MCT1005 INTRODUCTION TO LAW

The European Law Students' Association

MALTA

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ACKNOWLEDGMENTS

ELSA Malta President: Jack Vassallo Cesareo

ELSA Malta Secretary General: Beppe Micallef Moreno

Writer: Alec Carter

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The Evolution of the Maltese Legal System

The miniscule Islands of Malta have gone through an identified **9** stages of historical evolution with regards to legal structure.

1. Roman Malta (218BC-870AD)

There exists a minimum of 5000 years' worth of legal information endemic to the Maltese islands that are lost to us, mostly owing to the fact that Maltese residents in the Neolithic Era did not codify their laws or customs. The Romans, however, did. Malta officially became Roman Territory after the Second Punic War; but the Maltese were not regarded to be Roman Citizens in the eyes of Rome until much later. They were simply the residents of an occupied territory. Therefore, due to their not being Roman Citizens, the Roman *Ius Civile* could not apply to the Maltese people; albeit it *did* apply to the Roman Citizens situated in Malta (ex. soldiers). The Romans did not supress Maltese Custom, even though it lacked codification.

Roman philosopher and jurist, Cicero, asserted that the Maltese were given the appellation of **socii** – meaning that they had *some* rights under Roman Law due to the fact that they fell under Rome's great grasp of dominion. The Maltese were not *cives* of Rome, but were nonetheless bestowed with certain privileged rights.

In 212AD, the Roman Emperor Caracalla opted to grant Roman citizenship to ALL inhabitants found within Roman occupied territory. In doing so, Caracalla wisely imposed Roman citizenship on as many subjects as he possibly could in order to make them pay taxes in return. And through such a sudden influx of tax money, the Emperor could thus be able to widen his dominion by pumping capital and investing in the military and other crucial industries needed to aggrandise the Roman Empire. From a legal point of view, once the Maltese became Roman Citizens, the *Ius Civile* thus applied. Therefore, in 536AD, when the Romans adopted Emperor Justinian's Code, the *Corpus Iuris Civilis* also started to function in Malta; meaning that whatever comprised the *Corpus Iuris Civilis* rendered itself Maltese Law.

2. Arab Malta (870-1090)

Not very much is known from this period, but it is common knowledge that the Arabs did not abolish what the Maltese had already established to be their law – which happened to emanate from their preceding Roman occupants. And whenever a legal lacuna persisted, Maltese Custom was applied. Certain Arab Customs were also merged with Maltese Law by Arab governors (*emir*), but such Arab influences were outstandingly minimal.

3. Norman Malta (1090-1530)

The *Ius Civile* makes a reappearance here. In 1090, Count Roger conquered Malta and applied Sicilian Law – which was Roman *Ius Civile*, albeit treated to a thousand-year process of evolution. In this period, the Maltese also gained the influence of Canon Law – which was the Law of the Roman Catholic Apostolic Church. However, the Roman Catholic Apostolic Church is also based in Rome, thus connoting the fact that ecclesiastical law is indisputably also founded on traditional Roman Law. Therefore, both the State *and* the Church applied the *Ius Civile*, thus rendering Malta as a state functioning purely on Roman Law.

4. Hospitallers Malta (1530-1798)

The Grandmasters of the Order of St. John were also avid followers of the Roman *Ius Civile*. Therefore, Malta persisted on maintaining a legal system based on the Roman body of law. It was also in this period that Malta started receiving its first serving of Codified law – such as the Code de Rohan, which was the last recorded promulgated Code of Law originating from the Hospitallers occupation here in Malta.

5. French Malta (1798-1800)

The French also upheld Roman Law, but Napoleon added a dash of salt to the *Ius Civile* by drafting his French Civil and Criminal Codes.

6. British Malta (1800 – 1964)

Upon his arrival in 1801, Governor Alexander Ball reported that Malta utilised Canon Law, Common Law (Maltese Customary Law), Statute Law, Roman Law and Civil law.

Thus, the English Statutory Law system ousted the Roman *Ius Civile* the Maltese were so very accustomed to. Therefore, it acts as no surprise that this served as a massive shock to the Maltese citizens and the Roman legal body they were used to following.

This freshly established legal system governed the Maltese Islands and started setting new standards under the now-British Colony; as most of Europe had been, at the time, making use of the Roman *Ius Civile*. Even Scotland (which forms part of the UK), used to abide by the Roman *Ius Civile*. In fact, it could be argued that the *Ius Civile* was far more superior to English Statutory Law – as English Statutory Law began developing in the 1600s; which is significantly late when compared to the progress made by the Roman *Ius Civile* since 750BC.

Therefore, the Maltese legal system suffered greatly during the initial stages of the grip English Statutory Law enjoyed on the archipelago.

In 1802, 104 village representatives signed the Declaration of Rights (*Dichiarazione dei Diritti*), which was then submitted to the King of England so that he could recognise certain fundamental rights claimed by the Maltese.

A significant portion of British law had entered the Maltese legal system by 1964 – especially after having experienced no less than 13 different constitutions while under British reign. And it is during *this* period that Malta began to shed its pure civil law system – which was a hybrid mixture of civil and common law.

Very little remains from the *Ius Civile* (such as the Criminal Code, the Code of Police Law, and the Commercial Code). However, the lingering remnants of the *Ius Civile* have, undoubtedly, been tainted by the touch of English Common Law.

It is also important to note that the British took over Malta straight after the French occupation. And at that time, the British and the French were two (highly) disputing states.

When Napoleon and his dominion was still at its peak, he appointed two commissions to draft a Civil Code and a Criminal Code (which were promulgated in France in 1804 and 1806). And a bit later, in the early 1840s, the British Governor ruling Malta appointed a handful of Maltese Judges to draft the 5 Codes which are still in place today.

At the time, the Maltese Judges in question were greatly learned in Italian Law. Thus, when tasked with drafting the aforementioned Codes of Law, they based their texts on scriptures they were highly acquainted with – Italian Law. And as the Napoleonic Codes had, at the time, vastly dominated the Italian city states, then it automatically implies that by basing the newly drafted Maltese Codes on Italian Law, the Maltese Judges were thus also basing their drafts on Napoleonic Codification, albeit indirectly. It was natural for the Maltese Judges (who were mentally waist-deep in the Italian legal system) to instil Italian Law already influenced by Napoleon's Codes into our legal system.

In fact, Italy's law was so influenced by the Napoleonic Codes that, in 1819, the Kingdom of the Two Sicilies adopted a Criminal Code which was, in plain candidness, an Italian version of the Napoleon Criminal Code. **Therefore, as the Maltese Judges were influenced by Italian legal systems already influenced by Napoleonic Codes, it necessarily implies that the Judges thus administered Napoleonic Codification unto the Maltese Codes**.

Therefore, it can be said that Napoleon still conquers Malta to this day… albeit in a legislative manner. The Napoleonic Codes are still part and parcel with Maltese Law; and it is *this* set of Codes that brandishes a reminiscent flavour of Roman *Ius Civile*.

After digging their flag on Maltese soil, the British were very reluctant on adopting French legislation, so they assigned Scottish attorney Andrew Jameson to report on the contents of the French Codes which, at the time, infiltrated the nervous system of Maltese legislation. By this, the British could deliberate on whether French legislation (such as the French Criminal Code and the Code of Organisation and Civil Procedure) could be deemed worthy to persist in Maltese legislation or not.

However, due to his being Scottish, the appointed attorney found no moral objection when advising in favour of the French Codes in question. Thus, thanks to Andrew Jameson, the Codes were greenlighted in 1854, and persisted until 1878.

After 1878, Malta (under the British), abandoned Codification altogether – owing to the simple fact that the British could not comprehend what a Code was. And up until 1964, Malta did not establish any new Codes (except for the 5 Codes promulgated prior).

On a slight aside, Prof. Ganado's authoritative advice states that wherever there is a lacuna in Maltese Public Law, British Public Law should be the first port of call. But upon becoming independent, the Maltese courts found themselves unglued to Ganado's principle – however, nowadays, the courts of law still tend to abide by it in the face of legal lacunae.

7. Independent Malta (1964 – 2004)

Before becoming an Independent State, Maltese *public* law was very much adopted from English Statutory Law. However, Maltese *private* law was still inspired by Roman *Ius Civile*.

Although Malta gained independency in 1964, two agreements between it and the UK were founded; namely, the military and economic agreements. And one of the things these ascertained was the persistence of a UK military base in Malta.

Upon achieving an independent status in 1964, Malta retained the same head of state, namely, the monarch of England (Queen Elizabeth II). It is also important to note that the Queen maintained a representative general here in Malta. And it was only upon becoming a Republic in 1974 did Malta start sporting its first *domestic* head of state – President **Anthony Mamo.**

Ultimately, the integrity of the Independence of Malta is stored in the UK Malta Independence Act, which was enacted by the British Government in 1964. Thus, the Constitution of Malta was adopted as a **legal order** in 1964.

And due to the Queen of England *still* being Malta's head of state *even* after Malta gained its independency, it necessarily follows that the Maltese Constitution was thus *not* enacted in Maltese parliament.

Owing to this, the 1964 Labour Party (headed by Deputy Leader Dominic Mintoff) established a great sense of contempt towards the Constitution. But upon becoming Prime Minister of Malta in 1974, Dominic Mintoff strived to achieve a Republic status for his country. And so he did (albeit combatted by Giorgio Borg Olivier). Thus, the Labour Party extinguished any quarrels it had with the Constitution of Malta – largely because of the new amendments made to it, which declared Malta to be a sovereign state.

1973: the UK joined the European Economic Community (modern-day EU). Hence, they became legally bound by EEC legislation, thus integrating it into their own legislation. And as Malta was adopting UK legislation into its own legislation, it necessarily implies that some of the legislation we adopted from the UK was, in turn, already adopted from EEC regulations by the UK. In simple, Malta was gaining EEC/EU law before entering the EU in 2004.

1978: Malta declared its neutrality (even though this was not openly stated in the Constitution until 1987).

1979: Prime Minister Dom Mintoff terminated any remaining agreements with the UK, thus rendering Malta totally free from any lingering chains. And to this, the national celebration of Freedom Day was born.

8. European Unionised Malta (2004 -)

In 2004, Malta joined the European Union, and such an accession can be found to be logged in Cap. 460 of the law of Malta.

Prime Minister Eddie Fenech Adami spearheaded Malta's entry into the EU, but found opposing force from the leader of the Opposition – Dr Alfred Sant. When the Nationalist government came to promulgate the EU Act in Malta's legislation, certain difficulties were encountered. The Labour Party was not cooperating; mainly due to their insistence with regards to a lack of discernment between what would be supreme, EU law, or the Constitution of Malta. Ultimately, it all boiled down to which court one appeared in. A Constitutional Case in the Maltese Constitution Court would render the Constitution of Malta supreme, whereas if one was to appear before an EU court, EU legislation is that which prevails.

