CRL2006 SUBSTANTIVE CRIMINAL LAW 1

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MALTA

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CRL2006: Substantive Criminal Law

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Theft is an offence against the property of another and is contained within subtitle 1 of Title IX of Chapter 9 of the Laws of Malta. Despite the many variables involved in the offence of the theft the legislator is tasked with formulating an objective definition for the crime of theft. To that end, there is no definition of the offence of theft in the Criminal Code. In fact, Article 261 of our Criminal Code start immediately by classifying those instance of aggravated theft. Therefore, in Chapter 9 the law distinguishes between simple and aggravated theft but falls short of defining it. The former is theft without any of the listed aggravation whereas aggravated theft is theft coupled with any of said aggravations.

While Maltese courts tend to follow English law when an issue arises concerning Criminal Law, the judiciary does not subscribe to this in cases concerning theft seeing as the offence is regulated differently under Maltese Law when compared to the Theft Act of 1968. For example, there is no distinction between simple and aggravated theft under that Act, the only exceptions being if one carries a firearm, imitation firearm, weapon of offence or any explosive under Section 10 and Section 12A regulating the offence of aggravated vehicle-taking. The definition given for theft under this Act is the following:

"*A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.*"
This differs from the accepted definition made use of in the Maltese context as in the aforementioned definition it is immaterial whether the appropriation is made with the intention to gain or for the thieves for their own benefits. In the accepted definition made use of my the courts the element of gain is necessary.

Theft is defined under the Italian Penal Code of 1930 by article 624 as follows: *"Chiunque s'impossessa della cosa mobile altrui, sottraendola a chi la detiene, al fine di trarne profitto per se" o per altri…"* The code distinguishes this offence from the offence of snatch-and-grab and further provides for aggravating circumstances through Article 625 and the effects on punishment. The Maltese understanding is more closely related to the Italian understanding rather than the English understanding.

Therefore, both the Italian and English legislations provide a definition of theft where the Maltese legislation lacks one. We therefore, examine Carrara's definition of theft as he gives us the constituent elements that enable us to determine whether theft has occurred. This was made official by the courts in the case **R v. Pisani** whereby it was concluded that even though our law doesn't give a definition of theft, Carrara's definition must be the one referred to: *"huwa dottrinarjament paċifiku illi s-serq huwa l-kontrattazjoni doluża tal- ħaġa ta" ħaddieħor 'in vito domino;, bl-iskop ta' lucru".*

Carrara defines theft as being "*La contrattazzione dolosa di una cosa altrui fatto invito domino con animo di farne lucro*".
This refers to "the unlawful/malicious taking of someone else's property without his consent in order to make a gain".

(1) **La contrattazzione** -
Means "the taking away" and derives from the Latin word '*contrectatio*'. This refers to the idea that the thing shall be moved from the place it was stolen to another place. Therefore, theft presupposes

the taking away of something. This is complete the moment in which you touch the object one wants to steal. It is thus important as it distinguishes between when an offence of theft is completed and when it constitutes an attempt

a. Carrara's theory of *Amontio*:
   According to this theory, for the offence of theft to take place, the offender must move the thing or the object from where ti was left by the owner with the intention of stealing it. If the offender moves an object, technically, he or she has taken the object away. The first definition by Carrara speaks of movement - but this was redefined. In his second definition he defined *amontio* as the moment in which the item to be stolen is touched. Our Courts have always accepted Carrara's most recent theory of theft - the moment in which the offender touches the object he intends to steal amounts to theft. Carrara qualifies this and says it is not necessary that the object is taken away from the premises - once the object or thing is touched by the offender it is deemed as if the owner is no longer in possession of the object or thing in question.

b. Pessina - The Theory of *Amotio de loco ad locum*:
   The Movement from place to place, referring to the sphere of control. It's not right to simply say that any moving of an object is tantamount to take it away. However, the question of the sphere of control is always up for debate. With regards this theory, the mere touching of an object or thing with the intention to steal it doesn't constitute a completed offence.

c. Impallomeni - The Theory of *Amotio de loco ad locum qui destineravat*:
   According to this theory, the theft would not be completed until the object taken by the offender has been safely taken to the place where the offender intended to take it. Not only must the object be moved out of the sphere of control, but the item should arrive to the pre-determined placed chosen by the offender.

Carrara's theory is generally the one which is accepted as was outlined in the cases of **Police v. Carmelo Felice** and **Police v. John Zammit et**.
"Il-kontrattazzjoni hija konsumata malli l-haġa tiġi sotratta mil-liberta disponibilita, anki momentarjament, tal-propjetarju jew pussessur tagħha avolja dak li jieħu l-haġa ġieli ma jirnexxilux jappropja ruħu minnha għax jinqabad jew għal xi raġuni oħra indipendement mill-volunta tiegħu."

In the case of **Police v. Alfred Attard** the Court of Criminal Appeal confirmed that the offence of theft is consummated when the object is taken even momentarily from the control of its legitimate owner or possessor. This applies even if the offender places the object back in its place - as soon as the offender takes possession of the third-party object he wants to steal by removing it or removing it from the place where it was left by its owner or possessor, at that moment, there is the complete crime of theft.

(2) **Dolosa** -
Here we note that the contrattazzione must be *doloso.* Therefore, the act must be intended as opposed to accidental. The taking must be intentional, there must be volition. Therefore, the crime of theft requires a positive intent to commit a crime. One can't be found guilt of theft if they took something by accident or through negligence since the action itself would not constitute malice but rather a mistake of fact.

According to the author Antolisei, with reference to the general rules governing criminal law there is no malice if the agent mistakenly believed that the thing was his own or that the owner had agreed to the removal.

Such positions are reflected in local jurisprudence through cases such as **Police v. Alfred Scicluna (2016)** in which the court makes reference to the judgments of **Police v. Dennis Sghendo et. (2000)** and **Police v. Lorenzo Depares et.** The court argued that since the defendants in this case had no idea that they were stealing other people's clothes, the *animus furandi* that is necessary to be guilty of theft is diminished.

Moreover, in the case of **Police v. Martin Galea (2004)** the court argued that if a person genuinely believes that the object they are taking possession of was abandoned by its owner or that it was a *res nullius,* the formal element of the offence of theft doesn't arise. For one to discern whether a person genuinely believed this, it is necessary to examine all the circumstances of the case including the extent to which the error could be said to be reasonable, even though this remains subjective.

(3) **Di una cosa** -
One can steal something subject to touch and therefore must be tangible as argued by Manzini. One cannot steal an intangible away from a person physically. This means that one cannot steal something intangible and incorporeal - for example, one cannot steal a vested rights, IP rights or an identity (one can steal an ID card but not an identity - it is referred to as Identity Theft owing to common parlance. Identity theft is a crime under another offence).
Equally, the object must be a moveable object. Immovable object cannot be subject to theft as they are incompatible with being physically taken away. According to Carrara however, an immovable thing could still be subject to theft if part of it was stolen since part of the thing was made movable but this is an exception to the rule.

This becomes more challenging nowadays seeing as the definition of theft hasn't changed with the advent of technology and the online financial systems which leaves some holes in the system. This is because intangible currencies etc. cannot be susceptible to theft as they are not subject to touch and by their nature they are incorporeal - goes against the definition of theft. This doesn't mean however, that one cannot be committing a different offence in taking away someone else's rights - it is however, not the offence of theft.

To be subject to theft, something must be tangible, corporeal, moveable. Moreover, the object has to have some inherent value as items without value cannot be stolen and are not subject to theft. (**Pulizija v. Chetcuti (1963)**: The court argued: "*Hemm bzonn li l-haga misruqa jkollha xi valur anke minimu basta ikun hemm valur.*") This was also the line of reasoning in the case **Police v. Natalina sive Nathalie Mifsud.**

(A specific legal amendment was included in 1986 to the criminal code to include for theft of electricity, water and gas. These intangible objects are specifically catered for in the law in a very particular manner. The law creates a presumption that the owner of the premise has committed theft unless proved otherwise when there's damage to the meter, for example.)

(4) **Altrui** -
The subject-matter of theft must be *res aliena,* i.e. the thing must have ownership and for theft to arise, the person taking the object must have no right to take it. This requirement excludes a person being able to steal an item which they own or items which they co-own. The item must belong to someone else. In relation to this, we must also look at another characteristic of Carrara - "*invito domino*".

In the case of *Police v. Olaf Cini* the Court established that theft can be committed not only to the detriment of the thing that has been taken but also to the detriment of its holder.

There are also items which are not owned, *res nullius* (something which is nobody's) and *res derelicta* (something which is abandoned, which were in the property of someone but they were abandoned). If someone takes such items they cannot be charged with theft. In the case of **Police v. Daryl Schembri (2014)** the court quoted the Court of Criminal Appeal who in the 2004 judgment **Police v. Jean Claude Cassar** said the following: "kull min jiehu l-pussess ta' oggett li jsib mitluq taht ic-cirkustanzi li jindikaw li dak l-oggett jappartjeni lil xi hadd u li ma kienx gie abbandunat minn sidu, i.e. li ma jkunx *res nullius* jew *res derelicta*, ikon hati ta' "reat ta' serq"."

In this regard, Professor Mamo also contends however, that the physical control of the thing which is necessary to establish ownership can also vary depending on the thing.

(5) **Fatto Invito domino** -
The item must have been taken without the consent of the owner where the consent must be freely and spontaneously given. It is important to note that if the consent of the owner is obtained by fraud, according to Maltese jurisprudence, the result of fraud will exclude the offence of theft.

One is unable to defend theft on the grounds that the person one has stolen from is not the owner but the possessor. One can steal from a possessor as you are not getting the consent of the person who according to criminal law is the 'owner' at that point.

Ownership in terms of criminal law encompasses many things including possession. Ownership in a wider sense is defined as someone holding something under some title.

Once we have established an owner, we need to establish consent.
This raises an issue of presumed consent - there are certain circumstances where one can assume that there exists presumed consent. In order for this presumption to take effect, the relationship between the two persons must be such as to allow for this.
Consent can also be obtained by fraud - here, one doesn't have theft as it becomes fraud as the criteria for theft are no longer met.

Section 340 (1) - Theft by finding: If you find something and you take it, that is something which has been mislaid by someone and it cannot be labelled as a *res nullius* or *res derelicta*. One therefore, has three days to take it to any police station, if not one will be charged with theft by finding.

There cannot be theft if the person who is being stolen from has given their consent for the theft to occur.
When speaking of consent, the consent must be something which the offender must be aware of. If consent is not freely communicated, thieves operate under the assumption that they are satisfying the criteria of theft including an item being taken without the consent of the owner.

(6) **Con animo di farne lucro** -
Theft must be done with the intent to make gain. The law doesn't specify what 'gain' refers to. However, we don't take 'gain' to refer solely to monetary profit, but we understand it to include many things including the enjoyment and satisfaction of something which is not readily translatable in monetary terms.

The judgement **Police v. John Galea et (2003)** saw the court explaining this requisite of gain in the following manner: *"The special malice of theft consists in the intent to procure a benefit or satisfaction whatever from the thing belonging to others. Thus 'lucrum' in this connection does not mean an actual gain or profit in terms of money but any advantage or satisfaction procured to one's self…".* This is in line with Carrara's reasoning who argued that the specific intent necessary in order for theft to arise is the intention to

procure a gain through the use of someone else's thing for profit. Profit here is not to be understood as necessarily strictly monetary fulfilment but any advantage or satisfaction obtained for oneself.

Gain does not need to materialise or be realised in order for it to be made. Gain can remain potential and not happening and the crime of theft can still occur. Actual gain following the crime is not necessary provided one has acting with the intent to make such gain

It is important to note that theft for use, *fortum usus,* which occurs when one steals something with the intent to use it and return in within 48hours, is considered to be a contravention and the punishment for such actions is severely decreased.

Therefore, despite the fact that we lack a definition of theft within our legislation, it is evident that the Maltese court make use of the definition of Carrara exclusively since all judgments are based on the elements he outlines.

Aggravations

Maltese law distinguishes between 'simple theft' and 'aggravated theft'.

Aggravating circumstances are taken into account as they worsen the situation and it indicates that the offender is displaying greater malice and greater disdain for the law. The result of this is the creation of a more harsh punishment.

When dealing with aggravations, the aggravations must facilitate either directly or indirectly the commission of the crime. If the aggravation doesn't have an efficient impact on a trial, then there is no aggravation.

The Criminal Code give a list of aggravations and sets out the relative punishments. You can have a plurality of aggravations acting together and the law sets out guidelines of how these translate in terms of punishment awarded.

We distinguish between two groups of aggravations according to Carrara:
(1) *Qualita naturale* - refers to those aggravations resulting from the immediate harm caused, as in the case of a theft aggravated by the nature of the thing stolen and the amount.
(2) *Qualita politica* - refers to those actions which have a greater criminal disposition and therefore are deemed to be worthy of an increase in punishment such as cases of theft aggravated by violence. The attribution for increased punishment in such cases relates more to the influences which the theft might have had on society rather than the harm produced by the theft itself.

The following are the types of aggravations which will be discussed:
Article 261 of the Criminal Code notes that the crime of theft may be aggravated by any of the following:
a) *Violence*
b) *Means*
c) *Amount*
d) *Person*
e) *Place*
f) *Time*
g) *Nature of the thing stolen*

AGGRAVATION BY VIOLENCE, SECTION 262 OF THE CRIMINAL CODE

Article 262:
"*(1) A theft is aggravated by "violence" -*

(a) where it is accompanied with homicide, bodily harm, or confinement of the person, or with a written or verbal threat to kill, or to inflict a bodily harm, or to cause damage to property;

(b) where the thief presents himself armed, or where the thieves though unarmed present themselves in a number of more than two;

(c) where any person scouring the country-side and carrying arms proper, or forming part of an assembly in terms of article 63, shall, by a written or verbal request, made either directly or through another person, cause to be delivered to him the property of another, although the request be not accompanied with any threat.

(2) In order that an act of violence may be deemed to aggravate the theft, it shall be sufficient that such act be committed previously to, at the time of, or immediately after the crime, with the object of facilitating the completion thereof, or of screening the offender from punishment or from arrest or from the hue and cry raised by the injured party or by others, or of preventing the recovery of the stolen property or by way of revenge because of impediment placed or attempted to be placed in the way of the theft, or because of the recovery of the stolen property or of the discovery of the thief."

Firstly, we ought to note that the author Manzini held that the violent might not necessary be directed against the victim of theft. What is essential is that violence must be followed by the theft so as for the offender to be held liable for an aggravated theft with violence.

(a) This section stands to include therefore, bodily harm including homicide or the threat of bodily harm including homicide. It must entail an attack an not a mere passive resistance as the court noted through the case **Police v. Emanuele Delia (1961)**. It is important to note that the law doesn't distinguish between a thief being armed or unarmed in this sub-section.

It is important not to forget that threatening, either in a written or verbal manner, is sufficient enough to produce this aggravation. In this case, It must be proved that some degree of harm was inflicted. Manzini noted: *"Minaccia è una seria manifestazione del proposito di recare danno o un male, fatta alla persona che da questo male può ricevere un danno".*

When it comes to threats, in order for an action to qualify as a threat, it must be efficient. To threaten implies that the person on the receiving end feel threatened and there is a sense of fear instilled in them. The examination of whether a threat counts as being efficient or not is generally a superficial one and is usually taken to be based off the reasonable man. However, if there exists evidence to support the point one way or another, i.e. to prove whether a threat was efficient or not, that is taken into account.
According to Antolisei, it is not necessary that the 'evil' in the threat to kill or to cause harm be put into execution directly and immediately against the person being threatened. It is enough if the victim to whom the action is addressed is frightened sufficiently in order to enable the thief in reaching their objective.

(b) This aggregation subsists when a thief presents themselves armed or when there is a group of three or more thieves which are unarmed.

The law doesn't speak about being armed, one only needs to presets or portray themselves as being armed, they are satisfying the criteria of such an aggravation. One needs to give the impression that they are armed and the victim needs to believe that the perpetrator is armed in order to bring about this aggravation/the aggravation subsists.

Violenza Numerica - Jurists speak about the fact that if there is sufficient proximity between the perpetrators that they can tag in and help if something go wrong. However, in today's area, they are corresponding with other people through walkie-talkies does give the impression that there are more than two people - they are presenting themselves in a number more than two. It is important to go beyond the physical three and ascertain whether in the mind of the victim the perpetrators have presented themselves in a number more than three.

In the case of **Police v. Manuel Camilleri** the court argued that in order for this aggravation to subsist, the thieves need not be present simultaneously at the same location as long as the distance between them does not prevent them from taking immediate action to help the other theif.

(c) If a person manages to land themselves in the country-side and the person has arms proper, this aggravation will subsist. This nowadays can be considered obsolete and of little application.

In terms of sub-article 2, the violence exercise doesn't have to be at the time of the act itself, it could also be previously or after the commission of the crime especially if you are trying to gain access to somewhere or to escape from arrest - to screen offenders from arrest, to get away. This violence must facilitate the commission of the crime or to facilitate escape from arrest. This sub-article seeks to include all possible violence related to the theft in question.

In relation to this, Antolisei argues the following: "*L'immediatezza tra la sottrazione e la violenza o minaccia non va intesa nel senso che debba mancare un intervallo di tempo tra l'una e l'altra ma nel senso che debbano susseguirsi con una soluzione di continuità.*" This stands to refer to the fact that the immediacy between violence and theft should not be understood in the sense that there must be a lack of time between one and the other but in the sense that they must follow one another with a solution of continuity.

AGGRAVATION BY MEANS, SECTION 263 OF THE CRIMINAL CODE

Article 263:
"Theft is aggravated by "means" -
(a) when it is committed with internal or external breaking, with false keys, or by scaling;
(b) when the thief makes use of any painting, mask, or other covering of the face, or any other disguise of garment or appearance, or when, in order to commit the theft, he takes the designation or puts on the dress of any civil or military officer, or alleges a fictitious order purporting to be issued by any public authority, even though such devices shall not have ultimately contributed to facilitate the theft, or to conceal the perpetrator thereof."

(a) It cannot be the breaking of any object - it must be violence or force exercised on an object which is stopping someone from entering and therefore, which is protecting the item. One must necessarily break the object to enter or to gain access to the item one wants to steal. The breaking must facilitate the commission of the crime and according to Carrara must be directed towards those objects which are there to serve as a defence of the property and not something which is going to be stolen. This was confirmed in the case **Republic of Malta v. Cleo Azzopardi (1980)**.

Breaking in regards to this aggravation is explained extensively through Article 264 of the Criminal Code and stands to include: "*the throwing down, breaking, demolishing, burning, wrenching, twisting, or forcing of any wall, not being a rubble wall enclosing a field, roof, bolt, padlock, door, or other similar contrivances intended to prevent entrance into any dwelling-house or other place or enclosure, or to lock up or secure wares or other articles in boxes, trunks, cupboards, or other receptacles, and the breaking of any box, trunk, or other receptacle even though such breaking may not have taken place on the spot where the theft is committed.*"

Carrara notes that this aggravation does not have anything to do with the damage caused in the facilitation of the theft but it concerns the harm which the aggravated theft causes on society: "*Il concept della qualifica e tutto politico, e procede dalla mera contemplazione del danno mediato: perche quanto maggiori sono gli ostacoli superati dal lard tanto piu rispetto all'audacia sua, decresce la potenza della difesa.*"

False-key: any means one can use to force open a lock, a false key or a genuine key which is being misused or used for a different means other than the for the purpose being given - a genuine key becomes a false key when it is misused. A false key is defined in its entirety through Article 265 of the Criminal Code which follows from the definition given by Manzini: "*gli strumenti formati appositamente per mettere in azione il congegno d'una chiusura.*"

Scaling - climbing up walls and involves some element of physical exertion.

