therefore, court experts are sometimes, even till today, they have this power to decide issues which fall within their area of expertise. They will not decide on the law but on the technical aspect. He becomes like a separate judge and is not just a witness. In the common law system, only one judge, but he traditionally sits with a jury.



Prosecutors

If we look at the Anglo-American system, it is the police who typically lead and supervise criminal prosecution. Prosecutors are simply lawyers. Prosecutors are seen to working alongside Police. The prosecutors themselves do not exercise any judicial function. They are simply lawyers who are prosecuting. There is no difference in status between the defendant and the prosecutor. This is in the case of adversarial. Equality is reflected in the status of the lawyers. In continental legal system, by contrast, you have this situation where the prosecutors are usually judicially trained in criminal matters; they may be closely involved in criminal investigations and are seen to be working on behalf of the public rather than on behalf of the police. Because of this legacy, the prosecutors are usually seen as a branch of the judiciary, and not simply as lawyers on a par with the lawyers of the defence. They are seen are representing the public interest in prosecuting the case. The idea is that in civil matters, the basic idea here is that these prosecutors are not simply lawyers but have a kind of judicial and public interest function. They have a special status. The lawyers for the prosecution in the US is simply a lawyer who is prosecuting. He might be employed by the State of might be a private attorney but there is no special role for these lawyers. On the continent, these prosecutors are occupying a distinct public office, often trained in the same way as judges, and often seen as something more than ordinary lawyers. They have a public role like judges do.

See note on appeal: in Malta, we are closer to the continental legal system in this regard, that any party can appeal on both the law and the facts. One may argue that eve thought the content of our laws may derive much more from English laws, nevertheless when you look at the procedures through which the courts operate and the way they function, judgements are written, the absence of precedence and so on, it is clearly the case that the foundations of our system are still very much the continental tradition.

Criminal law actors

Anglo-American legal system (AALS) – the judge, prosecutor and the party or lawyers and a jury of 12 for more serious matters.
The system in Germany – a panel of judges, the key judge, then an additional lay judge for serious matters, and so on. The *Parte Civile* would be a lawyer representing the interests of the victim. Interestingly in Germany, no actual jury in criminal matters exist.
The system in France – a judge, 2 additional judges for more serious offences, the lawyer appearing as a prosecutor, the lawyers appearing *parte civile*, the parties and their lawyers.

Sources of law

We are talking about sources as materials that may legitimately be used in adjudication. A distinction is made between primary sources, binding legislation, and secondary sources of law where you would have legal authorities so to speak which range from the very to the barely persuasive. The difference being made is between primary sources and sources which are simply authoritative. Therefore, sources of law exist on a spectrum form what is binding to what is simply persuasive. In a legal system, the sources of law are rarely specified in a clear and formal way. for the student, understanding the sources of law is something which is usually absorbed through legal training in a particular tradition. For the scholar, they tend to have a very broad understanding of the sources of law. In Malta, we only have a formal statement of the sources of law in one of our major pieces of legislation, which is the Commercial Code, in article 3. Here it is saying that usages of trade are more important than civil law. The law here creates a hierarchy. All this come to the fore in a judgement which related to the charging of interest by banks when dealing with overdraft accounts, *Cassar v. Farrugia* (1989). If a practice goes against fundamental principles of Maltese public policy, Maltese public policy prevails over usage of trade. here, the judge added another source of Maltese commercial law, that of public policy. Furthermore, the judge is defining public policy in terms of Maltese history, a reading of what is Maltese national policy. The Court of Appeal said when talking about public policy, there is a European dimension and, on this basis, the CA applies article 3 of the commercial code and held that it was a usage of trade, this charging of interest rates, did not contradict Maltese public policy. This shows how important sources of law are in practice. Despite this article, the sources are rarely specified in a clear or formal way in a piece of legislation. Even there it would appear to be incomplete, since it does not refer to public policy.