However, this beckons the question: what happens if EU law suddenly runs counter to Maltese law?

> **"Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April 2003."**
>
> Art. 65 (1) of the *Constitution of Malta*

This means that EU law prevails wherever it can, and if the EU promulgates a law which goes *against* our Constitution, then the Constitution gets amended accordingly (with the blessing of both parties in parliament).

9. The Lawrence Gonzi Administration (2009) – *A Revival of Codification?*

During this point in time, Dr Tonio Borg (Deputy Prime Minister and Minister of Foreign Affairs) set forth a motion for the House of Representatives to appoint a Select Committee in charge of Re-Codification and Consolidation of Laws. The main aim was to collect the sudden influx of legislation encompassing new and diverse subjects.

And through this, Dr Tonio Borg intended to **repeal any irrelevant laws**, **codify any lingering commercial, criminal, and civil laws into their respective Codes**, and **to consolidate laws appertaining to the same subject into a single law**. Thus, this calls out a revival of the practice of Codification. And 2009 Prime Minister Dr Lawrence Gonzi appointed Franco Debono to be the Chairman for the Recodification and Reconciliation of Laws. But in order to understand why this happened, let us first look at the political and governmental situation of the time.

In 2009, Prime Minister Lawrence Gonzi won with a majority of 1 in the House of Representatives. Needless to say, this caused a handful of problems. In fact, some of his MP-colleagues suddenly started creating ripples of their own (including Franco Debono and Jeffrey Pullicino Orlando).

And this was because there was a single, particular snag. If Gonzi did not like a fellow MP's proposed bill, he, as Prime Minister, *did* have the power to block said bill from entering the agenda. However, Gonzi could not stop any MP's from disobeying his parliamentary orders if they so desired to. And at that time, MP's could leisurely disobey his parliamentary orders because, due to his winning with just one majority, blackmailing Lawrence Gonzi to get what one wanted was not only tempting, but also easy. Conversely, this was highly unlike 2013 Prime Minister Joseph Muscat's situation – who won with a comfortable 9-seat majority.

Since Gonzi did not want Franco Debono to garner too much power, he appointed him as Chairman for the Recodification and Reconciliation of Laws. Thus, Gonzi assigned him this role *not* because he believed in him, but only because he wanted to stuff Dr Debono's egotistical lust for power with something… anything.

It goes without saying that when the Nationalist Party lost the election in 2013 to Joseph Muscat's, Franco Debono was undressed from the role he was given by Lawrence Gonzi. Thus, codification in Malta suffered a two-year impetus. Ultimately, even the present Prime Minister, Robert Abela, chose not to appoint a designated person to Franco Debono's past role, thus meaning that the codification of laws remains impeded to this day.

CHECKPOINT

Roman Malta

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Arab Malta

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Norman Malta

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Hospitallers Malta

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French Malta

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British Malta

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Independent Malta

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European Unionised Malta

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The Lawrence Gonzi Administration

The Intricacies of Legislation

One might rightly imply that there exists a hierarchy of law within the constitution and its provisions. The constitution itself always takes precedence, and it rules supreme over any other law running counter to its fundamental nature; as stipulated in **Art. 6 of the Constitution of Malta**:

> ***Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.***

Ergo, the constitution itself can be referred to as **Primary Law**. Ordinary legislation is *also referred to as such*, but **Subsidiary/Delegated legislation** found dwelling beneath ordinary law is of a breed lesser than its Primary kin.

The term 'Ordinary legislation' refers to Acts and Ordnances (the difference between the two simply boiling down to history and British colonialism, as the Governor of Malta during the British grip on the Maltese archipelago promulgated 'Ordnances', rather than 'Acts').

Needless to say, the 5 Codes of law in Malta take the least precedence after the above.

It is also important to note that when there are two two-tier legislations claiming superiority in conflict, the General Principles of Law chime in to assist a court in deciding on which legal margins to act. Normally, the principle of **the *lex posterior derogat priori*** ("the most recent law is the one which is applied") is the maxim adhered to.

However, EU law considers itself subordinate to the ECHR laws, thus meaning that the *lex posterior derogat priori* does not apply in this instance.

How is primary legislation made?

The Pre-Parliamentary stage:

What eventually becomes an Act of Parliament starts off as an idea; it is embryonic. The idea is weighed within the four walls of a minister's mind, where he or she evaluates and predicts what positive and negative reception to such an idea might be before actually setting it to the table. The minister talks with the sectors directly related to the a would-be-law (e.g. the financial sector). Thereafter, the minister decides whether he or she will proceed according to plan, or withdraw. Political factors are crucial, as the minister wants his or her plan to appeal not only to the House of Representatives, but also to the people.

Before mediating the idea to the Cabinet, the minister has to draft a **memorandum** – which is a text that highlights the thought process behind the initial idea, and the possible pros and cons it also heralds (ex. the permanency of the effect it will leave). The memorandum also decrees a recommendation of what ought to be approved by the cabinet.

Thus, the minister then assigns a lawyer to draft a bill appurtenant to the memorandum first penned by the former; which is then received by Cabinet and addressed in Parliament to be debated and, quite possibly, voted about.

The Parliamentary stage:

The minister who took the initiative to erect the bill in question does what is called the **First Reading**. In this stage, a **motion** (a procedural device used to bring a limited, contested issue for decision) would be presented, introducing the title and subject of the minister's proposed bill. The Speaker then asks all those present as to whoever seconds the motion. The motion is then put to vote without any prior debate, as the bill in the motion in the First Reading is usually read *neminem contra* (no one against it).

NB: The First Motion is very rarely voted against, however, a bill proposed by Karmenu Mifsud Bonnici was once shot down due to it exhibiting high controversy in the mere title of the bill itself.

Once the First Reading has taken place, Publication ensues - wherein the bill is published in the Malta Government Gazette. If this does not happen, then the **Second Reading** cannot take place, as the opposition would not have had the opportunity to read and evaluate the proposed bill.

The shadow minister will evaluate the bill made by the minister and discuss it with the opposition so as to formulate a strategy for when both parties are present in the parliament for discussion.

The Second Reading commences by having the Speaker invite the initiating minister to take the stage and move the discussion by introducing the bill. He refers back to his memorandum, voices his argument, and promotes his proposal.

All members of the House are then entitled to an opinion, managed by the Speaker in order to maintain order. Once the other members speak, the Speaker then asks the initiating minister to proclaim his concluding statement, and reacts to the proposals made by the other members. If he approves of certain proposals, he may include them afterwards in the bill. The Second Reading, like the First, is concluded on the grounds of a vote.

The Committee Stage:

The Speaker leaves the Chair, and the House evolves into a committee presided over by the Chairperson. The clauses in the bill are then read word by word, both in Maltese and in English, then thoroughly discussed. After this, a final vote on the whole bill is taken.

The Chairperson then decrees that the discussion has reached its end, and if the bill is approved, it either proceeds onto the **Third Reading**, or becomes recommitted (when the whole House decides to send back the bill to the Committee stage, so that the Committee may further discuss any questionable limbs of the bill).

The Third Reading:

In the Third Reading there is no discussion, but a holistic evaluation of the clauses, lexical format, and other miscellaneous elements of the bill; much like proofreading it. If a division is requested, the House suspends proceedings for 20 minutes, and upon recommencing, the Clerk of the House calls out all the Members' names and takes note of the 'Ayes' and 'Noes'. Thus, the Speaker will then be in a suitable position to declare whether the bill has been successfully carried through its Third Reading stage or not. The Parliamentary stage closes with the President signing it, thus rendering it as law.

The Post-Parliamentary stage:

The law now has been assigned a number by the Speaker, and has been sent to the Government Printing Press in Maltese and English after being signed by the Head of State.

Art. 72 of the Constitution of Malta:

"(1) The power of Parliament to make laws shall be exercised by bills passed by the House of Representatives and assented to by the President.

(2) When a bill is presented to the President for assent, he shall without delay signify that he assents.

(3) A bill shall not become law unless it has been duly passed and assented to in accordance with this Constitution.

(4) When a law has been assented to by the President it shall without delay be published in the Gazette and shall not come into operation until it has been so published, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect."

A Bill does not become law if the President does not give his assent. And the Head of State is obliged to do so without reasonable delay.

Therefore, if the President refuses to sign a Parliamentary Bill, he either voluntarily resigns or is removed from office under **Art. 48(3)(b)** of the Constitution of Malta:

> ***"(3) The office of President shall become vacant –***
>
> ***(b) if the holder of the office is removed upon an address by the House supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the grounds of proved inability to perform functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour: Provided that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the inability or misbehaviour of the holder of the office under the provisions of this paragraph"***

After the bill is published in the Government Gazette, the first Article of said bill is hence referred to as the **Citation and Entry into Force,** and the Article following that would be the **Definition Section**. The first subsection is, quite simply, the short title of the bill.

If there is no indication with regards to the enforcement of the bill listed in a subsection, the Act comes into force on the first second of the day it is published in the Government Gazette (at 00:00:01am). Therefore, if the law is published in the Gazette at 5pm on a Tuesday, its functioning commences tersely prior to its explicit publishing on that same Tuesday.

If an Act is specified to come into effect on a date dictated by one of its provisions, its effect comes into force as stipulated – even if it is published in the Government Gazette prior to the agreed-upon date.

The Act may also be allocated a time frame by a prescribed authority (such as a Minister, or a Public Officer). Owing to this, Parliament may delegate power unto a Public Officer to bring an Act into force whenever said Public Officer deems fit. The Public Officer would thus publish a subsidiary legislation to indicate when the Act is to come into effect. This scenario is due to the fact that not all laws are of the same nature. If a law requires certain measures to be taken before coming into force, it cannot be given a fixed date of when it is to be enforced; as certain elements such as administrative, technological, and financial measures must be satisfied before.

CHECKPOINT

1. Pre-Parliamentary Stage

- **Light-bulb** moment
- Minister with the idea refers to the appurtenant **sectors**
- Drafting of **memorandum**
- A lawyer is assigned to draft a **bill** which is congruent to the memorandum
- Bill is **sent to parliament**

2. Parliamentary Stage

- **First Reading + motion** by the proposing minister
- Speaker asks for whoever **seconds** the motion
- Motion is then **put to vote** without prior debate, due to it normally being ***neminem contra***
- **Publication** of bill to the **Government Gazette**
- **Shadow minister** discusses bill with the opposition
- **Second Reading + vote**

3. Committee Stage

- **Speaker leaves**
- **Chairperson** now presides over House of Representatives
- **Clauses of the bill** are re-read in **Maltese** and **English**
- **Final vote**
- If **approved** = Third Reading. If **not approved** = recommitted

4. Third Reading

- **Proofreading** of bill
- **Clerk of the House** calls all names and registers '***Ayes***' and '***Noes***'
- If voted upon, bill is successfully passed and the **President signs it off**

5. Post-Parliamentary Stage

- The new law has been assigned a number by the **Speaker**
- The new law is signed by the **President**
- The new law is sent to the **Government Printing Press**

Unless stated otherwise, the new law comes into force on 00:00:01am of the day it is published in the Gazette. If implied to come into force on a later date, it will do so regardless of its imminent publishing in the Gazette.

