Law

Hugh W. Harding

The geographical position of Malta – in the centre of the Mediterranean – with its excellent harbour has given it an importance which is out of proportion to its size. As a result it has through the centuries been the coveted possession of many major powers and indeed its fate has been inevitably interwoven with the fate of the principal Mediterranean power of the time. Most of these powers – especially since the Middle Ages – have left in some way or other a mark on the evolution of the Maltese legal system. Indeed it can be said that the present legal system has been the result of a slow and gradual evolution throughout the centuries and that several factors have contributed to this evolution as each and every successive domination left its imprint on the Maltese legal system.

It would appear from modern methods of dating, such as radio-carbon and dendrochronology, that man first settled in Malta about the year 5000 B.C. There is no evidence at all about the legal system followed during Malta's prehistory. The presence of so many prehistoric temples in such a small island as Malta postulates the existence of a comparatively large population as is also evidenced by the fact that the bones of some 7000 individuals were found buried in just one place – the Hypogeum. An eminent historian observes that the collective tombs and ancestor cult suggest that the inhabitants produced no powerful chiefs or kings but lived rather in extended family or clan groupings and if there was any powerful class among them it was probably the priests. Their economy was based on farming and the temples and tombs furnish abundant evidence of stockbreeding. The evidence available also seems to show that the Maltese Islands were connected by a web of trade relations that were more than sporadic with most of the neighbouring lands of the Western Mediterranean, some of which lay at considerable distance. All these activities must have been governed by some legal system, but what this system was we do not know and we are not likely to know.

Malta's prehistory came to an end with the coming of the Phoenicians which is generally said to have taken place at some time in the 9th century B.C. The Phoenicians were mainly concerned with commerce and became, commercially at least, a world power. However, they never attained political unity as well and the cities which they founded remained politically independent of each other, each looking after its own immediate interests and having territory around it which formed its kingdom. There was never a Phoenician confederacy, still less a Phoenician nation. Malta must have been one of these Phoenician colonies but the Phoenician tombs and other remains which have been found do not cast any light at all on the system of Government which was in point of fact followed and the legal system which governed Malta.

The exact period when the Carthaginians supplanted the Phoenicians in Malta is not known. However historians agree that by the time of Ashur-Bani-Pal king of Assyria between 668 and 626 B.C., the authority of Phoenicia was no longer recognised in any of the colonies which had been formerly hers. Carthage herself as well was not imperial in the strict sense of the word and its cities enjoyed a certain amount of independence, though they trusted to Carthage to defend them when attacked. After the end of the Magonid domination,

an oligarchy took the place of hereditary royalty and the constitutional power in Carthage rested in the hands of two Magistrates (called kings or *suffetes*), a senate and a general assembly. A Maltese inscription mentions a constitution in Malta consisting of *suffetes*, senate and people, such as Carthage had. What laws, if any, were enacted by this body we do not know.

Carthage lost Malta at the close of the second Punic War (218 B.C.) when following the victory of the Roman fleet over the Carthaginians at Marsala (then known as Lilybaeum) the Consul Titus Sempronius Longus sailed to Malta and there accepted the surrender of Hamilcar with some two thousand men. This was the beginning of a long period of Roman rule marked by the diffusion of Roman culture as evidenced by several architectural remains and inscriptions. It does not appear however that the political change which took place at the end of the Second Punic War was accompanied immediately by a cultural and legal change. At this time Malta had begun to coin its own money. This Maltese coinage struck during the last two centuries B.C., it has been held, is a perfect reflection of the double culture of the island during this period: the fundamental Punic or Carthaginian one resulting from the basic ethnic character of the population which was Punic and the Roman one introduced by the conquerors in 218 B.C. The Roman culture ultimately prevailed during the first and second century A.D., with the romanisation of Malta.

This development in the cultural field appears to have been accompanied by a parallel development in the legal field. Sicily had become a Roman province in 218 B.C., and Malta became part of this province. The subjects of the province (including therefore the people living in Malta) were considered by the Romans as aliens (*peregrini*) and to them, as was observed by the distinguished historian James Bryce:

> "Roman law was primarily inapplicable not only because it was novel and unfamiliar, so strange to their habits, that it would have been unjust as well as practically inconvenient to have applied it to them but also because the Romans, like the other civilised communities of antiquity, had been so much accustomed to consider private legal rights as necessarily connected with membership of a city community that it would have seemed to be unnatural to apply the private law of one city community to the citizens of another."

This legal position gradually changed in the course of time. The main reasons given for this change by historians is that there was no pre-existing body of law deeply rooted and strong enough to offer resistance to the spread of Roman law and it was also unlikely that the Maltese, who had upheld the policy of the Romans and who had given themselves up to Rome without war, would have preferred the obsolescent laws of Carthage to those of the Romans.