(b) This departs from the general principle of aggravation in accordance with Italian jurists which regards our law as adopting a more restrictive approach. Under Italian Law, this aggravation is classified as *mezzo fraudulenti.*

1. Covers the identity through painting, mark or other face covering: Jurists say that it is not the mask which determines whether one has an aggregation but the effect of the victim - i.e. it must be effective/efficient that is obscures and conceals the identity of the offender. This gives effect to the aggravation.
   The victim must be more afraid that they cannot identify the identity of the offender behind the mask. The emphasis is not on the type of mask/conceal but on the effect it has
2. Takes on the uniform of a civil or military officer - tend to trust such people more easily and readily and will give up items more easily.

If we give true effect to the notion of this aggravation, every case of theft aggravated through section 263(b), becomes in effect a 'trial by jury'. From a practical point of view, this aggravation is cumbersome to apply in a court of law as you would have to establish that this aggregation notwithstanding the fact that it has actually been or used, did or did not have the effect of concealing the identity of the offender in the eyes of the victim.

Therefore, the use of any of these guises would suffice to give rise to the aggravation regardless of whether they succeed in concealing the identity of the perpetrator or not.

AGGRAVATION BY AMOUNT, SECTION 267 OF THE CRIMINAL CODE

Article 267:
"*Theft is aggravated by "amount", when the value of the thing stolen exceeds two hundred and thirty-two euro and ninety-four cents (232.94).*"
Previously Lm100.

It is a very low amount to have this aggravation added onto theft seeing as in today's world many items cost much more than that.

Manzini argued that "*Nella massima parte dei casi la scienza del valore del ladro venga presunta fino a prova contraria. Ma quando la prova contraria si ha, il magistrato non potrà trascurarne l'accertamento.*" Therefore, if a thief were to steal a vehicle and inside that vehicle there happens to be a bag of jewellery, the thief cannot be found guilty of the aggravation in regards to the value of the jewellery as well.

How does one calculate the amount of the item that has been stolen?

Emotional Value and Purchase Price is irrelevant what is included is the value of the item the moment it was stolen including appreciation and depreciation. Things are not that linear however, as this is simply the principle. In the case of crypto for example, the price goes up and down per minute.

Generally, we contend with Manzini's approach whereby he argues that the value of the object is that which is has on the market the moment it was stolen without any regard for the previous or future value. Such projections will not affect the liability of the offence.

AGGRAVATION BY PERSON, SECTION 268 OF THE CRIMINAL CODE

The law provides for a list of people who is they were to commit the crime they would have this aggravation added.

Article 268:
"*Theft is aggravated by "person" -*
(a) when it is committed in any place by a servant to the prejudice of his master, or to the prejudice of a third party, if his capacity as servant, whether real or fictitious, shall have afforded him facilities in the commission of the theft; the term "servant" shall include every person employed at a salary or other remuneration in the service of another, whether such person lives with his master or not;
(b) when it is committed by a guest or by any person of his family, in the house where he is receiving hospitality, or, under similar circumstances, by the host or by any person of his family, to the prejudice of the guest or his family;
(c) when it is committed by any hotel-keeper, innkeeper, driver of a vehicle, boatman, or by any of their agents, servants or employees, in the hotel, inn, vehicle or boat wherein such hotel-keeper, innkeeper, driver or boatman carries on or causes to be carried on any such trade or calling, or performs or causes to be performed any such service; and also when it is committed in any of the above-mentioned places, by any individual who has taken lodgings or a place, or has entrusted his property therein;
(d) when it is committed by any apprentice, fellow workman, journey-man, professor, artist, soldier, seaman, or any other employee, in the house, shop, workshop, quarters, ship, or any other place, to which the offender has access by reason of his trade, profession, or employment."

This aggravation outlines relationships between persons they aren't just random individuals. In all of these circumstances there is an element of trust in the sense that the person who is stealing has more easy access to the items of the person being subject to the theft, i.e. the theft of the item is made more easy. The aggravation occurs because an individual abused of the trust given to them to facilitate the commission of the crime as such trust enabled easier access/enabled privileged access to that which is being stolen.

For example, in relation to the relationship outlined through Article 268(a) where theft is committed by a servant, according to Carrara this form of theft entails a moral element to it - *della tradita fiducia.* This aggravation is based on the impaired powers of private defence owing to a level of trust being established. Carrara noted that in such cases, for this aggravation to arise the servant must be employed at a salary or other remuneration. In **Police v. Emanuel Zammit** it was noted that the quality of the servant should be an essential aspect to facilitate the theft.

In relation to Article 268(b) we regard those thefts committed by a guest or any person in his family, in the house where he is receiving hospitality to the prejudice of the host or his family and vice-versa.

The law gives four examples and while they are quite wide covering a multitude of relationships, they are still limited. For example, if a person goes to a supermarket and the person steals off the

shelf of the supermarket, is there aggravation by person? There is an element of trust between the shop owner and the client as the shop-owner puts trust in the client not to steal leaving their products on display - This scenario is not specifically mentioned in the law but it cold be similar to other provisions by analogy.

The list contained within Article 268 is exclusionary and therefore, we cannot deviate from that which the law prescribes despite finding analogous relationships.

AGGRAVATION BY PLACE, SECTION 269 OF THE CRIMINAL CODE

This is once again an exclusionary list.

Action 269:
"Theft is aggravated by "place", when it is committed -
(a) in any public place destined for divine worship;
(b) in the hall where the court sits and during the sitting of the court;
(c) on any public road in the country-side outside inhabited areas;
(d) in any store or arsenal of the Government, or in any other place for the deposit of goods or pledges, destined for the convenience of the public;
(e) on any ship or vessel lying at anchor;
(f) in any prison, or other place of custody or punishment;
(g) in any dwelling-house or appurtenance thereof."

(A) A place of divine worship is not any place one meets to pray but it refers to a place which is recognised by the state as being a place as divine worship. There is a register of those places which the state recognises as being places of divine worship - the state needs to have a measure of control. In the past, jurists insist that in order to effect this aggravation one must not only steal from a place of divine worship but also one must steal a sacred object. However, nowadays any theft from a public place of divine worship is enough to effect this aggravation one doesn't need to steal a sacred or consecrated object owing to the development of societies and the manner in which we make use of places of divine worship. The judgment **Avvocato della Corona v. Enrico Agius** establishes the fact that the law refers only to the place of worship but not to its appurtenances.

(*D*) Here, we are talking about:
(1) Theft from a store or arsenal of the Government (Government bonded stores) - a place where the government has bought something and is storing it there.
(2) Theft from any other place for the deposit of goods or pledges, destined for the convenience of the public - the Government criterion introduced in (1) must be upheld as when one starts with a qualifying rule and then proceeds, the remainder of the paragraph needs to be regarded in the same light and not as being separate and distinct. Therefore, one need to take the primary quality of the place, i.e. in this case the government criterion, and continue reading the remainder of the paragraph in the same line as that primary quality.

(*E)* This aggravation only applies when the ship or vessel is at anchor.

(*G)* A dwelling-house refers to a house used as a residence as opposed to for business purposes and an appurtenance refers to an accessory or other item associated with a particular activity or style of living. It has to have the potential to be and must be designed to have people lived in it. Even if it isn't being used.

Carrara justified this aggravation under the following three main criteria:

1) La violanzione del domicilio
2) Il pericolo personale
3) La superata difesa privata

On the other hand, Manzini justified it in the following manner: Greater audacity shown by the thief, who, in order to commit the theft, violated a place particularly intended for the custody of goods and safety of others.

AGGRAVATION BY TIME, SECTION 270 OF THE CRIMINAL CODE

Article 270:
"Theft is aggravated by 'time', when it is committed in the night, that is to say, between sunset and sunrise."

Professor Mamo comment on this aggravation stating that it was included as "the time of night aggravates the theft because it facilitates its commission or the escape of the thief."

The time must be taken into consideration when the theft is completed, on the same lines as Arabia who held that it is the moment of consummation of the theft which determines the juridical existence of the crime and thus, it is the moment the theft is consummated in the night that this aggravation arises. There is the issue of starting the crime during one time and ending during another, for example starting at night and ending during the day. Of to can be said that you used a greater part of the nighttime to facilitate the commission of the offence one will get the aggravation - the fact that you started at means that you intended to commit the crime at night and thus one will get the aggravation. While our courts follow the aforementioned reasoning, Manzini argued that the commencement of the execution of the theft is already in itself a punishable wrong.

AGGRAVATION BY NATURE OF THE THING STOLEN, SECTION 271 OF THE CRIMINAL CODE

Article 271:
"*Theft is aggravated by "the nature of the thing stolen"-*
(a) when it is committed upon things exposed to danger, whether by their being cast away or removed for safety, or by their being abandoned on account of urgent personal danger arising from fire, the falling of a building, or from any shipwreck, flood, invasion by an enemy, or any other grave calamity;
(b) when it is committed on beehives;
(c) when it is committed on any kind of cattle, large or small, in any pasture-ground, farmhouse or stable, provided the value be not less than two euro and thirty-three cents (2.33);
(d) when it is committed on any cordage, or other things essentially required for the navigation or for the safety of ships or vessels;
(e) when it is committed on any net or other tackle cast in the sea, for the purpose of fishing;
(f) when it is committed on any article of ornament or clothing which is at the time on the person of any child under nine years of age;
(g) when it is committed on any vehicle in a public place or in a place accessible to the public, or on any part or accessory of, or anything inside, such vehicle;
(h) when it is committed on nuclear material as defined in article 314B(4);
(i) when it is committed on any public record as defined in article 2 of the National Archives Act."

This is an exhaustive list.

The more aggravations you have, the higher the punishment. The law caters for all options and combinations and meets out different punishments depending on how many add-ons and the types of aggravations added onto the offence of theft.

With regards to Article 271(a), Professor Mamo notes the following: *"what is important to note is that the aggravation arises when the thing has been exposed to the danger under the stress of circumstances which impelled the will of the owner: perche la ragione della legge e di punire piu gravamente questo furto per rispetto alla difficolta maggiore del derubato di guardarsene, la quale cessa quando egli non spinto da necessita alcuna lascia o espone al furto le cose proprie. And when the reason which compelled the owner to leave his things ceases so that he can again, if he wishes, take care of them, the aggravation ceases."*

Article 284:
"Theft when not accompanied with any of the aggravating circumstances specified in article 261, is simple theft"

Breaking 264(2) creates a presumption in very specific circumstances in the case of tampering with electricity, water and gas pipes. In this case, if there is a tampering with any wire, cable, metre or seal of a metre, the law presumes on a *juris tantum* presumption that the person occupying the household knew of such breaking and that it was the person's doing. The aggravation shifts onto the person and it becomes the duty of the person to demonstrate that they were not aware of such a situation sufficiently to the court.

23.11.2021 - Fraud

What is fraud?
The essential distinguishing criterion between the offences of theft and fraud is the element of *contrattazione.* In theft, we always presuppose that there is the taking away of the object. In fraud, the essential characteristic of taking away is absent and this is the most important criterion to distinguish generally an act as being one of theft from one of fraud. In fraud you never have the forceable taking away of an object without the owner's consent. In most cases of fraud, the owner give you the item.

Fraud is an offence against property as through the commission of an act of fraud, one is attacking or exposing the right of another against property or ownership. Therefore, while theft is the forcible taking of an item, which is also an offence against property, in fraud, the victim has parted with the item willingly as the perpetrator has succeeded in making some unjust gain or benefit or illegal profit. Jurists have made it clear, however, that it is necessary for the person committing the fraud to have made an unjust gain.
There is an element of trickery involved as through the commission of this offence, one has taken an item, herein lies the element of malice as one makes the offender part with the object under false pretences.

There is no definition of fraud given in the Criminal Code. Instead we are given a list of examples of possible punishable scenarios of fraud and fraudulent gain. We understand fraud to comprise of an owner giving up possession of an item owing to the offender's commission of an *actus reus* listed in the relevant provisions of the Criminal Code through which the perpetrator makes an unjust gain.

Our Code makes a distinction between Frode Innominata (unspecified forms of fraud), Extortion, Extraction and Embezzlement and Truffa (the obtaining of money or property by false pretences),

Misappropriation

The functioning words in relation to this offence are those of 'misapplication' and 'converting'. The benefit must come from misapplication.
When discussing 'misapplication', this doesn't even necessarily need to be the illegal application of an item but a wrongful application. Moreover as a result of this misapplication, the perpetrator must make an unjust gain for themselves or for others.
This is a very verbose provision.

Article 293:
"*Whosoever misapplies, converting to his own benefit or to the benefit of any other person, anything which has been entrusted or delivered to him under a title which implies an obligation to return such thing or to make use thereof for a specific purpose, shall be liable, on conviction, to imprisonment for a term from three to eighteen months:*
Provided that no criminal proceedings shall be instituted for such offence, except on the complaint of the injured party."

The essential elements of the crime of misappropriation are as follows:
There must be a thing entrusted or delivered to the accused, an agent who misapplies the thing, converting it to his own benefit or to the benefit of others and the *mens rea* to defraud.

When discussing the fact that there must be a thing entrusted or delivered to the accused, we note that this can be facilitated under a form of title which implies its return or for a specific purpose. If such an item is then misapplied purposefully and maliciously and as a result of this misapplication the item is converted in its use into an unjust gain for the perpetrator the crime of misappropriation arises.
Misappropriation is excluded when the owner entrusts an object in the possession of another but then instructs or sends someone else to watch over the person having physical possession of the thing in question.

The offence of misappropriation could arise, for example, in a situation where Person A gives Person B money to go and buy X and instead of purchasing the item, Person B keeps the money for themselves to buy something. This is a misappropriation of funds.

WHAT TYPE OF ITEM BE THE SUBJECT OF MISAPPROPRIATION?

Anything which is corporeal and moveable or corporeal and immovable item can be the subject of misappropriation. The wording of Article 293 discusses two types of items. Items which are "*delivered*" which implies the fact that such items must be movable and "*entrusted*" and in such situation the item can be immovable. While you cannot deliver an immovable item, one can be entrusted with its care.

It is important to note that one cannot misapply a service owing to its nature as an incorporeal thing which cannot be "*delivered*" or "*entrusted*". Only something tangible and physical can be subject to delivery or an entrustment and therefore the subject of misappropriation. The minute one derives something which is not corporeal, it cannot by definition be misappropriation. This is because item needs to have been:
1. Delivered or entrusted;
2. Subsequently misapplied.

And an incorporeal item is precluded from both these criteria.

Taking the following example into account: Person A goes to a restaurant pretending to be a celebrity and the staff falls for the act and provides Person A with a free meal. It is subsequently discovered that it is not the case that Person A is the celebrity that they claimed to be. Even thought

the individual fraudulently roped their way into a meal, the person cannot be found guilty of misappropriation seeing as that one cannot misappropriate a service owing to its nature as an incorporeal thing.
x
When discussing the element of "*delivery*", we note that the delivery must be made under such circumstances to show that the owner did not intend on parting with this possession as was established through **Police v. Karmenu Abela.**

COMPLETION OF THE OFFENCE OF MISAPPROPRIATION

The offence of misappropriation is considered to be completed when the actual taking of the object occurs. This excludes the possibility of a material taking and presumes that the possession already vests in the accused - this is the moment of the consummation of the crime as noted through **Police v. Giuseppe Cauchi**. Therefore, it is complete whenever there is lawful *causa,* the reasons why the object was entrusted to the agent, which is substituted with unlawful *causa*.

In **Police v. Neville Grech**, the defendant failed to return a freezer which he was using in order to re-sell ice-creams to his employer upon request. Eventually, the freezer was returned. The court found him guilty of misappropriation but did not hand down a sentence.

COMPLAINT OF THE INJURED PARTY AND AGGRAVATION OF THE OFFENCE OF MISAPPROPRIATION
The offence outlined through Article 293 is one which is prosecutable upon the complaint of the injured party as a general rule.

Article 294:
"*Nevertheless, where the offence referred to in the last preceding article is committed on things entrusted or delivered to the offender by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit, criminal proceedings shall be instituted ex officio and the punishment shall be of imprisonment for a term from seven months to two years.*"

This article stipulates the aggravating circumstances which can be applied to misappropriation.

While, in principle, this is an offence which ought to require the complaint of the injured party in order for it to be prosecuted as stated above, this changes upon the application of the aggravating circumstance under Article 294. The aggravating circumstance occurs when the item central to the offence of misappropriation, i.e. the item which is misused, has been delivered or entrusted to the offender "*by reason of his profession*". This stands to include different professionals and is quite wide-reaching as it applies whenever the relationship between the victim and the offender is such that the former entrusts the item to the latter by reason of the latter's trade or profession. This is considered to be an aggravating circumstance as the offender is displaying greater malice as they are misusing their position to facilitate the making of a gain.

For example, when there occurs the misappropriation of funds by a notary public who has been entrusted with the money in order to pay the client's taxes. This entrustment occurred owing to the nature of the notary's profession and therefore, the aggravating circumstance applies.

Once this aggravation applies, proceedings are instituted *ex officio* as outlined in the provision and increases the punishment.

Article 310:
"*(1) In cases referred to in this sub-title -*

(a) when the amount of damage caused by the offender exceeds five thousand euro (€5000), the punishment shall be that of imprisonment from two to nine years;
(b) when the amount of damage caused by the offender exceeds five hundred euro (€500) but does not exceed five thousand euro (€5000), the punishment shall be that of imprisonment from six months to four years:
Provided that if the punishment laid down for the relevant offence in the preceding articles of this Sub- title is higher than the punishment laid down in this paragraph the former punishment shall apply increased by one degree and in the case of the offence under article 294 the punishment so increased shall not be awarded in its minimum;
(c) when the amount of the damage caused by the offender does not exceed five hundred euro (€500), the offender shall be liable to imprisonment for a term not exceeding six months.
(2) The provisions of sub-article (1)(c) shall not apply in the case of any of the crimes referred to in articles 296 and 298."

This section is a common aggravating element for all the offences of fraud under this title. This section is one which increasing the punishment of the offence according to the amount - the law has different paragraphs depending on the amounts and in each category of amount the punishment increases exponentially. The larger the amount of fraud, the larger the punishment.

Embezzlement

This offence is not placed under the same title as the other offences of fraud. This is because embezzlement is an offence which can be committed by a public officer and therefore, it is enclosed within the section 'OfOf Malversation by Public Officers and Servants'. It has a very similar offence definition but it must necessarily be committed by a public officer. The item discussed in this case is necessarily "*money*".

Article 127
"Any public officer or servant who for his own private gain or for the benefit of another person or entity, misapplies or purloins any money, whether belonging to the Government or to private parties, credit securities or documents, bonds, instruments, or movable property, entrusted to him by virtue of his office or employment, shall, on conviction, be liable to imprisonment for a term from two to six years, and to perpetual general interdiction.
(2) The provisions of sub-article (1) shall, mutatis mutandis, also apply to and in relation to any employee or other person when directing or working in any capacity for or on behalf of a natural or legal person operating in the private sector who knowingly, in the course of his business activities, directly or through an intermediary and in breach of his duties, conducts himself in any manner provided for in the said sub-article."

