

INTERPRETING THE LAW IN A MIXED JURISDICTION: THE PROFESSOR VS. THE JUDGE—PEERS OR RIVALS

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I. INTRODUCTION

J.H. Merryman defines a legal tradition as a set of “deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, the organization and operation of a legal system.”¹ He goes on to suggest that, whereas “a legal system is an operating set of legal institutions, procedures and rules . . . a legal tradition puts the legal system into cultural perspective.”² If one were to accept his arguments, it can be established that while each legal system is independent, which very often can be attributed to a political unit, there may be common denominators with other independent legal systems. Together, these independent systems may share a historic, cultural, or political ideology and can be described as forming a legal tradition.

As far as historical development is concerned, Professor Peter de Cruz argues that on one hand, it was widely accepted that the development of English common law was fairly straightforward, “wherein a large body of rules founded on unwritten customary law evolved and developed throughout the centuries with pragmatism, strong monarchs, an unwritten constitution, and centralized courts being its typical features.”³ On the other hand, non-common-law European countries have a more checkered history, which has led scholars to label the tradition “Romano–Germanic.”⁴ This reflects the strong influence of Roman law as well as the influence of the French Civil Code, namely the Code Napoléon, and the German Civil Code.⁵ Significantly, Roman law introduced the notions of codification and systematization of general principles into identifiable concepts.⁶ This is in stark contrast with the common law, whose principles “developed in an ad hoc fashion,” mostly in response to dispute settlements.⁷ Therefore, the most significant historical fact is that common law was developed by the courts, which gave

1. PETER DE CRUZ, A MODERN APPROACH TO COMPARATIVE LAW 27 (1993) (quoting JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 2 (2d ed. 1985)).

2. *Id.*

3. *Id.* at 30.

4. *Id.* (citations omitted).

5. *Id.*

6. DE CRUZ, *supra* note 1, at 30.

7. *See id.*

it considerable “weight,” whereas civil law was formulated and compiled at universities.⁸

As a consequence, a major distinction between the legal families of civil and common law is that in England, the Bench is paramount, while on the European continent, the law professor reigns supreme. Judges on the continent tend to be faceless, glorified civil servants sometimes described as fungible persons, which is “a reference to the *res fungibilis* in Roman law, i.e. goods that are replaceable and interchangeable in contrast to particular objects with a distinct value of their own.”⁹ Conversely, common law judges play an important personal role.¹⁰ Their names are known to the public through the publication of dissenting opinions amongst others. For example, one can mention Lord Denning from the United Kingdom or William Brennan from the United States.

From an academic perspective, “In civil-law countries the ‘makers of the law’ have for centuries been the learned jurists led by the professors in the Law Faculties. The academic writer is the senior, the judge is the junior partner in the life of the law.”¹¹ The authors of the treatises and the codes have all been law teachers, and the judges and lawyers “once sat at their feet” to learn.¹² One can mention Charles Aubry or François Laurent from France and Belgium as examples.¹³ In England though, it is hard to imagine law professors telling the Bench how to decide a case, because the Bench is the “oracle of the law.”¹⁴ Thus, while judges on the European continent follow professors’ teachings,

8. DE CRUZ, *supra* note 1, at 30.

9. See R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENIA 44 (2002) (citing Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1597 (1992) (“Traditionally the civil-law judge is a fungible person, one of a group of anonymous, almost colorless, individuals who hide their personality behind the collegiate responsibility of the court.”)); see also AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 251 (2009) (“**Res fungibiles** . . . ‘Fungible things.’ Goods that are interchangeable for all relevant purposes. In a commercial context, restitution of damaged property could satisfy the tortfeasor’s liability if the property was *res fungibiles*, such as common livestock, grain, or lumber.”) (emphasis in original).

10. VAN CAENEGEM, *supra* note 9.

11. *Id.* at 45.

12. *Id.*

13. See *id.* (“Legal wisdom spoke from the pages of the commentaries of Troplong, Aubry and Rau, Demolombe, Laurent and Le Page in France and Belgium, and from the *Lehrbuch des Pandektenrechts* of Windscheid in Germany.”).

14. *Id.* at 46.

English judges do not. In fact, when universities were first established in England, only Roman law was taught and no English law was taught at all.¹⁵ The teaching, or rather, the training in law was the priority of the Inns of Court, not the universities.¹⁶ While law had been taught on the continent since the Middle Ages—going as far back as Irnerius of Bologna and his glossators—it was not until 1882 that Professor Dicey questioned whether English law could be taught at English universities in his inaugural speech at Oxford.¹⁷ Even some eminent judges in the twentieth century studied a different discipline at university. For example, Lord Denning first studied mathematics before becoming a jurist.¹⁸

Having highlighted the differences between civil and common law jurisdictions, one may ask: But what about mixed jurisdictions? Legal systems are generally considered “mixed”

15. See VAN CAENEGEM, *supra* note 9, at 46 (“[A]round the middle of the nineteenth century there was no organized teaching of English law . . . There was some teaching of Roman law through the old Regius Chairs of Civil Law, but that had no bearing on everyday life . . .”).

16. See *id.* (explaining that legal teaching had previously flourished in “the old Inns of Court”).

17. See *id.* at 47 (“It strikes the present-day reader as comical that . . . Professor Dicey chose as the title of his inaugural lecture in Oxford ‘Can English law be taught at the Universities?’ . . . [and] this was in 1882!”); see also Am. Antiquarian Soc’y, *Westward Science in the Middle Ages*, 35 HUNT’S MERCHANT’S MAG. & COM. REV. 275, 276 (1856) (“Irnerius, at the beginning of the twelfth century, opened the first law school in his native city, Bologna, and thenceforth that science absorbed republican intellects, and led to a clearer defining of civil rights.”); *Irnerius: Italian Legal Scholar*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Irnerius> (last visited Jan. 3, 2017) (“Irnerius, also spelled Guarnerius or Warnerius . . . [was] one of the scholars who revived Roman legal studies in Italy and the first of a long series of noted legal glossators and teachers of law . . . at the University of Bologna.”).

18. See VAN CAENEGEM, *supra* note 9, at 47 (“History, political science, philosophy, even mathematics were suitable scientific fields, but the law was no science, it was a craft which one learnt through training and practice.”); see also Charles Stephens, *Freedom Under Law: Lord Denning as Master of the Rolls, 1962–1982*, in 3 THE JURISPRUDENCE OF LORD DENNING: A STUDY IN LEGAL HISTORY 16 (Cambridge Scholars Publ’g 2009), <http://www.cambridgescholars.com/download/sample/57914> (“Having taken a triple first, in Mathematics and Law, at Magdalen College Oxford . . . Lord Denning became a KC in 1938 and was elevated to the bench in the Probate, Divorce and Admiralty Division on the 6th March 1944.”); Edmund Heward, *Obituaries: Lord Denning, Culture*, INDEP. (Mar. 5, 1999), <http://www.independent.co.uk/arts-entertainment/obituaries-lord-denning-1078629.html> (“Returning to Magdalen in 1919, [Lord Denning] took a First in the Mathematical School in 1920. After a short spell teaching mathematics at Winchester College, he returned to Magdalen in 1921 to study for the Final Honours School of Jurisprudence. He obtained first class honours in 1922.”).

when they have been influenced by a variety of other systems. While presently avoiding the issue of whether “mixed” implies a legal family in its own right, one can easily refer to jurisdictions as mixed when, for various reasons, their development drew upon principles from both common and civil law.¹⁹ One might cite the laws of Scotland, Québec, Louisiana, Malta, and—in a different way—the European Union (EU) as examples. But the crucial question remains: What is the role of the professor or judge in a mixed jurisdiction? More specifically, do mixed jurisdictions follow the common or civil law approach, or have they created their own approach?

