

Legal Transplantation's Contribution to the Formation of Mixed Legal Systems, and the Paradigm of Cyprus' Legal System as a 'Polyjural' System

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Abstract

Legal transplantation has been a powerful process for a 'foreign' legal rule or an entire legal system to be either imposed or to be 'willingly' applied to the recipient legal system. This practice has been present for centuries and is perhaps a reason for the establishment of highly sophisticated legal systems from Roman law to the European Union's legal order. Legal transplantation has given birth to the concept of mixed legal systems based on the symbiosis of, in most cases, civil and common law rules. Cyprus is a unique amalgamation of legal cultures that transcend the traditional boundaries of civil and common law jurisprudence. Thus, the concept of 'hybridity' comes into the foreground aiming at analyzing and, perhaps, solving the problems we are facing in our attempt to bridge the gap between civil and common law, state and non-state norms, positive and natural law, legal centralization and normative polycentricity.

Keywords: legal transplantation, mixed legal systems, positive/natural law, Cyprus' legal tradition, European Union law, globalization, hybridity

Introduction

According to Alan Watson, the Scottish-American comparative law scholar (among other legal expertise), 'as a practical subject Comparative Law is a study of the legal borrowings or transplants that can and should be made. Comparative Law as an academic discipline in its own right is the other side of the coin, an investigation into the legal transplants that have occurred'.² In the same spirit, according to Mark van Hoecke and Mark Warrington, 'it has been a constant element in legal history that legal systems influence each other'.³ More broadly approaching the concept of 'legal transplantation', it could be argued that the universal evolution of law – from

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2 A. Watson, 'Legal Transplants and European Private Law', *Electronic Journal Of Comparative Law*, Vol. 4.4 (2000, December), available at <http://www.ejcl.org/ejcl/44/44-2.html>; See also R. B. Schlesinger, H. W. Baade, P. E. Herzog and E. M. Wise, *Comparative Law – Cases, Text, Materials*, 6th ed. (New York, NY: Foundation Press, 1998), 13-14.

3 M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quarterly*, Vol. 47 (1998), 533.

the time of the Codex Hammurabi,⁴ Egypt's law scriptures,⁵ Aristoteles' concept of Constitution,⁶ and Roman perception of private law⁷ to the time of the French and German Civil Codes⁸ in nineteenth and twentieth centuries respectively, and the most recent European Union's General Data Protection Regulation (GDPR)⁹ – has been a continuous process of legal borrowings and legal transplantations.

The comparative study of legal transplants focuses on the interactive communication between legal systems and explores the complicated paths of legal evolution they trigger. Legal transplantation has played a vital role in shaping our current, Western legal culture and in producing the contemporary notions of 'cosmopolitan'¹⁰ and 'global' law.¹¹ A neutral legal scholar could observe the contribution of legal transplantation in all kinds of legal reform projects adopted by individual nation-states, such as Switzerland or Poland, supranational institutions, such as the European Union or the North Atlantic Treaty Agreement, and international institutions promoting legal change on a global level. Moreover, the idea of legal transplantation is the 'fuel' that, in terms of norms production, has traditionally preserved in 'motion' mixed legal systems such as those of Israel, Cyprus, Scotland, South Africa, Louisiana, Quebec and Singapore.

Legal Transplants and the Positive/Natural Law Confrontation

The concept 'legal transplant' is based on 'a metaphor that was chosen *faute de mieux*, ill-adapted to capturing the gradual diffusion of the law or the continuous nature of the process that sometimes leads to legal change through the appropriation of foreign ideas'.¹² Principally, the development of law could be explained through the 'legal transfer' of legal rules among legal systems or through the process or transformation

4 *The Oldest Code of Laws in the World The code of laws promulgated by Hammurabi, King of Babylon B.C. 2285-2242*, trans. C. H. W. Johns, A Public Domain Book (2011).