It refers to an abuse of public authority but its *modus operandi* is the same as that of misappropriation. The difference is that this offence cannot be committed by a ordinary citizen but must be committed by a public officer who, for a private gain, "*misapplies*" or "*purloins*" money. The term "*purloin*" is not a formal taking away, even though as a word it connotes this, as the money has left the hands of the victim willingly and voluntarily.

It isn't misappropriation as the offender didn't take the money into their own hands immediately to use it personally. In this case, the offender finds a 'cash tin', so to speak, and takes from it. It is therefore, not the contrectatio we traditionally understand which involves the material taking away of something maliciously. But it is very particular and covers grey areas between taking away and actually misusing items delivered or entrusted to a person - grey area between taking and being being given something.

The punishment scheme for this offence is different - it is higher as one has the aggravations of being a public officer (Government public officer), not only someone involved in trade or a profession. Therefore, the offence is slightly more serious.

29.11.2021

Obtaining Money by False Pretences

The section of the law dealing with this offence is one which is very well defined in our Criminal Code. The law gives us a very detailed definition of the *actus reus* and the *mens rea* needed in order for this offence to arise.

Article 308:
"*Whosoever, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, shall make any gain to the prejudice of another person, shall, on conviction, be liable to imprisonment for a term from one to seven years."*

The way in which one can commit this offence is varied according to our law. Many manners are contemplated at law making this provision very wide. The offence arises when one makes use of any of these, such as "*by means of an unlawful practise"* or "*by means of any other deceit, device or pretence calculated to lead to the belief in a fictitious enterprise",* in order to make a gain.

For example, this offence arises when someone uses someone else's name to make an unlawful gain. For example Person A goes to a restaurant pretending to be a celebrity and the staff falls for the act and provides Person A with a free meal. It is subsequently discovered that it is not the case that Person A is the celebrity that they claimed to be.

Another example is Person X pretends to be the CEO of a fictitious subsidiary company of a well-established brand such as Apple and goes so far as to fake the get-up in order to deceive Person Y. Through such actions, Person X gets Person Y to invest in their company. This investment agreement was made under false pretences as Person X created the aura of a "*fictitious enterprise"* in order to deceitfully convince Person Y to invest money.

With regards to "*chimerical event",* an example would be Person Q duping Person R into buying paper, special ink and a pad as a set in order to allow them to print their own money. The actual items per se are not criminal, but in exchanging cash for that package in the hopes that some chemical process will occur and Person R will be left with legal tender every time the process is employed, is a criminal offence of obtaining money by false pretences as Person Q has duped the victim (Person R) into believing the expectation of a chimerical event.

Therefore, every time one uses one of the manners listed above in order to obtain money by false pretences to get a gain, one is guilty of the offence listed under Article 308.

JURIDICAL DEBATE SURROUNDING THIS OFFENCE AND THE NOTION OF MISE-EN-SCÈNE

It is important to note that this offence was subject to a lot of juridical debate in the 19th Century. This can be seen through the questions posed by the Italian and French Courts of Cassation which asked how one can be found guilty of this offence of obtaining money by false pretences when the offence is very much dependent on the gullibility of the victim. Many debated the fairness of being found guilty of this offence when one would land himself in trouble on this simplistic level. It was through to be too simplistic in order for one to be punished for it. This is because while the person who has performed such an action has displayed an element of maliciousness, it was debated whether this was sufficient to warrant punishment especially considering this is notion of fraud

whereby there must inherently be an element of trickery and deceit where the offender took active steps to deceive their victim in order to make an unjust gain.

It can be noted, that this offence is not of recent origins. One of the first formulations of this offence was explained by Cicero who did so through recounting the story of Titius. This individual wanted to buy a Roman Villa near the sea. He scheduled to view the villa and when he decided to do so, the 'agent' Cannius, who knew about the particular fondness for fishing which Titius had, paid the fishermen of the nearby market to, on the day of the viewing, spend some time fishing in the waters outside the villa, knowing that that sea was barren. When Titius went to see the villa, he notably liked the villa but also enjoyed the fact that the area was good for fishing and the deal was struck. This was noted by Cicero to be a form of trickery and deceit.

We distinguish however, between trickery which is socially acceptable, such as adverts for toys which make them out to be better than they actually are, and trickery which is unacceptable.

In the example provided by Cicero, Cannius went out of his way to create an aura, a backdrop, a scene, to support his false claims that the sea was good for fishing when the sea was barren. Such actions lead us into the realm of mise-en-scène:
For the purposes of this offence, is it sufficient to just simply say something while acting alone, or does one require a mise-en-scène in order to continue to deceive the victim by putting the backdrop of deceit?

Many jurists believed that this element is essential in order to constitute this offence. This divide between having this requirement and not lasted for a long time. Carrara, who Maltese jurisprudence heavily relies on, claimed the need to draw a distinction between using an "*unlawful practise*" or by means of *any other deceit, device or pretence*", the crime arises *ex officio*, without the need of mise-en-scène. This holds true no matter how ridiculous or simplistic the crime is. The fact that one is doing something to induce another person to fall for deceit suffices.

However, if the deceit is the result of a verbal discussion, like the use of a fictitious name (unfruitful words), words alone cannot and shouldn't give rise to this offence and therefore mise-en-scène is necessary. Here, one has not yet exercised enough deceit to be found criminally responsible for one's actions and receive punishment for it according to Carrara.

It makes logical sense to draw the line here. However, there is a difference between this distinction academically and in practise. In truth, this poses many problems in practise especially owing to how to determine whether there was a mise-en-scène or how to qualify the efficiency of the mise-en-scène. The Maltese law and domestic jurisprudence, therefore, walked away from this element completely for the practical reasons. It is thus not required for the purposes of our law. It is interesting to note that despite this, there are judgments in our Maltese courts which seem to have hinted towards the needs for a mise-en-scène drawing on the logical sense that this distinction makes academically.

Despite the fact that a mise-en-scène is not a requirement, it is still recognised. Therefore, if one is able to prove that it exists, it demonstrates a greater level of malice and might affect punishment. This is because the court notes that not only did the person try to deceive a person through that which they said, they acted upon that verbal deceit in order to make more certain that the victim becomes a subject to trickery. However the absence of one, will not effect this offence as mise-en-scène is not an essential requirement for this offence.

In the case of misappropriation, the item misappropriated needs to be tangible as one is misapplying it or converting it. However, in the case of the offence under Article 308 there is the use

of deceit to make a gain. We are no longer discussing misapplication or conversion. Therefore, one can make a gain out of an intangible object such as a service in relation to this offence because the offence is not limited to any further action, such as conversion or misapplication.

The law speaks of "*shall make a gain to the prejudice of another person*". This is interesting in relation to the formulation of this offence as if the offender uses any form of trickery and as a result of which they make a gain, they are guilty of this offence.
Gain isn't limited to money, it could include pecuniary gain, the delivery of an item as a gain, or the provision of a service as a gain. The marginal note which claims that this offence relates to obtaining money by false pretences is just a general description - this offence involves making a gain from an unlawful means.

There are therefore, fundamental differences between this offence and misappropriation.

Other fraudulent gains - Frode Innominato

Article 309:
"*Whosoever shall make, to the prejudice of any other person, any other fraudulent gain not specified in the preceding articles of this sub-title, shall, on conviction, be liable to imprisonment for a term from two months to two years or to a fine (multa)."*

This is a residual 'catch-all' offence. This offence is, in point of fact, an umbrella provision as it speaks of any other fraudulent gain done in any other manner as a result of which one makes a fraudulent gain. It is vague wide and therefore, stands the test of time and encompasses the colours of human behaviour. Provided one applies some form of deceit and one makes a fraudulent gain as a result of such action, this provision stands to apply. Owing to its far-reaching nature, it is very complex. It captures within it all fraud known to man.
It is not a linear section as there are certain conditions which must be present for one to be found guilty. If one isn't found guilty of another type of fraud under this title, they can be found guilty under this type of fraud. Therefore, Article 309 doesn't have limitations on the *actus reus* one can commit as long as it isn't contemplated under any other article in this title.

An employee was owed his wages, his employer wouldn't pay the wages because he was a miser. The employee went to the employers wife and told her that the boss required money to pay for services. The wife gave him the money and the employee pocketed it. The employer got to know and the police filed a report.
Can such an action constitute fraud under this article?

14.12.2021

In the case of Police v. Godfrey Formosa, there appeared to some funny documents to inflate the price and they charged him under Articles 308 and 309. Prosecution argued that the elements of the offence were akin to Article 308 but if the court disagrees with this, Article 309 can be applied. The prosecution have proved nothing to the extent that they cannot distinguish one offence from another. It is not the job nor within the competence of the defence counsel nor the magistrate to determine the offence.
Article 308 and 309 are not alternatives even though prosecution put them forward as such. Article 309 can only be applied when the act doesn't constitute an offence under any ofter Article in this title. Article 309 explicitly and positively ousts all other offences in this title. The fact that the prosecution claims that it might be Article 308, excludes the possibility of it being Article 309.

In the case of Police v. Albert Vella one of the essential tenements of fraud, the raison d'etre of fraud is that you are making an illegal gain. In the case of Albert Vella, who committed forgery

when he signed for his wife to give effect to the agreement he had with his wife to liquidate their policy to give to their daughter as a birthday gift. Even though the *actus reus* is similar to that stipulated in the Article, the unjust or illegal gain is absent.

They were both acquitted for their charges of fraud even though the latter was found guilty of forgery.

The distinction between theft, misappropriation and fraud

Theft presupposes a physical taking and therefore, it presupposes that the offender is not in possession of the thing originally. Misappropriation, on the other hand, presupposes that the offender is in possession of the thing. However, in misappropriation, the item is freely delivered to the offender by the victim. In theft, the item is taken by the offender without the victim's consent. In obtaining money by false pretences, there is no taking (as would be in the case of theft) and once again, the owner gives the item to the victim. But in this case, the consent is not a free one, but the result of deception.

Animo Lucrandi not actual gain is required for the consummation of theft. In misappropriation, a conversion of the object is required. In obtaining money by false pretences, actual gain is necessary.

Theft is only possible with respect to movables because it requires a taking. On the other hand, the offences of misappropriation and obtaining money by false pretences can be consummated in the case of both movables and immovables. As discussed, misappropriation can be committed with respect to tangibles because it requires misappropriation whereas obtaining money by false pretences can be committed with respect to tangibles and intangibles. This distinction will probably eventually die out owing to the advent of crypto-currency which is a currency unlike any other intangible giving a right.

The time frame in which to consummate the offence - there is a distinction between fraud and theft because the latter is committed the moment one touches the object provided that all the other elements are present. In the case of misappropriation, there is the requirement of a form of conversion, for one's own benefit or the benefit for someone else. In the offence of obtaining money by false pretences, actual gain myst follow from one's actions.

Emma de Gabriele

CRL2006 - Substantive Criminal Law

13.10.2021- Forgery Introduction

Defining Forgery

Forgery is a crime that affects public trust. This means that society in general are putting their faith and are trusting a particular document and therefore in return, they expect that such document is genuine, that such document is certain, and most of all that such document brings about good faith.

Blackstone defined forgery as the "*fraudulent making or alteration of a writing to the prejudice of another man's right".*

Forgery isn't defined within the Criminal Code of Malta. In fact, when speaking of forgery within the Maltese legal system, we aren't speaking of one offence but of a class of offences found between Sections 166 to 190 of the Criminal Code. In every scenario, the law defines the specific conduct leading to the commission of the offence. These articles distinguish between two types of forgery depending on the material object:

1. In Articles 166 to 178, we find sections relating to the forgery of papers, stamps and seals.
2. In Articles 179 to 188, we find sections relating to the forgery of other public or private documents and writings.
3. Articles 189 and 190 then deal with the general provisions of forgery.

Forgery can take two forms:
1. Forgery through Counterfeiting
2. Forgery through Alteration and Changes

The first class of forgery involves the creation of a document 'de nuovo'. Here, a new document which didn't exist before and ought not to exist is created and is the object of forgery. An example of this type of forgery is when one creates a counterfeit degree certification in the name of a person who didn't earn that qualification.

The second class of forgery involves making alterations and changes to already existing genuine documents to reflect what the forger wants to say. An example of this is taking a degree certifying the qualifications of Mr X and changing the name to reflect that Mr Y instead earned these qualifications.

The above classes were distinguished by the Italian author Pessina who noted a difference between committing forgery *ex integro* or *ex nuovo*.

Therefore, a fundamental element which needs to be present in order for the crime of forgery to occur is the presence of a document. If there is no document, there cannot be forgery. Thus, the word document holds a particular legal meaning.

Maltese law doesn't provide a definition of what a document constitutes. Here, we turn to the comments of foreign jurists on documents and how they are defined.

Manzini argued that a document refers to "*any writing fixed on any suitable means made by a determinate author which contains manifestations or declarations of the will or attestations of what is true tending to constitute the basis or the grounds of a juridical claim to prove a juridically relevant fact in a procedural or other juridical relationship.*"

Antolisei described a document as "*any writing made by a person identified in it which contains statements of facts or declarations of will.*"

Kenny's definition of a document is as follows: "*A writing in any form on any material which communicates to some person or persons a human statement whether of fact or will.*"
Maltese courts tend to favour and lean towards Kenny's definition of a document as it is the most encompassing definition.

- "A writing in any form"

This means that the writing can be in letters, numbers, symbols etc. and can be done in any manner, i.e. in pen, pencil, engraving etc. The only requisite is that the writing is capable of communicating ideas.

- "On any material"

The writing can be done on any material be on a moveable or immovable object. The means used must be visible in order to constitute the extrinsic materialisation of thought. Even if the means may be cancelled easily or if they disappear by time or if they're invisible but visibility may be acquired. The essential element here is that the writing is comprehensible.

- "Which communicates to some person or persons a human statement"

The writing has to be understood by more than just the author. If it is the case that the writing is only understood by the author then it cannot be subject to forgery. In order for a document to be subject to forgery it has to communicate an idea that is either understood by everyone or by a group of people.
The content of certain documents, by their nature, are not understood by everyone. For example, documents relating to auditing and accounts will be understood by those who are studied in such subjects and those who do not possess the technical knowledge will find the contents unclear.

- "Whether of fact or will"

This means that through these writings, one needs to either make a declaration/attestation of the truth or an expression of the will where someone is indicating what they want.

It is important to note, however, that when discussing documents in this context, one is speaking in relation to documents within the ambit of forgery and not within the entire sphere of law.

Owing to the progress made on the digital front, the definition and understanding of a document has had to be amended slightly to ensure that information stored through mechanical and electronic means are protected from being subject to forgery despite the fact that they are stored permanently invisibly and require a computer in order to be accessed. Previously, Maltese law would not cater for information stored and presented through such means. However, following the

incorporation of a more encompassing notion of a 'document' that incorporates any information stored digitally, Maltese legislators quickly followed suit through the introduction of Article 189A. Through this introduction, it is specifically mentioned that a document/instrument includes any means through which information can be stored including digitally and electronically. This came following the change in English Law from 'document' to 'instrument'.

Article 189A:
"For the purposes of this Title, "document", "instrument", "writing" and "book" include any card, disc, tape, soundtrack or other device on or in which information is or may be recorded or stored by mechanical, electronic or other means."

The best definition given by a Maltese Court of what a document is came from the judgment **'Il-Pulizija v. Paul Galea' (17.10.1997 - The Court of Criminal Appeal)**. This definition is heavily inspired by Kenny's definition. They argued as follows:

"Għall-finijiet tad-dottrina in tema ta' falsita` ikun hemm dokument kull fejn hemm kitba, attribwibbli għal persuna identifikabbli, liema kitba tkun tikkontjeni esposizzjoni ta' fatti jew dikjarazzjoni ta' volonta` (Antolisei, F., op. cit., p. 594). S'intendi, b'kitba wieħed ma jifhimx biss is-sinjali alfabetiċi, iżda tinkludi dawk numeriċi, stenografiċi u anke kriptografiċi, basta li dik il-kitba tesprimi ħsieb li jkun jiftiehem minn kulħadd jew minn ċertu numru ta' nies. Il- kitba f'dan is-sens tista' ssir kemm bl-id kif ukoll b'mezzi mekkaniċi, b'mezz indelibbli jew li jista' jitħassar, u fuq kwalsiasi mezz li jista' jieħu, imqar temporaneament, il-messaġġ – karta, parċmina, injam, ġebel, ħadid, plastik, ecc."

Fundamental Elements forming a Document

There are certain fundamental ingredients which make up a document.
1. Content
2. Author

Content (Il-tenore)

Every document for the purpose of forgery needs to have content. This acts in accordance with the Latin maxim *verba volant, scripta manent* which means that spoken words fly away, written words remain. Through-out history, writings and documents have always been the chosen means to prove facts. They are considered the best means in order to provide authentic evidence and to constitute proof.

There are documents which by themselves are evidence of their own content and other documents which require strengthening with other forms of evidence in order to act as proof. This distinction is also associated with the difference between public documents and private writings with the former having the ability to act as evidence of their own content and the latter requiring further substantiation to operate in the same manner.

In relation to documents which are evidence of their own content, they refer to documents that constitute either a narration of facts or are an expression of will.

There are certain documents which are made with a preordained purpose. This means that those drawing up the document are doing so for a particular purpose. For example, when drawing up a loan agreement, the document is drawn up to prove the money is owed and to establish when the instalments must be paid. Another example refers to the document drawn up during the sale of an immovable property.
Despite the fact that these documents are drawn up for a particular/preordained purpose, they can be used if needed to prove a juridical claim or a juridically relevant fact, i.e. to indicate that something actually happened. It is irrelevant in this case that the document is not being used for its intended preordained
purpose.

Take the following example into account:
Mr A appeared on a contract before a notary with Mr X. Mr A has a juridical claim against Mr X. However, Mr X is claiming that he has never met Mr A. Mr A is able to make use of the contract made before a notary to prove that Mr X and Mr A know each other, even though the contract made before the notary is irrelevant in terms of the juridical claim of Mr A against Mr X. The document is therefore being used to prove a juridically relevant fact.

There are also distinctions between preordained documents drawn up with the intent to prove something, 'dokumenti intenzjonali', and 'dokumenti okkasjonali', which can be anything and can constitute evidence. Both types of documents can be the subject of forgery.

Does a signature constitute as content that will satisfy this fundamental element making up a document that can be subject to forgery?
The general understanding is no as a signature is not enough to enable the understanding that a document has content and thus a document with solely a signature on it cannot be subject of forgery.
Smith and Hogan argue that in order for such a document to have content, the signature must be present together with minimum a date and the place of origin, i.e. where it was signed. If all elements are present this does constitute a complete document which may be the subject of forgery. Therefore, an empty document with just a signature is not a document.

However, there are cases where the law expressly provides that a signature alone is to be considered a distinct and complete document as is outlined by Article 167(3). This makes reference to certain documents, such as tickets or a schedule or any similar documents, whereby even though they don't have content per se, as they are made up solely of a signature or mark, they are still to be understood as complete documents that have content.

Article 167(3):
"Where the forgery consists only in the endorsement of a genuine schedule, ticket, order, or document, the offender shall, on conviction, be liable to imprisonment for a term from nine months to three years, with or without solitary confinement."