According to A.P. Vella when peace returned to the Mediterranean after the Punic Wars, the Maltese archipelago became a "*civitas sine foedere libera*", which meant that the Islands enjoyed an internal autonomy until it pleased the Romans, subject only to the payment of a tax to the Roman *quaestor*. Moreover Cicero's "*In Verrem*" brings out the historical fact that about the year 70 B.C. the Maltese enjoyed the quality of *socii* which must have entailed a certain degree of participation in the rights of Roman citizenship. However the Acts of the Apostles, a document of the period describing St Paul's shipwreck off Malta in A.D. 60 and his three month sojourn in the island, shows how gradual this process of change must have been because the author therein refers to the inhabitants as *barbari*: a word which denotes that the Maltese were then considered to be neither Roman nor Greek. But the gradual process of romanisation inevitably carried on and Malta became a *municipium* at the beginning of the second century A.D. This meant that the Maltese became Roman citizens (*cives*), their leaders being called

decurions. It appears that all Roman *municipia* could enact laws of their own so that Malta potentially could have had laws of its own, though none are known to exist. Roman law however must have completely prevailed during this period of Malta's history.

With the break-up of the Roman empire in the fifth century A.D., as a consequence of the invasions of the Vandals and the Goths the Maltese Islands came under the Byzantines, the Empire of the East which had its seat in Constantinople. This Byzantine rule lasted for some three hundred years until the seizure of the islands by the Arabs in 820 A.D. This period is a very nebulous one especially in so far as the law and its administration are concerned. We can however cull some idea of the government of the island from Justinian's *"De Praetore Siciliae"*, where mention is made of the praetor or civil governor of Sicily and its islands (*insulis adiacentibus* or *et alias insulas*), including therefore also Malta and Gozo, as well as of the duties of the *dux* who was concerned with the military defence.

The Arab domination, which followed and which cut off Malta from its Byzantine-Roman-Christian culture, is even more nebulous. It is a historical fact that many Arabs settled in Malta and these would have been governed by their own customs and laws based on the Koran. What happened in the case of the conquered Maltese one can only conjecture. As they were cut off from Byzantium, the Roman-Byzantine laws could only have been handed down by way of tradition from father to son and eventually became tantamount to customs of general observance.

The importance of customary law seems to have increased during the Norman and Suabian periods which followed the Arab occupation. Historians agree that Count Roger the Norman landed in Malta in 1090, freed the Christian slaves and exacted a yearly tribute from the Arab Emir or governor of the island. But according to modern historians who rely on accounts written at the time by Malaterra and Telesino, Count Roger the Norman did not impose his direct rule on the inhabitants and it was only in 1127 under his son King Roger II of Sicily that Norman rule properly started and Malta once again became a part of the European system, uniting its destiny with that of Sicily for over four hundred years up to the coming of the Order of St John in 1530. At that time there were living in Malta, besides the Maltese inhabitants, a strong Arab community as well as Greeks or Byzantines and Jews. Because of the paucity of their number which made it difficult for them to impose themselves on the subject races, the Norman rulers allowed the different communities to continue to be governed by their own laws and customs – the Normans themselves being governed by the *Coutoumier de Normandie* which was a collection of Norman customs. There was therefore no Norman Code and the Normans limited themselves to enacting special laws called *Assizes* dealing mainly with the repression of crime and with the feudal system which they introduced. In fact, in the preamble to the *Assizes* of Ariano of 1140 Roger II decreed as follows:

"The laws newly promulgated by our authority are binding on everyone, but without prejudice to the habits, customs and laws of the peoples subject to our authority, each in its own sphere .... unless any one of these laws or customs should be manifestly opposed to our decrees".

This system of personality of the law, where the origin and status of a man indicated the system of law by which all his legal acts were to be regulated, was gradually supplanted by the system of territoriality when the distinct races, originally living side by side, started to amalgamate with the passing of time. When this system of territoriality became gradually established, general laws were enacted applicable to all persons living within the realm.

These laws, with one notable exception to be referred to later, were completely permeated by the old Roman law. This

predominance of Roman Law in the Sicilian legal system (whereof Malta then formed part) is explained in many ways. At that time Roman Law had returned to its splendid heritage on the Continent through the halls of the Bologna School. The religious reorganisation carried out by the Normans contributed to its re-introduction since it placed the people, who still enjoyed a substratum of Roman culture and traditions, in touch with ecclesiastics who were well versed in that law and indeed followed its rules in many parts of the Canon Law then applicable to Malta. Another factor contributing to this predominance was the desire of the Sicilian monarchs to justify in some way their absolute and supreme power. Such Roman Law maxims as "*princeps legibus solutus*" and "*quod principi placuit legis habet vigorem*" contained in the Digest must have been most welcome to the absolute Sicilian rulers, particularly to the Swabian Frederick II crowned Holy Roman Emperor in 1220 by Pope Honorius III in St Peter's Basilica, King of Sicily and Jerusalem, he was referred to by his contemporaries as *stupor mundi et immutator mirabilis* because of his extraordinary character and versatility. Frederick, with the help of his erudite Chancellor Pier della Vigna, enacted in 1231 the *Liber Augustalis* also known as the *Constitutiones Regni Siciliae* based almost entirely on Roman Law.

Moreover, Frederick expressly ordered his judges to decide according to the Sicilian Constitutions and, in default thereof, according to established customs and the common laws, that is to say the Lombard Law and the Roman Law, as the circumstances of the litigants required. Since Malta never came under Lombard domination and there were no people of Lombard origin in Malta, this meant that in the silence of the Sicilian constitutions and recognised customs, the judges were, in Malta, to decide according to Roman Law – the *jus commune*. Thus Roman Law became a supplementary law to be applied by the judges. It may be added that this *jus commune* was not the pure Roman Law of Justinian's *Corpus Juris* since many cross-threads of diverse textures had been woven into the web of the system.