5 R. Versteeg, *Law in Ancient Egypt* (Durham, NC: Carolina Academic Press, 2011).

6 Aristotle, *The Athenian Constitution*, translated by P. Rhodes (London: Penguin, 2004).

7 G. Mousourakis, *Fundamentals of Roman Private Law* (Berlin-Heidelberg: Springer Verlag, 2012).

8 For the French Civil Code, see *The Code Napoleon*, or, *The French Civil Code* (Hard Press, 2018), and for the German Civil Code, see *Connecticut Railroad Commissioners and C. Wang, The German Civil Code* (Sacramento, CA: Creative Media Partners, 2015).

9 P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Cham, Switzerland: Springer Verlag, 2017).

10 A. Some, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

11 N. Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014).

12 M. Graziadei, 'Comparative Law as the Study of Transplants and Receptions', in *The Oxford Handbook of Comparative Law*, eds M. Reimann and R. Zimmerman (Oxford: Oxford University Press), 443. Other terms have been used in place of 'legal transplantation': 'legal transfer', 'circulation of legal models', 'legal reception', and 'legal borrowing'.

of already existing legal concepts in a national legal system so as for them to be applied in analogy, under a new environment.

Dealing with legal transplantation, a reference has to be made to the two doctrinal schools of thoughts, i.e. the 'pessimists' and the 'optimists'. To the pessimists, law is not only words, a text, or a document, but it is also a functional process which takes place through a subject applying a rule. Such an application obtains specific characteristics and subjective features influenced by general societal framework, geography, politics, mentality, and the culture of a specific society. Thus, 'legal borrowing' and a 'legal transfer' of certain rules or laws would not survive the journey from one legal system to another.¹³

Furthermore, legal transplants are more likely to cause harm than to benefit the recipient legal system. A new, imported legal rule would work more as an irritant to the existing legal order than as a benefactor that helps in coping with complicated legal issues. According to this argument, there is an *a priori* mismatch between the domestic and local legal system on one hand, and the foreign legal system on the other, on the grounds of various domestic, social, historical, cultural dissimilarities within the two legal traditions.

On the other hand, the optimists argue that legal borrowings are a blessing for any legal tradition. In the age of globalization, normative diversification, rapid technological evolution, legal polycentricity, the process of transplanting legal ideas, rules, laws, and doctrines from one legal system to another, helps legal systems to cope with major normative and regulatory challenges¹⁴ in fields such as environment, data protection, internet of things, artificial intelligence, blockchain technology, foreign investment, corporate law, and dispute resolution. Legal transplants designed under thorough preparation, with respect to the recipient country's legal tradition and with professionalism, would meet fewer impediments in compatibility, transferability, and successful application in the domestic legal order.

The specific issue of legal transplants is part of a broader issue, namely the relationship between society and legal change. A quite controversial dimension of 'legal transplantation' is the role of society as a 'producer' or as a 'recipient' of either a single new legal rule or a series of new legal entries. According to Watson, it is very difficult to discover any dialectic relationship between law and society since law does not necessarily have to reflect societal needs or a specific version of society in a

13 Generally, for an argumentation against legal transplantation, see P. Legrand, 'What Legal Transplants?', in *Adapting Legal Culture*, eds David Nelken, Johannes Feest (Oxford: Hart Publishing, 2001).

14 See Sir B. Markesinis, 'Our Debt to Europe: Past, Present and Future', in *The Coming Together of the Common Law and the Civil Law*, ed. Sir B. Markesinis (Oxford: Hart Publishing, 2000), 49.

regular and, theoretically, specified manner.¹⁵ The causation between law and society is mutual, interactive, multi-dimensional, but not direct and immediate. Regardless of the frequency, legal transplantations have taken place over time, and the acknowledgement of their regenerating role in world's legal systems appears often against some profound positions about the sources and the nature of law and normativity. These profound convictions deal with the relationship among law-making, state authority, and society's role in giving birth to a normative order. Is law, transplanted or not, the expression of a centralized, hierarchical statal authority and power? Or is law the product of the decentralized, heterarchical forces within the realm of society. A. Emilianides, exploring a path of transcending Cyprus' Constitution, proposes, as a helpful methodological foundation, the analysis of the never-ending struggle between natural law, positive law, and contemporary theories of justice.¹⁶ Indeed, one of the most fundamental issues of legal science is how much the consensual gap between positive and natural law can affect the reception or transplantation of a legal rule.