These stipulations regarding signatures create a contentious point vis-a-vis works of art which normally are donned solely with a signature. In the British judgment of **'R v. Closs'** decided in 1857, the courts argued that if one forged a signature on a painting, the signature is to represent the mark of the author, but since no date and place of origin are present, there is no forgery as the work of art is deemed to have no content. The court regarded the signature as no more than a

mark put on the painting by an artist with a view to identify it. Over time, this position has changed and evolved, however, there is still no clear cut definition.
Kenny says that writing is indispensable because the same message needs to be conveyed to everyone, whereas people may have different interpretations of art.

With regards to dates on documents and the question as to whether having a date is an indispensable ingredient that constitutes a document which is subject to forgery, it is agreed upon that if the date is not required by law to be present on the particular document than it is not an indispensable element. This begs the question as to whether changing dates on documents constitutes as forgery. Manzini holds that if the change in date doesn't add or subtract anything from the tampered document, it is not tantamount to forgery. It is up to courts to determine if the date change plays an important factor in the determination of something else.

In the case of blank cheques, Glanville Williams says if one gives a hequq with authorisation to fill it in with a specified amount and fills it in with a larger amount that authorised, this amounts to forgery. However, according to the Maltese courts, filling in signed blank cheques which an incorrect amount doesn't amount to a situation of forgery but falls under the crime of fraud. This is because the cheque only had a signature and thus it doesn't amount to the cheque having content. There is no forgery because there is no alteration of a document as there was no content constituting the document to begin with.

20.10.2021

Aside from the content as a fundamental requisite in order to constitute a document subject to forgery, the presence of an author is another criteria which must exist.

The Author

1) The author of a document must be present and identifiable when discussing the crime of forgery. This is because one must connect and allocate the content of the document to a particular person or entity in order that one knows from here it hails. If one has uncertainties in relation to who the author is, then the document must be considered as uncertain also seeing as if the author is uncertain the content is uncertain.
Therefore, the importance of the identification of the author of a document lies in the need to certify its content.

2) In cases of anonymous documents where no one has effectively taken responsibility for the content of such a document, it is agreed upon that it cannot be the subject of forgery as there is a lack of clarity as to who drew up and is behind the content of the document. There is debate as to the use of nom-de-plume and false names.

When speaking of the author of a document, we aren't necessarily referring to the person who penned the document but to the person to whom the content of the document can be attributed. Once a person attributes a document to themselves, they are effectively responsible for that which the document carries and contains. For example, when a director of a company asks a company secretary to draw up certain things, it is not the director who is penning and drafting the particular document, but since it is the director who ultimately signs the document, thereby attributing the contents to himself, he is recognising himself as the author of the document. By doing so, he

declares that he knows what the document contains substantively, i.e. in terms of content, and takes responsibility for it.

3) A signature means that the signatory is aware of the content of the document as is ready to be identified as the author. It is not necessary that one signs in full to identify themselves as the author of a document.. If one is able to identify who the author is, either through initials or nicknames or other identifiers of that sort etc. then the document can be said to have an author and can therefore be subject to forgery. It is also important to note that one can forge a a signature and that such an action is tantamount to the criminal offence of forgery - a person who signs the signature of another to appear to appertain that document to a particular person is guilty of forgery.
The Code of Organisation and Civil Procedure provides information with reference to signing and signatures for the certain instances where someone can sign in a means other than a signature so long as they abide by other specified requisites which must be present in order to effect the signature when one is unable to, doesn't have the capacity to or doesn't know how to sign a document. As a rule, however, a signature should be in the author's hand. A cross, for example, is only accepted when it is certified by a notary or a lawyer as dictated by Article 634(2) of the Code of Organisation and Civil Procedure.
It is interesting to note that the retracing of ink in somebody else's signature written in pencil or faint ink is not enough to constitute forgery.

There is also the questions of identifying authors through personal stamps in the case of Public Officers and Officials who make use of such stamps as a substitute for a signature. In such cases, should there be an alteration or the illegal copying of the stamp, this is tantamount to the consummation of the criminal offence to forgery as the stamp is an effective replacement for the signature of such official.

Ultimately, a document is forged when it is falsified as forgery doesn't consist in the imitation of calligraphy but in making the document appear as though it was signed by a particular person when in reality it was signed by someone else.

MANDATES
The question of authors also brings about a question of mandates. The procedure of providing a mandate to someone effectively gives another person the power to appear on your behalf. An example of such a situation is when a lawyer is given a mandate to appear on behalf of a client in relation to a contract of sale. This requires further discussion in reference to actions of Public Officials. Since Public Officials have powers which are delegated, they are unable to delegate any further according to the legal maxim *'delegatus non potest delegare'* - once a person has been delegated and entrusted with certain powers and duties, this person is unable to delegate them further. This applies particularly when the delegate possesses special skills or when a person of trust is involved. Therefore, if a Public Official is delegated through law to carry out and appear on certain documents, that Public Official cannot further delegate such an action to someone else and has the responsibility to appear.

The distinction between a void and a voidable document
A void document is one that was null from the onset, that was null *ab inizio.* In reality this document never produced and will never produce legal effects as it was null from the moment it was drawn up.

On the other hand, a voidable document is one that continues to produce legal effects and therefore, it is not considered void from the onset but will only be considered void after a court declares it to be so.

Both Carrara and Manzini agree on this theory distinguishing void and voidable document. The idea in relation to forgery and this distinction is the following:
One cannot have the forgery of a void document seeing as it never produced legal effects. However, any changes or alterations to a voidable document while it's still producing legal effects would still result in the crime of forgery.
However, Antolisei disagrees with this point of view. He argues that a void document can still be subject to forgery as one ought not to look at the legal validity of the document but at its existence in general.

The local position seems to favour the thought processes of the former.

The difference between public documents and private writings
This distinction is fundamental when discussing the criminal offence of forgery. It is important that one determined whether before them is a public document or a private writing for myriad of reason.

Firstly, the forgery of a public document, owing to its nature, is punished in a more severe manner than the forgery of a private writing. This is due to the fact that a public document is proof of its own content as it was drawn up with the particular idea to act as evidence and to constitute proof in the future. The forgery of a document of this nature is more severely punished as it deals with a crime against public trust as the public puts faith in a such a document and the law therefore, the law must look to safeguard this and opts to do so through increasing the severity of the punishment.

Secondly, in relation to public documents, the fact that one tampered with the document is enough to constitute the criminal act of forgery, even if the alteration of the document didn't result in any party gaining anything or any party suffering any damage. However, with regards to private writings, the forgery of the document isn't enough to constitute the criminal action of forgery, in addition to the alteration of the document, such alterations must also have led to the procurement of some gain for the perpetrator or another party or damage to an individual in order for this offence to be consummated and effected. With public document, the possibility of prejudice is not necessary.

Manzini states that a public document refers to "*those writings having the nature of documents and drawn up by a Public Officer or by a person employed in the public service made up in due form for a Public Law purpose inherent in the exercise of public functions or in the public service as well as those writings which contain private declarations of the will or attestations of the truth completely received by a notary or by another public officer authorised to attribute public faith to the document.*"

Antolisei would argue that this definition stands to include also:
- Atti pubblici in senso stretto (the first type)
- Atti pubblici in senso lato (the second type)

Further, Crivellari defines a public document as "*a document that has its aim and effect the attribution of the eyes of everyone and this created in those forms which are constituted as a guarantee to all".*
This indicates that in public document, the form itself, carries a significant amount of weight.

The Maltese Civil Code fails to define what a public document is but it does define "public deed" through Article 1323 (2).

Article 1323(2):
"An instrument drawn up or received with the requisite formalities by a notary or other public officer lawfully authorised to attribute public faith thereto."

However, it is important to note that these terms are not interchangeable and do not mean the same thing. This is because every public deed is a public document but not every public document is a public deed. Therefore, public documents include public deeds but serve to include other things also.

Analysing that which the Civil Code provides in relation to what a public deed is against the definitions we have been provided with for a public document, we notice the emphasis placed on the form of public documents. This differs from content. This refers to the requisite formalities which must be adhered to when a public document is being drawn up. For example, there is an emphasis on the roles played by notaries and public officers. When speaking about public documents, they must be drawn up by a public official who must always be involved in order for such a document to be drafted in accordance with the protocols set forth at law. However, it is important to note that just because a document is drawn up by a public official, it doesn't necessarily mean it is a public document - public officials are not precluded from drafting private writing.

When we speak about form, we note that different documents require involved parties to follow different formalities establishes at law in order for the document to be complete. One such example is that in relation to a public deed when purchasing property, the notary must read the contract out loud to the parties. Moreover, one cannot have a public deed that is signed by the different parties on different days. With private writings, the formalities are different owing to their nature.

In the case of **'The Queen v. Giuseppe Zahra' (1953)**, a question arose as to whether a driving license can be considered as a public document or not. The court concluded that a driving license ought to be considered as a public document since in the creation of this document, a public officer attributed public faith to it. The stamp was enough to attribute public faith to it without the signature of the employee.

Additionally, in the case of **'Police v. Carmelo Borg' (1984)**, it was noted by the court that a bank draft issued by an employee of the Central Bank was a public document owing to the fact that the Central Bank is a governmental organ and thus the employee is a public official.

With reference to **Police v. Paul Galea (1997)** the 'document' in question was a number plate on which a vehicle number and registration is written. When the plate was altered, the court ruled that such a plate constituted a document however, one of a private nature.

Emma de Gabriele

27.10.2021 - A closer look into Private Writings and Copies & Duplicates

PRIVATE WRITINGS

A private writing refers to something in writing prove what parties have agreed upon. Private writings are all the other writings which are not public documents. What is not a public document is automatically a private writing. Antolisei defines private writings by elimination - "*Any document that does not have the characteristics of a public document is a private writing.*"

Manzini's definition is more robust - "*Private writings are those writings having the nature of original documents or copies in the case provided for by law suitable to prove any fact or judicial relationship, drawn up by private persons without intervention of a certifying public officer. Or those acts which are substantially private received or drawn up by a public officer not competent or capable to do so, or which fall outside the exercise of his function. Or those acts which do not have the force of public acts due to a defect in form as long as they are subscribed by the parties.*"

This definition may be divided into three parts. The first refers to the following:
"*Private writings are those writings having the nature of original documents or copies in the case provided for by law suitable to prove any fact or juridical relationship, drawn up by private persons without intervention of a certifying public officer.*"

Through this, Manzini is referring to any document which is done without a public officer attributing faith to it. It is important to note in this regard that simply because a document is drawn up before a notary, it doesn't mean that the document is automatically a public document, even if the notary is a public officer. If the nature of the document is one which is not public, then it being drawn up before a notary doesn't make it public. Therefore, the first part of Manzini's definition refers to those document which are drawn up without the intervention of a public officer.

The second part of the definition is as follows:
"*Or those acts which are substantially private received or drawn up by a public officer not competent or capable to do so, or which fall outside the exercise of his function*"

This part looks at a defect from the part of the public officer and questions whether certain public officials are competent at law to attribute faith to a document. If the public officer doesn't have the power to attribute faith or their powers are restricted to certain things in particular, if they attempt to attribute faith regardless, the document loses its status as a public document but remains a private writing.

The third part of the definition reads as follows:
"*Or which do not have the force of public acts due to a defect in form as long as they are subscribed by the parties.*"

While in part two, the defect being discussed what owed to the public officer's attribution of faith and their capacity to do so, in the third segment of the definition, the defect regarded is that of formalities established by law which dictate the template and rules certain documents ought to follow. For example, when signing a public deed, a notary has to mark the place where the deed

was signed on the document. Failure to fulfil such formalities causes the document to lose its status as a public document but it remains a private writing.

Both our Criminal and Civil Code lack a definition of what a private writing is. In Article 1233 of the Civil Code, however, there is contained a list of particular documents that would need a private writing, i.e. in order for them to be valid, one would need at least a private writing to be drawn up. Here, one has certain types of document which at least need to be private writings.

Article 1233:
"*(1) Saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:*
(a) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
(b) any promise of a loan for consumption or mutuum; (c) any suretyship;
(d) any compromise;
(e) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements;
(f) any civil partnership; and
(g) for the purposes of the Promises of Marriage Law, any
promise, contract, or agreement therein referred to.
(2) Where, in the case of a private writing, the writing is not signed by each of the parties thereto, it must be attested in the manner prescribed in article 634 of the Code of Organisation and Civil Procedure."

The Civil Code of Organisation and Civil Procedure makes reference to private writings.

Article 633
"*Any act which, by reason of the incompetence or incapacity of the officer by whom it was drawn up, compiled, or published, or which, owing to the absence of some formality prescribed by law, has not the force of a public act, shall be admissible as evidence as a private writing between the parties, if the parties have signed or marked the same, or if it is proved that such act has been drawn up or signed by some other person acting on their instructions*."

Manzini's definition of private writings is partly reflected in this article through the discussion of "*incompetence or irregularity of the officer by whom it was drawn up."* This refers to particular cases whereby there exists a document where the public officer is not competent to attribute faith to it. Additionally, there is a reference to the lack of formalities and the fact that when a document doesn't meet the requisite formalities at law, it cannot be considered a public document.

Therefore, any public document which was drawn up by an official who was not competent to do so, or else if there existed some from of defect in the formalities required at law, then that public document is to be considered as a private writing.

COPY V. DUPLICATE
Copy: A copy refers to a photocopy of an act. A true copy, as understood in the aforementioned respect as being a photocopy of an act, however, is one which is certified by the holder of the

original. Copies may be made by private persons but they hold no juridical relevance unless they are duly certified and authenticated to do so by the public officer who has custody of the original. In such cases, the copy has the same effect as the original.

Duplicate: A duplicate cannot exist with reference to public documents seeing as there is only one original which is kept with the notary and filed in the archives. However, duplicates are very common in private writings. Duplicates refer to multiple original documents which are identify and each duplicate is signed individually. Their commonality is such because, one 'original copy' is kept by one party and another 'original copy' is kept by the other party. There can be as many duplicates as needed and as desired. Every duplicate is considered to be an original.

Simple copies of private writings are not subject to forgery. However, if a person has a copy of a private writing which is signed and certified to be a true copy by the holder of the original, of a person were to forge that certified true copy, then in that case there exists forgery.

In the case of '**Il-Pulijiza v. Patrick Spiteri (22.10.2004 - Court of Criminal Appeal)'** the falsification of a certified true document is being discussed. In this case, there was a contract of sale of an immovable property. This is therefore to be considered a public deed. The accused issued a copy of this public deed and falsified the signature of the notary. This falsification occurred not on the public deed itself, as the only one true copy was kept by the notary to be filed in the archives, but on the certified true copy of deed. Therefore, the accused forged a document which was purported to be a certified true copy. Some changes were made to the copy which did not reflect what originally was in the deed.

The crux of the case questioned whether, when dealing with a certified true copy of the deed, a private writing or a public document is being dealt with. The defence counsel tried to argue that one is not dealing with a public document since the forgery occurred on a certified true copy. However, the court disagreed and maintained that such a copy remain a document of a public nature. The fact that the signature was falsified indicated that the forged document was approved by the notary, even though in reality it wasn't.

Moreover, the court argued that if the formality is mistaken in a minor nature in a public document, it doesn't disqualify the document from being of a public nature.

The court argued that the follow make up what is to be considered a public document:
1. A document destine to attribute public faith;
2. A document drawn up according to the required formalities;
3. A document drawn up by a competent public official given the power at law.

What are the elements of forgery?
1. Alteration of the truth - the *actus reus*;
2. The criminal Intent - the *mens rea;*
3. The imitation of the truth
4. The damage

The last two are not required for all documents.

The alteration of the truth must necessarily be through a writing. A verbal untruth is not subject to forgery. One of the fundamental elements of forgery is having a document and therefore, if you don't have a writing one cannot have forgery. This encompasses alterations, cancellations and the creation of a document from scratch.

10.11.2021 - The Elements of Forgery and Falsity in Forgery

The Elements of Forgery

There are four elements to the crime of forgery:

1. The *Actus Reus* - The Alteration of the Truth
2. The *Mens Rea* - The Criminal Intent
3. The Imitation of the Truth
4. The Damage

The last two elements are not required for all documents.

Alteration of the Truth as an Element of Forgery - *Actus Reus*

The Alteration of Truth, i.e. the *actus reus* of forgery, myst necessarily be through a writing. A verbal untruth is not subject to forgery. This is because one of the fundamental elements of forgery is having a document and thus, if one doesn't have a writing, one cannot have forgery. This encompasses alterations, cancellations and the creation of a document from scratch - counterfeiting.

It is important to note, that forgery is dependent on the type of falsity being dealt with.

MATERIAL FALSITY

This is the most classic manner of having a forged document. This is because it deals with a forgery which takes place to alter/cancel the document or to create of a new document from scratch (counterfeiting). This occurs when one has a document which tells a lie about itself. Such a document purports that it is something or that it was written or amended by someone when in reality it wasn't. This goes back to the discussion on the genuineness of the document as in such cases the document is not genuine.

In the case of **'Il-Pulizija v. John Galea (24.02.2012 - Court of Magistrates)** the courts claimed the following: "*biex ikun hemm il-falsificazzjoni, irrid ikun hemm il-dokument, u irrid ikun hemm counterfeiting jew it-tibdil ta' dokument mill-gdid.*"

IDEOLOGICAL FALSITY

When speaking of ideological falsity, it is important to keep in mind that this sort of falsity does not give rise to forgery. Therefore, a person cannot be accused of forgery if they employ this kind of falsity. Here, a situation arises whereby even though a document might contain something which is untrue, it is still a genuine document. Here, there exists a situation unlike Material Falsity where the document doesn't tell a like about itself. The difference between the two is that in the former, there exists a document which is not genuine, whereas in the latter it is even though it might have something which is not true contained within it. The clearest example of this kind of forgery is the following:

A party to an agreement lies to the notary or lawyer who is drafting and the notary or lawyer faithfully reproduces what that party has told them. Therefore, the document doesn't tell a lie about itself as the notary or lawyer reproduced what they were told by the party faithfully.
On the other hand, if the party said something and the notary or lawyer wrote down something different and not effectively what the party told them, this is another type of falsity which could also amount to fraud. It is not ideological falsity as the document at that point is telling a lie about itself so there the document is no longer genuine.

The only case of ideological falsity under the Criminal Code is Article 188.

Article 188:
"*(1) Whosoever, in order to gain any advantage or benefit for himself or others, shall, in any document intended for any public authority, knowingly make a false declaration or statement, or give false information, shall, on conviction, be liable to the punishment of imprisonment for a term not exceeding two years or to a fine (multa):*
Provided that nothing in this article shall affect the applicability of any other law providing for a higher punishment.
(2) Where the document referred to in subarticle (1) is not one intended for any public authority the punishment shall be that of imprisonment not exceeding one year or a fine (multa)."

In this case, the *mens rea* is identified in the phrase "*in order to gain".*

Antolisei argues that the attempted forgery is juridically admissible and possible.

MATERIAL FALSITY AND IDEOLOGICAL FALSITY COMPARED
It is important to note first and foremost that when stating that a document tells a lie about itself, this is the fulcrum of forgery. The lie is not really in the content but it is a lie about the document per se. This is why we argue that we have forgery when we say a document tells a lie about itself. This is the reason as to why ideological falsity doesn't give rise to forgery, as even if the document doesn't reflect that which is true, the document remains a genuine one.