Subsidiary Legislation

> ***"Where an Act, whether passed before or after the commencement of this Act, confers power to make, grant or issue any order, warrant, scheme, rules, regulations, by-laws or other instrument, expressions used in any such instrument made after the commencement of this Act shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."***
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> **Art. 8** of the *Interpretation Act of Malta*

However, there exist other types of subsidiary legislation that are not mentioned above, such as **Planning Schemes** and **Proclamations made by the President**.

Subsidiary legislation may very well be a *form* of **Delegated legislation**. Parliament may decide to delegate powers onto certain authorities; and said delegates thus become bequeathed with the power of promulgating subsidiary law. Parliament may also empower the delegate to, in turn, subdelegate. This would hence connote **tertiary legislation**, as subsidiary legislation is strictly **secondary legislation**.

Therefore, Delegated Legislation is divided into Subsidiary and Tertiary legislation.

The Latin term '*delegatus non potest delegare*' (the principle of not being able to subdelegate) gets shot down by the supremacy of Parliamentary power which authorises entities to subdelegate. However, if there is no express provision of the law to that effect, then yes, the principle of the *delegatus non potest delegare* applies.

The Emergency Powers Act is an **empowering law** that allows the President of Malta to make delegated and subsidiary legislation, albeit on the advice of the Prime Minister. This law also allows the President to delegate said power to other Emergency Powers in cases of public and national emergency (ex. war, severe natural calamities).

Although one can legislate however, the magnitude of his power may be territorially limited. For instance, if a village gets demolished by a terrorist bombing, the President may authorise and delegate power onto the Armed Forces. This authorises them to issue legal regulations onto their Bomb Disposal Unit in a quick manner, with the main aim of mitigating movement of citizens by making the bombed locality legally inaccessible. In issuing a tertiary legislation which limits the citizens' Freedom of Movement, their safety becomes shielded against any looming potential hazards such as rubble, toxic fumes, and the potentiality of other explosions. Therefore, this type of tertiary legislation solely applies to a specific, singular locality - and not the country as a whole.

Art. 8 of the Interpretation Act explains the various shades of subsidiary breeds of legislation (order, warrant, scheme, rule, byelaw, etc.), and each type serves a particular purpose.

For instance, **Rules** are usually applied to establish procedures.

> ***"(7) Rules of Court making provision with respect to the practice and procedure of the Courts of Malta for the purposes of this article may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of those Courts, and shall be designed to secure that the procedure shall be by application and that the hearing shall be as expeditious as possible."***
>
> **Art. 46** of the *Constitution of Malta*

Orders are usually made to establish divisions of particular institutions, thus also outlining their functions. For example, if one wants to establish that the Court of Appeal is to have two chambers, an Order shall be declared to sustain that.

By-laws are normally promulgated by local councils. These usually regulate the influence of citizens on their own locality (e.g. the permission of affixing notices to walls on property, or by-laws regulating the placing of public furniture). In the University of Malta there exist three tiers of law: the Faculty of Laws maintains a faculty board which approves by-laws (ex. regulating the Bachelor of Honours degree and the prerequisites one needs to attain it), the Senate of the University provides Regulations for ALL students coming from ALL faculties and the University Council is that which declares Statutes (also a form of by-laws).

Planning schemes do not exist any longer, and are nowadays substituted by **Development Plans**. Various types of development plans (such as Local Plans, Strategic Plans, and Development Briefs) are regulated by the Development Planning Act.

Warrants exist in different forms of being. These can appear as certificates given and signed by the President of Malta, as advised by the Minister of Education, to people licensed to exercise a profession. The Ministry for Finance also issues a warrant to allow certain monies from the Consolidated Fund which have not been stipulated in the annual budget to be spent.

A Historic and Legal Timeline of Malta

In the year 1800, the British Empire occupied the Maltese archipelago as a protectorate, but did not govern the country in a constitutional manner. After observing our legal system, Sir Thomas Maitland opted to institute an early from of council government in Malta, which started issuing **ordnances**, such as the 1804 law of driving on the left – and certain **proclamations** such as this endure till this day.

Proclamations founded in Malta were normally comprising of two types of Common Law: **Judge-made Law** (Anglo Saxon/English Common Law) and **Continental Common Law** (the *Ius commune* emanating from Justinian's rule and Roman Juristic writings).

Proclamation XXII for instance, formally introduced the police force in Malta under The Police Force Establishment Law.

Proclamation XXIII of 1822 set the stage for Mortmain law appertaining to the ownership of land by ecclesiastical entities.

1829 – Criminal Trial by Jury law was introduced due to the innumerable piracy cases occurring in the Mediterranean Sea.

1839 – Promulgation of the ordnance introducing the Freedom of the Press.

1849 – The British decided to give the Maltese a form of representation. Thus, a person representing the Maltese society as a whole was instituted. And this system persisted until 1921, until the Maltese attained some sort of responsible government after the outbreak of Sette Giugno in 1919.

These new constitutional arrangements owed themselves mostly to the fact that England considered the Maltese Islands to be of utmost strategic importance in the face of a looming Anglo-French war.

> **"The elevation of the country's constitutional status was a means of gaining tighter control over it."**
>
> Raymond Mangion, *Legal History Vol. I.*

1854 – Promulgation of the Criminal Code of Malta.

1880 – The first political parties emerged in an organised fashion in Malta.

1887 – The London by Letters Patent established a Council of Government of 20 members. Four were selected by the Governor, and another six held a seat *ex officio*. The lingering ten members were elected according to the 1883 electoral system.

1889 – The first Maltese Chief Secretary to the Government was appointed: Count Gerald Strickland.

1896-1903 – The now knighted Sir Gerald Strickland proceeded to take progressive measures without resorting to legislation. In some scenarios, he relied on the Letters Patent and Orders-In-Council to alter legislation.

1901 – The Church took drastic measures in order to avert any attempts at non-Catholic proselytism, excommunicating Emmanuele Dimech and even prohibiting Reverend Ġorġ Preca to teach Catholicism through a lay society – the MUSEUM.

1902 – Sir Gerald Strickland became the mightiest politician and legislator in Malta.

1902 – Maltese Dockyard workers staged unprecedented strikes when the press appealed for better conditions in labour. Through the medium of journalism, a native, ex-convict, revolutionary, and socialist, Emmanuele Dimech, sought to promote trade unionism, Maltese as a national language, and compulsory education.

1903-1914 – Malta became constitutionally and politically retrogressive, but legislatively productive. The local Church and the Armed Forces of the Crown remained the leading powers of the country.

1903 – The London by Letters Patent re-instituted the Council of Government of 21 members.

1921 – Social Legislation was introduced in Malta after the conclusion of the First World War. Employment was very scarce pre-1921. In fact, Maltese citizens found the need to migrate to Australia in search of employment.

1939 – MacDonald Constitution.

1946 – Compulsory education was introduced in Malta.

1947 – MacMichael Constitution.

1950 – The death of Enrico Mizzi.

1961 – Blood Constitution.

1964 – Malta is now an independent country.

1967 – Act XXXI of 1967 was published, introducing the baptism of The Central Bank of Malta Act under Cap. 204. In 2004, the Bank joined the European System of Central Banks (ESCB), and in 2008, it became part of the Euro system.

1971 – The death penalty was abolished from the Constitution of Malta, but was maintained under the Armed Forces Act of 1970 for military offences committed by military personnel. In 1989, the death penalty was abolished with regards to military offences in time of peace, and only until the year 2000 was it abolished also in time of war.

1973 – the UK joined the European Economic Community (modern-day EU). Hence, they became legally bound by EEC legislation, thus integrating it into their own legislation. And as Malta was adopting UK legislation into its own legislation, it necessarily implies that some of the legislation we adopted from the UK was, in turn, already adopted from EEC regulations by the UK. In simple, Malta was gaining EEC/EU law before entering the EU in 2004.

1974 – Malta is now a Republic.

1978 – Malta declared its neutrality (even though this was not openly stated in the Constitution until 1987).

1979 – Prime Minister Dom Mintoff terminated any remaining agreements with the UK, thus rendering Malta totally free from any lingering chains. And to this, the national celebration of Freedom Day was born.

1982 – Malta was one of the first countries to have an Extradition Act, which made provisions for the extradition of persons overseas.

A Terse Overview of the Many Constitutions of Malta

The Constitution of Malta has been sifted through the sieves of time by many a political entity. The Royal Commissioners of 1931 wrote that "*It would be almost impossible to plot a graph of the constitutional history of Malta during the last hundred years showing the rise and fall of constitutions".*

The 1813 Constitution

In 1813, Malta voluntarily embraced the rule of the British, recognising the British monarch as their head of state. Thus, in 1813 Malta became overseen by British Governor Sir Thomas Maitland (AKA 'King Tom') – with no Maltese representants working in tandem with the Brits on a legislative spectrum. However, Sir Thomas Maitland was permitted to form a solely *advisory* council of not more than six members. But this nominated Council was never formed. The Maltese were highly unamused with such a lack of domestic voice in the legislative sphere, thus pressing for the grant of a representative council, also bringing their inherent rights and privileges (such as the *Consiglio Popolare*) unto the fray to strengthen their arguments.

The 1835 Constitution

In 1835, William IV deployed instructions decreeing Malta to have a council of 7 members in order to assist the Governor in administration. Four of said members were to be selected *ex officio*, namely the Chief Justice, the Bishop of Malta, the Chief Secretary to the Government, and the Senior Officer in command of the Land Forces.

However, the Maltese were not satisfied with this decree, as there still persisted a laughable population of Maltese individuals in the political sphere; and said persons were not even elected by the Maltese themselves. And to make matters worse, the council members were only bestowed with pseudo-power – as their role was simply that of *advising* the Governor, not carrying out independent decisions.

In fact, in 1838, the Council was reconstituted and diminished to a three-man board of officers.

The 1849 Constitution

A Council of Government of 18 members was now founded, taking care of promulgating laws "for the peace, order and good government of the Island". Holistic power was still reserved to the Crown, and in fact, this power was exercised in 1854 with the promulgation of Criminal Code of Malta and the Laws & Regulations of the Police of Malta.

The 1887 'Lord Knutsford' Constitution

With this constitution, Malta could now brandish its own set of native representatives in charge of local concerns. However, full power still resided with the Crown. Therefore, Malta enjoyed constitutional progression in the form of a responsible government.