This Article focuses on the role that professors and judges play in the interpretation of national private law in mixed jurisdictions. First, the Article examines the role that professors and judges play in the traditional legal families of civil and common law, by analyzing how the judge came to be the prevalent actor in common law systems, while the law professor is more important in civil law systems. More precisely, this part of the Article compares the civil and common law systems by discussing the applicable features of each in order to facilitate an understanding of the degree to which input from professors and judges influences the development of the legal system. Because mixed jurisdictions straddle the civil and common law systems, it makes sense to begin this study by investigating the “pure” forms of these concepts in their respective legal families.

Second, the Article takes these aforementioned issues and considers them within the context of mixed jurisdictions. Because this author is writing from Malta, a vibrant mixed jurisdiction in itself, the pertinent issues are examined from the Maltese viewpoint—i.e., with Malta serving as the jurisdictional point-of-reference. While the Maltese legal system is used as the main microcosm in this Article, there are also references to other important jurisdictions—including the EU—for purposes of comparison.

Third, the Article examines the differences in legal training and education among civil law, common law, and mixed

19. Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 3, 8 (Vernon Valentine Palmer ed., 2d ed. 2012) [hereinafter *MIXED JURISDICTIONS WORLDWIDE*] (“The first characteristic feature [of a mixed jurisdiction] is the specificity of the mixture to which we refer. These systems are built upon dual foundations of common law and civil law materials.”).

jurisdictions. It also briefly discusses the free movement of lawyers within the EU. Finally, the Article concludes by (1) summarizing the findings, (2) attempting to accurately define the role professors and judges play in the development of a mixed jurisdiction, and (3) comparing the resulting definition with the roles professors and judges play in the “pure” legal families.

II. THE CONTEXT: GLOBALIZATION AND COMPARATIVE LAW

A comparative approach to private law is essential because legal families and legal systems do not exist in limbo, but are influenced—to varying degrees—by one another in a globalized world. Cooperation and commerce mean that any particular legal system may borrow suitable concepts from other systems with which it interacts.²⁰ Naturally, regional trade agreements (RTAs) will further encourage this, and cross-border legal influence in Europe will likely accelerate due to the EU’s Internal Market.²¹ Any possible European private law, or “*jus commune*,” is likely to draw influence from Europe’s legal system, regardless of such law’s codification or lack thereof.²²

During this exercise, people sometimes question the nature of comparative law. Specifically, many ask whether it is a branch of law or a “body of rules?” The answer is: neither.²³ Peter de Cruz describes comparative law as “an intellectual activity with law as its object and comparison as its process,” where such comparison has traditionally focused on the major legal families.²⁴ Similarly, Alan Watson defines comparative law as

20. See DE CRUZ, *supra* note 1, at 3 (“A legal system may be defined as the legal rules and institutions of a country . . . in the narrow sense or . . . in the broad sense as the ‘juristic philosophy and techniques shared by a number of nations with broadly similar legal systems’ . . .”).

21. See *id.*

22. See Civil Code of Quebec, S.Q. 1991, c 64, Preliminary Provision (“The *Civil Code of Quebec* . . . lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”); see also VAN CAENEGEM, *supra* note 9, at 13 (“The supranational law *par excellence* was, of course, the *ius commune*. This is not a paradox but self evident, as it was the learned system produced by the European Universities and common to all Latin Christendom.”).

23. DE CRUZ, *supra* note 1, at 3 (“[C]omparative law’ can be said to describe the *systematic study of particular legal traditions and legal rules on a comparative basis*. To qualify as a true comparative law enterprise, it also requires the *comparison of two or more legal systems* . . . or of selected aspects, institutions or branches of two or more *legal systems* . . .”) (emphasis in original).

24. *Id.* (citations omitted) (“There are no less than forty-two legal systems in the

“the study of the relationship of one legal system and its rules with another [A study of] the nature of law, and especially [of] the nature of legal development.”²⁵ Based on these definitions, comparative law is better characterized as “a *method of study* rather than a legal body of rules.”²⁶ It recognizes the important relationship between law, history, and culture, and operates on the premise that every legal system is a special mixture of the spirit of its people and the product of several intertwining historical events, which have produced a distinct national character.²⁷ Thus, through comparative law one can understand how the “mixing of systems” takes place, which is ultimately reflected in the theme of this Article—i.e., the role of professors and judges in the development of private law in a mixed jurisdiction as compared to civil and common law systems.

A. A GENERAL VIEW OF THE “LEGAL FAMILIES” AND THE “MIXING OF SYSTEMS”

Examining the similarities and differences between the “pure” legal families may be an easier task than understanding mixed systems. This is because those similarities and differences serve as a basis for classifying each system’s general characteristics, such as substance, sources, and structures.²⁸ As previously discussed, through the study of the “pure” legal families, one may conclude that judges play a more central role in common law systems, while academics play a more central role in civil law systems.²⁹ However, it is not as easy to draw such simplistic conclusions about “mixed systems,” because they lack

world, and comparison has traditionally focused on three major legal families in the world, namely the civil law system, common law system and socialist system.”).

25. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 6–7 (1974).

26. DE CRUZ, *supra* note 1, at 3 (emphasis in original).

27. *See* WATSON, *supra* note 25, at 6–8 (citations omitted) (describing comparative law as “a Legal History concerned with the relationship between systems,” and further explaining that “[a] second type of relationship . . . has [been] called the ‘inner relationship.’ This rests not on any actual historical contact, but on a spiritual and psychical relationship and on an undeniable similarity between the peoples . . . or between their development”).

28. *See id.* at 8 (“When English law has not been influenced by Roman law it is of small significance that a detail is the same or is different in the two systems. But, in contrast, the absence of the trust in Roman law and its prominence and usefulness in English law should make us more aware of the nature of the trust and of the factors in its development Conversely the remedies against unjust enrichment in Roman law and the general lack of such until recently in the common law should make us more alive to the various aspects of both systems.”).

29. *See* discussion, *supra* notes 9–13.

the “common denominators” found among systems within the same legal family.³⁰ Accordingly, it is essential to examine whether mixed legal systems can be grouped within a particular family, in order to then determine whether characteristics from one legal system can later be extended to other mixed legal systems.³¹

At least in the Western world, legal families become mixed when they have been so strongly influenced by both common and civil law traditions that one cannot classify them exclusively under either of the main families.³² They contain considerable elements of both traditions, but no particular element of a tradition is strong enough to merit classification under one of the traditional legal families. Generally speaking, civil law principles predominate mixed systems in the private law context, while common law predominates under commercial law principles.³³ Similarly, public law tends to follow more common law lines.³⁴ Judges tend to play a more important role in mixed jurisdictions than in civil law traditions, but not necessarily to the same extent as in common law traditions.

In practice, mixed legal traditions are a reflection of their historical background. In fact the legal systems of Scotland, Malta, and Québec defy traditional classification by occupying a “midway” position between the two western traditions.³⁵ For the sake of completeness, one must mention that “mixed systems” are flexible, and over time one can classify them differently as new mixed systems come into being.³⁶ As mixed systems are wide in

30. See WATSON, *supra* note 25, at 7 (“If this approach is right and Comparative Law is best regarded as a study of the relationship between systems of law, then it follows that where there is no relationship there can be no Comparative Law, and any comparison drawn between the rules will be arbitrary and without systematic worth.”).

31. See *id.* (“It thus becomes important to establish the nature of *possible* relationships.”) (emphasis added).

32. See *id.* (“In the forefront, above all, stands the historical relationship: where one system or one of its rules derives from another system, probably with modifications; where more than one system or rules of such systems derives from a further system; or (where derive is too strong a term) when one system exerts influence on another.”).