Manzini looks to build on this and the distinction between the two kinds of falsities. He does so by mentioning *non genuinita* in relation to Material Forgery and *non veracita* in relation to Ideological Falsity. This distinction indicates that in the former there exists a document which is not genuine as it tells a lie about itself whereas in the latter, there exists a document which is genuine but which might contain a falsehood or untruth.

In addition, Antolisei holds that when a document is genuine we argue that it is genuine if it also emanates from the same author - it must not have undergone any further changes once it was concluded unless they were authorised. This includes unauthorised alterations made by the author himself.

Article 179:
"Saving the cases referred to in the preceding Sub-title, any public officer or servant who shall, in the exercise of his functions, commit forgery by any false signature, or by the alteration of any act, writing, or signature, or by inserting the name of any supposititious person, or by any writing made

or entered in any register or other public act, when already formed or completed, shall, on conviction, be liable to imprisonment for a term from two to four years, with or without solitary confinement."

This article speaks of the offence committed by public officers or servants if in the exercise of their functions they commit forgery by any writing made in any register or public act when already formed or completed. Kenny argues that a document is not a forgery when it merely contains statements which are false but only when it falsely purports to be itself that which it is not, it must necessarily tell a lie about itself.
This was upheld in the judgment **R v. Dodge & Harris**.
Smith and Hogan say that it is the document which must be false and not just the information on it. In the case **Police v. Patrick Leonard** expands on this concept of a document telling a lie about itself.

When a document is not simply altered but stolen, purloined, concealed or destroyed, Carrara argues that this amounts to forgery but under Maltese Law this is regulated by a different section, specifically Article 144.

PERSONAL FALSITY
Such cases of falsity revolve around the alteration of the truth when it relates to the very existence of an individual and not the quality of a person. This type of falsity deals with who a person is and the existence of the individual, i.e. their name, surname, birth parents etc. and not the quality of such an individual, such as the fact that the person may be a property owner. Cases of personal falsity arise when a person who is someone wants to appear as someone else - a simulation of identity.

Personal falsity does not arise if a person is declaring on a contract and lies about a quality of theirs. However, personal falsity is amounted to when a person portrays himself as someone else - when one changes their existence through a simulation of identity and tries to be someone they're not.

Nominal Fallacy occurs when a person uses a name different from the name legally his own. This does not necessarily entail liability for personal forgery, at best it could amount to alteration of the quality of a person.

In the case of **Queen v. Giuseppe Bezzina** the defendant was accused of being an accomplice to forgery. A certain Chetcuti acted on the instructions of Bezzina, impersonated another as being a creditor in a loan agreement. Chetcuti declared to be illiterate, authorised a legal procurator to sign in his name (which was really Bezzina). The court held that this was still tantamount to forgery since the document stated a lie about itself with Chetcuti as the ultimate cause.

Criminal Intent as an Element of Forgery - Dolo
Since this is something which is very important in relation to the crime of forgery, it naturally leads to a lot of argumentation amongst authors as to what sort of criminal intent is required in order to constitute the crime of forgery. Dolus is a *sine qua non* in relation to forgery except for certain cases expressly outlined at law.

Some writers argue that one needs the intent to deceive, others argue that one needs the intent to defraud, others argue that one needs the generic intent of will and understand, others argue that one needs a specific intent and other favour the *dolus in res ipsa* theory whereby the intent of carrying out forgery is inbred and is a part of forgery itself, i.e. the fact that a person committed the action proves the criminal intent as this intent is part and parcel of the forgery being carried out.

Kenny believes that in order to distinguish whether one has the necessary intent to constitute the crime of forgery, the distinction between whether the act was committed on a public document or private writing must be ascertained. In public documents, all one needs is the intent to deceive but in private writings that which one needs is the intent to defraud. The former intent to deceive refers to making someone believe that something which is false is true thereby inducing a state of mind. The latter intent to defraud goes a step further and entails depriving by deceit. The reason it is argued that it's a step further is that because through one's deceit, the perpetrator is either making a gain or is creating some kind of prejudice and subsists even if the defrauded person incurred no actual pecuniary detriment, if no particular individual was aimed at and even if there did not in fact exist any person whom the accused could have defrauded as long as the offender reasonably believed that someone may have been defrauded, there will be subsistence.

The Forgery Act of England 1913, required the intent to defraud in the case of various specific documents. In the case of document which were not so specified, i.e. public documents, it was sufficient if there was the intent to deceive. In accordance with the UK Forgery and Counterfeiting Act, what is necessary is the intention to use a false instrument to induce somebody to accept it as genuine (deceive) and by reason of so accepting it, to do or not to do some act to his own benefit or somebody else's prejudice (defraud). It is thus, a combination of the intent to deceive and to defraud.

In 1903, British judge Judge Buckley stated that "*the intent to deceive is to induce a man to believe that a thing which is true is false and which the person practising the deceit knows to be to be false*." In reference to the intent to defraud he argued the following: "*the intent to defraud is to deprive by deceit*."

Archibald continued this comparison by stating that "to deceive is by falsehood to induce a state of mind. On the other hand, to defraud is by deceit to induce a course of action."

Certain decisions of the Maltese courts have interpreted the phrase "capacity to deceive" to equate to the phrase "possibility to defraud or cause prejudice". In our Criminal Code, fraud is specifically mentioned in Article 180 whereby through the marginal note it reads: "*Fraudulent alteration of acts by public officer".* It must be kept in mind however, that this is not the only article that requires the intent to defraud in order for the crime to manifest despite it being the only instance of the word "*fraudulent"* being used under this title. The *dolus* of the other offences is assumed *jure et de jure* and is *dolus in est res ipsa* - there is dolo in the act itself.

Carrara looks at the *intendo nocendi*. He notes that the intent required for forgery is twofold:

1. The perpetrator needs to have the knowledge that that which he is doing is false - the individual is aware and knows that he is carrying out this falsity;
2. The perpetrator, through his actions may lead to the harm or potential harm of the rights of others. This is where the element of *nuocere* comes in as one is creating damage.

Therefore, according to Carrara, the law doesn't punish any type of falsity; only that which is prejudicial (or at least potentially) to the rights of others. For the agent to be acting against that which the law prescribes, he must not only know that what he is doing is false but that it is harmful to the risks of others. This is where the the *intendo nocendi* comes in.

Other authors favour the aforementioned *dolus in res ipsa* theory whereby the fact that one carried out the forgery is sufficient evidence to indicate one's intention. This means that the criminal intent is intrinsic and inbred of forgery. This approach means one thing - the fact that one carried out something means they are demonstrating their criminal intention through the action.

Crivellari remains on the level of the generic intent, this intent being the will and understanding. He holds that what one needs for the criminal intent in forgery is essentially the following:
1. The perpetrator knows that they are carrying out forgery;
2. The perpetrator knows that the action is against the law and thus is illegal;
3. The perpetrator has the intention of altering the truth and creating a falsity.

What is outlined through the above are the basic elements of generic intent: will and understanding. A general intent based on will and understanding refers to a situation where the intention of the individual is simply an intent to perform an act that is illegal: the necessary and, as a rule, sufficient psychological element for imputability in respect of a wilful crime. In accordance with the Latin maxim *dolus indeterminatus determinatur ab exitu*, the generic intent to cause harm is determined by the outcome and consequences the action results in.
The intention to cause harm is something which Crivellari doesn't consider to be part of the criminal intent.

Manzini goes a step further and speaks of generic intent - this must be done in order to deceive others with regards to the author or content.

Antolisei's thinking is based heavily on that which Carrara argues, i.e. the twofold situation whereby one needs the individual who knows he is carrying out the alteration of the truth, together with the fact that the individual is conscious that through his actions, he might prejudice the rights of other and is conscious that through his actions he can create harm.
"*Oltre alla coscienza volontà di falsificare il documento il dolo esige che l'agente abbia la consapevolezza di offendere interessi che no gli appartengono.*"

To a certain extent, even though it is not clear cut, what the two are saying is also dividing the intent between the generic intent, the will and understanding to carry out the falsity, and the specific intent, the *intendo nocendi* that through one's actions one is aware that they are potentially harming the rights of others.

In legal systems similar to ours, i.e. where the crimes of forgery are considered to be crimes against the public trust, a specific intent to drafts is not needed and an intent to deceive is regarded as being sufficient.

What is the position under Maltese law?

All crimes after Article 166 require dolo *mens rea*, *mens rea dolus ex sine qua non,* except for Article 182(2) which will be analysed shortly.

There aren't too many judgments in relation to what the intent required for forgery is. In fact, the first indication of the intention required under Maltese Law is found from the classification of the offences of forgery under the Maltese Criminal Code. Such offences are found under Title V of the Criminal Code - 'Of Crimes Against Public Trust'. If the intention was to defraud and not to deceive, they wouldn't be found under Title V but under Title IX. It can be deduced that owing to their containment under Title V and not Title IX, unless the law specifically states that the intent required is to defraud, the intent required is that to deceive. Therefore, from this classification, we are already given an idea as to that which the intent for forgery is.

When looking at local jurisprudence, the courts tend to base themselves on previous Italian jurisprudence. This means that we have the use of the *dolus in res ipsa* approach being that the intent to deceive is part and parcel and is inbred in the act if forgery that took place. The natural and general conclusion, especially when regarding the intent to deceive and the *dolus in res ipsa* approach, is that the intent to deceive is that which is necessary for the crime of forgery.

There are individual cases where this theory is put into difficulty found through Section 182 (2) of the Criminal Code. This relates to a Public Officer issuing a false document. In this case, we are dealing with negligence and therefore, one cannot argue that there exists an intent to deceive.

Article 182 (2):
"[*(1) The punishment laid down in the last preceding article shall be applied where the forgery is committed by the public officer or servant on a legal and authentic copy, by giving out the same in virtue of his office, in a manner contrary to or different from the original, without this being altered or suppressed.]*
(2) Where such copy is so given out by the mere negligence of the public officer or servant, he shall, on conviction, be liable to a fine (multa)."

Negligence in itself implies that one cannot have the intent to deceive. There are other cases which create doubt to the natural and general theory.

Under Article 180, the marginal note reads: "Fraudulent alteration of acts by public officer."
Don't make the mistake of believing that this is the only article that requires the intent to defraud. Even though the only instance of the word fraudulently being used under this title is under this article, the dolus of others is assumed *jure et de jure* and is *in est res ipsa.*

Imitation of the Truth as an Element of Forgery
Some argue that this is the third element of forgery, however, it is not a requirement under our law. Antolisei argues that its possible to have forgery of a signature even if it doesn't imitate the legitimate signature as there is still the possibility of causing harm. Imitation of the truth is a more of a practical requirement rather than legal. It is simply useful as recognition to its evidential value.

Manzini disagrees that it is essential. What happens when a person who with the intention to deceive alters [1]the truth in a gross manner that is recognisable by law? Antolisei argues that gross forgery is not punishable as it is incapable of deceiving. This was arrived to on the basis of the juridical relevance of the alteration which cannot violate public trust. Moreover, Carrara notes that no external act can be raised to the level of crime if it does not have the potentiality of causing

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harm and is not capable of deceiving. Any act whereby the imitation is gross lacks the potential to cause harm.

Where the potential to cause harm is required, in the case of private writings, the question of degree of harm arises. Only an evident, gross falsity excludes punishability of the act. Therefore, a perfect imitation is not required. This distinction, i.e. the one between public documents and private writings, wasn't always acknowledged within our Courts. In the case **Rex v. Lorenzo Cassar (1941)** regarding a forged Government Lotto ticket, there was doubt over whether there existed the potentiality of causing harm because the people could easily tell that the tickets were not genuine. Here, the court made no distinction.

Today, they do make a distinction - with respect to public documents, as soon as one has the material alteration, there exists an immediate realisation of the prejudice to the public faith. In the case of private writings, the courts have affirmed that when falsity succeeds in deceiving, any inquiry into whether the falsity could or could not deceive is unnecessary as it was deceit and the offence reached its judicial objective as was noted in the case **Rex v. Mary Azzopardi**.

Prejudice to Third Parties and Damages as an Element of Forgery
Whether this is an essential requirement is yet another debated issue. Carrara, Maine and Manzini all believe that there must be at least the potentiality of causing harm. Antolisei notes that this is judicially irrelevant. Roberti and Arabia make a distinction between public and private documents and writings. Our law is more in line with this - in reference to Article 187 and the notion *ubi lex volute dixit.*

As far as the prejudice to others is concerned, actual injury is not essential. This has been agreed upon. There is disagreement when regarding cases where there exists the possibility of prejudice to third parties. Under Roman Law, we note the following principle: "*"La falsificazione non è punita non solo se non ha causato danno, ma neppure se non era idonea a nuocere".* Here the forgery is so manifestly bad, that it is obvious that one cannot have faith in the document and therefore, there is never truly any possibility for prejudice. This applies only in cases of private writings and never in cases of public documents. There exists a distinction between private and public documents as noted prior. Regarding the latter, the prejudice against third parties is not essential. In terms of a private writing it is essential. This can be regarded through Article 187:

Article 187:
"(1) Whosoever shall, by any of the means specified in article 179, commit forgery of any private writing tending to cause injury to any person or to procure gain, shall, on conviction, be liable to imprisonment for a term from seven months to three years, with or without solitary confinement. (2) Whosoever shall knowingly make use thereof, shall be liable to the same punishment."

The same doesn't apply, for example, to that contained within Article 166 relating to government debentures seeing as there we are dealing with a pubic document. As soon as one forges a public document like that mentioned Article 166, there is an assumption *jure et e jure* that prejudice has been caused to the public trust. It is no defence to plead that the offender was lawfully entitle to what he sought to obtain by the forgery. The crime will subsists in the case of a public document even if the public document forged is null owing to some defect of form. The only exception arises is when the defect arises out of the absolute lack of authority and jurisdiction of the public officer attributing faith to the document.

Rex v. Victoria Muscat (22.09.1942) - In forgery offences, the question of the manner of executing the forgery cannot be raised if in point of fact, the forgery has deceived or defrauded. Victoria Muscat was indicted for forgery which was so grossly carried out that is was considered to be falso grossolano.

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Analysing the Provisions of Forgery

Of Forgery of Paper, Stamps and Seals

ARTICLE 166

"*(1) Whosoever shall forge any Government debenture for sums advanced on loan to the Government, shall, on conviction, be liable to imprisonment for a term from three to five years, with or without solitary confinement.*
(2) The same punishment shall apply where the forgery consists in opening a credit relative to such loan in the books of the Government Treasury.
(3) Where the forgery consists in the endorsement of a genuine Government debenture, the offender shall, on conviction, be liable to imprisonment for a term from thirteen months to four years, with or without solitary confinement."

Today the term 'stocks' is made use of instead of 'debentures'. These intimately effect the economy of the country and therefore, forging such documents is a serious offence which is why this is the first crime found under this subtitle. There is no direct mention of the means which may be used by the accused.

Here, the material act can consist in either counterfeiting or altering the originally genuine document. The crime is complete as soon as the document has been forged with the requisite criminal intent. It is not necessary for the completion of the crime that the forged document be passed off.

Article 166(3) argued that the false endorsement of a government debenture is the same as counterfeiting the debenture in the eyes of the law.

ARTICLE 167

"(1) Whosoever shall forge any schedule, ticket, order or other document whatsoever, upon the presentation of which any payment may be obtained, or any delivery of goods effected, or a deposit or pledge withdrawn from any public office or from any bank or other public institution established by the Government, or recognized by any public act of the Government, shall, on conviction, be liable to imprisonment for a term from thirteen months to four years, with or without solitary confinement.
(2) The same punishment shall apply where the crime consists in the forgery of any entry in the books of any such office, bank or other institution, relating to any such payment, goods, deposit, or pledge.
(3) Where the forgery consists only in the endorsement of a genuine schedule, ticket, order, or document, the offender shall, on conviction, be liable to imprisonment for a term from nine months to three years, with or without solitary confinement."

The elements of Article 167 include both counterfeiting and altering and once again the moment the forgery is done there is the crime. The only difference between 166 and 167 is that the latter deals with "*schedules, tickets, orders"* and "*other documents whatsoever, upon the presentation of which any payment may be obtained or any delivery of goods effected etc."*.

ARTICLE 168

"(1) Any public officer or servant who, by abuse of his office or employment, becomes guilty of any of the crimes referred to in the last two preceding articles, shall, on conviction, be liable to the punishment therein prescribed for any such crime, increased by one degree.
(2) The same punishment shall apply to any public officer or servant who shall knowingly re-issue any order for payment of money or any of the documents mentioned in the last preceding article, after the payment or the delivery of the goods obtainable upon the presentation of such order or document has been effected."

This article refers to the previous two sub-articles, namely Articles 166 and 167 and note that where such crimes are committed by a public officer in an act which abuses their office to facilitate such a crime, the punishment is increased.

ARTICLE 169

"Whosoever shall knowingly make use of any of the instruments specified in articles 166, 167 and 168 shall, on conviction, be liable to the same punishment as the principal offender."

This article stipulates that the use of a the documents listed in Articles 166, 167 and 168 constitutes a separate crime. The law through Article 169 creates a separate and distinct offence for the use of forged government documents. There is no complicity after the fact under our principles of complicity - Article 169 doesn't punish the accomplice to an offence and therefore, the user is a separate principle offender from the forger of such forged documents. The requirement is that the offender is knowledgable regarding the falsity of the instrument at the time of use. There are systems of law which distinguish between cases whereby the person receives and uses the document in good faith and where there is knowledge of the falsity but the document is used regardless. However, our law doesn't make such a distinction. However, Article 19H dealing with the calculation of punishment is applicable.

ARTICLE 170

"(1) Whosoever shall forge any act containing an order or resolution of the Government of Malta, and whosoever shall forge any judgment, decree, or order of any court, judge, magistrate, or public officer, whereby any obligation is imposed or terminated, or any claim allowed or disallowed, or whereby any person is acquitted or convicted on any criminal charge, shall, on conviction, be liable to imprisonment for a term from two to four years, with or without solitary confinement.
(2) Whosoever shall knowingly make use of any such forged act, judgment, decree or order, shall, on conviction, be liable to the same punishment as the principal offender.
(3) Where the person guilty of any of the crimes referred to in this article is a public officer or servant specially charged with the drawing up, registration, or custody of any such act, judgment, decree or order, the punishment shall be increased by one degree."

The object of forgery in this case is outlined within the article itself. Sub-article 2 goes into the use of such forged documents with the knowledge that they are forged documents and the third sub-article deals with the increase in punishment for public officers who commit this offence.

ARTICLE 171
"Whosoever shall counterfeit the Public Seal of Malta, or shall knowingly make use of such counterfeited seal, shall, on conviction, be liable to imprisonment for a term from three to five years, with or without solitary confinement."

ARTICLE 172
"(1) Whosoever, except in the cases referred to in the last preceding article, shall counterfeit any seal, stamp, or other mark, used for sealing, stamping, marking, authenticating or certifying, in the name of the Government or of any of the authorities thereof, documents or effects, whether public or private property, or which are under the public guarantee, shall, on conviction, be liable to imprisonment for a term from thirteen months to three years, with or without solitary confinement.
(2) Whosoever shall knowingly make use of any such seal, stamp, or mark and whosoever shall knowingly and without lawful authority be in possession of the said objects, shall be liable to the same punishment."