Notes on precedent

Distinguish between adjudication where the decision is binding on the parties in the case and jurisprudence where the judicial decision may be either binding or persuasive on future cases of the same sort. When we speak of precedent, we are talking about future cases of the same sort. It is also important to distinguish between precedent, and *stare decisis* where a single decision may be as a rule binding on other courts. when we say we do not have the doctrine of precedent in Malta, in truth we are saying we do not have the doctrine of *stare decisis.* There is definitely the idea that the Maltese courts will conform to the decisions of other courts. Many a times, the court says it will not move away from established principles unless

there are reasons as to why it should do so. Nevertheless, it remains the case that in Malta judges are free to disagree even with the judgements of the Court of Appeal. We still do not regard judgements as being a creation of law and we do not regard the judge as having that inherent power. We still think of the judge that through his judgements is simply applying the law which is found in a textual form in the form of legislation. This is the French notion of '*Jurisprudence Constante'*. Jurisprudence in France refers to judgements of the Courts. this is implying the collected decisions/judgements of the courts as found in law reports. '*Constante'* means that there is an approach where the courts in cases of the same kind have generally agreed on the same interpretative approach. This is in a way a doctrine of precedent, but not of *stare decisis*.

However, you can have different rules of precedent even in Anglo-American jurisdictions. Particular judgements are not subject to the rule of *stare decisis* but nevertheless, they can be persuasive. In Anglo-American legal systems, they often use precedent and stare decisis interchangeably. Quite possibly, if you look at England and local courts, you might find that the rule of *stare decisis* for decisions taken by local courts or local tribunals but would definitely apply to decisions of courts of appeal. The supreme court itself is not bound by its previous decisions.

In reality, in Malta we do have precedent; this idea of *Jurisprudence Constante*.

Jurisprudence

In Anglo-American systems, judicial application of laws in adjudication is very important. Judgements may be seen as law ('case law'). One should also be aware that jurisprudence is used in Anglo-American culture as philosophy of law. in Anglo-American legal systems, judges explicitly create law in limited ways. In continental legal systems, jurisprudence is not usually formally binding but is very important and persuasive in practice. in English law, they make a distinction between the Ratio and Obiter of a judgement. in common law, judgements are case law; they are law just as much as written legislation, so much so that when you open a common law textbook, they start off by saying what is the position as it emerges from case law then they refer to legislation as a post-script. Because the judgements of the courts are so important, they have developed a whole art and skill of reading and interpreting the judgements of the court. They've become experts on this subject because they need to decide which part of a judgement is creating new law/stating law and which part of judgement simply contains an opinion given by a judge which is not relevant on the decision of the case. The logic employed in reaching the decision is the Ratio, the other part of the judgement would consist of Obiter which would be statements on legal principle which are not essential to the court's decision in the case. Common lawyers have had no option but to create cases as establishing law, they have to be very careful as to how they interpret judgements – some parts are binding, others are merely persuasive. If you have more than one judge in common law, which at the appeal stage is quite often the case, judges may disagree. The judge who disagrees might want to write his opinion down in the judgement, provided that the minority judgement is not binding and does not create precedent. It may nevertheless have an influence on subsequent cases. Therefore, the judgement itself will contain parts which are binding - ratio, and parts which are not – obiter. In Malta we have not needed to make this distinction because in Maltese law we do not treat judgements as binding anyway. Nevertheless, you do find references to previous decisions of the court and the judge himself specify the part which disposed of the request made by the plaintiff. So, there is the beginning of such a distinction even in our jurisprudence in as much as the judges make a distinction between the part which actually decides the judgement, which is treated as having more

authority than an opinion which is expressed in the judgement. So far, it is rather embryonic as a distinction, which is expected given the mixed jurisdiction.

Although we say that in continental law judgements are not given the prominence that they are given in common law, they do not make law, nevertheless that is simply at the level of ideology. In practice, there are certain areas where judgements are all important. This is because there are some provisions that are so broad, that they depend on the courts to apply them in practice. Every single word in such a provision, has been interpreted by the court. judges continue to play an important role in the continental system; however, their presence is a bit more shadowy. In the continent the judge is not treated as a special person but is a state employee applying the law, which is codified, and the focus lies on the law. Nevertheless, in practice, judges in the continent are going to collectively decide on how the law is going to be interpreted and applied. At the end of the day, Parliament is supreme, and it can pass laws which the judges disagree with.

Judgements and opinions

The line between application and creation of law is frequently unclear. In Malta, we have moved form a more continental elliptical style of drafting judgements towards a more discursive style, towards the common law. Judgements have become much longer than in the past. Arguably, the reasoning of the past is more clear-cut. This is something that has changed of a result in legal culture; as we read more and more common law judgments and textbooks, our way of reasoning of the law is in itself changes.