The 1903 'Lord Chamberlain' Constitution

Reminiscent of the 1849 Constitution, it has been described to be "one of the narrowest and most oppressive oligarchies that ever mocked the form of free government". After the First World War, the Maltese demanded a reform to the Constitution which would grant them a louder voice in the legislative sphere. And subdued contempt towards an oppressive governance peaked in 1919 Sette Giugno.

The Aftermath of Sette Giugno in 1919

After World War I was done ravaging all possible fields of human life, the Maltese citizens found themselves between a rock and a hard place due to the cataclysmic collapse in economy. Import reduced drastically, wages got floored down, and the cost of living blew up so high that it was nigh impossible for anyone to maintain an acceptable state of livelihood. In 1916, dockyard workers were quick to organise a union, and a year later in 1917, a strike was issued after rumours that grain importers and flour millers were making unfairly excessive profits due to the obscene prices in bread.

Thus, after a predictable uprising, the National Assembly held a meeting on February 25th, 1919, approving a compromise which bestowed Malta all the rights given to other nations by the Versailles Peace Conference.

On June 7th, 1919, the National Assembly was set to meet for the second time. However, as proceedings ensued, a massive rally, comprising of thousands, reaped havoc on buildings brandishing the Union Jack, vandalised and desecrated other British-occupied houses, and assaulted British officers – with all this resulting in an alarming number of injuries and deaths.

Thus, a military court was opened to investigate the aforementioned uprising, with a court martial assigned to look into a total of thirty-two people that took part in the uprisings. However, Governor Lord Plumer gifted liberal concessions to the Maltese being charged.

After all this chaos, the House of Commons of the United Kingdom decreed that Malta was to have *"control of purely local affairs"*, with the Colonial Secretary sending a detailed description of a newly proposed constitution to the National Assembly soon after. And on April 30th, 1921, the **Amery-Milner Constitution** was given birth; under which the running of local affairs became mostly entrusted to the Maltese Government – also setting the stage for a diarchy, wherein two governments worked simultaneously (The Maltese Government for Local Affairs, and The Imperial Government for Reserved Matters).

However, the 1921 constitution was suspended in 1933, and revoked in 1936.

The 1939 'MacDonald' Constitution

Gozo lost its autonomy as an individual in 1939 by being conjoined with the second district when a new constitution, the "MacDonald" Constitution, was bequeathed unto Malta's lap. This Constitution was a retrograde step in Malta's constitutional progress as, once again, a Council of Government consisting of 20 members under the presidency of a British Governor was set up.

The 1947 'MacMichael' Constitution

The MacMichael constitution was heavily reminiscent of the 1921 form of government, albeit sporting differences of its own. 40 members were to be elected by Universal Suffrage to form a Legislative Assembly, with elections occurring every four years, fully absconding from the notion of a Senate.

This breed of Maltese parliament had the power to legislate on all queries, except *"matters touching public safety or defence of Our Dominions."* The Maltese Parliament could not legislate on Reserved Matters.

The 1961 'Blood Constitution'

The 1961 Blood Constitution provided the basis for the soon after 1964 Independence Constitution. A crucial characteristic of this constitution was the annihilation of the diarchic system, duly replaced by a system comprising solely of a single Government (the Government of Malta,) which brandished full legislative and executive powers. Militarily speaking, Her Majesty's Government back in England remained fully responsible for the preservation of the Maltese, as Malta was still, at the time, a subsidiary country of the British Empire. At this stage however, the prospect of an independency in Malta had never shone brighter, and the 1961 Constitution later on turned out to be a major establishing factor of many ingredients of the 1964 Constitution – such as the Chapter on Human Rights.

The 1964 Independence Constitution

With the main instigator being George Borg Olivier, the Constitution of Malta was finally adopted as a legal order on September 21st, 1964, and has been amended twenty-four times, most recently in 2007 with regards to the entrenchment of the office of the Ombudsman.

Ergo, Malta became a parliamentary democracy within the British Commonwealth under the effect of the 1964 constitution. Queen Elizabeth II remained sovereign of Malta, with a governor general acting as a medium for executive authority on her behalf. The actual direction and control of the government, including all national affairs, found themselves under the hands of the cabinet under the leadership of a Maltese Prime Minister.

The Independence Constitution of Malta of 1964 proclaimed Malta to be a liberal parliamentary democracy. It safeguarded the fundamental human rights of citizens, and forced a separation between the executive, judicial and legislative powers, with regular elections based on universal suffrage. However, it is also good to note that Malta still possessed the aforementioned organs of the State, even prior to its independence.

Another crucial entry which appeared alongside the birthing of this constitution was the introduction of a chapter covering the preservation of Fundamental Rights and Freedoms of the Individual; thus meaning that the now independent state of Malta became burdened with the responsibility of the protection of its subjects.

The Legislative Assembly's normal life span was of four years. It consisted of fifty members and they were elected by universal suffrage and the single transferable vote.

However, not everyone in Malta agreed with the 1964 Independence Constitution. The Malta Labour Party had three main objections:

1. the Constitution was not liberal enough with regards to religion.
2. the Defence Agreement was against the inherent concept of Independence.
3. the Financial Agreement was not supporting the needs of an independent Malta in a sufficient manner.

However, The Nationalist Party (who was in government at the time), was quite popular at that time, and thus, the Labour opposition did not manage to impede the Nationalist's objective of achieving Independence. The citizens of Malta were then asked via referendum held in May of 1964 whether they agreed with the Independence Constitution or not. And the majority answered 'yes'. Thus on 21st September 1964, after 164 years of British rule, Malta achieved its political independence and became a sovereign state.

In December of 1964, Malta joined the United Nations, becoming the 114th member state. In March 1965, it also joined the Council of Europe as its 18th member state.

On December 13th, 1974, the constitution was revised, and Malta became a Republic within the Commonwealth, with executive authority vested in a Maltese president (who was appointed in parliament). In turn, the president was given the task of appointing prime minister the leader of the party that wins a majority of parliamentary seats in a general election for the unicameral House of Representatives.

On 31st March 1979, the Defence Agreement reached its deadline, and the last Royal navy ship left Malta with the Labour Government proclaiming the day as 'Freedom Day'.

One might rightly argue that the 1964 Independence Constitution was, in fact, an amalgamation of nit-picked ingredients from prior constitutions; and only a fool would deny the fact that the constitution of today has reached its pinnacle. The constitution has, is, and will keep on growing, changing, and improving with accordance to the public's interests and general well-being.

CHECKPOINT

"*It would be almost impossible to plot a graph of the constitutional history of Malta during the last hundred years showing the rise and fall of constitutions*".

Royal Commissioners, 1931

1813 Constitution – Malta opened its arms and embraced Great Britain. Sir Thomas Maitland was the first Governor of Malta, and although an advisory council could be set, Maitland chose not to formulate such a board.

1835 – **William IV** deployed instructions for a Constitution of Malta, and an administration of a **non-elective 7-member council** was set up to advise the British administration. The Maltese were still not happy with the population of Maltese nationals in the political sphere.

1849 Constitution – the Maltese could not legislate on strictly domestic affairs, as all holistic power was still retained by the Crown. The promulgation of the Criminal Code and the Laws & Regulations of the Police Force of Malta occurred in this epoch.

1887, **Lord Knutsford Constitution** – Malta could now brandish a form of native representation in the legislative sphere. A constitutionally progressive change in things.

1903, Lord Chamberlain Constitution – oppressive oligarchy; maddened the Maltese into causing the havoc ensued on Sette Giugno after World War I.

1919, **Sette Giugno** – National Assembly convened to consider bestowing Malta the rights declared by the Versailles Peace Treaty. But an uprising was happening in the background. After all this, the House of Commons asserted that the Maltese were to have *"control of purely local affairs"*.

1921, **Amery-Milner Constitution** – Maltese now had jurisdiction over ***"purely local affairs"***, and a **diarchy** between the Maltese Government, and a Maltese *Imperial* Government was thus set up.

1939, **MacDonald Constitution** – Gozo lost its autonomy after being merged with the second district. A **constitutional retrograde** as a **Council of 20 members under the presidency of a British Governor** was set up.

1947, **MacMichael Constitution** – **40 members in a legislative assembly** were elected through universal suffrage, absconding from the notion of a Senate. This unicameral legislature had the power **to legislate on all queries, except *"matters touching public safety or defence of Our Dominions."***

1961, **Blood Constitution** – Provided the basis for the 1964 Constitution, and eradicated the diarchic system; **now, the Maltese Government had full executive and legislative power**. The Brits were still responsible for the preservation of Malta. The enforced chapter of Human Rights was introduced.

1964, **Independence Constitution** – Instigated by **George Borg Olivier**, democratic Malta gained independence and now brandished a Maltese Prime Minister; however, **Queen Elizabeth II remained Head of State**. Malta forced the separation between the executive, legislative and judiciary, but maintained them all itself. The 1964 Constitution catered for the **Fundamental Rights and Freedoms of the Individual**. The Labour Party was not fully content with this constitution.

1974, **Republic Constitution** – Under Prime Minister Dominic Mintoff, the Constitution was amended by a two thirds majority to declare the state of Malta as a sovereign Republic. Thus, Malta now bore its own Head of State – **the President**, who adopted all the roles the Queen maintained before him as Head of State, and more.

1979, **Freedom Day** – the Defence Agreement Britain had with Malta came to a close, and the last ever Royal Navy ship departed from Maltese harbours.

The History and Meaning of the Prolegomena

The Maltese Islands boast a Civil Law jurisdiction brandishing extensive Common Law influence. And this is owed to the fact that the country of Malta spent an exponentially huge stretch of time dwelling under a multitude of civil law jurisdictions. Thus, this denotes that Maltese jurisdictions are **hybrid** in nature.

With regards to civil law, there exist three very important and renowned systems all over the four corners of the world:

The Sharia System – predominately found residing in Muslim states, it bases its principles on the hallowed book of the Quran. The Sharia system regulates problems such as property, family law, inheritance, business, commercial transactions, and banking.

Very often, a modern Sharia legal system is found to maintain external influences due to its expansive historical background. In Morocco and Alger for instance, a flavour emanating from the French legal system persists in their fundamental Sharia system, due to them having once been pinned under French occupation.

Common Law – originating from England, Wales, and Ireland, it gets its dubbing from being widely known to nigh every person in said states. But let us roll back the hands of time a little.

In the Middle Ages, it was the King who dispensed justice. Over time, this power was delegated to the King's own Chancellor, who was, in essence, a sort of Prime Minister Judge. And British Common Law was thus carried unto wherever the English expanded their Empire. Ergo, Common Law may be nowadays found dwelling in ex-British colonies, such as the USA (with the exception of Louisiana) Canada (with the exception of Montreal), Australia, New Zealand, Singapore, Hong Kong, India, and a handful of African States.

Two major characteristic sources of Common Law are:

1) the **Judicial Doctrine of Binding Precedent** (by which English Courts have the legal principle of having law declared by superior courts bind inferior ones); and

2) the **Trust**, which was, quite simply, the fruit borne of the principle of Equity (devised from the aforementioned Chancellor's Courts of Chancery, whose primary role was to offer Equitable remedies to third parties).