33. See Palmer, *supra* note 19, at 9–10.

34. See *id.*

35. See Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 477, 478 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

36. See Glenn H.P., *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 35, at 422.

scope, this Article limits its analysis to the legal systems that owe their origin to the Western European legal civilization, rather than to African, Asian, or Islamic cultures.

One can look at the origins of the “mixed” legal system and notice that the dominant spirit is still that of legal nationalism.³⁷ Mixed systems owe their origin to a separate identity from their sources.³⁸ Most mixed systems emerge and then develop differently from the parent system, which likely belongs to a traditional legal family rather than that of a mixed nature. The separation from the parent may result due to neglect by the parent system, which may resemble a relationship between the colony’s and colonial master’s legal systems.³⁹ Mixed legal systems may have had siblings, but they would have developed independently of each other because they would have been in different geographic regions, often far apart.⁴⁰ It could also be argued that mixed systems were generally not formed by a voluntary choice between civil and common law; i.e., they may have been the product of several successive colonial masters.⁴¹ The pressure to conform to foreign influence is a powerful impulse for change, which balances against the merits of rules from other legal traditions.⁴² More recently, states with a mixed legal system have acquired more constitutional autonomy, and the effects of globalization and regional integration have further contributed to the blending of civil and common law traditions.⁴³

From the above discussion, one could argue that mixed systems enjoy a particular degree of autonomy.⁴⁴ However, this approach would allow mixed systems to develop legal doctrine whereby a certain “equilibrium” is achieved, meaning that the mixed systems would be unlikely to proceed in the direction of

37. Du Plessis, *supra* note 35.

38. *Id.*

39. *Id.*

40. *Id.* at 477.

41. *Id.* at 478.

42. See Du Plessis, *supra* note 35, at 480 (“Traditionally, the most prominent families have been configurations of the civil law and common law, whereas other families . . . had to be satisfied with more modest positions. This relative prominence reflects the traditionally Eurocentric and private law-biased outlook of the classifiers.”).

43. See *id.* at 480–81 (“[W]hatever the differences in detail may be, all of these classifications have to deal with the phenomenon that a system can display the features of more than one family to the extent that it cannot easily be brought home under any one of them.”).

44. *Id.* at 480.

any constituent legal system.⁴⁵ A second possible approach, as advanced by Esin Örucü, posits that “the existing classifications of legal systems into legal families are no longer tenable, partly due to their inability to deal satisfactorily with mixed systems.”⁴⁶ Örucü further argues a new “family trees” approach could be adopted, instead of the more common classification of legal families.⁴⁷ The advantage here is that, in today’s globalized world, legal systems do not live in a cocoon and so there would be an element of influence from other systems, which is better represented by a family-tree system.⁴⁸ Through the family tree one can follow the evolution of the mixed legal system. Jacques du Plessis has argued that this approach acknowledges that certain systems cannot easily be located within established legal families.⁴⁹

Keeping the above theories in mind, it is highly likely that the relationship, or lack thereof, between the judge and the professor reflects the above criteria. As Sections III and IV of this Article highlight, the difficulty of doing this analysis in a mixed legal system is that one cannot make broad statements. It is important to keep in mind that “mixes” in a mixed legal system are like a chocolate cake. Not only may the cake’s flavor be different, but even within a flavor, chocolate cakes can have a stronger or weaker taste than other chocolate cakes. Ultimately the taste depends on the mix, as do the players in a mixed legal system.

To the mix one must add the cook. In a legal system, the

45. Du Plessis, *supra* note 35, at 480–81 (“[I]n the context of the traditional mixed systems, where these systems enjoy political autonomy and a developed legal literature, they can achieve a certain ‘equilibrium,’ which means there is no reason to believe that they will necessarily proceed in the direction of any of their constituent systems.”).

46. *Id.* at 481; see Esin Örucü, *A General View of ‘Legal Families’ and of ‘Mixing Systems,’* in *COMPARATIVE LAW: A HANDBOOK* 169, 171 (Esin Örucü & David Nelken eds., 2007) (“Recently there has been increasing interest in mixed, or hybrid systems. [One scholar] calls ‘mixed jurisdictions’ the ‘third family’ . . .”).

47. Du Plessis, *supra* note 35, at 481 (“Her remedy for this problem is that these classifications of legal families should be abandoned in favour of a new ‘family trees’ approach, which takes as its point of departure that all legal systems are regarded as mixed and overlapping to various degrees.”).

48. *See id.* (“Given that mixed systems may remain part of the legal landscape for quite some time, they should therefore not be regarded as anomalies or misfits, but rather as symptoms . . .”).

49. Esin Örucü, *Family Trees for Legal Systems: Towards a Contemporary Approach,* in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 367 (Mark Van Hoecke ed., 2004).

cooks are the legislators, or rather the political masters. The Scottish mix does not result from the imposition of common law upon a civil law system as in Malta or Louisiana.⁵⁰ Kenneth Reid argues that the Scottish legal system can be regarded as being “mixed from the very beginning,” as Scottish jurists created the mix by selecting the best ingredients.⁵¹ However, the exact mix is controversial. In the Maltese system, the first mix was the result of a change from French to British colonization. While this makes sense from a legal historic point of view, it may not necessarily be extended to the last fifty years of independence, during which the Maltese legal system has developed tremendously and has contributed to the EU for the past ten years. The mixing in Malta currently occurs as changes result either by the imposition of EU directives, like during colonial times, or by purely local decisions taken by the local sovereign legislature. The tug of war here will be between what is substantively preferable—as may be advised by experts in the fields, such as professors—and simple political convenience. This brings Malta closer to the way the Scottish legal system evolved in the past.

Next, this Article tests the level of influence between the judge and the professor in a mixed jurisdiction by briefly looking at how the Maltese legal system was formed and how it works today.

B. MIXED LEGAL SYSTEMS CASE STUDY: MALTA

The Maltese legal order is at the crossroads of civil law and common law. Malta’s legal history has a connection with continental Europe, which strengthened during the period of the Knights between 1530 and 1798 and continued well beyond the arrival of the British in 1800.⁵² When the Maltese Civil Code was first enacted in 1868, the major source was the Code de Napoléon.⁵³ As a result, Maltese substantive private law is based on the Roman/civil law system.⁵⁴ However, the British period strongly influenced Malta’s legal system. For example, procedural and administrative law in the Maltese system is much closer to the British common law system than to the continental

50. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 22–24 (2003).

51. *Id.*

52. See Özücü, *supra* note 49.

53. See *id.*

54. *Id.*

civil system.⁵⁵ Nevertheless, the Maltese legal system is a codified system, unlike British common law. The Maltese Code of Organization and Civil Procedure (COCP) dates back to 1865.⁵⁶ Although the Laws of Malta include codes as their continental counterpart, common law influence can still be seen because codification is not complete. As in England, while most of the private law is found in the Civil and Commercial Code, other private laws are scattered throughout the various 500 chapters that make up Maltese law.⁵⁷ Similarly, while the Maltese courts use the common law adversarial system, the doctrine of precedent—which is essential for a “pure” common law system—is largely absent. In addition, the Maltese Constitution follows the British model, with one major difference. While in England Parliament is supreme and the current Parliament can never bind a future Parliament, under the Maltese Constitution, parliamentary sovereignty is limited by the supremacy clause, which means that Parliaments can be bound by past Parliaments if a two-thirds majority votes to do so.⁵⁸

Thus, Maltese law belongs to a “mixed” legal family where concepts from the two major legal families exist side by side. European law is also evolving on a “mixed family” line. While as a system it originated on civil law grounds, given the fact that the original six countries were civil law jurisdictions, common law principles started leaving their marks following the UK’s accession. An example is the Second Company Directive, which introduced common law concepts into European company law.⁵⁹ In a way the Maltese legal system could serve as a laboratory to prove how EU law could evolve, bearing in mind certain obvious variables, such as that the Maltese legal order is a national legal order while the EU legal order is a *sui generis* kind of legal order

55. See Özücü, *supra* note 49.

56. CODE OF ORGANIZATION AND CIVIL PROCEDURE [CODE ORG. & CIV. PROC.] ch. 12 (Malta), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>.