Statutory interpretation

Here, we are talking about the interpretation of Acts of Parliament. In the UK, the courts generally adopt a strict or literal interpretation of the words of the statute. The approach his to say we look at what the legislator actually wrote, regardless of what the legislator intended. What he wrote, in itself, is what should guide the courts. By contrast, in the continent, you have much more use of purposive interpretation, whereby you ask what the purpose of the law is. look at what the law is intended for. Here we have this distinction that in common law you do not as a rule allow purposive interpretation because the idea is that what the legislator wanted to say, is in the statute. The legislator has the responsibility to make his meaning clear.

David Attard speaks of the principles applicable in Malta in such cases: pages 68-75: we have a discussion of the principles which apply to statutory interpretation in Malta. We see that there are a number of Maltese and English judgements which are quoted. The Maltese courts supplement the provisions of the interpretation act by applying principles of civil and common law to statutory interpretation. we see here that even here in Malta we make this compromise, on the one hand the common law approach which emphasising the literal meaning, and on the other hand we have the continental approach which provides that we can look at the intention of the legislator. In Malta, we are closer to the continental approach. There is this issue that in continental systems there is more attention paid to purposive interpretation, while in common law systems there is this idea that you should look at the strict interpretation of the statute. There is a connection here between the theory of how the judges should interpret statutes, on the one hand, and the way in which the statutes are written on the other. Remember we have a lot of importance to codes. At the end of the day, the courts are going to need to interpret general provisions. Common law statutes are often written in such a narrow way that they try to exclude possible interpretations.

Codes – generic; statute – narrow & detailed with the aim that it can only lead to one interpretation. In reality, you have different approaches to legal drafting and corresponding to this you have different approaches to judicial interpretation – adopting a literal meaning vs. intention.

In Malta we have both types of legislation – the codes and specific statutes, specifically those that deal with commercial matters. Actually, in Malta, we are introduced to both approaches to legal interpretation; one would be just look at what the law says, and the other approach says look at the law by looking at the intention of the legislator, apply it in the context of our values in our legal system, look at the constitutional values when interpreting the law.

Doctrine

There still remains a bit of a shift in emphasis, that is that in the civil law it remains a really important source of law that remains extremely persuasive so much so that judges may deal that they are no allowed to interpret the law in a different way. However, in Anglo-American law, doctrine was traditionally unimportant but is now coming more to the fore, particularly in the USA. In the USA law review articles are becoming more and more prominent.

Source summary

In Anglo-American legal systems, the primary binding sources remain written, constitutional, European law and so on but also including case law which is considered as a primary source. In the continental legal system, we find that amongst the secondary sources of law, first of those is doctrine and jurisprudence which is the equivalent of case law comes after jurisprudence. The fact that judgements make law within the Anglo-American system continues to set it off sharply from continental systems which give a lot of important o doctrine, though secondary legislation.

AALS Court structures

These do not really make a big difference between different kinds of specialised courts. they tend to have courts of general jurisdiction that can handle civil or commercial matters. And then you have normally a single appellate pyramid. The idea in this system is you do not have a civil court, a commercial court, and so on but a single court of general jurisdiction form which appeals are allowed to a single court of appeal. There is a single appellate pyramid.

CLS court structures

There are often several appellate hierarchies for each different type of court. in Malta, you have a civil court with an appeal to the superior court of appeal, then you have the criminal court with an appeal to the court of criminal appeal. You do not have a single court of appeal. In this regard, we are closer to the continental system. Administrative law on the continent you may have a separate hierarchy for administrative law cases. This is different from the common law.

Appeals

In both Anglo-American and continental legal systems, the movement from lower to higher court may be mandatory or discretionary and it frequently involves collegial bodies of judges. In the Anglo-American system, the idea is that the lower court decides the facts and that if an appeal is made, it is only on the grounds of fact. And there is precedent. In continental legal systems, the court of appeal often review both questions of law and fact; it re-hears the case from scratch. In Malta you have an appeal which is allowed both on grounds of law and on grounds of fact. The Maltese legal system here resembles more the continental. There are also

different types of appeal within continental legal systems – the Court of Cassation, and revision.