This debate between believers in a law derived from a sovereign state and those who declare the need of a stateless, societal or a universal law, it can be argued, is one more episode in the eternal struggle between natural law and legal positivism, between society's impetus and spontaneity on the one hand, and centralized state authority on the other, between 'found' law and 'made' law.¹⁷ The antithesis of origins and goals between natural and positive law has taken different forms and names throughout history, but very little has changed in substance. In antiquity it was the unwritten, eternal laws of nature versus the city-state's law, in the Middle Ages it was divine law versus human law, and in the post-Enlightenment era it has been the struggle between state and centralized codification on the one side and society's spontaneity and 'free law' movement on the other.¹⁸ In this age of disruptive technologies and the

15 R. Cotterrell, 'Is there a Logic of Legal Transplants?', in *Adapting Legal Cultures*, eds David Nelken and Johannes Feest (Oxford: Hart Publishing, 2001), 71-72.

16 A. C. Emilianides, *Beyond the Cyprus Constitution* [in Greek] (Athens: Sakkoulas Publications, 2006), 3, 5.

17 See also D. Koukiadis, *Reconstituting Internet Normativity: The role of State, private actors, and the online community in the production of legal norms* (Baden-Baden/Oxford: Nomos Verlag/Hart Publishing, 2015), 18ff.

18 From the time of Sophocles, Aristotle, and Cicero, to the time of Samuel Pufendorf, Thomas Hobbes, and to our contemporary John Finnis, the natural law doctrine has gone through many modifications. However, we can identify some basic features that have survived through the ages: a) all human beings share a common nature; b) this common nature is identified through human knowledge and experience; c) our common nature generates a specific and unmalleable normativity; d) in case of conflict between natural law normativity and positive law norms, the former prevails. For further analysis on the natural/positive law dichotomy, see C. Focarelli, *International Law as Social Contract: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012); J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 2011); G. Flavius (H. Kantorowicz), *Der Kampf um die Rechtswissenschaft* (Baden-Baden: Nomos Verlag, 2002).

Industry 4.0 economy, the battle has been transformed into the spontaneous order of individual constituents, the social impetus of global society, the private interest of the individual versus the centralized state authority and the interest of the public community. Precisely, this shift from the public interest of the community to the private interest of the individual is one of the key characteristics of the new era.

Legal positivism in the modern era can be traced back to the post-Enlightenment time, when the rational approach to the production of norms, and the need for clarity, uniformity, certainty, legitimacy, and strict legality gave birth to the sweeping codification movement. Legal positivists claim that, by adapting positive law to the new environment, it is capable of offering adequate solutions to the rising issues of comparative law, and that, by abolishing the traditional role of 'statal' authority as the 'maker', society, the 'infuser' of new law, will return to a period of obscurantism, anarchy, metaphysical, and lofty speculations. It would be a time of intellectual immaturity and naivety.

A legal order, according to legal positivism, is made by human will. Unlike the rules of natural law, its rules derive from the arbitrary will of human authority, and therefore, simply because of the nature of their source, they cannot have the quality of immediate self-evidence. Rules of positive law do not lay down a final determination of social relations, but they allow for the possibility that these relations could be alternatively determined and shaped by another legal authority's rules of positive law. Thus, positive law is essentially an order of coercion in the sense that it prescribes coercive acts, and coercion becomes an integral part of positive law.¹⁹ Positive law, as an arbitrary human order, whose rules lack self-evident rightness, necessarily requires an agency for the realization of acts of coercion and displays an inherent inclination to evolve from a coercive order into a specific coercive 'organization'. This coercive order, when it becomes an organization, is identical to the State. Hence, it can be argued that the State is the perfect form of positive law.²⁰

Positivism regards law as the creation of the ruling power in a society in an historical process. Hobbes put this in his own words by stating '*Auctoritas non veritas facit legem*'.²¹ Law is made not by the subjective truth of society's constituents but by what the highest authority and the ruling power has commanded. It is the justice of positive law that has abolished anarchy and chaos, that created peace and order, brought to an end the '*bellum omnium contra omnes*' and the '*homo hominis lupus*' prevailing doctrines and,

19 H. Kelsen, 'The Natural law doctrine before the tribunal of science', in *What is Justice?: Justice, Law and Politics in the Mirror of Science*, ed. H. Kelsen (Berkeley/LA, CA: University of California Press, 1957), 392.