ARTICLE 173
"*Whosoever shall counterfeit postage stamps, or shall knowingly make use of counterfeited postage stamps, shall on conviction be liable to imprisonment for a term not exceeding two years, with or without solitary confinement."*

ARTICLE 174
"(1) Whosoever, without the special permission of the Government, shall knowingly keep in his possession counterfeited postage stamps, dies, machines or instruments intended for the manufacture of postage stamps, shall, on conviction, be liable to the punishment established in the last preceding article.
(2) The provisions contained in this and in the last preceding article shall also apply in regard to any stamp denoting a rate of postage of any foreign country."

ARTICLE 175
"The same punishment established in article 173 shall apply to any person who, without lawful authority or excuse, (the proof whereof shall lie on the person accused), knowingly purchases or receives, or takes or has in his custody or possession any paper exclusively manufactured or provided by or under the authority of the Government of Malta, for use as envelopes, wrappers or postage stamps, and for receiving the impression of stamp dies, plates or other instruments provided, made or used by or under the authority of the Government for postal purposes, before such paper has received such impression and has been issued for public use."

Article 175 contemplates different scenarios.

ARTICLE 176
"*There shall be forgery within the meaning of articles 171 and 172, not only if a false instrument is made or affixed but also if the genuine instrument is fraudulently affixed."*

ARTICLE 177
"Where the person guilty of any of the crimes referred to in articles 171, 172 and 176 is a public officer or servant charged with the direction, custody, or proper application of the seals, stamps, or other instruments, the punishment shall be increased by one degree."

ARTICLE 178
"Any person guilty of any of the crimes referred to in articles 166 to 177 inclusively, shall be exempted from punishment if, before the completion of such crime and previously to any proceedings, he shall have given the first information thereof and revealed the offenders to the competent authorities."

Of Forgery of Other Public or Private Writings

ARTICLE 179
"Saving the cases referred to in the preceding subtitle, any public officer or servant who shall, in the exercise of his functions, commit forgery by any false signature, or by the alteration of any act, writing, or signature, or by inserting the name of any supposititious person, or by any writing made or entered in any register or other public act, when already formed or completed, shall, on conviction, be liable to imprisonment for a term from two to four years, with or without solitary confinement."

There are three elements which must be regarded:
1) The status of the agent - whether they're a public officer or a public servant (these two are often considered together in the eyes of the law)
2) The manner of the falsification (four manners contemplate)
3) The nature of the document falsified

The crime arises in the cases of the alteration of any act when the alteration is material (such as to affect the truth of the document). Arabia argued "*so that there can be the crime of forgery … the writing may … alter the truth contained in it, if the writing adds nothing or takes away nothing there would be no crime.*"
Therefore, there cannot be criminal forgery where there is no alteration of the truth.

ARTICLE 180
"Any public officer or servant who, in drawing up any act within the scope of his duties, shall fraudulently alter the substance or the circumstances thereof, whether by inserting any stipulation different from that dictated or drawn up by the parties, or by declaring as true what is false, or as an acknowledged fact a fact which is not acknowledged as such, shall, on conviction, be liable to the punishment established in the last preceding article or to imprisonment for a term from eighteen months to three years, with or without solitary confinement."

There are three ingredients which must be considered:
1) The status of the agent - whether they're a public officer or a public servant (these two are often considered together in the eyes of the law)
2) The falsification must concern an act falling within official duties
3) The manners specified within the article

There is an alteration of the substance of an act when as a whole, it expresses something different from the truth. There is alteration of circumstance mentioned in 180 when the falsification refers only to some particular or part only of the act. For this crime to arise, the falsified particulars must reflect the true intentions of the parties. This does not imply the requirement of the intent to defraud to be proved. Here, the word fraudulently means maliciously and deliberately. The intent to defraud thus, need not be proved.

In this context, it is important to remember the difference between forgery and simulation. The former is the alteration of the substance or circumstance of the act. With regards to the latter, that which the parties themselves say is untrue but the public officer innocently puts down that which they have been told. The parties in such a scenario are not acting in good faith.

A public officer has a two-fold function in drawing up an act:
- He acts as a direct witness
- He acts as an interpreter - he draft the intention of the parties agreeing in front of him by registering the facts as declared to him by the parties.

ARTICLE 181
"*Any public officer or servant who shall give out any writing in legal form, representing it to be a copy of a pubic act when such act does not exist, shall, on conviction, be liable to imprisonment for a term of thirteen months to two years, with or without solitary confinement.*"

ARTICLE 182
"(1) The punishment laid down in the last preceding article shall be applied where the forgery is committed by the public officer or servant on a legal and authentic copy, by giving out the same in virtue of his office, in a manner contrary to or different from the original, without this being altered or suppressed.
(2) Where such copy is so given out by the mere negligence of the public officer or servant, he shall, on conviction, be liable to a fine (multa)."

The notion of 'copy' has been outlined in the aforementioned sections. Article 636 of the Code of Organisation and Civil Procedure is rendered applicable o the Criminal Code through Article 520 and it outlines that which an authentic true copy is.

ARTICLE 183
"Any other person who shall commit forgery of any authentic and public instrument or of any commercial document or private bank document, by counterfeiting or altering the writing or signature, by feigning any fictitious agreement, disposition, obligation or discharge, or by the insertion of any such agreement, disposition, obligation or discharge in any of the said instruments or documents after the formation thereof, or by any addition to or alteration of any clause, declaration or fact which such instruments or documents were intended to contain or prove, shall, on conviction, be liable to imprisonment for a term from thirteen months to four years, with or without solitary confinement."

This is an umbrella clause. Article 183 is a popular offence where the objects of the crime and threefold:
1 - Authentic and public instrument
2 - Commercial document
3 - Commercial bank

A public officer does not render an instrument public and authentic purely because an instrument originated from him, he does so only if it is drawn up with the requisite formalities required by law and lawfully attributes public faith to it.

In Article 183, the intent to defraud need not be proven. Not is prejudice to third parties essential under this article.

Certain authors like Arabia, write that where the forgery relates to a Commercial or Private document, the crime will not subsist unless the forger has uttered the forged document. The probability is that the court will not accept this line of reasoning owing to the fact that in Article 184, "*any person who shall knowingly make use of…*" By implication, once the law is dealing with the use distinct from the forgery, the argument of Arabia is null and doesn't hold water as a separate offence is created under Article 184.

With reference to commercial documents, here, what is meant are writings which have for their object an Act of Trade as defined in the Commercial Code. A document is not a commercial document for the purposes of Article 183 simply because it emanates from a trader - it must refer to an an Act of Trade. If the document is a commercial document it foes't matter that the forgery has been committed by a non-trader.

ARTICLE 184
"Any person who shall knowingly make use of any of the false acts, writings, instruments or documents mentioned in the preceding articles of this Sub-title, shall, on conviction, be liable to the punishment established for the forger."

ARTICLE 185
"(1) Saving the cases referred to in the preceding articles of this Title, where any public officer or servant who, by reason of his office, is bound to make or issue any declaration or certificate, shall falsely make or issue such declaration or certificate, he shall, on conviction, be liable to imprisonment for a term from nine months to three years.
(2) Where the falsification is committed by any person, other than a public officer or servant acting with abuse of authority, the punishment shall be imprisonment for a term from seven months to two years."

ARTICLE 186
"Whosoever shall knowingly make use of any of the documents mentioned in the last preceding article, shall, on conviction, be liable to the same punishment established for the author thereof."

A defining word one must keep in mind in relation to this article is the word "Knowingly"

ARTICLE 187
"(1) Whosoever shall, by any of the means specified in article 179, commit forgery of any private writing tending to cause injury to any person or to procure gain, shall, on conviction, be liable to imprisonment for a term from seven months to three years, with or without solitary confinement.
(2) Whosoever shall knowingly make use thereof, shall be liable to the same punishment."

This article deals with private writings. The criminal code does not define a private writing, but according to Articles 683 of the COCP, all documents which have not been drafted with the requisite formalities required by law, by exclusion is deemed to be a private writing. The means are not specified, instead, we are referred to Article 179: "*Tending to cause injury to any person or to procure gain" - Atto a nuocere.* This wording is not found in relation to public documents.

This is an umbrella provision.
Sub-article 2 deals with "*knowing use".*

ARTICLE 188
"(1) Whosoever, in order to gain any advantage or benefit for himself or others, shall, in any document intended for any public authority, knowingly make a false declaration or statement, or give false information, shall, on conviction, be liable to the punishment of imprisonment for a term not exceeding two years or to a fine (multa):
Provided that nothing in this article shall affect the applicability of any other law providing for a higher punishment.
(2) Where the document referred to in sub-article (1) is not one intended for any public authority the punishment shall be that of imprisonment not exceeding one year or a fine (multa)."

THE COUNTERFEITING OF CURRENCY IS DEALT WITH FROM ARTICLE 188A TO 188H

ARTICLE 189
"Whosoever shall commit any other kind of forgery, or shall knowingly make use of any other forged document, not provided for in the preceding articles of this Title, shall be liable to imprisonment for a term not exceeding six months, and if he is a public officer or servant acting with abuse of his office or employment, he shall be punishable with imprisonment for a term from seven months to one year."

This is an umbrella provision which stands to include any kind of forgery. This is referred to by Italian authors as 'Falso Innominato'.

Il-Pulizija -v- Yunus Yusif: The Appellant admitted to falsifying an Italian residency card (permesso di soggiorno), which although is not classified or mentioned in the offences listed in the Title of Crimes affecting Public Trust, is punishable in the general offence of falsification found in Article 189

ARTICLE 189A
"For the purposes of this Title, "document", "instrument", "writing" and "book" include any card, disc, tape, soundtrack or other device on or in which information is or may be recorded or stored by mechanical, electronic or other means."

ARTICLE 190
"In all crimes of forgery when committed by public officers or servants, the punishment of perpetual general interdiction shall always be added to the punishment laid down for the crime."

This refers to a perpetual general interdiction. This means that the civil inexistence of a person. It is important that the implications and effects of such an action are not underestimated.

Antolisei
"*ogni scritto dovuto ad una persona che in esso si palesa continente esposizione di fatto o dichiarazione di volontà."*
The following 3 requisites emanate:

1. Forma scritta - The only requisite is that the writing is capable of communicating ideas. It is not necessary for a document to be written in a way with means that make it indelible either. Even if it is legible for a certain amount of time, it is sufficient.
2. La riconoscibilità del autore - The author can be identified. A document must indicate who made it. An anonymous writing doesn't constitute a document. The author of the document isn't necessarily the person who wrote the document: "*author e propriament culio (27:27)*
3. Il tenore - The content. Antolisei makes a distinction between *esposizzione de un fatto* or *dicerazzione di volontà.*

The essential function of the document is the fact that it transmits a juridical truth. It does't need to have been drawn up for this purpose, to show the content, but it is enough that the document can be used in this manner.

Emma de Gabriele

CRL2006: Substantive Criminal Law

11.10.2021 - Title I: Of Crimes Against the Safety of the Government

In this section, the title 'OF CRIMES AGAINST THE SAFETY OF THE GOVERNMENT' will be discussed, including especially Articles 55 and 56. In order understand Article 55 in all its complexities we must regard its history going back thousands of years.

ROMAN LAW AND *LEX MAIESTATIS*

To comprehend Article 55 we must enter into contemplations about the notions of *lex* and *crimen maiestatis* which encompass several ancient Roman Laws throughout the Republic and Imperial periods dealing specifically with crimes against the Roman people, state or emperor. *Crimen maiestatis* refers technically to acts which facilitate "the diminution of the majesty of the Roman people". The technical definition taken from Ulipan provided for in the Digest is as follows: "*maiestatis crime illud est quod adversus populum Romanum vel adversus securitatem eius committitur"* which translates to "the crime of *maiestatis* is that which is committed against the Roman people or against their safety." (SPQR).

The development of that which was contemplated under this law occurred as different emperors reformed its understanding mainly during the reign of Tiberius. However, in its vaguest sense as a portmanteau charge, it was deployed against any form of treason, revolt, or failure in public duty. This law effectively replaced by expanding in scope *perduellio* which referred to solely 'treason'. *Perduelles* were public enemies who bore arms against the state with the Twelve Tables making actions such as communication with the enemy and the betrayal of citizens to the enemy punishable by death. Additionally, treason was one of the *public judicia,* a crime any citizen is entitled to prosecute.

UK TREASONS ACT 1351

Despite the influence of Roman Law, the basis of Articles 55 and 56 remain the UK's Treasons Act of 1351. This refers to an Act of Parliament of England which codified the common law offence of treason - "A Declaration which Offices shall be adjudged Treason". Its purpose was to clarify that which treason is owing to the rapid expansion of its comprehension by the courts which in practise was controversially vast and difficult to apply. The king's judges expanded the notion of treason defending these actions by claiming that any "assortment of royal power", i.e. performing any action which only the king or his officers could by law perform, amounts to treason. An example of the ridiculous nature of this expansion is that in the 14th Century, judges determined that killing deer in the park belonging to the sovereign amounted to High Treason as you would be breaching the sovereign's rights. Additionally, when John Gerberge of Royston was convicted of treason for falsely imprisoning someone who owed him £90, the barons compelled Edward III to agree to an Act of Parliament to reign in and limit the extensive powers of the court in their determination of what constitutes as treason.

According to the American jurist and Supreme Court Judge Joseph Story, "[the 1351 Treasons Act] statute has since remained the pole star of English jurisprudence upon this subject." Moreover,

according the jurist Blackstone, the crime of treason is “the highest Civil crime which, as a member of the community, any man may commit.”

The Act distinguished between two forms of treason:
1. High Treason
2. Petty Treason, or *petit treason.*

The former refers to disloyalty, or to a breach of faith and trust owed to the sovereign from his subjects while the second refers to disloyalty to a subject, i.e. when a subject of the crown kills another who was his superior. This extends to also cover a wife killing her husband as men were considered to be above men in this regard.
The practical distinction in this regard relates to the consequences of conviction; the forfeiture provisions having since been repealed by the ‘Forfeiture Act 1870’ and the penalty was reduced from the death penalty to life imprisonment through the ‘Crime and Disorder Act of 1998'.

This Act contemplated seven classes of High Treason which today relate practically to Articles 55 and 56 under the Maltese Criminal Code.

(1) A person was guilty of high treason under this act if they “*doth compass or imagine the death of our Lord the King or of our Lady the Queen or of their eldest son and heir”.*
The use of the terms “compassed or imagined” insinuated that the death of the king, his wife or his eldest son and heir has to be planned. Such terminology is taken from the Norman French terminology "*fait compasser ou ymaginer*". Now owing to the ‘Succession to the Crown Act 2013’, the heir of the king is no longer the eldest son but the eldest child. While the term “*compassing”* is used specifically, it is not sufficient to render one guilty of this offence for thinking alone. An “*overt act”* must also be proven by judges in order for one to be guilty of treason under this and all subsequent titles.

(2) A person was guilty of high treason under this act if they violated the king’s companion, the king’s eldest daughter (if she was unmarried) or the wife of the kings eldest son and heir. Once again owing to the provisions within the ‘Succession to the Crown Act 2013’, the last contemplation is only valid if eldest son is the heir.

(3) A person was guilty of high treason if they levied war against the king in his realm.
Here, the interpretation of the word ‘war’ ought not be limited to that which is understood in International Law but ought to include any “*forcible disturbance that is produced by a considerable number of persons and is directed at some purpose which is not private but of a ‘general character’”.* It is also not necessary that those affecting such actions do so armed with military weapons.

(4) A person was guilty of high treason if they adhered to the king’s enemies in his realm, giving them aid and comfort in his realm or elsewhere.
In this context, ‘enemies’ ought to be understood using the International Law definition.

(5) A person was guilty of high treason if they counterfeited the Great Seal or the Privy Seal, a heading which was repealed and reenacted in the ‘Forgery Act 1830’ and reduced to a mere felony in 1861.

(6) A person was guilty of high treason if they counterfeited English coinage or imported counterfeit English coinage, an act reduced to a felony in 1832. The penalty for this was the same as petty treason.

(7) A person was guilty of high treason if they killed the Chancellor, Treasurer, one of the king's justices, a justice in eyre, an assize judge, and "*all other justices"* while they are performing their offices.

On the other hand, a person was guilty of petty treason for the murder of one's lawful superior. This offence was abolished in 1828.
The Act originally envisaged the fact that further forms of treasons would arise that would not be covered by this law and therefore, it legislated for this possibility: "*if any other car, supposed treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without any going to Judgment of the Treason till the Cause be shewed and declared before the King and his Parliament, whether it ought to be judged Treason or other Felony."*

The trial of **Roger Casement** in 1916 enabled a broader interpretation of this legislation in order for the notion "*in the realm or elsewhere"* to refer to anywhere an act may have been performed and not just where the king's enemy might be. Therefore, his defence that his collaboration with Germany during WWI did not amount to treason under the Act as the activity was not carried out on British soil, was null.

Closer look into Article 55 and Article 56 under the Maltese Criminal Code
Therefore, 'treason' (Article 55) and 'sedition' (Article 56) are the key focuses of our contemplation. It is interesting to note, however, that despite its importance as a concept, the word 'treason' is not present in the Criminal Code or in other relevant legislation. Article 55 is instead the embodiment and the equivalent of treason. Article 66 then embodies the notions of insurrection, coup d'état, sedition etc.

Article 55

Article 55:
"*Whosoever shall take away the life or the liberty of the President of Malta, or shall endanger his life by bodily harm, shall, on conviction, be liable to the punishment of imprisonment for life.*"

This articles relates specifically to the President as it is the President who occupies the highest national and political office in the nation and is the Head of State. It is under the President, the head of the body politic, that the nation is united. Therefore, the person holding this office is offered the highest protection under the law. The development of the concept which enables one person to symbolise the entire institution is a Roman Law development whereby legislation afforded protection to the Emperor as he represented the Roman state.

Treason strikes at the heart of the state and at the very life of the state.

Sedition is closely associated with treason but it more associated with public disorder and falls short of striking at the very heart of the state. It may lead to treason but it should not be equated with it.

This article discusses the killing or the taking away of liberty or the endangering by bodily harm which must be actual (probability in this case is not sufficient to amount to this offence) of the President of Malta. Any person committing this offence is liable to life imprisonment - the punishment inflicted is higher than that applicable when the crime is inflicted upon regular citizens owing to the nature of the role of the Present as the Head of State that resides on all three branches of government.

ARTICLE 55 AND ATTEMPT

When discussing this Article, it is important to consider the principles of attempt. In order to constitute a crime, two elements are required which refer to the *actus reus,* the unlawful act of commission or omission, and the *mens rea* which refers to the intent. The realm of punishable attempts exists when the entirely of the *actus reus* of the criminal offence has not been consummated but is performed only in part. In such cases, one can be held to be criminally liable without fully committing the crime as expressed under Article 41 of the Criminal Code.

Article 41 (1)"

"*Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by the commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction -*

(1) *If the crime was not completed in consequence of some accidental cause independent of the will of the offender, to the punishment of the completed crime with a decrease of one or two degrees;*
(2) *If the crime was not completed in consequence of the voluntary determination of the offender not to complete the crime, to the punishment established for the acts committed, if such acts constitute a crime according to law."*

(1) Refers to *Delitto Mancato* where the actus reus is interrupted by an accidental cause independent of the will of the offender.
(2) Refers to *Delitto Tentato* where the offender voluntarily desists from performing the execution of the crime.

