ABSTRACT

'The Role of Public Policy in a Mixed Jurisdiction: the Maltese Experience'

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This paper explores the role played by the concept of Public Policy in the Maltese mixed legal system by outlining its historical development, with particular reference to contract law, between the colonial and postcolonial periods and comparing this to the Italian experience. In the colonial period, Public Policy was expressly incorporated in the Maltese Civil Code of 1870 in a manner largely reminiscent of the French and old Italian Civil Codes. By the late nineteenth century, the concept was being utilised by the Maltese Courts to assert that mixed marriages where one of the spouses was Catholic contravened (Maltese) Public Policy and could not be judicially recognised unless contracted in accordance with the Canon law requirements. This led to a standoff with the Judicial Committee of the Privy Council, which upheld the contrary position. This impasse, which was clearly motivated by the courts' desire to uphold Maltese identity in the context of colonial rule, lasted until the Marriage Act was passed in 1973.

In 1989 a judgement of the Commercial Court asserted that Public Policy, as reflected in the rules of the Civil Code capping permissible interest rates at 8%, prohibited banks from charging compound interest in excess of this limit in relation to overdraft facilities. The court reasoned that the Civil Code rules stating the 8% limit reflect national Public Policy; which is a source of Maltese law, despite the absence of a rule in the Civil Code outlining the sources of Maltese law in general. Therefore it held that the banks may not charge excessive interest by relying on Article 3 of the Commercial Code, which privileges such banking practices as an example of (customary) usages of trade above the rules of the Civil Code. Yet this judgement was overruled by the Court of Appeal, which held that national Public Policy does not totally prohibit the charging of such compound interest exceeding the 8% limit, as the applicable laws permitted various exceptions. Moreover, Public Policy could no longer be interpreted in purely national terms but also in relation to Public Policy as defined in Italy and France, where such contracts were permitted and enforced.

These cases suggest that by the postcolonial period, the Maltese courts were defining Public Policy in less exclusively nationalistic terms than in colonial times. At the same time, their reluctance to follow the Italian example of using Public Policy to permit the full-blooded Constitutionalisation of private law, must itself be understood as a response to structural features of the Maltese mixed jurisdiction. Prominent among these structural features are the tendencies to think of the system in terms of defined and clearly distinguishable compartments reflecting distinct legal traditions and the associated failure to identify an authoritative hierarchy of general sources of Maltese law.

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