20 Ibid., 393.

21 T. Hobbes, *Leviathan* [1651] (London: Penguin, 1982), 133.

finally, established the rule of law and not the rule of man. The fundamental value that positivism serves is the existence of security, order social peace, and the continuous reference to a higher, indisputable norm. The law has to be obeyed only because it ought to be obeyed and not necessarily because it is the right law. It is the objective need for order that matters and not so much the need for the subjective truth.

On the contrary, natural law is based on the assumption of a 'natural order', in which, unlike the rules of positive law, the rules governing human behavior and human relations are not in force because they stem from an artificial centralized public authority, but because they stem from societal impetus and instincts, and from the presumption that citizens themselves are in a better position to know what is best for them, and thus, they are better equipped to produce their own 'laws' for regulating and resolving their legal disputes. Natural law claims absolute validity, and hence, in harmony with its pure idea, it presents itself as a permanent unchangeable order.²² Codes, statutes, regulations, and norms that stem from a political superior within a specific political community and then are applied and enforced in a court of law are not acknowledged sources of law. Natural law's principles and norms derive from a universalized conception of human nature rather than from state's legislative or judicial action.

Throughout the centuries, the right to resist against the unwanted and undesired positive law, which was allegedly against the fundamental human principles and rights, was granted by natural law all its necessary legitimization. Positive law is an order of coercion and this coercive nature of law is most of the times identical with the statal structures.

Thucydides' remark that a man serves his own interests by serving the community's interest was transformed by natural law into the belief that when a man serves his own interest he serves the interest of the community. Thus, natural law, together with the domination of political liberalism's belief that 'deifies' the role of the individual, leads to a creation of a more individualist society. This dualism of natural law and political liberalism is one of the main reasons why natural law is on its way to a new renaissance, and legal positivism is in retreat. The overall demand for self-regulation is mainly a shift from legal positivism to natural law.

In order for positive law to survive, it will have to adapt to the new reality and become more flexible and receptive to changes. When Richard Posner characterizes the people who are bound to protect the traditional, 'statal' regulatory system in the name of Jurisprudence as the 'medieval canonists', he does not abolish the traditional model of law-making in total. He merely expresses the need that positive law should become more malleable, more efficient, more modernized. 'When Judiciary is defined more

22 H. Kelsen, 'Natural Law Doctrine and Legal Positivism', 397.

broadly, as legal theory, the limitations of conventional Judiciary are even plainer'.²³

In a purely comparative law context, the above mentioned struggle still influences the reception of legal transplants within a legal order. For a positive law theorist, it is alarming to accept that a 'new' legal transfer is coming from outside the 'realm' of statal authority, and that its implementation may have very little to do with the will and the decision-making of a state authority. On the other hand, for a natural law theorist, it is alarming to accept that too many new legal borrowings derive from state authorities outside the border of his nation-state, and that any act of legal transplantation takes place only when the state authority has decided to engage in such a process, because the 'adopted' law has proven successful elsewhere.

Legal Transplants and Their Role in the Formation of Mixed Legal Systems

Regardless of whether the identity of the dominant 'subject' of the process of legal transplantation is a centralized state authority or decentralized societal, private actors, legal transplantation occurs among different legal systems and cultures. The outcome of this communication between two legal systems has very often created mixed legal systems, that is, a national or supranational legal system that consists of legal doctrines, and legal rules attributed to different legal cultures. In a broader sense, as already mentioned above in the text, most legal systems, even the most 'internationally' influential ones, such as the UK, German, French, and the US legal systems, have been the product of a long-lasting mixture of different legal traditions and cultures. In a narrower sense, the term 'mixed legal system' speaks for the legal system in which there is a blending of the Continental Law tradition and the Common Law tradition. The most commonly known examples of mixed legal systems are those of Scotland, Cyprus, Israel, Louisiana, Quebec, Puerto Rico, South Africa, and the Phillippines. All these states have a legal system that consists of legal elements of both the Romano-Germanic legal tradition and the Anglo-Saxon legal tradition. Legal dualism is evident in these legal orders, in which another common feature is that common law is dominant in their public/constitutional/administrative law, and continental law is dominant in their private law.²⁴