An important document of the year 1240 published by Winkelmann shows that at the time Frederick's constitutions were enacted, Malta had its own customs and constitutions which were different from those obtaining in Sicily. In fact, in that document, Frederick II, addressing himself to the Abate Giliberti in answer to the *Capitoli* which the people of Malta had sent to him, ordered that as a general rule the Imperial Constitutions and the customs of the Kingdom of Sicily were to be observed in Malta. However if the customs and constitutions of the Maltese were to the greater advantage of the King, then the Maltese were to be governed by them: "*Quod si mores et constitutiones eorum redundant ad maius comodum curie nostre, eos permittat, secundum soliti sunt mores.*" What these constitutions (applicable solely to Malta) referred to in the document were, the present writer has been unable to establish but, in his *Storia della Legislazione Civile e Criminale di Sicilia*, Lamantia expresses the opinion that the reference to these constitutions must have been to the laws enacted by the Norman kings for Malta.

However as regards customs, the position is different. Although there was no law-making body proper in Malta during this period of its history, yet there existed a body called the *Commune* or the *Consiglio Popolare* wherefrom were chosen the Capitano della Verga (Captain of the Rod), four jurats and other officials who constituted the *Consiglio Particolare* or *Università*. This body did not possess legislative powers but had the right to send to the King for his approval "Capitoli" containing requests regarding the particular requirements and needs of Malta. The Capitoli, when approved by the King, acquired the force of law. They contained

inter alia requests for the approval or amendment of customs special to Malta and the King's decision thereon. An examination of these Capitoli shows that there existed in Malta customs sanctioned by the King and thus having the force of law which regulated juridical relationships in the silence of the laws enacted by the King.

It has been stated above that generally speaking the laws enacted after the coming of the Normans were completely permeated by Roman Law with one notable exception. This exception consisted in the laws governing the introduction of feudalism whose direct and principal source was the system of beneficiary grants which grew up under the Frank kings and emperors. When the bands of the Germanic warriors settled in the Roman provinces, some portions of the conquered territory, called allodial land, were left in the hands of the provincials. The greater part, however, were occupied by the invaders and large demesnes were held for the King. Out of the royal demesne the sovereign granted lands to his favoured followers under the title of fiefs. These fiefs, which gradually became hereditary, were subject to certain conditions such as military service, respect for the person and honour of the grantor and pecuniary contributions in certain emergencies. In consideration of these conditions corresponding duties of protection devolved on the grantor so that the relations between lord and vassal were those of a mutual contract of support and fidelity. The vassal frequently had vassals of his own to whom he carved out portions of his own fief and the subgrantee became his vassal.

The first feudal concessions of which we have record occurred under Tancred, the last of the Norman Kings, who granted Malta in fief to his admiral Margheritone of Brindisi to reward him for his services in the naval battles against the fleets of Pisa and Genoa in 1191. This was the beginning of the numerous feudal concessions of Malta made by the Sicilian Kings which were interrupted only during those periods when Malta, following the representations made by its *Commune*, became by Royal Charter part of the royal demesne. In fact Malta became part of the royal demesne by Royal Charter in 1240 during the reign of Frederick II, in 1350 during the reign of Ludovico and again in 1397 during the reign of Martin I and finally in 1428 under Alfonso V. During these periods several fiefs regarding particular tracts of land were granted by the sovereign, such as the fief of Dar il-Bniet granted to the Noble Francesco Gatto by King Ludovico of Sicily in 1351 and the fief of Gariexem granted to Henrico de Osa in 1372 during the reign of King Frederick III. The grant of these fiefs gave rise to a local aristocracy. When a tract of land was granted by a sovereign to one of his followers, it was called a "*feudum nobile*" and conferred nobility on the person to whom it was granted. These nobles were called barons. By Act XXIX of 1975 titles of nobility are no longer recognized.

The fact that feudalism had been introduced in Sicily by the Normans and that Malta formed part for a considerable time of the Kingdom of Sicily, leads to the obvious conclusion that it is to the Sicilian system that we have to look for guidance when studying the effects of feudalism in Malta. This rule was recognized on 9 June 1882 by the Maltese Civil Court in the case "Nobile Augusto Testaferrata Abela vs. Nobile Dottor Pietro Paolo Testaferrata Abela Moroni."

Feudalism affected the system of land tenure. Property could be either feudal or allodial. Under the first category came all property held in fief, under the second all property which could be freely disposed of. It also affected the law of succession. Although the law based on the Roman model remained unchanged in so far as allodial property was concerned, yet, as regards feudal property the mode of succession was that established by the

conditions of the investiture. This was held by the Court of Appeal in "Sceberras Trigona Testaferrata Falzon Dorell vs Sceberras D'Amico" on 3 August 1885 and in "Formosa Montalto vs Attard Montalto" on 15 November 1885.