Therefore, an attempt is a crime which, either because of some interruption outside the will of the offender or through a mistake on the offender's part, is not terminated by the desired event and has the following elements constituting it:

A) An overt act manifesting the intention to commit a crime;
B) The commencement of the execution of the crime;
C) The non-completion of the crime by reason of accidental circumstances independent to the will of the offender.

The basic distinction between an attempted offence and a consummated offence is that the punishment for the latter is decreased by one or two degrees. However, Article 55 is not subject to the principles of attempt and is an exception. Other exceptions include drug trafficking and money laundering. There is no reduction in the punishment for attempt in relation to the substantive content of the Article.

There is no case law on Article 55. However, the roots of this Article and of Article 56 are of immense importance since they form the bases of Article 68 which deals with the crime of assembly (*l-attruppament*), which is made use of in court fairly often and upon which we have case

law. The fact that there is no case law on this article means that the court have never needed to interpret the article to deduce the material and formal element of the crime. However, it is cleat what the *actus reus* consists of through reading the article.

Therefore, while generally attempt brings with it a lessening of the punishment, in such cases as under Article 55, attempt of the offence will not result in a reduction of the punishment by one or two degrees and will be treated as though the consummation of the act has occurred.

ARTICLE 55 AND COMPARISONS TO THE ITALIAN CRIMINAL CODE

Article 55 can be compared to Articles 276 and Article 277 of the Italian Criminal Code.
https://www.imolin.org/doc/amlid/Italy/penal_code.pdf - Access the Italian Criminal Code

Article 276 (Italian Criminal Code):
"*Attentato contro il Presidente della Repubblica -*
Chiunque attenta alla vita, alla incolumita o alla liberta personale del Presidente della Repubblica, e punito con l'ergastolo."
Translation: Anyone who attacks the life, safety or personal freedom of the President of the Republic, is punished with life imprisonment.

Article 277 (Italian Criminal Code):
"*Offesa alla liberta del Presidente della Repubblica -*
Chiunque, fuori dei casi preveduti dall' articolo precedente, attenta alla liberta Repubblica e punito con la reclusione da cinque a quindici anni."
Translation: Anyone who, apart from the cases provided for in the previous article, attacks the free Republic shall be punished with imprisonment from five to up to fifteen years.

In the Italian Code, there is specific focus and the amplification of the concept of 'liberty' through references to 'personal' and 'moral liberty'. In the Maltese Code, the word 'liberty' is not qualified and therefore, such a discussion is limited to 'physical liberty'. Article 277 further protects moral liberty by including the right to determination and the autonomy of individual action. Malta doesn't have an analogous provision to encompass that which is discussed in Article 277. The following position is considered in relation to this question of the inclusion of moral liberty in the Maltese Criminal Code - if the law wanted to include specific reference to this form of liberty, it would have: *ubi lex voluit dixit)*.

Further reading: Novissimo Digesto Italiano - 'Delitti Contro La Personalità dello Stato'.

The understanding of liberty was widened even within the UK's framework to include the imprisonment of the king as an offence constituting high treason. Such a development is owed in part to Machiavelli who argued that "between the prisons and the graves of Princes, the distance is very small."

Article 55A:
"*Whosoever by any means shall incite others to take away the life or liberty of the President of Malta or any Minister shall, for the mere incitement, be liable on conviction to imprisonment for a term not exceeding nine years of to a fine (multa) not exceeding five thousand euro or to both such a fine and imprisonment."*

This provision was introduced in 2018 and the contents of which are not drawn from Italian nor Anglo-Saxon law. This article allows for the sheer incitement of others to commit the crime as outlined by the rest of the article to be criminally liable.

HISTORY OF ARTICLE 55 IN MALTA

Article 55 appeared in Maltese Law in 1835 following the report drawn up by the UK British Commissioner which contained proposals to the Criminal Code. We identify Section 89 of this report to the be original Section 55 within out laws and was included following the insistence of Sir Adriano Dingli when the Criminal Code was promulgated in 1854. This section, at the time, related to the King, Queen and their heir. It formed a part of our statue books till 1974, however, following Malta's transition to a Republic, it was changed to discuss the President as opposed to the British Monarch. It discussed the crime of deprivation of the liberty of the King.

ARTICLE 55 AND THE ACTING PRESIDENT

Owing to the fact that we lack case law relating to this Article, there is a debate on whether such a provision extends to offer the same protection to the Acting President of the Republic. Chief Justice Emeritus De Gaetano argues that it doesn't stand to include the Acting President of the Republic and that due to the circumstances surrounding this Article, that it is a moot point.

DEFINING AND UNDERSTANDING 'TREASON' AND 'SEDITION'

Roman Law did not specifically define 'treason' nor 'sedition'.

'Treason' comes from the Latin word 'tradere' which means 'to betray'/

Manzini attempted to distinguished between *perduellio* and *crimen maiestatis.*

Under Germanic law, treason was understood to be a breach of trust and occurred either through the betrayal of one's allegiance or through the betrayal of one's Lord or Tribal King. As previously noted, in the UK, treason was either High Treason or Petty Treason.
Treason is generally understood to constitute a hostile act against the state by an internal enemy. A person who commits treason is said to be a 'traitor' because they are betraying their state.

In the Scottish Case of **'The Queen v. John Grant et.'**, Lord Justice Clark defined sedition as follows: "*Wilful, unlawfully and mischievously and in violation of the party's allegiance and in breach of the peace and to public danger, uttering language calculation to produce popular disaffection, disloyalty, resistance, to lawful authorities or in more aggravated cases, violence and insurrection.*"

This case is important in terms of Article 68. Here, what needs to be confirmed is that the individual accused of performing such actions is going beyond his fundamental right to exercise freedom of speech of legitimate objects but is performing such actions to purposefully incite popular disaffection.

According to Chief Justice Marshall, treason refers to "*the atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society.*"

'Sedition' per se is not found within the Criminal Code. However, under Maltese Law, there exists an Ordinance of Seditious Propaganda which is Chapter 71 of the Laws of Malta. The definition was

taken from Sir James Fitzjames Stephen's definition within the digest of English Criminal Law. However, under the English framework of laws, the crime of sedition is not contemplated, but there is the existence of the crime of sedition of words or seditious libel.
The English concept of sedition was heavily influenced by Scottish law which in turn was influenced by Roman law. The trials of Scotland, under the Presidency of Lord Braxfield is the first time in the history of Scottish law that the term of sedition was coined coming from the phrase 'taking away' and the latin word '*ire'* which means to go.

Article 338 of the Maltese Criminal Code discusses the contravention of breaching the public peace, the origins of which are Roman Law origins.

Article 338:
"*Every person is guilty of a contravention against public order who - …*"
Several contraventions are then contemplated from (a) to (mm).

Justinian referred to sedition as being something against the public peace or the public good: '*contra pubblica quiete'.* In Latin, the definition given by Justinian is the following: "*quo seditio tomolutsque adversus rem pubblica in fiate'.*

According to the English jurist Burger, under Roman Law, sedition stands to include "*open resistance and uprising of a rather large group of persons with the use of armed or unarmed force against Magistrates, a violent disturbance of a popular assembly or of a meeting of the Senate*."
This definition highlights both the qualitative and the quantitative elements of sedition by including contemplation of force and numbers.

https://www.um.edu.mt/library/oar/handle/123456789/59496

INTENT
There is no specific intent envisaged under Article 55 and thus generic intent is enough to incriminate the agent who performs the crime. In this situation, the onus of proof is lighter than that of wilful homicide. It is commonly held by text writers that the "*intentional element of this crime consists in the wilfulness of the act against the person of the sovereign and more precisely in the deliberate attack upon his person or his liberty."*

It is important to note that if Person Y wants to kill Person X but by accident kills the President, they are guilty by transferred malice.
In this context, causus and culpa apply if the president is killed by accident or by negligence and Article 55 doesn't stand to apply.

Some authors interpret this provision as a crime versus the security of the state as in order for this crime to have been commissioned, the agent must have willed the actions versus the President as the individual that represents the state. This would lead to the conclusion that if a person were to kill the President based on a personal feud and not owing to the President's capacity as Head of State, then Article 55 is inapplicable. However, it is doubtful if the court would apply these notions. More than likely, the motive or object of the crime would not necessarily need to be definitively ascertained seeing as the crime arises regardless of the motives, even if they were non-political motives.

Emma de Gabriele

18.10.2021

Article 56

Section 56 of the Criminal Code deals with insurrection and *coup d'etat*. The Statute of Treason of 1351 lists seven forms of high treason, five of which are contained within Article 56. It is important to note that this list is an exhaustive one and not an indicative one.

In the context of this article of law, the term "*subvert"* stands to include the destruction or forceful change of the Government which is not carried out by peaceful or democratic means. The element of violence is implicitly implied in order for subversion to take place. What amounts to subversion according to law is exhaustively listed through Articles 56(1)(a), 56(1)(b), 56(1)(c), 56(1)(d) and 56(1)(e).

Article 56(1)(a), 56(1)(d) and 56(1)(e) contemplate the actual crime of insurrection.

Article 56(1)(a):
"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: taking up arms against the Government of Malta for the purpose of subverting it".*

Article 56(1)(d)
"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: usurping or unlawfully assuming any of the executive powers of the Government of Malta, for the purpose of subverting it"*

Article 56(1)(e)
"Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: taking up arms for the purpose of compelling the Government of Malta to change its measures or counsels, or of obstructing the exercise of its lawful authority."

In simpler terms, Article 56(a) contemplates the taking up of arms against the Government of Malta, Article 56(d) contemplates the usurping and unlawfully assuming executive powers of the Government of Malta and Article 56(e) discusses another facet of taking up arms against the Government of Malta to obstruct the exercise of lawful authority.

Therefore, the obvious form of offence outlined by these section is a *coup d'etat* whereby the power of the government is taken unlawfully. However, not all cases are clear cut, for example, if an armed group of people were to attack a police station to protest against a government measure, according to the English case law and authors, if the object of the uprising is of a private or local nature, such act would be one against public tranquility but not against the safety of the government. A crime against the safety of the government is one of a public and general nature.

Article 56(b) and 56 (c) are considered to be acts of disloyalty and deal with the bearing of arms and the aiding of the enemy of the Republic respectively.

Article 56(b):

"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: bearing arms in the service of any foreign Power against the Republic of Malta".*

Article 56(c):
Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: aiding the enemies of the Republic of Malta in any other manner whatsoever against the said Republic."

The case of **Rex v. Carmelo Borg Pisani**, Carmelo Borg Pisani was tried under Article 56(c) and is the only Maltese to have been found guilty of sedition. Borg Pisano was accused of conspiring with a group whose members owed their allegiance to Italy during WWII. While Borg Pisani was unaware of the identity of his co-conspirators, he was found to have been a member of the Commitato Azzione Maltese, a group set up to help the enemies of the King with the aim of uniting Malta with Italy. This group published a newspaper, made radio transmissions and set up exhibitions.It was argued that a relationship between co-conspirators or even awareness of all the members of a conspiracy was not necessary in order for one to be found guilty. Therefore, since Borg Pisani formed part of a group which detailed the plan of action to commit a crime and in doing so breached Article 56(c) of the Criminal Code, he was found guilty.

VOLUNTARY DESISTANCE
Contemplated within Article 56 is a reduction of punishment owing to voluntary desistance.

Article 56(2):
"*The punishment, however, shall be diminished by one or two degrees, where the crime is not carried into effect, in consequence of the voluntary determination of the offender not to complete the crime."*

Through this sub-article we note that the diminishing of punishment can only be due to voluntary desistance and cannot be granted if the desistance occurred owing to an accidental cause independent to the will of the offender. Usually when regarding the 'attempt' under the Maltese Criminal Code, when the *actus reus* is interrupted by an accidental cause independent of the will of the offender, this is enough to result in a reduction of punishment under Article 41(1)(a). This is known as *Delitto Mancato.*

Article 41(1)(a):
"*Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by the commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction - If the crime was not completed in consequence of some accidental cause independent of the will of the offender, to the punishment of the completed crime with a decrease of one or two degrees."*

However, in relation to this article, this is not grounds for a diminishing of punishment. The only manner in which a diminishment of punishment may be awarded is discussed through Article 41(1)(b) which discusses this notion of voluntary desistance from the performance of the execution of the crime - *Delitto Tentato.*

Article 41(1)(b):
"*Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by the commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction - If the crime was not completed in consequence of the voluntary determination of the offender not to complete the crime, to the punishment established for the acts committed, if such acts constitute a crime according to law.*"

Although in relation to voluntary desistance the actions of the state are not punishable, owing to the state's desire to protect itself as much as possible, the law punishes the conduct regardless.

WHAT IS THE *MENS REA?*
English case law, predominantly, states that intention must be proved in the sense that recklessness is not enough.

HISTORICAL CONTEXT
Article 56 was mentioned in the 1835 Commissioners report. It was argued that:
"*Chiunque sovvertisce o forzamente cambiasse il governo di suo maestà stabbilito nell' isola di Malta o in qualunque altro dei domini della corona Brittanica sarà punito con la morte*."
Translation: Anyone who subverts or forcibly changes the government of his majesty established in the islands of Malta or in any of the dominions of the British crown is to be punished with death.

Here, the word *forzamente* is important to regard. This is because in democratic processes, governments change owing to natural progression and the nature of democracy itself, however, the element of force never ought to play a part in this process.

In the Code of Two Sicilies, the analogous article was as follows: "*e misfatto di lesa maesta ed e punito con la morte l'attentato o la conspirazzione che abbia per oggetto di distruggere o di cambiare il governo o di eccitare i suddeti del regnio ad armarsi contro l'autorita reale.*"
It is an act of lesa maesta an act of attempt or conspiracy that has as its object to destroy or change the government or to excite the subject of the kingdom to arm themselves against the royal authority and is an act punishable by death.

The use of the term 'conspiracy' opens a very important door onto a very vast subject which will be discussed in the future. It is here that conspiracy was brought up in relation to such acts.

In 1842, the Commissioners came once more and drew up another report. In relation to Article 56, a shorter provision was made which stated that "*chiunque sovvertisce il governo di sua maesta stabbilito nell'isola di Malta arà punito con la morte.*"
Whoever subverts the government of his King will face the death penalty.
This excludes the forceful change of government from the analysis as was included in the previous report.

In 1844 the famous jurist Andrew Jameson, who made a huge contribution to Maltese Criminal Law at large, noted that the term "subvert" as was being made use of was vague and therefore, not as practically functional in terms of application. He argued that specific heads of treason ought to be spelled out and this led to the development of Article 56 which sets out specific criminal actions in relation to this. In 1854 the Criminal Code was promulgated and from 1856, this article remained the same till 1974 till Malta became a Republic.

It is interesting to note that when reading the Italian author Manzini on this subject, his commentary of Article 284 of the Criminal Code is important. Article 284 of the Italian Criminal Code states the following:

Article 284:
"*Insurrezzione armata contro I poteri dello stato e punito con l'ergastolo*"

What needs to be regarded is the reference to 'powers of the state'. This isn't exhausted through reference to the government. The powers of the state refer to the three separate branches of the state and thus, under the Italian Criminal Code, insurrection against the judiciary is contemplated.

ARTICLE 56(1)(A)
Article 56(1)(a):
"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: taking up arms against the Government of Malta for the purpose of subverting it".*

This relates to the offence of taking up arms against the government of Malta for the purposes of subverting it. In this case, mere attempt is put on par with the very act of subverting. The attempt requires an overt act. Under 56(1)(a) specific intent is required owing to the use of the wording *"for the purpose of".* This indicates that generic intent is not sufficient but that *dolo specifico* is required.

In this provision, "*taking up arms"* is discussed, however, what this substantively means isn't defined. However, a definition and distinction exists between 'arms proper' and 'arms improper' through Article 64 of the Criminal Code. Further information is also provided through the Weapons Act.

Article 64:
"(*1) Arms proper are all fire-arms and all other weapons, instruments and utensils which are mainly intended for defensive or offensive purposes.*
(2) All other weapons, instruments or utensils are not considered as arms, except when they are actually made use of for any offensive or defensive purpose, in which case they are called arms improper."

In this case, the taking up of arms is sufficient in itself. It is not necessary that the offender has lined himself up with the armed forces.

When looking at he UK Treasons Act of 1351, the third head of treason as contemplated by this legislation, i.e. *a person was guilty of high treason if they levied war against the King in his realm,* is very similar to that which is discussed through Article 56(1)(a). The English author Kenny when explaining "*levying war"* notes that this doesn't refer to war as understood by International Law but describes it as a "f*orceful resistance of a general character."*

In the 1921 English Court case **Rex v. Hardy***,* it was notes that the object of the insurrection is what is important and not the force employed or the number of people assisting in the commission of the crime. Another case of importance in this regard is the case of **Regina v. Galliger (1883)**. Here,

the accused was a member of a brotherhood and was found guilty of treason for levying war against the Queen in an attempt to obtain freedom for Ireland through the use of explosives.

Article 270 of the Italian Criminal Code of 1930 deals with "subversive association". The association is regarded as being subversive if it aims at one of a number of things:

1. To establish by violence the dictatorship of one social class over another;
2. To suppress by violence one of the social classes;
3. To subvert by violence the economic or social order existing in the state;
4. To overthrow by violence the legal and political institution of society.

Article 270: "*Associazioni sovversive"*
"*Chiunque nel territorio dello Stato promuove, costituisce, organizza o dirige associazioni dirette a stabilire violentemente la dittatura di una classe sociale sulle altre, ovvero a sopprimere violentemente una classe commesso: sociale o, comunque, a sovvertire violentemente gli ordinamenti economico sociali costituiti nello Stato, e punito con la reclusione da cinque a dodici anni.*
Alla stessa pena soggiace chiunque nel territorio dello Stato promuove, costituisce, organizza o dirige associazioni aventi per fine la soppressione violenta di ogni ordinamento politico e giuridico della societa. Chiunque partecipa a tali associazioni e punito con la reclusione da uno a tre anni.
Le pene sono aumentate per coloro che ricostituiscono, anche sotto falso nome o forma simulata, le associazioni predette, delle quali sia stato ordinato lo scioglimento."

This contains and reflects a lot of political history of Italy and nods its head towards the facist regime the Italians lived through, the conflict between communism and fascism and later in the 1970s the Brigade Rosse and the kidnapping of the Italian Prime Minister Aldo Moro to collapse the government in relation to the corruption of the Secret Service. In Malta, there doesn't exist a counterpart to this Article.

These 4 heads as outlined have the use of "violence" in common.
Manzini argued thus that subversive association refers to "whenever the association does not limit itself to cultivate or propagate ideas or aspirations for reform to be achieved by or through constitutional means but aims at situations or results to be achieved by the use of violence against the opposition which the political and social institutions would naturally put up to defend themselves."

This boils down to the question of the rule of law. This is the anthesis of might is right which is that which this article is protecting against. While Manzini is referring to Article 270 of the Italian Criminal Code when he expanded on subversive association, which we don't have reproduced in our Criminal Code, the concept of sedition is still present and therefore, this definition which is provided is important.

Article 272 of the Italian Criminal Code moves on to discuss anti-national and/or subversive propaganda. For example, one attempts to justify a crime through propaganda - id-delitt tal-apologija, for example someone claiming that the Holocaust didn't happen. In terms of Article 272, anti-national and/or subversive propaganda is propaganda which promotes the fours aims contemplated through Article 270 as well as "to discourage and destroy the national sentiment". The latter is also absent within the Maltese Criminal Code.