The place of the constitutional law decision-making bodies

In the Anglo-American legal system, it is the Supreme Court which hears appeals from decisions from ordinary courts but also such decisions taken by administrative tribunals. The Supreme Court basically hears all the appeals not just in private law but in public law and criminal law matters and relating to administrative law matters.

Public law

Public law and constitutional law are essentially the same thing and the point about public or constitutional law is that it is intrinsically linked to political structures. If we compare the American system of presidential government to parliamentary government, within the American system the president is the head of the executive but then you have a separate legislature and judiciary which act as checks and balances on one another. In a parliamentary, the executive and legislature tend to merge into one body, whereby the judiciary is the most independent body. Unitary and federal governmental in theory, power comes from the centre and then it can be withdrawn. Malta is a unitary state where power comes from the centre. By contrast where you have a federal state it is the territorial governments who are giving power to the central government. In theory, in federal states limited is granted to the centre and can be withdrawn. Constitutional law is increasingly written down and there developed the approach initially in the USA that other laws must be within the bounds of the Constitution and therefore it acts as a higher law limiting the other laws. They are more than ordinary statute. They often rely on legal conventions.

Constitutional review

The power given to the court to review laws in light of the constitution – different types such as strong, centralised and so on.

Some examples:

Limited – arguably in Malta we have this situation because we do not apply the doctrine of precedent.

Strong – the court is able to literally remove a law from the statutes book on grounds of its incompatibility.

Selective – such as the EcrtHR. It is only in regard to a particular action that the court will pronounce.

A priori* or *a posteriori – a priori is that before the law is made you may have the duty to refer the draft to a particular body which would examine the law beforehand to see if it raises issues. *A posteriori* would be after the law is made.

Anglo-American legal system

Usually public or constitutional law matters are decided by the most senior appellate court in the ordinary judicial hierarchy. The same court which could function as a court of appellate review could function as a court of constitutional review. In Malta, we are closer to the continental system because the Constitutional Court in Malta only decides issues relating to the Constitution. There are very significant differences between English and American Public law. In the UK there is this idea that Parliament can do whatever it likes and that supremacy rests with the Parliament.

Continental Public Law

On the continent you have very often centralised constitutional courts or councils which are separate from the ordinary courts. You often have a process by which ordinary laws before they have been promulgated are checked to see whether they are compatible to the Constitution. Public law in the continent is treated as a specialised subject, not every court should know about it.

Comparative constitutional review

In the UK you have the possibility of an appeal originally to the House of Lords now to the supreme court from decisions of ordinary courts. in the US you have also the possibility of an appeal to the supreme court. In France, it is a different process because the Parliament itself may refer a law to the constitutional council and so may the ordinary courts. In Germany, ordinary citizens may make a complaint directly.

Summary comparative public law

UK: Parliamentary system with an 'unwritten' constitution contained in numerous texts and conventions, a large unitary state (undergoing devolution and an EU member), and a relatively weak monarchy; the bicameral legislature is elected by plurality voting or is hereditary or chosen by the executive; constitutional review is weak, decentralised, concrete and *a posteriori*.

US: Presidential system with a written constitution, a very large (centralised) federal state, and a strong President; the bicameral legislature is generally elected by plurality voting, the executive by an 'electoral college'); constitutional review is strong, decentralised, concrete and *a posteriori*.

Germany: Parliamentary system with a written constitution, a large (centralised) federal state (and an EU member), and a weak President; the bicameral legislature is elected by proportional representation or chosen by the territories, the President is chosen by a federal 'convention'; constitutional review is strong, centralised, and both abstract and *a priori* and concrete and *a posteriori* (including the possibility of 'constitutional complaints').

France: Semi-Presidential system with a written constitution, a large (decentralising) unitary state (and an EU member), and a potentially powerful (and currently active) President; the President and the bicameral legislature are elected by majority voting and territorially; constitutional review is strong, centralised, and both abstract and *a priori* and concrete and *a posteriori.*

France and Germany: these countries have been through the very bitter experience of World War II and were both on the losing side. Nevertheless, both emerged from it with the experience of having a constitution which was substantially influenced by this experience which broke Human rights which is why constitutional review is given so much importance in these countries. In the post war era, it was decided that they never again wanted to be in a situation where they are attacking human dignity. By contrast, the UK and the USA were on the winning side so there was less desire to change their constitutions. Particularly, in the UK constitutional review is still weak. The USA was in the sense the pioneer of constitutional review and therefore it has a strong possibility of judicial review but nevertheless unlike Germany and France you do not have the possibility of *a priori* constitutional review.