23 R. A. Posner and W. M. Landes, 'An Economic Analysis of Copyright Law', *Journal of Legal Studies*, Vol. 18 (1989), 327ff.

24 The only exception to this rule is Cyprus, where, contrary to the classic mixture of the two legal traditions, private law, criminal law, and procedural law are strongly influenced by the Common Law tradition, whereas its public/constitutional/administrative law is strongly influenced by the Greek and French law. For the Cyprus paradigm, see further in the text. For a general introduction to mixed legal systems, see V. V. Palmer, *Mixed Jurisdictions Worldwide. The Third Legal Family* (Cambridge, Cambridge University Press, 2014); See also V. V. Palmer, M. Y. Mattar and A. Koppel (eds), *Mixed Legal Systems, East and West* (London: Routledge, 2015).

The dualism based on the civil/common law tradition outweighs any other possible pair of normative ‘influencers’ in a foreign legal system. As T. B. Smith puts it, “[T]he “mixed” or “hybrid” jurisdictions[...]are those in which CIVIL LAW and COMMON LAW doctrines have been received and indeed contend for supremacy. Other hybrid systems where, for example, customary law or religious law coexists with western type law are not considered.”²⁵

Vernon Palmer refers to mixed legal systems as the ‘third legal family’. This application of the term ‘third family’ does not mean that there are no other legal ‘families’ or ‘groupings’ beyond. Rather, it demonstrates that the classical mixed legal systems have impressive unity despite the indisputable diversity of peoples, cultures, languages, climates, religions, economies, and indigenous laws existing among them.²⁶ It is the background presence of these highly diverse settings which makes legal unity all the more remarkable and impressive.²⁷

Traditionally, the institutional ‘vehicles’ through which a legal change has taken place in a mixed legal system have been the legislation and the adjudication processes. Considering the legislation process, the main goals for legal change have been public/constitutional/administrative law and civil/criminal procedural law. As far as commercial law is concerned, shipping, insolvency, insurance, intellectual property, corporate law, and sales law have been the main sectors of law which, most commonly, have been amended through the statutory reforms.²⁸ The prime goal served with the above mentioned legislative/statutory transplantations was the fortification of colonial rule and colonial status, the facilitation of the commercial/trade relations between the legally exporting State and the importing State, the harmonization of the two legal systems, and the demonstration of who is the dominant power in the ‘bi-juralistic’ relationship.

On the other hand, the adjudication process has been the chosen process in order to implement common law elements in the realm of private law. Especially, the introduction of the *stare decisis* doctrine in the recipient country has been highly

25 T.B. Smith, *International Encyclopedia of Comparative Law*, vol. 6, Property and Trust, Brill Publ. (1974); See also T.B. Smith, ‘The Preservation of the Civilian Tradition in “Mixed Jurisdictions”’, in *Civil Law in the Modern World*, ed. A. N. Yiannopoulos (Baton Rouge: Louisiana State University Press, 1965), (emphasis in the original).

26 V. V. Palmer, ‘Mixed Legal Systems’, in *The Cambridge Companion to Comparative Law*, eds M. Bussani and U. Mattei (Cambridge: Cambridge University Press, 2012), 373. On mixed legal systems, see also V. V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2012); J. Husa, ‘Legal Families’, in *Elgar Encyclopedia of Comparative Law*, ed. J. Smits, (Cheltenham: Edward Elgar Publishing, 2006).

27 *Ibid.*, at 373.