Hybrid System – which refers to an amalgamating cocktail of different breeds of jurisdictions baptised by the colourful effects of history (such as the one found in the Channel Islands).

The History of Civil Law and its Presence in Malta

It can be safely stated that modern Civil Law in Malta finds its origin from Roman *Ius Commune* (not to be confused with English Common Law).

However, there are certain principles of the *Ius Commune* one must grasp first:

1 – One cannot interpret the past with the eyes of today.

2 – There are always two sides to a coin. A story must be heard from both angles.

3 – History is written by those who win.

Roman Law drifted towards two directions: the Eastern Empire (headed by Justinian), and the West (in which a vast fragmentation of the Roman Empire occurred, followed by the 'Dark Ages', wherein a significant quantity of knowledge was lost).

In the Middle Ages, an important revival of the study of Roman Law took place in many European universities. And this was due to the fact that funding aimed specifically for Roman Law teachers was suddenly established, meaning that it was now made worthwhile for teachers and students alike to vest their interests into studying Roman Law. Hence why the late Middle Ages produced many revered Roman Law scholars, such as Bartolus.

Through this, Roman Law persisted as Customary Law and enjoyed being the 'new' *Ius Commune* of the Western World. Amazingly enough however, *Ius Commune* is NOT Common Law, but rather, refers to Customary Law. It is the main foundation of Roman Law which, ultimately, serves as a legal basis for Western Europe civil law systems *even to this day*.

The political fragmentation of Western Europe in the Middle Ages caused a massive ripple in the advancements made by Civil Law. Many smaller states began erecting themselves, and in each fragmented state, there existed a written law which adopted a strain of Roman Law, edited it, and thus applied it (Ex. Aragon in Spain).

Roman Law in Malta persevered all throughout the many different reigns the country was subdued under – and the strongest position Roman Law held was under the occupation of the Order of St John. From this time, we maintain four very important documents:

1. **The Grammaticali of Grandmaster Lascarus** – these were rules directly appurtenant to the management and peacekeeping of the state. These texts presupposed that the basic law of the Maltese lands was the Roman Law, and they retain historic relevance as they also made the assumption that the Civil Law of Malta is the Roman *Ius Commune*.

2. **The Consolato del Mare of Grandmaster Perellos (1680s)** – a maritime code working in tandem with a court in which two or three businesspeople (such as traders and importers) discussed maritime concerns. Once again, this was put in a Roman civilian context.
3. **The Code de Vilhena** – this was an effort to establish a particular methodology regarding the management and running of a country, specifically with regards to property, succession, marital inheritance, and kinship. Nowadays, this is commonly referred to as Family Law.
4. **The Code de Rohan** – founded the notion that the *Ius Commune* was applicable to anyone and anywhere in Europe (*il Diritto Comune e il Diritto Romano*; the universal basis upon which Roman Law is applicable).

A Timeline of Civil Codes in Europe

In Europe, Roman Law persevered as the *Ius Commune* – which was applicable to all European states, regardless of the mass fragmentation of states of the Renaissance.

In the 1700s, and after the dying breaths of the Renaissance Era were exhausted, the door was cordially opened for the Enlightenment Age to step inside. This introduced strong states (such as France) to take hold of the religious climate of the world; thus, the religious wars ensued. However, this epoch in human history also heralded the **Era of Codification**. Thus, the legal history of Civil Law in Europe took a turn, as the sudden thirst for legal Codes sprouted heavily. The prime function of a Code was to serve as a systematic collection of laws. In this case, European Civil Law Codes bore the duty of encapsulating the gist of Civil Law in order to crunch it down into a single Code.

Therefore, let us look at a holistic timeline of said legal codifications:

1780s-1950: the flourishing of the Era of Codification (ex. the Prussian Civil Code, and the Code of the Austrio-Hungarian Empire Civil Code, which found its end in Sarajevo after the death of Archduke Ferdinand prior to WWI)

1804 – Code Napoleon

1950s – **1970s**: Era of Decodification

1970s – **today**: a return to the Codification mindset of the late 18th century ensued.

In continental Europe, the most important Code is, indubitably, the French Code of 1804, which was accompanied by the very influential writings of Jurists Jean Domat and Joseph Pothier.

Back to Malta, the Maltese legal system moved in tandem with the progress made by continental Europe. The *Ius Commune* persisted under Napoleon's grip on the country; and endured also under British Rule.

Adrian Dingli convinced the British to draft up a Maltese Civil Code, which was consolidated and published in 1868. The Code Napoleon was thus adopted as a basis for this to happen, but the topic of Family Law had to be duly added to the equation.

Even though Malta has, Civilly speaking, progressed beyond the perimeters of Roman Law, the Maltese Court of Appeal stipulates that wherever a legal lacuna curses certain Civil Law cases, Roman *Ius Commune* still applies to the law of Malta. Ultimately, the French Code itself is already heavily reminiscent of Roman Law, therefore it would make sense to refer directly to Roman *Ius Commune* in times of need.

"What nothing will destroy, what will live forever, is my Civil Code"

Napoleon Bonaparte

What Was Happening in Italy?

In 1805, Napoleon Bonaparte was crowned King of Italy (which refers to modern north-eastern Italy). In 1815 however, Napoleon was defeated and expelled from the regions of Italy he once governed. But his Code Napoleon lived on as the fundamental base for many of the now-restored kingdoms. And even in places wherein the Code Napoleon was abolished, it got duly reinstated with the ultimate unification of Italy in 1848, when King Carlo Alberto bestowed the first constitution unto the whole Kingdom.

But let us first take a step back. In 1837, The Kingdom of Sardinia enacted its own Civil Code – **The Code of Sardinia** – which was heavily based on the Code Napoleon. And in 1848, the Kingdom of Sardinia amalgamated itself with the region of Piemonte, thus reinforcing their legal system, while also becoming the strongest region in the whole of Italy.

In 1861, the Kingdom of Sardinia conquered the Kingdom of the Two Sicilies, and thus, in 1865, the newly formed Kingdom of Italy created its own ***Codice Civile***, which highly reflected the original Code Napoleon.

In fact, even the Italian Civil Code of 1965 is heavily based on the French Code Napoleon of 1804.

NB: In 1942, the Italians drew up a new Civil Code, which was heavily reminiscent of the German Civil Code of 1905.

And What About Germany?

Moving on in history, a movement of German legal scholars who studied and taught Roman Law in the early 19th century developed – called **Pandectists**. And they taught Roman Law as a model of what they called ***Konstruktionsjurisprudenz*** (which is a form of conceptual jurisprudence as recorded in the Pandects of Justinian). And these Pandectists maintained the technical Roman method of interpreting Civil Law.

In 1905 the German Civil Code was born. And here, the clear division in Civil Law tradition between the German and French schools of thought is outlined.

The German school developed as a result of the technical approach taken by the Pandectists, whereas the French school, albeit still Romanistic, gave great importance to Custom Law. Malta remains faithful to the French school of thought even to this day. In layman's term, both French and German Codes were based on the Law of Justinian, but the French functioned heavily on Custom Law.

Post-World War II

The world took a significant tumble after World War II. Social cohesion took a massive hit, and the Era of Decodification ensued. However, codification mindset made a reappearance in the year 1970, in which the following Civil Codes became enacted:

- Netherlands Code of 1992
- Slovenia Code of Obligations of 2001
- Romania Code of 2009
- Czech Republic Code of 2012
- Hungarian Code of 2013

After the fall of the Berlin Wall, Codes in the Republics of the Eastern European started formulating; such as the Czech Code, the Hungarian Code, and the Slovenian Civil Code. What's interesting about these Codes is that they are heavily reminiscent of the prior existing Austrio-Hungarian Code, and to it, they added a whiff of Communism; not to mention that they resorted to the best minds of Western Europe to help draft their Codes.

The Sources of Maltese Civil Law

NB: Nowadays, the written law is the major source of legal production. Other areas (such as judgements and commentaries) have their own essential, non-negotiable role.

The European Union as a Source for Civil Law

European Union Law is NOT a foreign source, but rather, a local one. European Law forms a significant part of Maltese Civil Law. **Therefore, any right or remedy under EU law is available as domestic law.**

In case of conflict between EU law and domestic law, EU law prevails due to its being supreme. In fact, the constitution itself dictates that law regarding the promulgation of laws itself has to exist in peaceful accordance with EU law.

*The term **'Private International Law'** refers to the international aspect of Civil Law.*

The Brussels I Regulation contains a jurisdictional regime. It contains rules used by courts belonging to EU member states to determine whether they maintain jurisdiction over cases bearing links to more than one EU country. **Therefore, the Brussels I Regulation** is the recognition and enforcement of **foreign judgements** with regards to civil matters.

The Brussels II Ter Regulation on the other hand is the recognition and enforcement of **family law judgements**.

The Rome III Regulation of Property affects consequences borne of marriage and other forms of unions between parties. A proviso/condition comes into play here – which includes the law one signs to, and how that signed-to law regulates the marriage of the ones signing it.

The Succession Regulation is a mechanism whereby a particular jurisdiction's Law of Succession gives a person the right to regulate his succession by letting said person pick and choose the law which regulates it. **The European Certificate of Inheritance** is thus that which labels a party as 'heir' to a succession; and this Certificate is valid throughout the entirety of the EU's domain.

Domestic Written Law and Custom as Sources of Civil Law

Written law lays the foundation for authorities to establish their own Rules of Interpretation. In domestic Malta for instance, the Planning Authority bears the power to issue Rules which are binding in nature. Another example is that it is lawfully written that the FIAU (Financial Intelligence Analysis Unit) has the power to issue implementing procedures which, also, bear the support of the law itself.

Black Letter Law is law which is written in a Code and thus formally enacted.

Conversely**, Soft Law** refers to situations of good or best practice. Oftentimes, a professional organisation issues guidelines in **Practice Directions**.

But are these Practice Directions to be recognised as *law*? On one hand, one cannot make the assumption that they are, because they are not formal and legislative enactments. But on the other, Practice Directions are lucidly so influential that one might consider them to be pseudo-binding.

For instance, a hospital's tenets of practice are not formally legislated, but they bear so much weight that breaching them would be considered as grave as breaching formally enacted law. Courts of law do not disregard these Soft principles, and many a time have they also been used as arguments by asserting, for instance, that in the lack of attention given to a fundamental principle belonging to a certain profession, harm was ensued unto a party. A concrete example of this would be Art. 2 of the Commercial Code, which formally recognises Custom usages of a trade. In fact, it is here written that Custom principles of the trade in question *prevail over the Civil Law*. Therefore, this type of Soft Law becomes legal Custom which bears legal rights and obligations that also herald punishment in cases of non-observance.