57. See *generally Laws of Malta*, MINISTRY FOR JUST. CULTURE AND LOC. GOV'T, <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>.

58. MALTA CONST. ch. I, § 1, cl. 3, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1>.

59. Second Council Directive 77/91/EEC of Dec. 13, 1976 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, with a View to Making such Safeguards Equivalent, 1976 O.J. (L26), at 1 (EC).

that exists alongside the national legal order.

Malta's independence from the UK in 1964 was marked by legal continuity at both constitutional and private-law levels. In fact, the advent of independence did not bring any significant changes. Malta opted to continue with the same legal regime it had before, and there was no attempt to shift back to a civil law system as it was before the British colonial period. The change from monarchy to republic did not alter the status quo with regards to both private law and public law. Basically, Malta continued to follow the old civil law tradition with regards to pure civil law principles, while procedural law and new commercial law were modeled on common law traditions. Between 1987 and the start of EU accession negotiations after 1998, Malta continued to advance modern legal initiatives, particularly in the fields of commercial law and financial services, drawing inspiration from common law traditions. As an example, one can mention the introduction of the common law concept of trust to the Maltese legal system by legislation.⁶⁰

Following EU accession in 2004, Malta seems to have lost the motivation to come up with local legal initiatives. Over the past decade, Malta has been busy transposing EU legislation, namely directives, across various chapters of the laws of Malta rather than through codification.⁶¹ The way transposition takes place is usually through the enactment of an act of parliament, or through subsidiary legislation, without any thought as to the origin of the legal traditions of the EU legal instrument and how it would best suit the Maltese legal order. In fact, one might say that EU transposition is done in a way convenient to the EU Commission rather than to satisfy any local legal tradition. The end result is that Malta generally complies with the *acquis communautaire*,⁶² and the EU Commission is generally satisfied with Malta. However, Malta now has laws spread throughout more than 500 chapters, and by choice and for political convenience with its European obligations, it is a "purely" mixed

60. TRUSTS AND TRUSTEES ACT, ACT XXXV OF 1988 (Cap. 331, Laws of Malta, 1989), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8805&l=1>.

61. See generally *Laws of Malta*, supra note 57. One may also refer to the Companies Act, which is Chapter 386 of the Laws of Malta, as a specific example of such a scattering of private law.

62. The *acquis communautaire* is the body of laws of the EU and includes primary and secondary legislation as well as the jurisprudence of the Court of Justice of the EU.

system. “Purely” because little thought is given as to how to create and respect local legal traditions; the aim is to comply with EU law in the shortest possible time and to avoid EU infringement proceedings.

C. THE “MIXING OF SYSTEMS” IN EUROPEAN PRIVATE LAW

Having briefly discussed the Maltese legal system as an example of a national mixed jurisdiction, it is also worth briefly analyzing the development of private law at the level of the EU legal order so that it too can be used as a background case study later in this Article. Although EU law is a *sui generis* legal order, one would be mistaken to simply compare it with any other national legal order. First, although it is a separate legal order from that of the member states, it cannot exist without the member states’ own legal orders. Second, its development is limited by union competence. This is because the EU legal order is a supranational legal order that exists alongside the national legal orders of the member states, and its development is limited to the extent permitted by the founding treaties.⁶³ Thus, while one can examine whether it may be closer to one of the legal traditions than the other, one must keep in mind that the EU legal order is not similar to the traditional legal orders of national states. In fact, most of the areas usually associated with private law, such as family or property law, are not found in EU law.

Nevertheless, the fact that the EU is composed of legal orders from both legal traditions means that EU law draws its inspiration from different legal traditions; as a result, the EU legal order tends to be more of a mixed legal tradition in image. When the EU, then called the European Economic Community, was originally established by the Treaty of Rome in 1957, the six founding members were mainly from the civil law tradition. Thus, if one were to analyze the administrative and institutional law set up in the EU, one could conclude that in the early stages

63. Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1. The case is authority for the proposition that articles of the Treaty on the Functioning of the EU are directly effective (as distinct from directly applicable) in their application against the state. The case illustrates the creative jurisprudence of the European Court of Justice. The concept of direct effect is not mentioned in the Treaty. The court held that such a doctrine was necessary to ensure the compliance of member states with their obligations under the Treaty of Rome. The case illustrates a procedure of enforcement of EU law at the national level—direct effect does not require the Commission to bring an action against the state. This is significant, because it provides a more effective, distributed enforcement mechanism.

of EU law, it followed more closely the civil law tradition. This can be seen in the way the European Court of Justice was organized. The same can be said with regard to private law legal instruments, such as the First Company Directive.⁶⁴ However, with the accession of common law member states in 1973, common law influence started being introduced.⁶⁵ For example, in the field of private law, subsequent company law directives were influenced by common law principles such as the Second Company Law Directive.⁶⁶ Thus, one can say that European law is developing more along the lines of a mixed system.

It may be essential in European private law that the rules and the methodology of civil law collide as hard as possible with those of common law. Only then can there be a satisfactory guarantee that the various legal cultures actually “trade off” against each other, so that afterwards it is not possible to complain within one or both traditions that their own legal culture was given up too easily for another.⁶⁷

It is essential to the formation of a mixed legal system that not only legal scholars engage in comparative law research, but also that the courts are prepared to draw inspiration from different legal systems when settling a dispute. Inspiration is primarily drawn from another legal system when one’s own system does not regulate an issue, or it does so incompletely or ambiguously. The competition between foreign legal rules does not only lead to an elimination of rules of inferior quality, but a supplementation of existing rules. Equally essential as the role of the courts is the importance of legal science. The mixed systems mainly evolved as a result of the interaction between the courts and legal science, between cases and systematizing principles. A

64. First Council Directive 68/151/EEC of Mar. 9, 1968 on the Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, with a View to Making such Safeguards Equivalent Throughout the Community, 1968 O.J. (L65), at 8–12 (EC).

65. In 1973 two common law states joined the then EEC, namely the U.K. and Éire.

66. Second Council Directive 77/91/EEC of Dec. 13, 1976 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, with a View to Making such Safeguards Equivalent, 1976 O.J. (L26), at 1 (EC).

67. For example, the EU managed to mix civil and common law concepts in European company law. *See id.*

large role for systematization also appears to be in keeping the masses of cases from the member states of the EU manageable. Therefore, EU law is drawing inspiration from both legal traditions. However, it is also likely that the process of Europeanization is in itself innovative and will contribute to establishing a European identity.

III. THE ROLE OF THE PROFESSOR

Having examined the context of mixed jurisdiction, this section now turns to the role played by the professor in the civil and common law traditions. More specifically, this section examines to what extent the combination of these traditions has affected the role of the professor in mixed jurisdictions.

In civil law countries the professor is clearly paramount. For centuries learned jurists from law faculties have assisted both judges and legislators in drafting and interpreting the law. This role owes its origin to the Roman *jurisconsult*, who advised the *praetor* and the judge. He was widely recognized as an expert, though he had no judicial or legislative function. His opinion carried significant weight; during the second century AD, the opinions of the *jurisconsult* were even considered to be binding upon the judges.⁶⁸ Much of the work of Justinian's *Corpus Juris Civilis* was the work of *jurisconsult*.⁶⁹ This trend grew with the revival of Roman law in Europe in the Middle Ages and the early Modern Age. The work of the glossators and the commentators added to Justinian's works; hence, the professor and the scholar were central to the development of the medieval *jus commune*, which is the foundation of contemporary civil law traditions.⁷⁰

From the medieval *jus commune* one can move to the modern codification and the birth of the nation states in Europe as well as their colonies, including the Americas. Scholars were the main authors behind famous codes, including the French and German codes.⁷¹ Even where parts of the codes were actually drafted by lawyers and judges, the influence of scholars was predominant.⁷²

68. JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 57 (3d ed. 2007).

69. *Id.*

70. *Id.*

71. *Id.* at 58.