28 J. du Plessis, ‘Comparative Law and the Study of Mixed Legal Systems’, in *The Oxford Handbook of Comparative Law*, eds M. Reimann and R. Zimmerman (Oxford: Oxford University Press, 2006), 490.

important on the grounds that the judicial precedents of the common law dominant country were planned to function as precedents in the legal order of the recipient country. "The tenability of some of these justifications has been heavily disputed in some systems, the main antagonists in this *bellum juridicum* being "purists", who generally wanted the civil law to be untainted by a common law perceived to be disorganized and lacking in principle, and "pollutionists", who, despite the constraints of *stare decisis*, had few qualms about supplanting civil law, which they often regarded as antiquated and obscure, by common law rules."²⁹

The reasoning behind the predominance of common law in the recipient country has been the promotion of uniformity between the two legal systems, and this uniformity has been also significant in the statutory reorganisation of public and commercial law. Even after the status of 'colony' has ended in some mixed legal systems, e.g. Republic of South Africa and Cyprus, and there is no longer any need for uniformity between the two legal systems, the compliance with the ex-colonial power's law still enjoys a significant spectrum of application. Commercial relationships, trade agreements, economic cooperation, and political support have been the prime reasons for such a continuation of the former legal status.

The common law effect also functions in an 'indirect' and 'soft' way, to the extent that it is employed 'to support or illustrate a position adopted with regard to the existing law, and not to supplant it. To comparative lawyers who may believe that foreign law can generally only influence local legal development via the statutory route, the mixed jurisdiction experience shows that the judiciary[...]can be a significant source of borrowing[...]This neither means that the borrowings necessarily improve the quality of the local system, nor that optimal use is made of the opportunities to adopt a comparative perspective."³⁰

The Case of Cyprus as a Mixed Legal System and the Paradigm It Sets

Cyprus has such a legal system that reflects its rich and diverse history. In short, Cyprus' legal history extends from early antiquity through the Hellenistic period (Antiquity - 58 B.C.), the Roman-Byzantine period (58 B.C. – 1191 A.D.), the Franco-Venetian period (1191-1571), the Ottoman period (1571-1878), the British period (1878-1960), and finally to its Independence period (1960 – to date). It is easy to imagine that each of the above periods would deserve an individual thesis so as to describe and explain the cultural and legal versatility of this island.

29 du Plessis, 'Comparative Law', 490.

30 Ibid., 493.

As Prof. Symeonides describes:

‘Cyprus is too small a country (less than 5000 square miles) to have geographically dispersed legal diversity. However, Cyprus has a different type of legal diversity – by subject matter...in Cyprus one changes laws as often as one changes subject matter. Indeed, the law of Cyprus resembles the beautiful mosaics that adorn so many of its ancient Byzantine churches – it is a colorful plurilegal mosaic. It is so diverse in terms of sources, legal traditions, and applications as to be unsusceptible of being neatly classified as a member of either the common law or the civil law legal families...it is an example of what is known as ‘mixed legal system’. Nevertheless, it is a decidedly European legal system.’³¹

Cyprus’ contemporary law is founded on civil law and common law, each dominating different legal ‘realms’. In the context of mixed legal systems, what makes Cyprus unique is, contrary to the general doctrinal orientation of mixed legal systems, the fact that its private law, criminal law, civil/criminal procedural law, and legal methodology follow the common law tradition, whereas its public/administrative law follow the civil law tradition, and not the other way round. It could be argued that Cyprus is not so much a typical paradigm of a mixed legal system but rather a ‘hybrid’ one.³²

Moreover, in Cyprus, it is not only the different mixture of civil and common law tradition that makes it special. On the top of that, lies the fact that Cyprus is a versatile mosaic, in which the colors of English private/criminal law coexist with the colors of Greek and French administrative law, European law, post-colonial law, American constitutional law, Roman-Byzantine law, and Ottoman law. It would be very difficult, at least within the Western legal family, to identify another legal culture with such legal diversity. That is why, perhaps, Cyprus is called a ‘paradise of comparative law’.³³

The term ‘mutation’ could be a helpful word that characterizes the current Cyprus legal system. Traditional legal fields, under the influence of civil law tradition, have been ‘mutated’ through the use of common law procedure and a common law mentality among the judiciary, whereas the legal profession has mutated away from common law’s original structure.³⁴ The bar is a massive, unitary body, the judiciary has established a hierarchical and bureaucratic system, and the Supreme Court is not a mere common law court of last resort, but, absent an intermediate jurisdiction,

31 S. C. Symeonides, ‘The Mixed Legal System of the Republic of Cyprus’, *Tulane Law Review*, Vol. 78 (2003), 442.

32 Usually, the term ‘hybrid’ means a system that cannot be clearly classified in any of the accepted legal families and is not purely based on the dual foundations of common law and civil law traditions.