It is also important to note that, as a rule, Custom is not collected and published. Sometimes however, Custom finds itself existing in international conventions (ex. the Hamburg Rules).

In court, the mere existence of a legal Custom *has* to be expressly pleaded by the attorney/s in order for them to have effect. And naturally so, because a judge mainly operates on written law; therefore, he has to be rendered aware of any unwritten Soft Law. **Therefore, a judge will <u>not</u> make a voluntary motion to notice legal Custom *ex officio***.

The presence of legal custom must also be proven as fact. Normally, this is done by experts in the trade appurtenant to the Custom brought up in the court case.

Customary law gained massive clout in a German school of law, dubbed as the **Historical School** – which believes that law is the subject of popular creation and is therefore the will and spirit of the people. By their definition, **Custom is the incessant repetition of a particular practice over a stretch of time**.

However, this view has been altered by contemporary thinking which no longer holds the view of Custom needing to have existed from *ab antiquo* (time immemorial) for it to be relevant – *as long as the element repeated maintains a consistent pattern of behaviour*.

consuetudo praeter legem: Custom which develops **beyond** the law.

consuetudo secundum legem: Custom which **does NOT develop beyond** the law.

consuetudo contra legem: Custom which goes **against** written law (ex. the hypothetical example of having a majority of people suddenly deciding to drive on the right side).

Custom is highly important in Commercial Law and banking practice. A lot of our domestic banking rules (which are stipulated in contracts) are the products of developments in practice. For a banking example, there exists a principle which allows compound interest to surmount *solely in cases of an overdraft*.

Moreover, Customary Law requires an **Object** and a **Subject** for it to be established: the former relating to the constant and repeated exercise of an action, and the latter being the psychological internalisation of persons when believing that the action they are repeatedly executing will yield positive results.

In recap, Customary Law clearly does not maintain the same importance as written law, yet nonetheless bears significant influence. It is even recognised by various EU regulations which refers to the practice and Customs of a state.

Court Judgements (Jurisprudence) as a Source of Civil Law

In this instance the term 'jurisprudence' refers to court judgements and other workings of the court. Magistrates are tasked with awarding a judgement by interpreting the law, and in this process of application, the courts take a creative stance, *not* in the sense of legislating, but rather, in the sense of applying and interpreting the law. In the process of interpretation, courts state law, provide perspectives, and take an anonymous position.

Therefore, this denotes that courts maintain a set of values upon which their ultimate judgement it founded upon. Thus, this implies that, indirectly, the judiciary also *makes* law. And the importance of court judgements is significantly high for a practical application of law to be assigned.

In Maltese Civil Law, the doctrine of precedence is not legally imposed on judges. However, preceding case law and judgements are still the first port of call judges resort to when faced with particular troubles.

Juridical Negotia

The term *Juridical Negotia* connotes a contract formulated between parties being law, thus drawing legal clauses between the parties involved. *Juridical Negotia* is a source of law which finds its basis in the expressed and manifested will of the parties. **The primary difference between Customary Law and *Juridical Negotia* is that the latter solely concerns itself with the negotiation of the contractual will of both parties**. Thus, whenever a contract is erected between third parties, the clauses stipulated in that contract must be considered to be law, therefore making contracts a source of law.

Writings of Authoritative Jurists as a Source of Civil Law

Respected opinions are commonly expressed in books and journal articles. But does their status of high regard render them as sources of law? Courts and practitioners often consult authoritative writings, thus making authoritative authors influencers of decisions and judgements in court. Therefore, while legal literature is academic in nature, it nonetheless maintains massive influence. And the very high demand for legal literature is testament to this. Legal literature may not be regarded as a *formal* source of law, but it is highly respected nonetheless; so much so, that it is still regarded as an *informal* source of law.

Aristotelean Equity as a Source of Civil Law

The Aristotelean (and Ciceronian) version of equity introduced the concept of ***Eipieikeia*** – which is the standard for describing natural fairness and justice as opposed to the strict application of law through the Latin maxim *dura lex, sed lex*. This notion stands ground against the fact that legal norms and articles tend to be quite general and abstract, therefore Equity comes to rescue when there is an application of specific circumstances to a Civil case.

Being a source of law however, Equity may open the door for a dangerous degree of subjectivity in the hands of the court. However, the Civil Code of *Malta* itself stipulates that contracts between parties are to be applied with the principles of Equity.

In practice however, Equity is realistically not far off from the minds of judges, as they normally aspire to attain a desirable degree of fairness when adjudicating Civil cases (as long as the level of fairness they resort to is permitted by law).

European Private Law and the DCFR as a Source of Civil Law

Commencing in the 1990s, European Private Law enjoyed the political support of the European Commission. For a terse time, it was being lobbied on whether there should exist a European Civil Code, but the idea deflated due to the near-impossible possibility of erecting one.

Instead of endeavouring to penning a very intricately tedious European Civil Code, the EU resorted to drafting the Draft Common Frame of Reference (DCFR). The aspiration and objective of the DCFR is to find out the common values of the general culture of European Private Law, thus meaning that the DCFR offers a toolkit for judges in EU states to utilise when handling a Civil case. Therefore, the DCFR is the amalgamation of concepts, drafts, and ideas which judges, practitioners, and academics may source as needed.

CHECKPOINT

The 8 Sources of Maltese Civil Law:

- **The EU**
- **Domestic Written Law**
- **Customary Law**
- **Decided Cases** (**Jurisprudence**) (*NB*: this is a debated question – as some claim that court decisions are not legitimate sources of law)
- **Writings of Authoritative Jurists**
- **Aristotelean Equity**
- **The Draft Common Frame of Reference** (**DCFR**) – an initiative in which brilliant minds got together and produced a set of general principles found in the civil system.
- ***Juridical Negotia***

The Application of Civil Law in Time

The promulgation of new laws certainly affects ongoing cases which were erected under preceding law. For instance, the effects of the **2004 Law of Succession** serves as a prime example to this. Prior to this Law of Succession, there existed certain restrictions over those persons who were born out of wedlock. Before the 2004 law, the entitlement to inheritance of these types of persons was lesser than that granted to persons born within legitimate marriage. However, this was remedied in 2004 through the Law of Succession – which extinguished any form of discrimination towards people born outside of marriage.

Another example is the **Law of Lease and Tenancy**. Over the years, there have been many changes to the law of Lease (particularly on residential leases). The **Right to the Peaceful Enjoyment of Possessions** (stipulated by the ECHR) created massive pressure for reforms to the Laws of Lease to be established. Prior to 2009 for instance, garages were protected by indefinite renewal; but this legislation was abrogated.

A third example relates to **Family Property**. Prior to 1973, an attempt at dispensing some sort of equal participation in property administration with regards to married couples was exhausted. This was done in hopes of battling the common concept that the husband in a marriage was the sole *dominus* (owner), and only became a partner of the property once his death ensued. In 1982, there was another attempt at bringing equal participation in the administration of familial property, and the joint intervention (through signature) of both spouses was now suddenly required.

Therefore, how does new law impact existing situations?

Very often, legislators try to intervene by setting a specific date in which a new law shall take effect, thus stipulating that any cases which been finalised before the set date CANNOT be reopened (*res iudicata*).

However, one must also heed those principles which are present in the system, that are sometimes expressed, and sometimes implied. Being one or the other matters not, because they are nonetheless present in the Civil system. The Maltese Civil Code does not have a specific *ad hoc* (necessary) provision regulating on whether old law applies (unlike the French and Italian Civil Codes).

However, the *broccardo brocare* (general principles) regarding the issue are as follows:

1. **A new law should not have retroactive effect**
2. **A new law should have immediate and prospective effect**

It is imperative to note that the prohibition against retroactivity is not absolute (as in Criminal Law).

Even though the principle of abhorring retroactivity in Civil Law originates from ancient Roman Law, Weber stipulates that this taboo was never expressed through deeds, but rather, through words. Therefore, it is not impossible for a Civil Law to, exceptionally, maintain retroactive effect.

With regards to **Transitory Law**, **Bergmann** argues that one should decide on whether a law is retrospective or not through its express provisions, and also consider the fundamental intention of the old law's legislator when promulgating the old law. **If the legislator's fundamental intention cannot be indubitably ascertained, then the new law should be applied retrospectively, because it was promulgated for the sole purpose of improving on the old one, and thus, should be given the widest application**.

In Maltese 17th, 18th and 19th century, there existed very strong taboo against the notion that Civil Laws be retroactive. Thus, the principle of ***lex non habet oculos retro*** was erected, which directly translates to "the law does not have eyes at the back". And this tradition distinguished between Acquired Rights (***diritto acquisito***) and **Expectations**.

This distinction highlighted the fact that, due to their being 'acquired', laws regarding Acquired Rights could never be retroactive – because in this case, rights have been lawfully acquired by a person, and NO law can, at any point in time, undress a person from a legally Acquired Right. For instance, the French Revolution of 1792 changed Succession Rights retroactively, thus meaning that preceding acquisitions made by persons became annulled; which caused a great degree of havoc.

"One can never find an obstacle to their [contractual] fulfilment in the new law under whose rule the condition is fulfilled" – meaning that a new law may never demerit the established fulfilment of a party's contractual agreement with another party; as long as the former's end of the bargain remains fulfilled under the new law.

Francesco Gabba, *Teoria della non retroattivita' della leggi*

In the case of mere Expectations however, retroactivity *can* seem to operate. But this notion gained heavy criticism due to its inability of drawing a clear line.

NB: In law, an '**Expectation**' refers to a lucid assurance given to those who understand that a particular course of action will be taken with regards to a situation they might have.

But the primary distinction which divided an Acquired Right from an Expectation was, in many ways, unsatisfactory; because it was very vague and did not provide a clear-cut answer for the query of what was to happen with regards to open situations that are still developing.

Therefore, ongoing and incomplete situations seemed to fall into the gaping cavity formed between old laws and newly promulgated ones. And this difficulty led to the gradual discarding of the Classical Theory. However, there still exist a few important remnants begotten by the Classical Theory.

Our treatment of retroactivity has been progressively developed by judgements and principles, as we do not have the necessary instruments to fill in the gaps made by our questions (such as the Quebec Codes with *ad hoc* principles). For instance, I apply for a planning permit today, but by the time it is to be decided upon by the authorities, the appurtenant policies change. Therefore, which policies are to be adhered to? The ones that existed when I initially applied for the permit? Or the ones existing now?

The crux of what we are saying is that nowadays, what exists with regards to tackling retroactive problems is quite akin to *general guidelines*, rather than *specific rules*. Albeit these general guidelines are, in quite some instances, supplied with legislation. And this underlines the delicate issues that may arise in retroactivity, because a sudden change in the law may be absolutely game changing.

Let us take the two upcoming **lateral observations** with regards to the notion of retrospectivity in laws:

1. A new law **cannot** affect what has already been settled. What is dead and buried cannot be resurrected, and once there is finality, nothing can oppose that finality through a retrospective lens.