Comparative legal history and each countries different experience has shaped the way they think of these fundamental issues. This is all shaped and influenced by the history.

7: MIXED LEGAL SYSTEMS

- The best known mixed legal systems are those combining continental private law with Anglo-American public and criminal law, the so-called 'classical mixed jurisdictions' (CMJ). Vernon Palmer has even suggested they make up a 'third legal family' (TLF)

All legal traditions are hybrid now. They all contain different elements, but mixed legal systems can be used to describe combinations of legal traditions. The idea here is that where a system is so mixed that it's difficult to say whether it belongs to one family or the other, then you have a mixed jurisdiction. It is not clear whether it is primarily one or the other. The idea is when the mixity is so strong that it actually raises doubts as to which legal tradition the system belongs to. This is why the Maltese system fits. The predominant impression given by the substantive law is that many of them are taken from the common law world. You have this kind of mixity which makes it really difficult to classify sometimes the Maltese legal system. Malta also does fit to some extent within what Palmer called the classical mixed jurisdictions which he suggested made up a third legal family. These are primarily jurisdictions which combine common law and civil law traditions. However, there are many other kinds of mixed legal systems. We also have mixed systems for example of civil law, common law and customary law. If we look at Palmer's categories, he argues that most CMJs are created by means of an 'intercolonial transfer' from continental European power to either Britain or the US. In regard to Malta, the French gave Malta to England but that would be to ignore the fact that there was a Maltese uprising. Even though the Maltese did not sign the act of surrender, nevertheless, the Maltese played an important role. The question of on what basis Malta became a mixed jurisdiction and when cannot be compared to a moment of intercolonial transfer. Also, for the first century of England the Italian language was preserved, secondly continental style codes were drafted and promulgated under the British and because the common law influences filtered in gradually, it only did so through public law which is similar to other classical mixed jurisdictions. You have this kind of mixture even in Malta.

Palmer's jurisdictions worldwide

Palmer argues that most CMJs are created by means of an *'intercolonial transfer'* from a continental European power to either Britain or United States. He dates the founding of the jurisdictions at the point when:

(1) The law in question was specifically a civil-/common-law mixture,
(2) This mixture reached sufficient proportions as to strike a neutral observer as obvious, and
(3) A structural division existed between private civil law and public Anglo-American law [including criminal law].

Language and culture

Palmer notes that language influences:

- the choice of law,
- the 'orientation' of jurists,
- the complexity of the system,
- the ability to communicate with other jurists and the source tradition.

When you think about Quebec, for example, the fact that they maintained French means that when they come to enact laws they look to the continent and to the continental tradition. Bilingual systems = more complex. In Scotland for example, you do not get that many jurists who know Latin and who are able to communicate with continental lawyers on that basis. The ability to communicate with continental jurists is impaired. In Malta, Italian was the

main legislation of the courts, legislation and so on, Maltese lawyers were more able to communicate with Italian lawyers. Very often in these mixed systems, Palmers note that jurists tend to divide into 3 classes: ***Purists*** (defend the continental elements)**, *Pollutionists*** (want to import more of the Anglo-American) **and *Pragmatists*** (don't really care much either way). Most Maltese are the pragmatist purists, most lawyers do are not in favour of one or the other, but they are purist in the sense that it is a mixed legal system that seems to be divided into different compartments – one area is government by continental, another area is common law, and the lawyers can be purists within these departments. Language has a lot to do with identity.

Pollution

Whether the increasing encouragement of Anglo-American law can be seen as pollution and contaminating the state.

Lawyers and judges

Both lawyers and judges in mixed legal systems tend to resemble their Anglo-American equivalents in their legal style, i.e. they're practical and inductive. In Malta, we do not have separate concurring or dissenting opinions. We are still rooted more in the continental approach in this regard.

With judges:

- There's no separate continental-style judicial training and they tend to be drawn from senior practitioners.
- They see themselves as possessing inherent, rather than delegated, powers.
- Their opinions typically resemble the discursive pattern of the common law. separate concurring and dissenting opinions are common.