The legal system established by the Normans and the Swabians did not change under the subsequent very short Angevin domination which was marked by continuous wars. Neither did it change under the Aragonese and Castillian dominations which followed. The laws enacted during these dominations provided for new matters but did not revoke the previous legislation. Indeed these laws maintained expressly in force the Constitutions enacted by the Emperor Frederick with certain modifications required by the changes which had taken place in society with the passing of time. Neither did they do away with the privileges and customs of the Maltese. Indeed these dominations are marked by frequent *Capitoli* where these privileges and customs were duly recognized by the sovereign. The most important of these were the *Capitoli* of 1428 often referred to as the Maltese *Magna Charta* whereby the islands, following the payment by the Maltese of 30,000 gold florins to the feudal overlord Monroy, were irrevocably united to the royal demesne in the same way as Messina, Palermo and Catania. Alfonso V also granted to the Maltese the right to resist with the force of arms (*manu forti*) any future attempt to grant the Islands in fief. The local Courts were given unlimited jurisdiction and the inhabitants were allowed the privilege of being judged by their own Courts only. These *Capitoli* also confirmed the privileges which had been recognised by the predecessors of Alfonso V and were themselves followed by other *Capitoli* which granted and recognised further privileges and customs.

With the coming of the Order in 1530 Malta ceased to be a political appendage of Sicily and laws were enacted locally by the Order. The laws enacted in Sicily after the grant made by Charles V could not, and did not, have any legislative authority in Malta. However the legal position with regard to Sicilian Law enacted before the grant was different. The grant was not made forcibly to a sovereign who had conquered the island but was a concession made "*ex munificentia et pietate*" of Charles V, as was stated by Pope Clement VII in his bull of the 7th May 1530 confirming the said concession. By that grant Charles V, in agreement with the Pope, made Malta a bulwark against the incursions of the Saracens, giving therein a stable and permanent refuge to a military and religious Order, whose mission was that of fighting the enemies of Christendom, after it had been expelled from its ancient seat in Rhodes. Neither was such a grant given effect to before an agreement was entered into in the records of Notary Giacomo Saliva on the 21st June 1530 between the Deputies of the Maltese people and the Commissioners representing the Order, subsequently confirmed by Grand Master Villiers de L'Isle Adam on the 16th July 1530 prior to his taking possession of Malta. In that agreement the privileges, laws and customs of the Maltese were expressly preserved and confirmed: *omnia et quaecumque privilegia, indulta Regia, leges municipales, usus, consuetudines, praeminentias, prerogativas et honores indistincti scriptos et non scriptos*. The Grand Master himself, when taking possession, swore on the cross that he would observe the said privileges, laws and customs. The Order, therefore, came in possession of the Maltese Islands by virtue of a compact expressly stipulated and signed as well as confirmed on oath by the party stipulating. Moreover, the Grandmaster who, by the said concession, took the place of Charles V, could not have brought with him other laws to be substituted for the pre-existing ones since he was only the head of a religious body without a State. It was not the case of a sovereign of a people having its own laws who had come as a conqueror and who

could therefore have imposed on the Maltese, had they been conquered, the laws of his people instead of the laws which the Maltese had.

It followed that until the pre-existing Sicilian laws were revoked or amended by the Grandmaster they continued to be in force even after the grant of Malta to the Order. As a consequence, the legal doctrines enunciated by Sicilian authors continued to be followed and the Latin and Italo-Sicilian legal terminology continued to be used in Court proceedings and in public documents. It also followed that Maltese customs continued to be observed though in the course of time these were considerably whittled down either because they were superseded by express legislation or because they were incorporated in such legislation. Amongst these institutes of customary origin one may mention the institute of conjugal partnership (*società coniugale*) and that of pre-emption (*irkupru*) which were incorporated in the Code de Rohan of 1784.

Particular mention is to be made in this respect of the mercantile law of Malta. Up to 1697 Malta continued to be governed as regards mercantile matters by the *Consolato del Mare* of Messina. With the passing of time the laws of Messina were found to be insufficient to meet the increasing needs of the country and hence Grandmaster Perellos promulgated the *Consolato di Mare di Malta*. This notwithstanding, it was expressly laid down therein that in cases not provided for by Maltese Law, the commercial usages of Messina were to be observed. When later the mercantile law was again amended and included in the *Costituzioni di Manoel* promulgated in 1723 it was expressly laid down that controversies not provided for in Maltese Law were to be decided according to the *Consolato del Mare* of Barcelona and that of Messina. As a consequence the teachings of the commentators of the *Consolato del Mare* of Barcelona, such as Targa and Casaregis, started to exercise a considerable influence on the development of this branch of law besides the teachings of the commentators of the *Consolato del Mare* of Messina.

When the Order came to Malta, Sicilian Law also continued to be the substratum of Maltese procedural law, though with the passing of time several laws were enacted by the Grandmasters. This applies especially with regard to the Code de Rohan, enacted in 1784, which contains several rules of civil, commercial and criminal procedure. This Code was also greatly influenced by the legal reforms carried out by Vittorio Amadeo II of Savoy in 1729 and by Carlo III of Bourbon and by Ferdinand his successor, though, of course, the main influence in Maltese Law (and this applies to most legislation – except mercantile legislation – enacted during the Order's rule) remained that of Roman Law particularly in the field of the law of property, the law of obligations and the law of succession. As was pointed out by the Royal Commission of 1812:

"The Code de Rohan, so differently viewed and represented by different writers, is founded on the Roman Law and partakes of all the merits and demerits of its great original. With the exception of some modifications and additions rendered necessary by local circumstances, we may consider it as a compilation of the same law by which the greater part of the Continent of Europe continues to be governed."