2. When promulgating a new law with regards to long-term and ongoing situations (such as marriage and contracts), the general principle is that the new law **applies** to such incomplete situations. As stated earlier, new laws should be placed in immediate and prospective effect – and the future settlement of ongoing situations is very prospective.

However, all this is subject to important exceptions. **Sometimes, a law is expressly declared to be retroactive.**

Do note that, although suffering a decline in popularity, the **Theory of Vested Rights** is not entirely off the table. If there is legislative retroactivity, then the legislators have to tread very carefully in order to avoid prejudice against Vested Rights. Apart from the civilian's perspective, there exist General Principles in the Civil system which are not formally expressed, but are nevertheless hidden in the system – such as the general principle of gender equality and respect for the person; and in Civil Law, there is a very strong General Principle against retroactivity, and therefore, when there *could* be legislative retroactivity, the taking away of Vested Rights could, for example, also disturb the inherent Right to the Peaceful Enjoyment of Possessions.

The Theory of Vested Rights dictates that once a right is vested in a person in a given locality, the existence of that vested right should be recognised everywhere.

Sometimes, a law is simply enacted to fill in a lacuna, or to clarify vague interpretations.

There is also a very strong presumption in the case of contractual situations which presupposes that **it is the law <u>in force</u> and <u>applicable</u> at the time of the writing of the contract that applies to the contract over time**. And this also supports the element of **Negotiating Balance** between the parties – as they enter the contract on the basis of the law which is in action at the time of contracting. A party would thus have a **Legitimate Expectation** which gives the party in question an understanding that its right, obligations, and dealings will continue to be regulated by the law contractually applicable at the time of drafting.

For instance, if I concluded a contract which was valid *today*, I have the Legitimate Expectation that what was valid *today* will continue to be valid and not be annulled in the future. A collective agreement is a prime example of an agreement which falls under these circumstances.

Therefore, the opposing argument to this is that, with the same reasoning, then something which commenced under an old regime should continue to exist under the old regime it commenced under.

But another argument would be that of stipulating that the new should take over the old – because the old must be incomplete if a new version of the law was ultimately found to be needed (see **Bergmann** argument above).

CHECKPOINT

Premise: *what happens when Civil Law changes over time? Does it apply retrospectively? (ex. 2004 Law of Succession, Law of Lease and Tenancy, Family Property).*

The doctrine of ***res iudicata*** – a law which has been finalised CANNO be reopened, hence why legislators tend to set a specific commencement date for new laws.

The Maltese Civil Code does not have *ad hoc* wording relating to whether Civil Law should be applied retrospectively or not, but the ***broccardo brocare*** is as follows:

1. **A new law should not have retroactive effect.**
2. **A new law should have immediate and prospective effect.**

Weber: the taboo of retroactivity was never expressed through deeds, but rather, through words. **Therefore, it is not impossible for a Civil Law to, exceptionally, maintain retroactive effect.**

Bergmann: With regards to **Transitory Law**, argues that one should decide on whether a law is retrospective or not through its *express provisions*, also considering the fundamental *intention* of the old law's legislator when promulgating the old law. **If the legislator's fundamental intention cannot be ascertained, then the new law should be applied retrospectively, because it was promulgated for the sole purpose of improving the old one, and thus, should be given the widest application**.

17th – 19th century Malta: dogma of ***lex non habet oculos retro*** also distinguishing between Acquired Rights (***diritto acquisito***) and **Expectations**. Acquired Rights may never be cursed with retroactive legislation, lest the legislator's glutton for legal chaos (as recorded in the 1972 change in the Law of Succession of the French Revolution).

Francesco Gabba: "One can never find an obstacle to their [contractual] fulfilment in the new law under whose rule the condition is fulfilled"

Mere Expectations *may* seem to be subjected to retroactive legislation, but this concept gained heavy criticism due to it being unable to draw a clear line.

Sometimes, laws are *explicitly* declared to be retroactive.

Theory of Vested Rights is a strong argument against retroactivity.

There is a very strong presumption in the case of *contractual situations* which presupposes that **it is the law in force and applicable at the time of the writing of the contract that applies to the contract over time** – which gives persons **a Legitimate Expectation.**

Patrimony

To understand the notions of **Patrimony**, one must first dispel the technical term of patrimony which refers to the amount of assets one enjoys.

That denotation is not legally correct.

Generally, Malta follows the **Classical French Doctrine** of Patrimony, which is supplemented by **Aubry** and **Rau** in their ***Traite de Droit Civil***. Hailing from the University of Strasbourg, they combined efforts to ultimately draw out an accurate definition of Patrimony in law:

Patrimony is the capacity flowing from natural or legal personhood to hold the *Universitas Iuris* – which is the ensemble of assets, rights, liabilities and obligations of persons. Patrimony only finishes with the termination of personhood, i.e. natural and physical death, or the expiry of *legal* personhood.

And it matters not whether a person possesses more liabilities than assets in his or her Patrimony (and vice versa).

"Whosoever has bound himself personally, is obliged to fulfil his obligations with all his property, present and future. Debtor's property to constitute common guarantee of his creditors."

Art. 1994 of the *Civil Code of Malta*

"The property of a debtor is the common guarantee of his creditors, all of whom have an equal right over such property, unless there exist between them lawful causes of preference or there shall have been a transfer of any property by way of security or a transfer under a security trust for such purpose in accordance with this Code"

Art. 1995 of the *Civil Code of Malta*

It is on these articles that the notion of Patrimony in the Maltese Civil Code has been built.

To this, there exist <u>three</u> developments with regards to the expansion of the notion of Patrimony:

1. The traditional French view of Aubry and Rau as developed in the Maltese Civil Code. This traditional view holds that Patrimony is <u>one and indivisible</u>.

This means that in the traditional French view, any person, natural or legal, can only have **ONE** Patrimony. Thus, it necessarily follows that all the assets and liabilities of a person's Patrimony form a single bundle. In the traditional French view therefore, there is no segregation between a person's assets and liabilities.

For instance, a person maintains a liability which arose and existed 5 years ago in the *past*. And *today*, that person acquires an asset. Therefore, the asset that person acquires *today* (five years after the establishing of the liability in question) will make good for the liability that existed in the *past*. Conversely, a person acquires an asset *today*, and a particular liability in the *future*. Thus, the asset he acquires *today* will be subject to the liability in the *future*. Fundamentally, this is all owed to the French traditional notion of the absolute indivisibility of Patrimony.

This also relates to queries revolving around **Succession Rights**.

The above articles taken from the Civil Code of Malta stipulate that the assets of a debtor are the common guarantee of the creditor. **Therefore, it denotes that whatever assets a person, both natural and legal, has, are subject to be seized and sold by the creditors to get paid (whenever the need arises)**. Ergo, this directly links to the principle of absolute indivisibility as everything is assumed to be gathered in a single bundle.

Another consequence brought about by the above articles is that, **unless there is another cause of preference, all creditors rank the same and *pro rata***. Naturally, this discussion is linked to circumstances of insolvency/bankruptcy.

NB: Insolvency is when a person/company is unable to pay its debts as they fall due.

The Balance Sheet Test and the **Liquidity Test** may be utilised to identify whether a third party is suffering from insolvency. Therefore, when an insufficient amount of assets/liquidity is identified, the situation becomes one in which no lender may advance money unless there is *prior ranking*.

NB: The term 'Ranking Creditors' refers to the precedent taken by particular entities in particular situations (ex. when a loan is issued from a bank). For instance, a bank assumes first rank when a person is bequeathed a loan when purchasing a home. After the purchaser pays an upfront deposit, he thus becomes encumbered with the condition that, if he becomes insolvent/bankrupt before being able to pay back the loan to the bank, the bank will thus have the legal authority to seize control of the asset in question (the house) so that the creditor (the bank) is not put in economic jeopardy.

Conversely, the German school of thought accepts the possibility that, in the context of a person's Patrimony, there are certain assets which may be dedicated to a specific purpose and are segregated from the holistic ensemble of assets and liabilities of the person in question. In fact, the Italians (who follow the inherent German tradition) boast this notion also, dubbing it as the ***Fondo Familiare***.

2. The Development found in the First Schedule of the Civil Code.

The First Schedule lists the assets belonging to a person that are ensembled for a particular purpose – dubbed as the ***Universitas Facti***. And it is from this idea that the foundation for the notion of a legal person is born. Therefore, this development establishes the fact that it is very possible for one to have a group of assets organised solely for an intended, specific purpose (much akin to the above *Fondo Familiare*).

Therefore, the First Schedule of the Civil Code claims that Patrimony is the consequence of the assembling of assets for a specific purpose. For instance, a monastery could have a vast collection of specific assets.

3. Those situations that advocate for the possibility of possessing multiple and distinct Patrimonies.

Simply put, this is a variation of the notion that a person can only have a *single* Patrimony. Within legally defined limits, contemporary thinking allows the possibility of separate Patrimonies of the same person to exist.

For instance, the following are all entities which have the capacity of maintaining more than one Patrimony:

- **Investment Service Providers**
- **A Trust Service Provider**
- **Insurance Cell Companies**

For instance, a Trust Service Provider may have numerous assets it intends to dispense to multiple beneficiaries (because a Trust fund may be charitable in nature). Therefore, it thus also maintains numerous *patrimonies*.

In recap, the basic fundamental rule of the French tradition, however, remains unaltered. **The initial notion that Patrimony is a consequence of personhood, *and* the notion that it is indivisible, still live on to be the bedrock of Maltese Civil tradition**. In other words, the French tradition remains alive and breathing to this day.

CHECKPOINT

French Tradition of *Aubry* & *Rau* in their ***Traite de Droit Civil***: **Patrimony is the *Universitas Iuris* – an ensemble of assets, rights, liabilities and obligations of persons**; only terminated through death and/or legal termination of personhood.

> **"Whosoever has bound himself personally, is obliged to fulfil his obligations with all his property, present and future. Debtor's property to constitute common guarantee of his creditors."**
>
> **Art. 1994** of the *Civil Code of Malta*

3 expansions to the notion of patrimony**:**

1. **The Traditional French view of Aubry and Rau that Patrimony is <u>indivisible</u>.** Persons thus possess a single bundle of assets and liabilities which make good for each other through time. The Civil Code of Malta stipulates that the assets of a debtor are the **common guarantee of the creditor**; **therefore, whatever assets a person has are subject to be seized and sold by the creditors for them to get paid (whenever the need arises)**. Unless there is another cause of preference, **all creditors rank the same and *pro rata***. **Succession Rights** also form part and parcel with the traditional French view of indivisible Patrimony.
2. **The Development of the First Schedule of the Civil Code** asserts that people may possess a patrimony **dedicated to a specific purpose** – ***Universitas Facti***.
3. **The possibility of possessing multiple Patrimonies;** of which possibility is exercised by entities such as Investment Service Providers, Trust Service Provider, and Insurance Cell Companies.