33 *Ibid.*, 453.

34 N. E. Hatzimihail, ‘Reconstructing Mixity: Sources of Law and Legal Method in Cyprus’, in *Mixed Legal Systems, East and West*, 77.

it sits on all civil and criminal appeals, and acts simultaneously as an administrative jurisdiction and a constitutional court.³⁵

A further enrichment factor in Cyprus' 'mixed' legal system has been Cyprus' membership in the European Union in 2004 after 15 years of multi-level negotiations. Ever since, Cyprus has officially adopted EU's primary and secondary law. Most of the legislation adopted since the end of the '90s, under the prospect of EU membership, has been orientated towards the country's gradual European integration and respect for the EU's *acquis communautaire*. In the process of implementing EU's secondary law, as another advantage of being a mixed legal system, Cyprus' legal system had the opportunity to follow the earlier compliance steps taken by either Greece or the United Kingdom.

In Cyprus, contrary to the United Kingdom's legal tradition, there is a clear adherence to a hierarchy of sources of law, i.e. the Constitution is the backbone of the whole legal discourse, including provisions that make it very hard to amend. Besides that, Cyprus' accession to the European Union has made EU primary and secondary law become the cornerstone of the entire legal system, and the importance of written, statutory law has been gradually enhanced and stabilized.

At this point, it would be useful to point out the hierarchical order of norms in the mixed legal system of Cyprus, an order that also illustrates the gradual shift of influence from the pure civil/common law tradition to the European Union's legal tradition. Following the accession of the Republic of Cyprus to the European Union, the hierarchy of norms in Cyprus' legal order could be described as follows:³⁶

1. European Union Law,
2. The Constitution of The Republic of Cyprus,
3. International Conventions/Treaties/Agreements,
4. Formal Laws,
5. Regulatory Acts,
6. Supreme Court Case Law,
7. Common Law and Principles of Equity.

Common law and the principles of equity are still a source of Cypriot law and are applied in cases in which there is no other legislative provision/institutional framework. In Cyprus' legal system, the line between influence and authority is often hard to distinguish, due to the fact that 'traditionalism is a force to be reckoned with but also a vehicle for juristic innovation. From legal borrowings, transplants, and enclaves,

35 Hatzimihail, 'Reconstructing Mixity', 77.

36 Cyprus Member State law, available at https://e-justice.europa.eu/content_member_state_law-6-cy-en.do?member=1.

Cyprus law is gradually, slowly transforming into something unique'.³⁷

Cyprus' legal paradigm helps us shift from the context of a mere co-existence of civil and common law principles and doctrines within a legal system, as is the case with most of the mixed legal systems, to a context of how a true polyjural legal tradition can thrive and evolve in the age of globalization, normative fragmentation, legal polycentricity, and continuous transnationalisation. Cyprus does not simply have a mixed legal system. Cyprus has a polyjural legal tradition and culture which means something deeper and more versatile.

A polyjural legal tradition transcends the term 'mixed legal system' to the extent that is not just a legal system consisting of a combination of civil and common law rules. Much more than that, it is a legal tradition built on diversified legal traditions, whose endowment to the recipient environment is deeper and more difficult to distinguish. The concept of 'polyjuralism' expresses better 'the variety of disparate elements that can be traced back to different legal traditions and legal cultures'.³⁸ Cyprus' contemporary legal culture goes beyond the traditional boundaries of civil and common law. Cyprus embraces Roman-Byzantine law, Episcopal courts' law, Franco-Venetian legal rules, Ottoman law's elements, British private/criminal law as well as civil/criminal procedural law, Continental public and administrative law, and on the top of all these legal traditions comes the European primary and secondary law, having its own legal impact on Cyprus' legal order. Very few countries in the world can claim a more versatile legal culture.