Roman Law also continued under the Order to perform the important function of a supplementary law or a *jus commune* to which recourse was to be made in cases not provided for by Maltese Law. This *jus commune*, it must be again stressed, was not the pure Roman Law of Justinian but Roman Law as modified by the comments and treatises of influential writers as well as by judgments delivered by various Continental courts, particularly those of the Rota Romana.

During the Order's rule the authority of Canon Law increased considerably because the Order, although a militant body, was also at the same time a religious one whose supreme head was the Pope. During this period the old Canon Law was modified by

the decrees of the Council of Trent. These decrees were formally accepted by Fra Martino Royas, the accredited ambassador of the Order, which ratified his action when reported by him, on his return, to the Council of the Order. It may also be added in this connection that King Philip of Spain (who under the deed of donation of 1530 was the suzerain lord of Malta) by Proclamation of the 17th July 1564 had ordered all his subjects to conform to the decrees of the Council of Trent.

The Order's rule came to an end on the 12th June 1798 with the cession of Malta to France. This event, however, did not bring about the abolition of the existing laws. The deed of donation of 1530, whereby Charles V had granted Malta to the Order as a noble fief, had contained a very important clause of reversion which was intended to ensure that Malta either belonged to the Order (to whom it suited Charles V to belong) or to no one else but him and his successors. In fact this clause stipulated that if the Order were to succeed in reconquering the Island of Rhodes and for this reason or for any other cause were to depart from Malta and establish its home elsewhere, it would not be lawful for the Order to transfer the possession of Malta to any person under whatsoever title without the express sanction of its feudal lord. If the Order alienated Malta without any such sanction or licence, then it was to revert to Charles V and his successors in full sovereignty. The cession made to Napoleon therefore had no legal effect because when the Order left Malta, it immediately reverted to the King of Naples as successor of Charles V and indeed the rights of this sovereign had been expressly reserved in the "Convention" of the 12th June 1798 by his representative the Bali of Torino. The French, therefore, could only enact administrative measures to maintain public order and could not, without the consent of the legitimate sovereign, enact legislative acts which were not necessary for this purpose. Moreover, the French had only a *de facto* possession which was neither peaceful for a sufficient period nor recognised by other nations. Indeed the Maltese rose against the French within less than three months – on the 2nd September 1798 – and besieged the French garrison behind the walls of Valletta and Cottonera, raising the Sicilian flag in the other parts of the country. During this period of hostilities the former laws of Malta were applied as if no change had been effected by the French and, after the French Capitulation of the 4th September 1800, they were applied in Valletta without any act expressly revoking the laws enacted by the French as if these laws never existed. All these reasonings are to be found in "De Piro vs Grech Delicata" decided by the Court of Appeal on 7 January 1885.

Therefore, generally speaking, the laws in force at the beginning of British rule remained those contained in the Code de Rohan. If a case occurred on which the Code was silent, then recourse was to be made to the *jus commune* of Malta which, as already stated, consisted in the Roman Law as modified by the comments of influential writers and by judgments of the Continental Courts. This Code remained in force until the major legal reforms carried out in the second part of the nineteenth century. However, even before these extensive reforms, a number of important and lasting reforms were also introduced. Amongst them one may mention the laws rendering the judges independent and the laws setting up the different Courts promulgated by Governor Sir Thomas Maitland in 1814, the laws introducing *viva voce* proceedings and other salutary rules of the English law of evidence, the laws introducing appeals to the Privy Council which remained in force throughout British rule, the laws abolishing sanctuary and subjecting all classes of H.M.'s subjects in temporal matters to the jurisdiction of H.M.'s lay tribunals, the law introducing the system of trial by jury in criminal cases which succeeded beyond all expectations and which, with some

modifications, has remained in force up to the present day, and the law abolishing censorship and providing against the abuses of the freedom of publishing printed matter.

This was a period where the legislative power appertained up to 1835 exclusively to the Governor and after the 1st May 1835 to the Governor advised by a Council consisting of four official members and three unofficial members, the latter consisting of two Maltese selected from among the chief landed proprietors and merchants, and of a British-born principal merchant of the Island. It was only in 1849 that a new constitution was granted where provision was made for elective representation. In fact the Council set up by this Constitution was to consist of the Governor (with an original and a casting vote) and eight elected unofficial members and nine official members, four of whom had to be English. This Council was given the power to make laws provided that such laws were not repugnant to the law of England, to the statutes of the United Kingdom, to any Order-in-Council extending to Malta, to the Letters Patent themselves constituting the Council and to the accompanying Royal Instructions. The power was reserved to the Crown to legislate generally for Malta by Order-in-Council. The power of disallowance was also reserved to the Crown and the power of veto was reserved to the Governor.