72. *Id.* ("The actual work of drafting the French codes was put into the hands of commissions composed of practicing lawyers and judges The German codification, as we shall see, was even more thoroughly dominated by scholars.")

For example, one can mention the works of Robert Pothier within the context of the code Napoléon.⁷³ The civil law *modus operandi* is so strong that Napoléon's hope "that no commentaries would be published on his civil code" was wishful thinking.⁷⁴

Commentaries are meant to explain codes, and such clarity is part and parcel of the works of scholars in the civil law tradition. According to a well-known story, Napoléon exclaimed, "My code is lost," when he learned that the first commentary was published on his code.⁷⁵ Of course the reason was that Napoléon thought that his code was too clear, complete, and coherent to merit a commentary. He wanted his code to break new glass, but the role of scholars in interpreting the code was too big to be diminished by even the strongest of politicians of that time.⁷⁶ Today there are similar efforts by certain state institutions to curtail the scholar's influence. One can mention instances where Italian judges cite doctrine without quoting scholars.⁷⁷ The Italian parliament has even tried to curtail the judges' reliance on scholars, but this has not proved successful.⁷⁸ Hence, one can easily conclude that professors do play an important role in interpreting legislation in civil law countries.

While on one hand the professor is important in Europe, on the other hand the professor is less important in England and in the legal systems that evolved from English law.⁷⁹ One of the reasons for this is the way English law has evolved and detached from Roman law. Common law was born through judges, most of whom had no legal training, but were groomed into judges by experience.⁸⁰ Because experience rather than formal education

73. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 58.

74. *Id.* at 59.

75. *Id.*

76. *Id.*

77. *Id.*

78. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 59. ("In contemporary Italy, for example, the legislature has told the courts that they may not cite books and articles in their opinions. Therefore Italian Judges, who are heavily influenced by legal scholarship, employ the ideas suggested to them by scholars without citing them, and refer in a very general way to 'the doctrine,' which is the civil law term for books and articles written by legal scholars. This easy circumvention of the Italian parliament's command is merely another example of the futility of legislative attempts to eliminate or even reduce the influence of the scholar in the civil law world.").

79. *Id.* ("Much of what is called legal history in the civil law tradition is baffling to common lawyers who first approach it.").

80. VAN CAENEGEM, *supra* note 9, at 46.

made judges, English law was not taught in the early English universities.⁸¹ Rather, the first English-law faculties taught Roman law.⁸² Hence, the task of training future lawyers (more precisely, barristers) fell to the Inns of Court, which were mainly gentlemen's clubs.⁸³ As a result, the role of the continental professor was taken over through practical training by the judges of the Inns of Court. While they were not formal scholars, the judges filled the roles of the continental judge and continental scholar.⁸⁴

Eventually during the mid-nineteenth century, English law began to be taught at English universities.⁸⁵ Contemporary legislation is more complex than early legislation, and with the ongoing evolution of judge-made law being supplemented by statutory legislation, universities and scholars stepped in and formal legal education grew.⁸⁶ Nevertheless, the importance of training in the Inns of Court was preserved.⁸⁷ As discussed in Section V of this Article, while it is technically possible to become a barrister without formal legal education (as legal training remains paramount), today both scholars and judges play an important role in the formation of barristers and, hence, indirectly in the interpretation of the law.

In mixed systems one would not be surprised to find a mixture of the experience of both civil and common law traditions. As explained in Section II of this Article, one can reference the Maltese scenario as an example. Prior to becoming a mixed jurisdiction, Malta was a civil law country and the role of the scholar was important. To an extent, this has been preserved to this very day. If one looks at well-studied judgments of the high civil courts, both in the olden days as well as in

81. See VAN CAENEGEM, *supra* note 9, at 47.

82. See *id.*

83. *Id.*

84. See *id.*

85. *Id.* at 48 ("Eventually the debate was settled in favour of the universities: Oxford created a School of Jurisprudence and Modern History in 1850, followed by an autonomous School of Jurisprudence in 1871.")

86. See VAN CAENEGEM, *supra* note 9, at 47. ("Nowadays Law Faculties are omnipresent and almost all young people who want a career as solicitor, barrister or judge obtain a law degree in a university.")

87. See Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 429 (1967) ("In England, the training of young jurists was long considered to be a function and responsibility of the practicing bar; the Inns of Court still provide an indispensable stage in the preparation of Barristers.")

contemporary times, judges find it easy and reliable to quote scholars. If one were to look at a sample of judgments of the Court of Appeal of Malta, one would find various references to scholars in most judgments. Many Italian and French scholarships dealing with private law apply to modern private Maltese law as it is mainly modeled on these jurisdictions at least with regards to the core principles. Hence, these scholars who indirectly shed light on the foundations of modern Maltese civil law are still held in high regard. When it comes to administrative and other modern commercial law where Maltese law tends to be closer to common law traditions, Maltese judges refer to English scholars and judges as a source of inspiration, even though there is no precedence in Maltese law.⁸⁸ One might say that English scholars are held in higher esteem by Maltese judges than by their English counterparts. Unfortunately, there are only a few Maltese scholars of the past who produced legal literature. However, some sources, such as the Mamo notes or the Caruana Galizia notes, are occasionally cited in court judgments to the extent that they are still relevant to the law in question today.⁸⁹

Indeed, the teaching of public and civil law, together with canon law, was already well established when the *Pubblica Università di Studi Generali* was set up in 1769 at the University of Malta. Within the Maltese legal system it performs an indispensable function, being the only institution in Malta authorized to award the degree of Doctor of Laws (LL.D.), which is required in order to qualify as an advocate, magistrate, or judge in Malta.⁹⁰ In Malta there are no Inns of Court, but the law faculty of the university is the *de facto* gentlemen's club of the Maltese legal profession.⁹¹ Hence in Malta, more than in England, the role of the judge and professor were fused into the same person for a long time.⁹² Another important point is that,

88. For an example, see O. HOOD PHILLIPS ET AL., *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (8th ed. 2001).

89. These notes are available as unpublished student notes from the law society of the Faculty of Laws of the University of Malta.

90. Civil Code art. 306(1) (Malta), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1>.

91. Nowadays, as women outnumber men in both the law faculty and the law courts themselves, the term gentlemen's club may be obsolete from a gender point of view.

92. See OFFICE OF REGISTRAR, COMPLETED AWARDS 2014/5 STATISTICS BY FACULTY/INSTITUTE, COURSE & ROUTE, U. OF MALTA (May 2016), http://www.um.edu.mt/_data/assets/pdf_file/0009/269064/completedawards14-15.pdf.

with the advent of a number of new modern professional scholars, there is a de facto separation between professors and judges. Nevertheless, if scholars produce good work, it is more likely that they will continue to be held in high esteem by the courts.

From the above discussion, one can conclude that in both the traditional legal families and mixed systems, scholars are in fact complementary to the judges. In some cases the same person may even occupy both roles at different stages of his career. Additionally, the role of a professor in a mixed jurisdiction is probably closer to that of a civil law system than that in a common law system.