Sources of law: jurisprudence

Debates on the sources of law are important: *May raise…a defining issue in the quest to locate the 'soul' of the system…, as if the doctrine of precedent is a litmus test of family allegiance or a sharp tool of classification.* I.e. do they employ *stare decisis* or *jurisprudence constante*?

Our system applies *jurisprudence constante* so we are more similar to the continental here. At the end of the day, you cannot say Malta is fully part of the third legal family, we are still alien in the way we think about judgements. However, we still share so much in common. Sean Donlan actually gave a lecture where he talked about Malta as being the black sheep of the third legal family. This suggested its inferior. If anything, we are closer to a continental system than the others are. If it were possible to consider it as being not a derogate label then yes maybe in a sense, we are this. We are closer to continental systems than the others are.

Legal precedent and legal reasoning

Palmer argues that the force of precedent in [CMJs] falls between the Anglo-American and continental traditions [at least in theory]. It differs between codified and uncodified jurisdictions.

With the horizontal effect of precedent ('the degree to which the highest court…regards itself as bound) – codified jurisdictions are liberal while uncodified jurisdictions tend to adopt a stricter approach. In general, '[t]he vertical effect of precedent, the degree to which lower courts are bound by a ruling of a higher court, is uniformly strict'.

If we look at the Maltese example, what we find is that the vertical effect of precedent is strict in regard to a particular case however the vertical effect does not really bind when you

have a different court decision. With the horizontal effect, uncodified jurisdictions tend to adopt a stricter approach. Malta is liberal about this.

How does Anglo-American contamination creep into the pure civil law system?

This has often occurred in apparent legal lacunae or by an 'argument from similarity'. This differs in different areas:

- 'The field of **obligations** (tort, contract, and quasi-contract) has been the most susceptible [especially tort] ....
- In contrast, … **property** has been described as "the most unassailable stronghold of civilian jurisprudence (MJ 472)."'
- **Succession** law ... has been largely resistant ..., although the question of free testation has sometimes been a battleground (MJW 57).'

It often occurs when there appear to be gaps in the system. generally speaking, when we are talking about a private law system based on continental law, the law of succession and property tend to be the most resistant to penetration by common law whereas the field of obligations has been the most susceptible. In Maltese law, many tort cases refer to English cases. When it comes to commercial law, this are almost fully assimilated.

Pollution: Procedural law

Anglo-American 'adversarial' procedures dominate, leading to continuous trials, a focus on orality, elaborate rules of evidence, and jury trials. But Palmer notes differences between those:

- 'Countries with procedural systems which were once civilian and have been thoroughly anglicized [South Africa, Puerto Rico, and the Philippines]'
- 'Only partly anglicized [Quebec and Louisiana]'
- 'Which have never known civil law procedure in the first place [Scotland and Israel] (MJ 473).'

Court structures, too, are usually unified in an Anglo-American manner (though without their Equity courts or doctrines).

Appellate courts are courts of 'revision' rather than 'cassation' and the highest courts are composed of a small number of judges sitting *en banc* in every decision.

In reality, countries with procedural system which where once civilian are countries like Malta and Maltese procedure, its true we introduced the jury system, but that's it. By and large most of our rules are those of the past. We don't have continuous trials, such a focus on orality, elaborate rules of evidence in civil matters in Malta. In Malta, we only have partial unification. We still have separate criminal court and a separate criminal court of appeal. Even though we merged commercial and civil court.

Is Malta a Member of Palmer's 'third legal family' family?

Malta combines:

- An **essentially continental substantive private law**, with some British influences, but including elements of **inquisitorial procedural law**.
- A **hybrid British/continental criminal law**?
- An **essentially British public law**, but perhaps with some continental, now European, influences?!?
- **Malta may be a 'classical mixed jurisdiction', but not a sibling in the 'third legal family'?**

If we include 'normative hybridity' …

Smits and Du Plessis on MLS

Jan Smits has argued that they (i) can contribute to understanding the current mixing of laws at the pan-European level and (ii) suggest the possibility of a more rational borrowing from different traditions.