However, although, as stated above, the major legal reforms were carried out in the second half of the nineteenth century, the first steps in this direction were taken as far back as 1831 when a Commission was set up – consisting of the Chief Justice Sir John Stoddart, Mr John Kirkpatrick, a member of the Supreme Council of the Ionian Islands, Mr Baron Field, Chief Judge of Gibraltar, and Maltese Judges Bonnici and Bonavita – with the express purpose of proceeding to draw up successively five codes of law: a Criminal Code, a Civil Code, a Commercial Code, a Code of Civil Procedure and a Code of Criminal Procedure. Attorney General Langslow was later included in the Commission. The history relating to the enactment of these Codes was destined to be a long one and, indeed, in the case of the Criminal Code and Code of Criminal Procedure, a highly eventful one and many years had to pass before Malta got its Codes.

In fact, the Commission, which started its work on the Criminal Code, found itself confronted by two major fundamental problems. The first problem was whether the authoritative text of the Codes was to be the English language or the Italian language. After considerable correspondence where the members of the Commission advanced their separate views, the British Government decided to accept the view of the Maltese judges, which had been upheld by Kirkpatrick and also shared by Lieutenant Governor Ponsonby, and ordered that the Italian language was to be the text of the Codes, care being taken that they were to be accompanied by a clear literal translation into English.

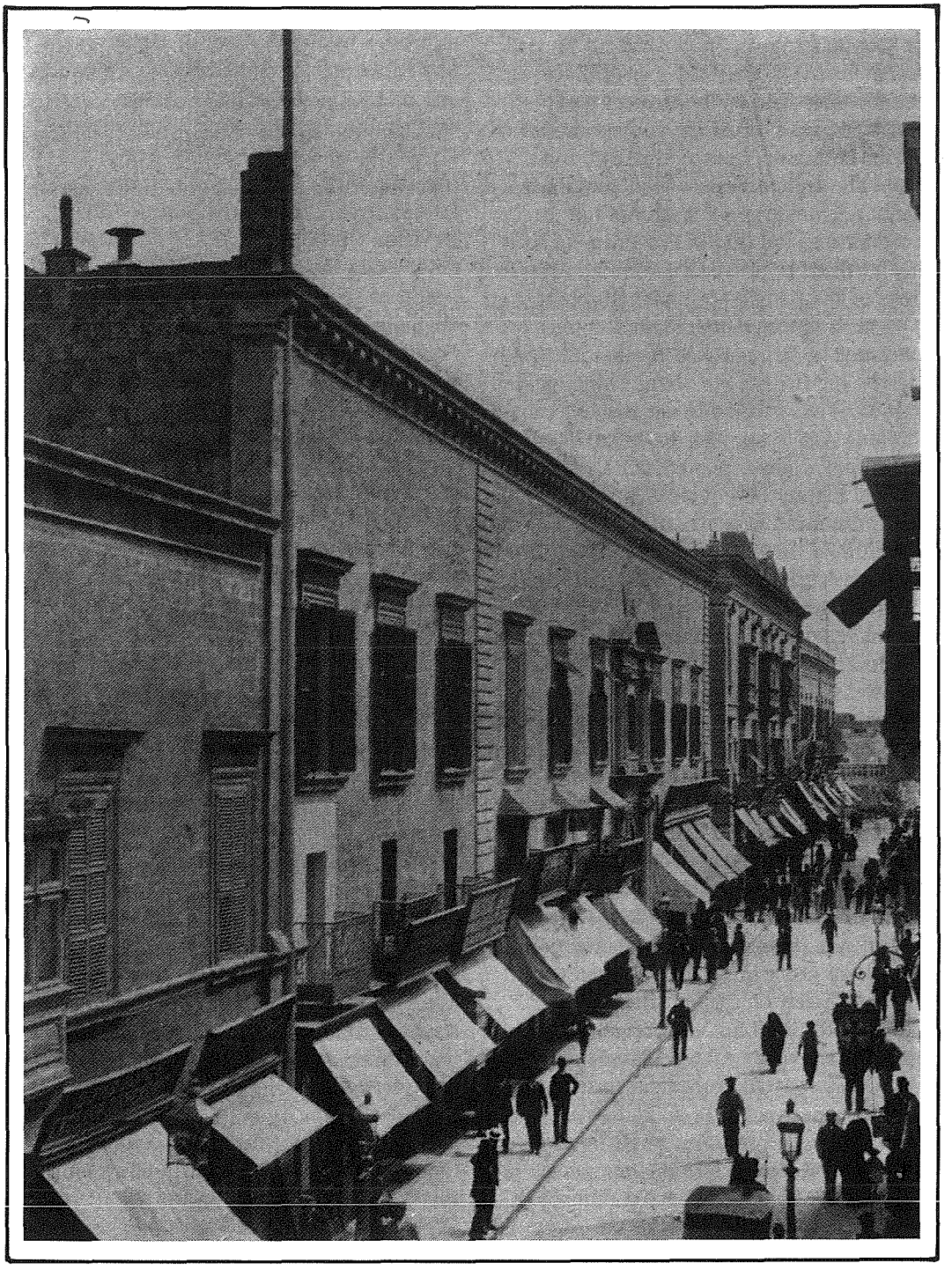
The other major problem concerned the basis of the Codes. Diametrically opposite views were expressed by Chief Justice Stoddart and Attorney General Langslow on the one hand and by Judges Bonnici and Bonavita on the other. The British Government, after considering the detailed submissions made by the Commissioners, arrived at the conclusion, in view of the discordant opinions and the past proceedings of the Commission, that there was no reasonable hope that any useful result could be expected from a continuation of the labours of the Commission and it therefore ordered its dissolution. Government at the same time requested the Maltese Commissioners, Judges Bonnici and Bonavita, to continue to prepare a Project of the Criminal Code and a sketch of the Code of Criminal Procedure. When these were completed, Government decided to have them published granting at the same time a period for observations on the proposed