Through the study of Cyprus's contemporary legal culture, the study of polyjural systems may be assessed, and through the assessment of polyjural systems our understanding of multi-regulated, normatively fragmented, doctrinally polycentric legal orders can be enhanced and deepened. Cyprus can function as a useful paradigm not only on how the development of common European private law or common European public law may flourish despite the apparent and deep differences existing among its national legal systems but also on how the local-, national-, supranational-, international-, and transnational law-making and regulation can function in harmony and effectiveness.

Issues such as environment, world financial system, climate change, industry

37 See Hatzimihail, 'Reconstructing Mixity: Sources of Law and Legal Method in Cyprus', 98.

38 B. Andó, 'As Slippery as an Eel? Comparative Law and Polyjural Systems', in *Mixed Legal Systems, East and West*, eds Palmer et al (London: Routledge, 2015), 3.

4.0 economy, disruptive technologies, bioethics, and privacy protection go beyond the boundaries of civil and common law, Roman law, and even European Union's law. What is needed to tackle these global issues is more than what pure comparative law can offer. What is needed is the concept of 'hybridity', a concept that straddles traditional legal theory, well established legal doctrines, legal sociology, legal anthropology, and comparative law. Hybridity expands traditional comparative analysis to other levels of mixes, and 'paves the way for a different assessment of the complexity of the normative phenomenon'³⁹

Hybridity can bridge the normative gap created by the never-ending struggle between positive and natural law, statal and societal norms, hard law and soft law, hierarchical and heterarchical law-making, legal centralisation and legal polycentricity, and self-regulation and institutional regulation. Through hybridity, the complexity of both an individual legal system and many legal systems working together serving a common goal can be better explained. S.P. Donlan phrases his understanding of legal and normative hybridity as a way 'to cover the fluid complexity of both laws and norms at the levels of both principles and practice'.⁴⁰

Donlan argues that legal hybridity is something much more than an element of the contemporary, formerly colonized global East and South. He claims that 'acknowledging complexity has consequences not only for comparative law and legal history, but also for legal philosophy and the meaning of law. Hybridity challenge, for example, the dissection of plural and dynamic traditions into discrete, closed families or systems. More critically, *hybridity undermines commonly held and conjoined beliefs in legal nationalism and positivism, legal centralism and monism. It points, in fact, toward a more plural jurisprudence*'.⁴¹

Legal hybridity speaks against doctrinal and normative purity, which today does not amount for highly complex and globalized legal issues. Cyprus' legal paradigm serves this notion of hybridity better than any other legal culture. It teaches us that the aim should be not looking for the appropriateness of the rule in question in its country of origin or which legal system a rule comes from, but looking for the best rule whatever its source or its legal system of origin. In short, to combine the best of both worlds, Cyprus' legal tradition, founded through the ages on the symbiosis of many legal cultures that are contrary to each other. can assist on the future project,

39 Andó, 'As Slippery as an Eel', 10.

40 S. P. Donlan, 'To Hybridity and Beyond: Reflections on Legal and Normative Complexity', in *Mixed Legal Systems, East and West*, eds V. V. Palmer et al., 19.

41 *Ibid.*, 18 (emphasis added).

which is the gradual approximation of civil and common law, state and non-state norms, positive and natural law, at both the European Union level and the global level.

The future of mixed systems is most likely to focus on a continuing ‘hybridization’ rather than on identifying a case by case dominance of either civil or common law. Worldwide, the tendency is for mixed legal systems to increase and become more powerful institutional ‘normative’ actors. The whole European Law experiment, after all, is nothing more than a gradual creation of a huge mixed legal system combining the best of the civil and common law worlds. Whether the final goal is the production of a European private law, or European procedural law, or a specialized transnational law, the Cyprus’ paradigm shows how to be open to the world, normatively, linguistically, and culturally, knowing why certain legal transplantations have taken place and how to improve our own law.

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