IV. THE ROLE OF THE JUDGE

As explained in Section II of this Article, judges in civil law countries tend to be faceless civil servants while their common law counterparts are highly visible individuals. At common law, a judge is a culture hero. The legal tradition of the common law in fact owes its origin to the hands of the judges. They have nurtured it through the law of precedent. The law of precedent is what makes common law, and common law could not have developed without it. This, in itself, distinguishes the judges in the common law tradition from those of other systems.⁹³ Once the judges can make law through interpretation, they earn the right of respect of the public. It is the judge's job to find a solution for the parties, and through the process, they create the law for similar future cases. The solution lies not in a codified body of law, but rather in the judges themselves. This creates all the difference because they are not just interpreting the law, they are effectively creating the law.⁹⁴

Another important difference lies in the path of how one can become a judge. In the civil law tradition, it is purely a career choice that leads to a high position within the national civil

93. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 34 ("Many of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story, Brandeis, Cardozo. We know that our legal tradition was originally created and has grown and developed in the hands of judges, reasoning closely from case to case and building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly.")

94. *Id.* ("We know that there is an abundance of legislation in force, and we recognize that there is a legislative function. But to us the common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function.")

service.⁹⁵ While the formative years are common to all legal professionals, law students eventually make a choice to become judges instead of lawyers.⁹⁶ In France, for example, law students who choose this career path go to a special school, pass state examinations, and if successful they can be appointed as junior judges from the list of successful candidates.⁹⁷ Eventually, after time and after gaining experience, judges can advance to higher courts or bigger towns much like a career progression within the civil service.⁹⁸ Lateral entry into high positions is rare.

On the contrary, in England you can only choose to become a barrister.⁹⁹ Appointment to the bench as a Queen's Council is normally the result of a political appointment by a senior barrister.¹⁰⁰ Hence, one does not train to be a judge; one trains to be a lawyer, and after gaining experience at the Inns of Court may be appointed to the bench. Thus, judges would have experience in the private sector as lawyers in the first part of their career, rather than their civil law counterparts who may know no other world outside their civil service.

Another important distinction is that civil law judges rarely preside over the bench as individuals, but rather as chambers of three or more judges. This means that very often the public only gets to know the final opinion of the group of judges rather than their individual input. Dissenting opinions are also a rarity.¹⁰¹ In contrast, common law judges in the first instance, i.e., in the lower courts, almost always issue opinions alone. Therefore, the opinion of each individual judge is apparent to all those affected and to the public at large. The judge delivers judgment in his own name and earns praise and possibly criticism on an individual basis. It is also worth noting that, as a result of these arrangements, there are often fewer judges in common law systems than in civil law systems when comparing the number of judges per opinion.¹⁰² The fact that there are fewer judges puts

95. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 35 ("But in the civil law world, a judge is something entirely different. He is a civil servant, a functionary.")

96. *Id.*

97. *Id.*

98. *Id.* ("In time, he will rise in the judiciary at a rate dependent on some combination of demonstrated ability and seniority.")

99. *Id.*

100. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 35.

101. *Id.* at 37 ("In most jurisdictions separate concurring opinions and dissenting opinions are not written or published, nor are dissenting votes noted.")

102. *Id.* at 35.

them in a more prestigious position. In a civil law system the judge is the “operator of the machine designed and built by legislators.”¹⁰³ In a common law system the judge is the machine himself to a considerable extent, because he has greater input in the judgment. From the above explanation, one can easily understand the dominant role played by the judge in the common law systems. So what about the mixed system?

In mixed systems the role of the judge also depends on how the office evolved. As previously explained, one must be very careful not to overgeneralize. The Maltese judicial system is basically a two-tier system comprising a court of first instance, presided over by a judge or magistrate, and a court of appeal.¹⁰⁴ The court of appeal in its superior jurisdiction is composed of three judges and hears appeals from a court of first instance.¹⁰⁵ The court of appeal in its inferior jurisdiction is presided over by a single judge and hears appeals from a court of first instance presided over by a magistrate, a junior judge in the Maltese system.¹⁰⁶ There are also various tribunals that deal with specific areas of law and have varying degrees of competence.¹⁰⁷ The majority of appeals from decisions rendered by any of these tribunals are heard by the court of appeal in its inferior jurisdiction. Judges and magistrates are political appointees appointed from lawyers who have the required experience established by the Constitution: twelve years for the judges of the superior courts and seven years for magistrates.¹⁰⁸

In Malta, judges have a very important role in interpreting the law, certainly much more than their civil law counterparts but probably less than their common law counterparts. Judges are important because most judgments are given in their own name. Only the court of appeal in its superior jurisdiction is presided over by three judges; the rest of the courts are presided over individually. Hence, there is ample opportunity for a judge to demonstrate her worth. Judges rarely consult each other unless they preside over the case together. It is also very rare

103. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 36–37 (“Civil law judges are not culture heroes or parental figures, as they often are with us. Their image is that of a civil servant who performs important but essentially uncreative functions.”).

104. CODE ORG. & CIV. PROC., art. 3 (Malta), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>.

105. *Id.* art. 41(1), (5).

106. *Id.* art. 47.

107. *Id.* art. 2(2).

108. *Id.* arts. 96, 100 (containing rules for judges and magistrates respectively).

that judges consult scholars or practitioners. Officially, this is never done—the judge is expected to know all of the law even though judges may preside over cases regarding matters of which they may not be experts. While some judges are very good, others may be very poor, only ending up on the bench as political appointees. Often when a judge is not comfortable with the area of law under examination, she tends to do more research and, thus, rely more on scholarly opinion.

The fact that there is no binding precedent means that case law and scholarly articles complement each other to assist the judge in interpreting the law. The absence of the law of precedence dethrones the Maltese judge from the enviable position of his common law counterpart. From the above observation one can conclude that, in the Maltese system, the role of the judge and the scholar depends largely on the credentials of the person occupying the role. It is evident from the system, and well recognized among peers, that there are good and bad judges just as there are good and bad scholars.

If one looks at the EU legal order, the analysis can be limited to the judges appointed to the Court of Justice and the General Court of the Court of Justice of the EU. The judges are selected from scholars, practitioners, and local judges. A rigorous selection process prior to being sworn in ensures that all judges are qualified for the job. Effectively, given their status, they are scholars in their own right. Nevertheless, because there is no precedence and they sit in chambers of three, five, or thirteen judges, there is no room for an individual mark on the judgment as with common law judges.¹⁰⁹ In fact, their position makes them closer to civil law judges. One may add that the role of Advocate General (AG), though coming from the civil law tradition, resembles a common law judge with regard to the individual input the AG can contribute through his opinion. Again, with regard to the positions of the judges of the EU, one can say that judges and professors occupy different roles that make them unlikely rivals and peers in their interpretation of European law.

109. KOENRAAD LENAERTS ET AL., *PROCEDURAL LAW OF THE EUROPEAN UNION* 13 (Robert Bray ed., 2d ed. 2006) (“As in the case of the Court of Justice, the Court of First Instance sits as a rule in Chambers of three or five judges. The Court of First Instance has five Chambers of five Judges and five Chambers of three Judges. Unlike in the case of the Court of Justice, the most common formation is the three-Judge Chamber. The Court of First Instance may also sit in plenary session, as a single Judge or as the Grand Chamber. The Grand Chamber consists of thirteen Judges.”).

From the above one can appreciate that in mixed jurisdictions the role of the judge and that of the professor is complementary, and that the contrast is less evident than from the point of view of the traditional legal families.