Malta follows the French Tradition (point no.1).

Hermeneutics

The upcoming **Hermeneutics** (methods of interpretation) are solely endemic to the Civil field of law.

The reason for having such a vital necessity for tools and methods of interpretation is to arrive at the inherent meaning of the words splayed in a law, code, opinion, submission, or any other legal document (ex. contracts/testaments).

Traditionally, the tools we use when interpreting legal documents are **words** and **languages**. However, there exists a snag to all this: language changes over time; and this results in having many **linguistic nuances**. At a particular moment in time therefore, words and languages carry a specific and particular meaning which is, quite naturally, conditioned by social and cultural factors, practices, habits, and custom.

Therefore, there exist many different Hermeneutics one may adopt when interpreting legal documents, five of which shall be described below.

NB: Depending on which method of interpretation one opts to deploy, the result attained may be different than one possibly achieved when using alternative methods of interpretation. The values one harbours will therefore influence the Hermeneutics one chooses to follow, which ultimately, also affects the way one interprets what he or she is trying to decipher. But why should one method be chosen instead of another when the choice of method influences the conclusion? The answer to this (and to the conundrum itself) is purely **meta-legal**; no single answer may ever be found, lest everyone on the face of Earth starts harbouring the same values. **Therefore, interpretation is not neutral** – and judges may be fiscal or creative.

A Contrario Method

In layman's terms, this method carries the belief that **a) it is *only* what is expressed that is included** and **b) that which is not expressly mentioned is thus deliberately excluded** (sometimes expressed in the maxim ***a contrario sensu***).

This thinking is highly associated with a culture of formal, grammatical, and literal reasoning – meaning that an interpreter will look very closely at the vernacular employed in the document in front of him. Thus, what is not expressly mentioned is considered to be deliberately excluded. This is sometimes expressed by the maxim ***'ubi voluit dixit, ubi noluit tacquit'*** (when the law intends something, it decrees it; and when it does not intend something, it deliberately excludes it).

Analogia Legis Method

In a sense, this is not only a method of interpretation, but possibly also the extension of the applicability of a norm or principle. Let us take the following logical explanation:

'**A**' is a factually legal case which occurred in the past, and '**B**' is the norm or principle applied to situation '**A**'. Ergo, **(A → B)**.

'**C**' is an event akin to '**A**', albeit having occurred in a different moment in time. Logically therefore, **(C → B)**.

So, because of the similarity between '**A**' and '**C**', the same norm or principle may apply.

What this method is arguing is that once a given norm is applied to a specific situation, then that norm should be continually applied to other similar situations bereft of any specific regulation.

'A minori ad maius, a minori ad minus' – 'from the small to the big, and from the big to the small'; which means that a given rule may potentially be made applicable to a number of situations. And this is why the *Analogia Legis* method is diametrically opposed to the above *A Contrario* method, namely because of the extension of applicability of laws.

A Fortiori Method

This method is solely based on the inherent persuasive strength of the reasoning being deployed in the face of a head-scratching interpretative muddle. It is a comparative method insofar that the *better* and *stronger* argument bears the most weight in front of the person judging and interpreting a legal document in front of him. Therefore, there is **all the more reason** for one to abide by the method of reasoning more persuasive than the lesser persuasive one.

The Dogma of the Completeness of Law

The premise this method leaves off of is the question of how a situation widowed of a rule directly applicable to it is dealt with. And fundamentally, this dogma treats that question by adopting the assumption that a legal system is complete, and that any ideas of looming legal lacunae are simply illusory – because in a presupposed complete legal system, there will *always* be a tool one may apply to tackle each and every legal case.

Now, whether that applicable tool is the written law itself, or an element extraneous to the written law (such as the Sources of Civil Law or the General Principles of Law) matters not, because all arguments yielding legal validity are applicable to problems which deceive oneself into thinking that they are legally unsolvable.

This method of interpretation has been widely embraced both politically and judicially as both sides do not wish to admit that there exist elements which elude the grasp of law (such as legal lacunae).

The Internal Consistency of the Legal System

One might notice another instance of political and judicial overtones appertaining to this method, mainly due to their not wanting to admit to the fact that contradictions in the law (***antinomia***) may very well occur.

This Hermeneutic revolves around the Latin maxim of the ***Res iudicata*** – which decrees that a Civil procedure may never be re-opened once it has been successfully finalised. And this maxim exists solely to prevent any possibilities of conflicting judgements. The antimony of judgements has led to the development of various techniques with regards to laws prone to contradiction; and this is one of them.

The presupposition that a later law supersedes a prior law is also such a technique (***lex posterior derogat priori***); and having a *special* law which addresses a particular situation prevailing over a *general* law also forms part of the effort to prevent judicial antimony (note, however, that a subsequent *general* law does **NOT** overrule a prior special law).

The above dogmas of the Completeness and Consistency of Law are endemic to the ***A Kin*** method of interpretation.

In conclusion, these 5 methods of interpretation are completely alien to each other. They reflect a totally different attitude towards the interpretation of law and, as stipulated above, are normally based on the values borne of the person interpreting a document of law.

CHECKPOINT

5 types of Hermeneutics when interpreting law (no two methods of interpretation will produce the same result):

A Contrario: only that which is expressly mentioned is included, and that which is not is deliberately left out (***ubi voluit dixit, ubi noluit tacquit***).

Analogia Legis: once a given norm is applied to a specific situation, then that norm should be continually applied to other similar situations bereft of any specific regulation (***A minori ad maius, a minori ad minus'*** – from the small to the big, and from the big to the small).

A Fortiori: the more persuasive argument gives the most reason for why it should be followed.

A Kin Methods:

The Dogma of the Completeness of Law: law is complete, and legal lacunae are an illusion. There will always be a valid and legal method one may apply to solve an issue (written law, custom, general principles of civil law, other sources of law, etc.)

The Internal Consistency of the Legal System: a Civil procedure may never be re-opened once it has been successfully finalised so as to prevent any possibilities of conflicting judgements (***res iudicata***). Most recent laws outshine older ones, and special laws take precedence over general laws in order to mitigate ***antinomia*** between judgements.

Plagiarism

As defined by the **University Assessment Regulations**, plagiarism is *"the unacknowledged use, as one's own, of work of another person"*.

Plagiarising work does not only connote fraud, but is also a blatant exhibition of the purloining of **intellectual property** belonging to other parties. The inherent *use* of the work of others is not, in itself, illegal; but the *deliberate seizing* of ideas whilst also claiming them as your own is what provokes a sour look on the face of examiners.

The correct method of borrowing the ideas of others is when partnering it with **quoting** and **citing**. In fact, the habitual practice of referencing authoritative authors is not only considered to be legal, but is also *encouraged*. Ergo, not providing adequate citation will give the mistaken impression that the copied work is native to the mind of the fraudster author.

Self-Plagiarism (copying from one's own work) is also not accepted academically.

Major Plagiarism refers to circumstances of blatant copying without giving credit where credit is due; such as the copying of published/unpublished material, manuscripts, and documents. The **acquisition** and employment of ideas not belonging to oneself *and* other muddled attempts at **patchwork writing** (scruffy paraphrasing) also connote Major Plagiarism.

Minor Plagiarism appertains to occasions wherein individuals commit plagiarism not necessarily due to malintent, but because they are **academically incompetent**. However, the possibility for the intent to deceive enters the fray here. Failing to compile a bibliography, not registering the adequate references to their respective references, and listing incorrect references all give rise to Minor Plagiarism.

Academic Incompetence comes in many different flavours. **Unsubstantiated claims** and **floating arguments** are simply the tip of the iceberg. A pattern of referencing borne of dissonance confuses the reader as to which information belongs to the author, and which does not. Moreover, it tries to mimic the art of legitimately being able to paraphrase information; albeit unsuccessfully.

However, the University acknowledges the fact that being able to cite and paraphrase in a perfect manner is not a skill instantly attained by everyone. So it views instances of Minor Plagiarism committed by first-year undergraduate students to be acts borne of Academic Incompetence.

Ultimately, referencing is a good ingredient to administer to your assignment. But putting too much water spoils the broth. So one should embrace Aristotle's Golden Mean and employ just the perfect amount of quotes and references.

Ghost Writing refers to instances wherein students commission other people to write their work for them. And submitting a Declaration of Authorship under assignments that are not product of your own mind constitutes a severe illegality in the eyes of the University.

Collusion occurs when two or more students join forces to produce a piece of work intended to be written by one's lonesome. In examination conditions, students are expected to work alone, and may only refer to external sources when allowed (ex. in open-book examinations). Fundamentally, it is the sharing of *concrete materials* which is considered to be sacrilege. The sharing of *abstract ideas* is not considered to be necessarily illegal. And in cases of group work, any source material used in one's individual write-up which is product of another person's work has to be advertised as a reference in the individual write-up in question.

NB: If two brothers following the same course have the same assignment, write it, and abscond from plagiarising each other BUT are found to be using the exact same sources, then collusion is identified.

Avoiding plagiarism entails learning how to paraphrase, reference, summarise and quote correctly. Reading from multiple points of information is also sure to fill any person's *tabula rasa*, thus meaning that any possible instances of plagiarism will be automatically mitigated. Acknowledge your borrowing of other's intellectual property and do not fail to mention it accordingly; and acknowledge that your assignment shall be judged individually. It fails to adhere to logical rationality were one to rely on the grey matter of others to submit personal work. Their also exists a degree of dignity one must maintain when drafting and submitting a piece of work.

Common knowledge does not require one to cite the source he or she obtained it from. However, citing wherever possible is not a bad thing altogether.

Primary Sources are sources which make an original and substantiated claim. Conversely, **Secondary Sources** are those that, in themselves, already contain second-hand accounts emanating from a Primary Source.

Turnitin is an electronic blessing bequeathed to modern-day students. It helps persons identify instances of plagiarism in order for them to have another chance at editing their work in order to improve its quality. Disciplinary action is administered unto students when they are found to have copied chunks of data. The plagiarism percentage does not truly indicate the competence of a student, because Turnitin also considers references and footnotes – which are, in themselves, the inherent tools needed for one to showcase his or her skills when drafting an assignment.

Plagiarism can be punished through written/oral rebuking, fines, reduction of marks, instant failure, suspension, and expulsion.

CHECKPOINT

University Assessment Regulations: plagiarism is *"the unacknowledged use, as one's own, of work of another person".*

Plagiarism connotes **fraud** and **theft of intellectual property**.

- **Self-Plagiarism.**
- **Major Plagiarism & Minor Plagiarism.**
- **Academic Incompetence.**
- **Ghost Writing.**
- **Collusion.**
- **Avoiding Plagiarism.**
- **Common Knowledge.**
- **Primary & Secondary Sources.**
- **Punishing Plagiarism.**