In a more measured opinion, **Jacques Du Plessis** suggested they:

- 'First, ... pose[] significant challenges to those concerned with the classification of the world's legal systems….
- Second, ... [are] relevant to debates on legal transplants….
- Third, ... illustrate what practical techniques may be used to adopt rules from various foreign jurisdictions and what motivations may underlie the use of these techniques…
- Fourth, ... [provide] no firm indication that [they] have generally given rise to law which is particularly good or particularly bad….
- Fifth, ... may be relevant to those engaged in developing private law in Europe…. What mixed jurisdictions like ours can provide is that we have already been comparing and contrasting the rules of common law and civil law for a lot of time.
- Sixth, ... demonstrate the crucial role that language can play in the initial processes of reception, as well as in subsequent legal developments.' In Malta, while we still used Italian as a national language it was much easier to important ideas and doctrines from Italy. Language does play an important role.

Esin Orucu

- Believes in expanding research to **more complex legal hybrids**
- Has written extensively on the unique mix and complexity of her native **Turkey**
- Has suggested a **'family trees' model** that traces the different historical-comparative elements of the current system
- Has emphasised the importance of **legal movements**
- Has employed a very useful and colourful **vocabulary**
- Has suggested that comparatists must go beyond positivism and **include non-state norms**
- Has noted that mixes may be **ongoing**, **overt** or **covert**, **structured** or **unstructured**, **complex** or **simple**, and **blended** or **unblended**

Palmer starts out by looking at the normal elements of formal law – the sources, actors, the role of judges and so on. Orucu looks at this issue from a cultural standpoint and she believes in expanding research to more complex legal hybridity. Hybridity is not just about whether the system has precedent or not but is much more about the culture. She suggests that we should go beyond positivism. This is, therefore, the approach of Orucu. She gives various instances of mixing. She talks about simple hybrids (include more than classical mixed jurisdiction; includes Malta also), complex hybrids and legal pluralisms. These are three dimensions of mixing. Religious law in this regard, at one level you can treat it as being formal law and at another level you can consider it as being unwritten law and forming part of legal pluralism.

- ***Simple*** ('hybrids with civil law and common law as their ingredient—mixed at substantive level—mixing bowl):
  Mixed jurisdictions (a la Palmer).
  Other, including Jersey, Malta, and Cyprus.
- ***Complex*** ('hybrids with civil law, common law, (socialist law), religious law and customary law in different combinations).
- ***Legal pluralisms*** (Dualist systems with layers of law co-existing and applicable to different members of the population …)'.

Orucu on Malta

'One can see complicated crosses even within the continent of Europe, such as those in Malta. Here legal history began with the Phoenician settlement and continued with the Roman conquest bringing the *Corpus Iuris*. Then the Normans invaded and brought feudal

law as applied in Spain, Naples and Sicily. The invasion of the Moors had direct influence on the Maltese language. The sovereignty of the Knights of St. John recognised local usage and issued declarations of private law drawing on laws of other countries, mostly Italian. Then came the French with their Napoleonic laws. Finally the British brought the common law. So here in Malta we see a good example of an eclectic Criminal Code drafted under a strong Italian influence but with pervasive English and Scottish impact, and a Commercial Code largely based on the French, with maritime law following English law. The 1873 Civil Code is predominantly based on the French and Italian Codes and also on the Municipal Code de Rohan, the Civil Code of Louisiana and the Austrian Civil Code. Canon law applies in family law where there is also the influence of English, German, Italian and French laws. Constitutional law is mainly British. The official languages are Maltese and English. The ingredients work cumulatively and interactively. Malta has now joined the European Union. What kind of new mixing can we expect? How is it possible to fit this mixture into any of the classical categories?' Örücü, 'What is a mixed legal system: exclusion or expansion?', 9-10 (citing JM Ganado, 'Malta: microcosm of international influences' in Örücü, E Attwooll, and S Coyle, *Studies in legal systems: mixed and mixing* (1996)).

Palmer's challenge?

In 'Two rival theories of mixed legal systems', Palmer contrasts:

- the 'classical mixed jurisdictions' with
- 'a pluralist conception of a mixed legal system.'

While he's focused on the latter, he's acknowledged that '[a]ttempting to reclassify and reorder the mixed legal systems of the world in accordance with the information supplied by historical pluralism, ethnic pluralism, and transnational legal pluralism is the next daunting task of comparative law….

[But] it has yet to be shown how [to do this] in a rational and coherent way.'

- Orucu is more on the pluralist side.