V. LEGAL EDUCATION AND TRAINING VERSUS GLOBALIZATION

Now, the vast majority of lawyers and law professors in modern jurisdictions coming from common law, civil law, or mixed jurisdictions start their formal legal education at university and at some point they practice law. For practitioners, law practice is essential to obtain the license in the sense that academic qualification alone is not sufficient. For scholarship, a license to practice law is not necessary but is common among professors, especially if they teach and research an area of law directly associated with a practice. Most scholars and judges begin their career from the same place. Yet, as previously explained, legal education and subsequent legal training are instrumental in establishing the role of scholars and judges later in their careers. This section aims to (1) show the differences and similarities that exist in general legal education and training between the common law and the civil law traditions, and (2) illustrate how methods from the traditional legal families have influenced mixed jurisdictions. This principle is then analyzed from the point of view of globalization and the free movement of lawyers in the EU.¹¹⁰

As previously mentioned, legal education in civil law countries owes its origins to the establishment of the first modern universities.¹¹¹ University education was always central in the education of the legal profession.¹¹² All judges, lawyers, and other officers of the court emerged from the hands of scholars. Also, the

110. See Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1640 (2011) (citations omitted) ("The multitude of legal professions across the European Union has varying structures, customs, cultures, and legal traditions. The variation among entry requirements reflects this colourful diversity. Yet, despite these relatively deep differences in entry requirements, the EU has created some of the 'particularly remarkable' and most dramatic rules for allowing free movement of lawyers and cross-jurisdictional practice rights in the world.").

111. See Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 429 (1967).

112. See *id.* ("[In England], [t]he university role in legal education is relatively recent. On the [c]ontinent, the study of law was always a part of the higher education of the universities.").

legal tradition emphasizes a code to provide a comprehensive solution to most legal problems that emerge in life. Education involves a deep study of the principles and provisions of the law that is often well structured and divided according to a proper classification of the law.¹¹³ Successful candidates are expected to be well versed in the actual provisions of the law. The central theme analyzed in education is the law rather than the solution to the legal problem, which is later derived from the interpretation of the law. Legal training after formal education is also centered on the law. With this mentality heavily enshrined in the *modus operandi* of the tradition, one can appreciate why the professor is held in a higher esteem than the judge, and why the judge finds no issue in recognizing the patronage of the professor.¹¹⁴

Common law training has not been traditionally centered on formal legal education, and rather emphasizes learning by doing (i.e., legal practice at the Inns of Court).¹¹⁵ Moreover, in common law, the solution to a legal problem is determined by the judge, rather than by a pre-established code. The judge also plays a very important role in the education and training of the legal profession. While in civil law, formal university education is the path to the legal profession, in common law the path to the profession there is more emphasis on bar training.¹¹⁶ In the past and even today, with regard to the justices of the peace in England, formal university education is not necessary.¹¹⁷ Until recently, it was the norm that barristers had a university

113. Dainow, *supra* note 111 (“In civil law countries, the student starts his study with codes and textbooks. He learns about the Justinian codifications and their influence on his present-day legal system. He is taught general principles and how to think in abstractions. It becomes part of his being to appreciate classification and coordination of subject matter, and to take for granted a comprehensiveness of the law as systematic and a whole. It is only recently in countries like France and Belgium that the law student has been required to read some decided cases, and he usually attaches only secondary importance to the judicial decisions. He concentrates on the codes, the treatises, and the notes taken during the formal lectures by his professors.”).

114. MERRYMAN & PEREZ-PERDOMO, *supra* note 68, at 60 (“This is what we mean when we say that the legal scholar is the great man of the civil law. Legislators, executives, administrators, judges, and lawyers all come under his influence. He molds the civil law tradition, and the formal materials of the law into a model of the legal system. He teaches this model to law students and writes about it in books and articles. Legislators and judges accept his idea of what law is, and, when they make or apply law, they use concepts he has developed.”).

115. Dainow, *supra* note 111.

116. *See id.*

117. *See id.* at 431.

education, but not necessarily a law degree. In fact, Lord Denning was a graduate in mathematics.¹¹⁸ Here one can easily appreciate that formal education is seen more as a way to enrich the candidate, while the actual legal training is done during the bar practice. Also, joining the legal profession may be a choice that one makes later in life.

Today, however, virtually all judges, barristers, and solicitors study first for a law degree (LL.B.) and then do the necessary bar or solicitor training before sitting for the formal state exams to be admitted to the respective legal profession.¹¹⁹ This may appear closer to the civil law system, but it is worth stating that modern common law is not just judge-made law because modern statutory law is essential given the complexity of modern legislation. The education itself also takes a different approach. While continental education is structured and built around the law, common law education is more centered on case law and is not as structured as in the civil law system.¹²⁰ The civil law system focuses on the law, while the common law system emphasizes interpreting the law (case law and statutory law), to solve legal problems. Most law professors in the civil law system are legal academics. In common law, most law professors are former practitioners who either teach part-time or have retired into academia. Full-time career legal academics tend to focus more on specialized subjects, such as aviation law, or international or philosophical subjects. Until a few decades ago, Ph.D.'s in law were rare. Even today it is much easier to get a university position teaching law without a Ph.D. in a common law country than in civil law countries, even though Ph.D.'s in law for university law-teaching posts are also becoming the norm

118. Stephens, *supra* note 18 ("Having taken a triple first, in Mathematics and Law, at Magdalen College Oxford . . . Lord Denning became a KC in 1938 and was elevated to the bench in the Probate, Divorce and Admiralty Division on the 6th March 1944."); Heward, *supra* note 18 ("Returning to Magdalen in 1919, [Lord Denning] took a First in the Mathematical School in 1920. After a short spell teaching mathematics at Winchester College, he returned to Magdalen in 1921 to study for the Final Honours School of Jurisprudence. He obtained first class honours in 1922.").

119. See Marilyn J. Berger, *A Comparative Study of British Barristers and American Legal Practice and Education*, 5 N.W. J. INT'L L. & BUS. 540, 563-64 (1983).

120. See Dainow, *supra* note 111, at 428 ("Legal education for the civil law is centered on legislation, codification and doctrine, on a very high level of abstraction In contrast, legal education for the common law is founded on the primacy of the decided cases; it emphasizes the important role of the king's courts in the development and unification of law").

through globalization.¹²¹

From the foregoing discussion it is easy to appreciate that common law students learn to respect the role of the judge much more than their civil law counterparts. Hence, the importance of common law judges is natural. However, within this context one might ask: But what about mixed jurisdictions? Once again, one may refer to the case study of Malta as an example of a mixed jurisdiction to observe the role of legal education in the relationship between the professor and the judge.

Formal legal education has been the norm in Malta since the establishment of the Faculty of Laws at the University of Malta during the eighteenth century.¹²² Until the late nineteenth or early twentieth century, Malta was predominantly a civil law country and university education was very similar to that on the continent.¹²³ Throughout the twentieth century until the present, the Faculty of Laws offered a six-year program called Doctor of Laws (LL.D.), which was, and still is, mainly taught in the civil law style with some English influence; after the formal training, a minimal one-year practice leads to the license of *avukat*—the legal term for a lawyer.¹²⁴ With time, common law influence in the curriculum increased, as did the use of case law. However, the course remains predominantly civil law in its approach. For completeness sake, the LL.D. is being replaced with a four-year LL.B. (Hons) and a one-year M.A. in Advocacy, where the curriculum focuses on procedure and practice.¹²⁵ This is followed by a further year of legal practice under the responsibility of the Chamber of Advocates which, with the new Lawyers Act¹²⁶ (when and if it will enter into force), is styling itself along the lines of the Inns of Court. Here one can observe a mixed system par excellence, where both the national law faculty and the Chamber

121. See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 507 (2016).

122. *Faculty of Laws*, U. MALTA, <https://www.um.edu.mt/laws> (last visited Jan. 3, 2017).

123. See Sean Patrick Donlan, et al., “A Happy Union”? *Malta’s Legal Hybridity*, 27 TUL. EUR. & CIV. L.F. 165, 195 (2012).