reforms. In point of fact the Criminal Code and the Code of Criminal Procedure were published on the 31st July 1836. At that time political agitation in Malta was at its height and the British Government had decided to send a Royal Commission to Malta consisting of two Royal Commissioners – John Austin and George Cornwall Lewis – who recommended *inter alia* the suspension of the coming into effect of the Criminal Code and a careful and skilful revision thereof. This revision was carried out by Sir Ignazio Bonavita (who had become President of the Court of Appeal) and Judges Falzon and Chapelle. But again Government hesitated as it considered the Code to be a transcript of the Neapolitan Code with some alterations in order to adapt it for trial by jury. In fact, the Code was eventually revised by a Scottish lawyer – Sir Andrew Jameson. However the Code had to pass through many further vicissitudes before it became law, particularly because of the Title containing the provisions dealing with offences against the religious sentiment, which distinguished between the Catholic Church and other religions. As the British Government found these provisions objectionable, it enacted the Code by an Order-in-Council dated 30th January 1854 omitting from the Order the provisions considered objectionable and leaving to the Maltese legislature full power to amend its provisions from time to time: a power made use of by the Maltese Parliament in 1933 when by Act XXVIII it introduced a number of provisions under the title "Crimes against the Religious Sentiment". The Code, it may be added, also expressly discarded Roman Law in its very first section, the object being that of ensuring certainty in the Criminal law.

The Criminal Code, as so enacted, is with certain minor amendments, still in force today and consists of two books – the first book dealing with the substantive part of criminal law and the second book dealing with laws of criminal procedure. The first book is based mainly on the plan and spirit of the Neapolitan Code, which, in its turn, was based on the French Penal Code. The second book was founded almost entirely on the existing procedure introduced mainly by the Governor Sir Thomas Maitland, with some modifications which were necessary to adapt it to the system of trial by jury (which was also maintained and, indeed, has been maintained up to the present day). The Code has proved that it is possible to apply successfully the substantive criminal laws of the Continental system in a court where the procedure followed was that belonging to a different system i.e., the English system.

The other Codes did not have such a chequered history. Following the dissolution of the 1831 Commission for the reasons mentioned above, another Commission was set up in 1834 consisting solely of Maltese judges and lawyers with instructions to proceed to draw up three Codes of law – a Civil Code, a Commercial Code, and a Code of Civil Procedure. The Italian language was to be the authoritative text of all the Codes – as it remained up to the 1936 Constitution – and the three Codes were to be, as far as circumstances permitted, founded upon and comformable to the principles and rules of the most approved Codes of foreign countries, provision being nevertheless made for all those cases and exigencies in which local reasons required the preservation of any law or custom prevailing in Malta. In drawing up the Codes the Commissioners were not required to invent original Codes but were to frame them upon the principles, spirit, system and rules which pervaded the French Code and other Codes based on it.

In point of fact, as regards the Commercial Code, the Commission adopted as its model the French Code of Commerce of 1808 which had been adopted by most Continental states and to which we owe the principle of the freedom of trade, the duty of traders to keep books and the prohibition to brokers from



The pre-war Law Courts at the Auberge D'Auvergne.

trading in their own name. The Project of the Commission was published on the 3rd December 1853. With the exception of the second book thereof the Project was approved and formed the subject matter of several Ordinances passed in 1857 and 1858. The second book which contained the merchant shipping laws was not acceptable to the British Government as it was felt that its provisions were contrary to those of the British Merchant Shipping Act of 1854. Therefore, merchant shipping continued to be regulated by this Act, and later by the British Merchant Shipping Act of 1894. Today we have our own Merchant Shipping Act (Cap. 234, Rev.Ed. 1984) which was enacted by Act XI of 1973 and is based mainly on United Kingdom legislation and on international conventions. In 1927 the Commercial laws were considerably amended by Act XXX based on the Italian Project of a Code of Commerce (itself based on the German Commercial Code) prepared by Professor Vivante. All these laws were later embodied in the Commercial Code (Cap.17 Rev.Ed. 1942). It must be added that by an express provision therein the usages of trade have remained one of the important sources of our commercial laws.

As regards the Code of Civil Procedure, a Project (the work of a new Commission set up in 1848) was published in 1850. This Project was intended to bring some order to Maltese procedural law which at that time was based on Sicilian Procedural Law, on Roman Law, on previous judgements and on a large number of ordinances enacted from time to time to deal with specific matters. This Project was also revised (and praised) by Sir Andrew Jameson and finally became law on the 1st August 1855 and, except for a number of amendments, still constitutes our procedural law.