124. See CODE ORG. & CIV. PROC., arts. 79–81 (Malta), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>; *Faculty of Laws*, *supra* note 122.

125. See *Faculty of Laws*, *supra* note 122.

126. CHAMBER OF ADVOCATES, REGULATING THE LEGAL PROFESSION FOR THE 21ST CENTURY: A CONSULTATIVE DOCUMENT (2008), <http://www.avukati.org/downloads.aspx?id=364339> (follow “Consultative Document relating to the formulation of a Lawyers’ Act” hyperlink).

are sharing responsibility for lawyers' training. However, the judges still play a very important role in the examination of candidates for the law license.

The above discussion shows that, in a typical mixed jurisdiction, professors, practitioners, and judges are peers in the literal sense because they all play an essential role in certifying candidates for the legal profession. With some very minor exceptions, all law professors are effectively certified lawyers in their own right. Hence, the relationship between the two is more of a collaborative relationship, albeit within certain determined parameters, than one of rivals.

If one were to shift the focus to the EU legal order, one would notice that EU law has become an obligatory subject in almost all national-law curricula. The style of textbooks and teaching methods are undoubtedly influenced by the way in which national law is taught. Postgraduate LL.M. programs of study in EU law are common. Many universities teaching European law at the postgraduate level tend to mix teaching styles by drawing on both common and civil law approaches.¹²⁷ For example, one can mention the LL.M. program of the College of Europe in Bruges, Belgium, which is one of the world's leading postgraduate programs in EU law.¹²⁸ The college adopts a flying-faculty model whereby professors come from all over the world to teach their respective field of specialization.¹²⁹ The mixture of professors from different legal traditions helps students to understand the different approaches that one can take to learn the law. This may help contribute to both the element of mixture in interpreting the European legal order as well as training future professors and scholars to look beyond their national training and embrace different approaches. This globalized approach to law teaching and training helps bridge the gap between the traditional roles of the professor and judge in the traditional legal families, and again makes them more like peers than rivals.

Having mentioned the teaching of EU law, one cannot leave out the impact made by the EU's free movement of lawyers' directives on the relationship between the role of the professor

127. See *LLM Programs in Europe*, LLM GUIDE: MASTER OF LS. PROGRAMS WORLDWIDE, <https://llm-guide.com/schools/europe> (last visited Jan. 3, 2017).

128. See *College of Europe—Full Profile*, LLM GUIDE: MASTER OF LS. PROGRAMS WORLDWIDE, <https://llm-guide.com/schools/europe/belgium/college-of-europe> (last visited Jan. 3, 2017).

129. See *id.*

and the judge.¹³⁰ The mobility of lawyers within the EU may appear difficult to enforce by the member states. EU lawyers in general have relevant knowledge and skills in relation to the laws of their own country where they are qualified, but not necessarily in relation to the laws of other member states. Furthermore, as in all the member states, the legal profession is regulated—the admission to a local law society or bar association is subject to possessing certain diplomas, formal qualifications, and/or performing supervised training.¹³¹ In addition, lawyers admitted in the member states are subject to specific rules of conduct, which can sometimes lead to conflicts between countries (professional secrecy, privilege, conflicts of interest, etc.).¹³² Facilitating mobility across the EU for all member-state lawyers could also be seen as a threat to the protection of the consumers and to the functioning of the national justice systems. In the early seventies, the first cases of lawyers' mobility within the EU were brought before the Court of Justice of the EU.¹³³ Notwithstanding the reasons presented by the member states to restrict free access to their legal market by EU lawyers, the Court of Justice has now removed almost all unjustified barriers to give full effect to the Treaty.

Secondary law has also defined the framework of cross-border services¹³⁴ and the recognition of diplomas, certificates, and professional qualifications as essential to permanent establishment in another member state.¹³⁵ Today we can say that mobility of lawyers within the EU has essentially been achieved. The EU's economic integration through the free movement of persons (including lawyers) is unique and has no equivalent in other regions of the world. Over time, its scope has been

130. See generally DR. S.J.F.J. CLAESSENS ET AL., EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS: FINAL REPORT (2012), http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf.

131. Council Directive 89/48/EEC of Dec. 21, 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration, 1988 O.J. (L19), at 17–19 (EC).

132. Council Directive 77/249/EEC of Mar. 22, 1977 to Facilitate the Effective Exercise of Lawyers of Freedom to Provide Services, 1977 O.J. (L78), at 17–18 (EC).

133. Mehmet Çakmak, *Development of the Law Regarding Free Movement of Lawyers Within the EU*, 4 L. & JUST. REV. 127, 129 (2013) (“It can be said that the free movement of lawyers in the EU started with two revolutionary cases; *Reyners [v. Belgium]* and *Van Binsbergen [v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid]*.”).

134. Council Directive 77/249/EEC, *supra* note 132.

135. Council Directive 89/48/EEC, *supra* note 131.

significantly extended. Initially reserved to workers, today it includes, under certain conditions, inactive member state citizens, students, recipients of services, etc. This trend stems from the notion of EU citizenship. Under Council Directive 77/249, the lawyer:

Shall adopt the professional title used in the Member State from which he comes (also known as the home title) expressed in the language or one of the languages of that state with an indication of the professional organization by which he is authorized to practice or the court of law before which he is entitled to practice pursuant to the laws of that State.¹³⁶

For instance, a German lawyer who provides services in France must indicate that she is a Rechtsanwalt, i.e., a lawyer authorized to practice by the Munich Bar.¹³⁷

In representing a client, the EU lawyer is subject to the rules of professional conduct of the host member state, without prejudice to her obligations in the member state from which she comes.¹³⁸ That means that two rules of conduct are applicable to the lawyer providing services in another member state: those set by the host state and those set by her home member state. This is called the principle of “double deontology.”¹³⁹ The contrary applies with regard to consultancy activities; the rules of the home member state are applicable without prejudice to the need to respect the rules that govern the profession in the host member state, “especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.”¹⁴⁰ The latter home rules are applicable, but only if they are objectively justified to ensure, in that state, the proper exercise of a lawyer’s activities, the standing of the profession, and respect for the rules concerning incompatibility.¹⁴¹

136. Art. 3, Council Directive 77/249/EEC, *supra* note 132, at 17.

137. Council Directive 98/5/EEC, to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in Which the Qualification was Obtained, arts. 1, 4, 1998 O.J. (L77), at 38–39 (EC).

138. Art. 4, § 2, Council Directive 77/249/EEC, *supra* note 132, at 17.

139. CLAESSENS ET AL., *supra* note 130, at 9.

140. Art. 4, § 4, Council Directive 77/249/EEC, *supra* note 132, at 17.

141. *Id.*

Having briefly examined the free movement of lawyers in the EU, it is clear that the framework will contribute to further cross fertilization of approaches between the legal traditions of Europe. While the legal families remain, they are all increasingly exposed to approaches from different systems. While this does not necessarily alter the relationship between the role of the professor and the judge, the complexity of modern law and the increasing element of cross fertilization undoubtedly contribute to making the professor less of a rival, and more of a peer, to the judge.

VI. CONCLUSION—*QUA VADIS?*

The previous subsections of this Article make clear that, when it comes to analyzing the research question, “What role do professors and judges play in the development of private law in a mixed jurisdiction when compared to civil/common law systems?,” one cannot expect to arrive at fool-proof conclusive findings. The role of a judge in the common law tradition remains paramount, while the role of a professor in the civil law tradition remains supreme. Mixed traditions remain somewhere in between, but the relationship generally comes closer to one of cooperation than to one of rivalry. Nevertheless, one must accept that, with increasing globalization, worldwide trends shift slightly and edge closer to the position of a mixed jurisdiction. Professors and judges have their own separate roles, yet both make an important and necessary contribution to the interpretation of modern legislation.