However no Civil Code as such was ever drawn up during this period and in fact we owe our present Civil Code to the genius of Sir Adrian Dingli who, during his long tenure of office as Crown Advocate, drafted several Ordinances which were approved by the Council of Government and subsequently embodied in Ordinances VII of 1868 and I of 1873. These Ordinances, dealing respectively with the law of things and the law of persons, together with other subsequent ones, were later consolidated by the Statute Law Revision Commission 1942 and became our Civil Code which, with some amendments, is still in force today. These two Ordinances were mainly based on the Code Napoleon which, in its turn, in many parts had reproduced with modifications the principles of Roman Law long established in Malta. These Ordinances were, in certain respects, more progressive than the Code Napoleon because they incorporated provisions containing solutions to the controversies which arose after the promulgation of the Code Napoleon. In drafting these Ordinances Dingli also consulted the provisions of other leading Continental Codes and the treatises of textwriters of repute, and did not lose sight of the ancient laws and customs obtaining in Malta as well as the basic principles of Roman Law. He also referred to the Code of Louisiana, itself based on the Code Napoleon.

After the promulgation of the Codes several new laws were enacted (especially after 1921 when Malta enjoyed self-government) dealing mainly with commercial, maritime, fiscal and administrative matters. These were at first mainly inspired by English law but since the attainment of independence in 1964 the Maltese legislator is, more and more, relying on other foreign legislations as well as international conventions. Amongst these conventions one cannot but mention the European Convention for the Protection of Human Rights and Fundamental Freedoms which, with some reservations, became a part of Maltese domestic law by Act XIV of 1987 and which, together with Chapter IV of the Constitution, protects fundamental rights in Malta.

The Malta Constitution has been since 1974 a republican constitution and its head of state is a President. Besides protecting fundamental rights, it has maintained the traditional threefold division of the powers of the state – the executive, the legislative and the judicial powers – introduced in Malta by Governor Sir Thomas Maitland as far back as 1814. The Constitution provides *inter alia* for the composition, the powers, the procedure and the summoning, prorogation and dissolution of Parliament. It lays down provisions dealing with the executive authority, particularly with regard to the Cabinet, the appointment and tenure of office of Ministers, the powers and functions of the President of Malta and of the Prime Minister, the appointment of the Leader of the Opposition as well as the office of Attorney General. The Constitution moreover recognises and protects the independence of the judiciary and the power of the Courts to declare a law invalid.

It may therefore be concluded from this necessarily brief survey that the present legal system reflects Malta's chequered history. During the long period before 1530 when Malta was under a foreign ruler and when, as far as is known, there was no law-making body proper in Malta, the laws of the successive foreign rulers applied to Malta, though due recognition was also given to local customs. During this period – particularly during the latter part thereof – Malta became part of the European system and was governed by the legal principles recognised and developed by the Continental system of law which itself was inspired by Roman Law. During the subsequent period running from 1530 up to the early part of this century, although laws were enacted in Malta, still these depended on the decision of the foreign ruler, though Maltese legal talent started contributing in great measure – especially during British rule – towards Malta's legal development. This contribution necessarily greatly increased when Malta was granted self-government in 1921 and again in 1947 and became exclusively Maltese with the grant of independence in 1964. Malta's connection with the Continental system of law acquired before 1530 was never severed although attempts were made to do so in the early years of British rule. It still exists today though with the passing of time other factors have contributed to Malta's legal development, mainly English legislation and more recently other foreign legislations and international conventions. The Maltese legislator very wisely studies these recent legal developments and introduces them after adapting them to the circumstances of Malta.

Bibliography

BRES, O., *Malta Antica Illustrata*, Rome, 1816.

COLEIRO, E., "Maltese Coins of the Roman Period", *Numismatic Chronicle*, Seventh Series, Vol. XI, 1971.

DEBONO, P., *Storia della Legislazione in Malta*, Tipografia del Malta, Valletta, Malta, 1897.

EVANS, John B., *Malta*, Thames & Hudson, London, 1963.

FRENDO, H., *Party Politics in a Fortress Colony: The Maltese Experience*, Midsea Books Ltd, Malta, 1979.

GANADO, J.M., Maltese Law, *The Journal of Comparative Legislation and International Law*, November, 1947.

HARDEN, D., *The Phoenicians*, Thames & Hudson, London, 1962.

HARDING, H.W., *Maltese Legal History Under British Rule 1801-1836*, Progress Press Co. Ltd, Malta, 1968.

LAMANTIA, V., *Storia della Legislazione Civile e Criminale di Sicilia*, Clamis e Roberti, Palermo, 1858.

MIFSUD, A., *Origine della Sovranità Inglese in Malta*, Tipografia del Malta, Valletta, Malta, 1907.

MIFSUD BONNICI, C., *Del Comune Maltese*, Empire Press, Valletta, Malta, n.d.

MONTALTO, J., *The Nobles of Malta*, Midsea Books Ltd, Malta, 1979.

TRUMP, D.H., *Malta: An Archaeological Guide*, Faber & Faber Limited, London, 1972.

VELLA, A.P., *Storja ta' Malta*, Klabb Kotba Maltin, Malta, 1974.

WINKELMANN, E., *Acta imperii inedita saeculi XIII et XIV*, Two Volumes, Innsbruck, 1880-1885.

ZAMMIT, T., *Malta: The Islands and Their History*, Malta Herald Office, Valletta, Malta, 1926.