Article 272: "*Propaganda ed apologia sovversiva o antinazionale"*

"*Chiunque nel territorio dello Stato fa propaganda per la instaurazione violenta della dittatura di una classe sociale sulle altre, o per la soppressione violenta di una classe sociale o, comunque, per il sovvertimento violento degli ordinamenti economici o sociali costituiti nello Stato, ovvero fa propaganda per la distruzione di ogni ordinamento politico e giuridico della società, e punito con la reclusione da uno a cinque anni.*
Se la propaganda e fatta per distruggere o deprimere il sentimento nazionale, la pena e della reclusione da sei mesi a due anni(1).
Alle stesse pene soggiace chi fa apologia dei fatti preveduti dalle disposizioni precedenti.
(1)La Corte costituzionale, con sentenza 6 luglio 1966, n. 87, ha dichiarato l illegittimità costituzionale di questo comma."

This type of propaganda under Article 272 is similar to that which is outlined by Chapter 71 of the Laws of Malta: The Seditious Propaganda Ordinance. This was enacted in 1932 and is a reflection of the times which Malta was passing though, similar to Article 270 of the Italian Criminal Code. In 1932, Malta was in the throws of a very acrimonious debate between English and Italian and whether Maltese should be the national language of Malta, i.e. The Language Question. This was emphasised by a question as to whether Malta ought to be annexed to Italy. This is significant seeing as the year after, in 1933, Mussolini came to power in Italy. I
In Chapter 71, a definition of seditious material. This is not found in the Criminal Code.

Article 270 bis of the Italian Criminal Code discusses "*associazzioni terroristiche o eversive".* This wording is not made use of in the Maltese Criminal Code seeing as the nation did not go through the historic feat of the Red Brigade and their kidnapping of Italian Prime Minister Aldo Moro and thus the law reflects this accordingly.

Article 270 bis: "*Associazioni con finalita' di terrorismo anche internazionale o di eversione dell'ordine democratico*"
"*Chiunque promuove, costituisce, organizza, dirige o finanzia associazioni che si propongono il compimento di atti di violenza con finalita' di terrorismo o di eversione dell'ordine democratico e' punito con la reclusione da sette a quindici anni."*

Article 280 of the Italian Criminal Code is also notably without a counterpart in domestic legislation as speaks of the following: "*attentato per finalita terroristiche o di eversione".*
The Italian Criminal Code distinguishes between '*eversione*' and '*sovversione*'.

Article 280: "*Attentato per finalita terroristiche o di eversione"*
"*Chiunque, per finalita di terrorismo o di eversione dell ordine democratico attenta alla vita od alla incolumita di una persona, e punito, nel primo caso, con la reclusione non inferiore ad anni venti e, nel secondo caso, con la reclusione non inferiore ad anni sei."*

Article 289 bis: "*Sequestro di persona a scopo di terrorismo o di eversione"*
"Chiunque per finalita di terrorismo o di eversione dell ordine democratico sequestra una persona e punito con la reclusione da venticinque a trenta anni…"
This was introduced following the kidnapping of the Prime Minister Aldo Moro in 1978. He was kidnapped owing to his attempt to find compromise in terms of the governance of the country. The Red Brigade who were very influenced by Communism decided that they could not stand for elements of the state bearing a resemblance to Mussolini's Italy in the 1930s and thus, they

kidnapped him and regarded his actions to be treason against the people. They tried him through a 'tribunal of the people' and found him guilty and killed him.

The word '*eversione'* according to Manzini means"*capovolgere violentemente".* This refers to the employment and use of violence to effect change.

Another Italian author Antolisei sums up the notion of *'eversione'* in the following terms:
"*L'eversione dell'ordine democratico e lo stravolgimento dell'ordine constituzzionale cioe la radicale violazione atuata con la violenza dei principi seconda la nostra carta fondamentale debbono disciplinare la dialettica politica."*
This is the antithesis of the rule of law as in such situations one takes the law in their hands. This cannot be done in a democratic country as when one lives in a country where might is right, the weak suffer. Through such actions, one radically violates the principles which according to our constitution must discipline our political debate.
This is similar to Article 85 of the Maltese Criminal Code deals with unlawful pretended rights.

For the Italians, as mentioned there is a difference between '*eversione*' and '*sovversione*'. Subversion, as understood by the Maltese Criminal Code, encompasses more than just upsetting the government but stands to include overthrowing and destroying the government through the means outlined in the law.

Article 56 mentions the "*Government of Malta*". The term "*Government of Malta*" is found in various sections of our law:

1. Article 87 of the Constitution of Malta where it includes the Judiciary
   "*The Prime Minister shall keep the President fully informed concerning the general conduct of the Government of Malta and shall furnish the President with such information as he may request with respect to any particular matter relating to the Government of Malta*"

2. Article 92(1) of the Constitution of Malta. Through the mentioning of "*department of government"*, it is restricted the the Executive branch.
   "*Where any Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department; and, subject to such direction and control, the department may be under the supervision of a Permanent Secretary*"

3. Article 92 of the Criminal Code. Through the mentioning of "*public officer",* it refers to the Executive branch.
   "*The general expression "public officer", includes not only the constituted authorities, civil and military, but also all such persons as are lawfully appointed to administer any part of the executive power of the Government, or to perform any other public service imposed by law, whether it be judicial, administrative or mixed."*
4. Article 112 of the Criminal Code. The term "*Government*" means the three branches of power.
   "*Any officer or person employed in any public administration, or any person employed by or under the Government, whether authorized or not to receive moneys or effects, either by way of salary for his own services, or on account of the Government, or of any public establishment, who shall, under colour of his office, exact that which is not allowed by law, or more than is allowed by law, or before it is due according to law, shall, on conviction, be liable to*

imprisonment for a term from three months to one year.

5. Article 170(1) of the Criminal Code. The term "*Government of Malta*" stands to include the Legislative and the Executive but not the Judiciary owing to the use of the word "*resolution"* as the Judiciary doesn't issue resolutions.
   "(*1) Whosoever shall forge any act containing an order or resolution of the Government of Malta, and whosoever shall forge any judgment, decree, or order of any court, judge, magistrate, or public officer, whereby any obligation is imposed or terminated, or any claim allowed or disallowed, or whereby any person is acquitted or convicted on any criminal charge, shall, on conviction, be liable to imprisonment for a term from two to four years, with or without solitary confinement."*

6. Article 175 of the Criminal Code. Here, the term "*Government of Malta"* refers only to the Executive branch.
   "*The same punishment established in article 173 shall apply to any person who, without lawful authority or excuse, (the proof whereof shall lie on the person accused), knowingly purchases or receives, or takes or has in his custody or possession any paper exclusively manufactured or provided by or under the authority of the Government of Malta, for use as envelopes, wrappers or postage stamps, and for receiving the impression of stamp dies, plates or other instruments provided, made or used by or under the authority of the Government for postal purposes, before such paper has received such impression and has been issued for public use."*

7. Article 292 of the Criminal Code. Here, the term "*Government of Malta"* refers only to the Executive branch.
   "*Whosoever, without a licence from the Government, shall keep for sale or deal in any articles which are by common repute considered to come under the denomination of marine or ship's stores, and whosoever, without such licence, shall be found in possession of such articles, without being able to give a satisfactory account as to how he came by the articles so found, shall, on conviction, be liable to a fine (multa) and to the forfeiture of the said articles."*

8. Articles 290 and 291 of the Criminal Code speaks of properties belonging to the Republic of Malta.

Therefore, the "*Government of Malta"* can be understood as the whole machinery of the state carrying out the business of a country (the three organs of the state) and the executive organ of the State, interpreted to included the Armed Forces of Malta and the Police but not the legislature, judiciary or body established by law. Since the law gives no definition of Government in this article or the purposes of it, it is likely that the more extensive interpretation ought <u>not</u> to be applied. It is very unlikely that an attack on the judiciary can be considered an attempt to subvert the Government of Malta.

ARTICLE 56(1)(B)

Article 56(1)(b):
"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: bearing arms in the service of any foreign Power against the Republic of Malta".*

In relation to this Article, there need not be a declaration of a war in an international sense. Moreover, it doesn't distinguish between bearing up arms in Malta or elsewhere. There is the implication that there must be hostility between Malta and a foreign state for this article to apply. It is important to note also that 'bearing arms' is different from 'taking up arms'.

Article 56(1)(b) can be compared with Article 242 of the Italian Criminal Code which speaks of both 'bearing arms' and giving service to armies. Article 242 mentions "*il-cittadino"* which the Maltese law doesn't touch upon. The Maltese Code instead states "*whosoever".*

Article 242: "*Cittadino che porta le armi contro lo Stato italiano"*
"*Il cittadino che porta le armi contro lo Stato, o presta servizio nelle forze armate di uno Stato in guerra contro lo Stato italiano, e punito con l ergastolo. Se esercita un comando superiore o una funzione direttiva e punito con la morte(1).*
Non e punibile chi, trovandosi, durante le ostilita , nel territorio dello Stato nemico, ha commesso il fatto per esservi stato costretto da un obbligo impostogli dalle leggi dello Stato medesimo.
Agli effetti delle disposizioni di questo titolo e considerato "cittadino" anche chi ha perduto per qualunque causa la cittadinanza italiana.
Agli effetti della legge penale, sono considerati "Stati in guerra" contro lo Stato italiano anche gli aggregati politici che, sebbene dallo Stato italiano non riconosciuti come Stati, abbiano tuttavia il trattamento di belligeranti.
(1)La pena di morte e stata soppressa e sostituita con l ergastolo."

The term 'bearing up arms' may give rise to doubt whether someone who joined the armed forced against the Government of Malta in a non-combative position would be guilty of this crime. Manzini says that 'bearing up arms' is the literal translation of the Latin phrase '*arma ferre*'. The first use of this phrase can be found in Roman Law in the Lex Julia Majestatis. Under the old Germanic Code, the expression made use of was "*serving with enemy forces"* which stands to include not only service with enemy forces a combatant but also service in any other capacity.

However, "*Portare le arme*"/bearing up arms does not only mean carrying a weapon but also includes effective participation in the hostility in a combatant capacity in the service of the foreign power. It is not necessary that the individual has fought in active battle - mere enlistment is enough.

In fact, the defence of **Carmelo Borg Pisani** in 1942 was that he wasn't carrying any arms or making use of any arms. He argued that while he was a part of the Italian army, he was not active. This defence was denied and therefore, mere enlistment means bearing up arms.

In the case **Rex v. Casement (1917)** it was noted that "*any act done by a British subject who strengthens or tends to strengthen the enemies of the King in the conduct of a war against the Kind constitutes giving aid and comfort to the King's enemies."*

ARTICLE 56 (1) (C)
Article 56(c):
Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: aiding the enemies of the Republic of Malta in any other manner whatsoever against the said Republic."

This article deals with aiding the enemies of the Republic in any manner versus the Republic itself. Here, 'enemies' ought to be understood in the strict sense of true belligerents in accordance to Palzon in the 'Annotazioni all Leggi Criminale'. Therefore, it is likely that the aiding of a terrorist organisation against the state will fall under this article but this boils down to a matter of interpretation. When questioning whether the enemies of the Republic must in a state of war, the court treats this on an *ad hoc* basis. However, if we're speaking of enemies, there must at least be a sense of hostility.

Aid may be in various forms including financial aid, the provision of equipment, spying, sabotage and changing nationality during times of war as was established through the case of **R v. Lynch** and **Rex v. E.F. et**. Moreover, giving aid to an enemy agent against an ally is sufficient to constitute the crime, as was determined through **Rex v. B.P.**.

With respect to attempt and punishment, we understand that attempts of a crime of this nature are subject to the same punishment as the completed crime. An explanation as to why that is can be identified from a famous speech delivered by Areri where he points out that the legislator, in views of the danger that the state would encounter during such attacks, equates the attempt to the commission of the crime so long as the true characters of attempt are present, noting further that such precautions ought to be present in a meaningful way and not accidentally in order to secure the integrity of the state. However, it is provided for that where the crime is not carried into effect owing to voluntary determination of the offender, the crime may be reduced by one or two degrees.

25.10.2021

ARTICLE 56(1)(D)
Article 56(1)(d)
"*Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: usurping or unlawfully assuming any of the executive powers of the Government of Malta, for the purpose of subverting it".*

Article 56(1)(d) requires a specific intent and not a generic intent in order for the crime to be fulfilled as can be ascertained through the use of the words "*for the purpose of"* in the provision.

Here it is important to note that "*usurping"* and "*unlawfully assuming"* for this purpose are synonymous however, the law is silent on how these come into being solely that actions of usurpation and unlawful assumation must be made towards the executive powers of the Maltese State including the political powers of Ministers, Parliamentary Secretaries, the Armed Forces of Malta A reference ought to be made here to Article 287 of the Italian Criminal Code.

Article 287: "*Usuerpazione di potere politico o di commando militate"*
"*Chiunque usurpa un potere politico, ovvero persiste nell'esercitarlo indebitamente, e punito con la reclusione da sei a quindici anni.*
Alla stessa pena soggiace chiunque indebitamente assume un alto comando militare.
Se il fatto e commesso in tempo di guerra, il colpevole e punito con l ergastolo; ed e punito con la morte(1), se il fatto ha compromesso l esito delle operazioni militari.

(1) La pena di morte e stata soppressa e sostituita con l ergastolo."

Usurpation implies absolute arbitrariness and illegality of the means used. The means specially made use of are irrelevant as this doesn't necessarily imply the use of force or violence, it could stand to include for example, bribery.

Article 56(1)(d) refers to the Executive arm of the Government of Malta through mention of "*the Government of Malta".*

ARTICLE 56(1)(E)

Article 56(1)(e)

"Whosoever shall subvert or attempt to subvert the Government of Malta by committing any of the acts hereunder mentioned, shall, on conviction, be liable to the punishment of imprisonment for life: taking up arms for the purpose of compelling the Government of Malta to change its measures or counsels, or of obstructing the exercise of its lawful authority."

This article talks about "*taking up arms"*. This can be compared to Article 71 in which Article 56 is explicitly mentioned. Article 71 deals with a different crime. However, the difference between them is while Article 56(1)(e) makes specific reference to the action of "*taking up arms",* Article 71 doesn't stand to include this action. Therefore, if someone commits the same material offence without "*taking up arms"* they are not guilty of this offence but of Article 71.

Article 71:

"*Whosoever shall, by any unlawful means not amounting to the crime referred to in article 56, endeavour to compel the President of Malta or the Government of Malta, to change his or their measures or counsels, shall, on conviction, be liable to imprisonment for a term from six months to two years"*

It is important to note that Article 56(1)(e) can be the subject of attempt under the general principles of attempt.

Conspiracy

Articles 57 & 58

Thesis 2017: Jeremy Muscat on Conspiracy.

Conspiracy is originally a British Common Law concept. The general crime of conspiracy in Maltese law was introduced formally in 2002 through Article 48A.

Article 48A:

"*(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.*

(2) The conspiracy referred to in sub-article (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.

(3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.

(4) For the purposes of sub-article (3), in the determination of the punishment for the completed offence object of the conspiracy account shall be had of any circumstances aggravating that offence."

The offence of conspiracy seeks to criminalise and punish the indirect harm which would have arisen if the conspiracy had been allowed to take its natural course. The legislator believes that the agreement between two persons which includes agreement on the mode of action to commit the crime is in itself dangerous and therefore it must be punished and repressed. This is why conspiracy is a general crime. The legislator believes that should this agreement take place, it is not prudent to wait for the commencement of the execution of the crime which would allow for a punishable offence, but established grounds for criminal conspiracy whereby those caught conspiring to commit a crime can be apprehended and punished.

A criminal conspiracy is formed when the conspiracy is directed towards performing a criminal action. It extends criminal responsibility to a moment in time when the act was previously not considered to be punishable.

CRITERIA OF CONSPIRACY

Under Maltese Law, the substantive crime of conspiracy is completed once the means to be employed have been agreed upon between two or more persons, i.e. the mode of action. It is not required that the conspirators did something in furtherance to the mode of action.

There are three criteria which ought to be considered: The Act of Agreement, The Persons Agreeing and the Purpose Agreed Upon and Mode of Action.

(1) The Act of Agreement

There must exist an agreement between two or more parties to commit an offence. According to Lord Chelmsford, "*agreement is an act in advancement of the intention which each person has conceived in his mind".* Therefore, it is not mere intention which gives rise to conspiracy. In order for this criterion to be satisfied, one must give their acquiescence - announcement and acceptance of intentions. This may occur in various forms such as through speech, writing, gestures etc. It may also be a tacit agreement. The *actus reus* in cases of conspiracy refers to the acceptance to commit a crime through an agreed upon means which indicates an individual's adherence, confirmation and agreement of the conspiracy plot being formulated. This must exist in addition to the intent to commit the crime.

The offence of conspiracy must satisfy the *actus reus* and mens *rea* requirements. This is difficult to do as the offence stems from English Common Law, whose fundamental legal principles propping up liability and responsibility differ greatly from the principles made use of in Malta i.e. make use of a different theory of liability in terms of *actus reus* and *mens rea* than Carrara's theory.

An analysis of Article 48A(2) establishes that simple agreement and intent to commit a crime is not sufficient to prove conspiracy. There exists the necessity of there being an agreed upon mode of action.

(2) The Persons Agreeing

It is an essential element that there must be at least two conspirators. However, it is not essential that such conspirators know each other personally. In the case '**R. v. Griffith**' it was proved that

various co-conspirators may come in at any time so long as and they come in agreeing to the mode of action. Moreover, they need not know all the other conspiring parties.

The above can also be identified from the case of **Rex v. Carmelo Borg Pisani**, who was accused of conspiring with a group whose members owed their allegiance to the Italian regime to commit a coup d'etat during WWII. While the defence argued that Borg Pisani was unaware of the identities of his alleged co-conspirators and thus couldn't be conspiring, the court declared that a relationship between co-conspirators, or even awareness of all members of the conspiracy, was not necessary.

Through this case the Courts defined conspiracy as coming into existence at the moment where the means of action which will lead to an offence are agreed upon by two or more persons. Borg Pisani forming part of the group which detailed the plan of action to commit a crime amounted to him being regarded as an equal conspirator. Therefore, it can be concluded that even if a conspiracy had formed prior to a person's entrance into a group, but the person still knowingly joined afterwards, then they are to be regarded as equally guilty.

The fundamental element is that there must be a common goal on which there is agreement between all conspirators which can be transmitted through third parties. This was once again emphasised in the cases **'R v. Griffiths'**.

(3) The Purpose Agreed Upon
The purpose of the conspiracy, according to Article 48A(1), is essential in the commission of "*any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Ac*t". This excludes primarily contraventions.

Therefore, the purpose agreed upon must be an illegal purpose. However, it is important to note that in the 1967 English Court of Appeal judgment **Churchill v. Walton**, the court concluded that if, on the facts known by the conspirators, what they agreed to do was lawful no conspiracy can arise.

This must not be confused with ignorance of the law as *ignorantia legis nemimen excusat* - ignorance of the law is never an excuse. Therefore, one cannot defend themselves upon being charged for having committed a criminal offence by claiming that they were unaware that that which they were doing is illegal. This maxim that a mistake of law cannot serve as a legitimate defence is absolute, applicable for both crimes and contravention and applicable for all people within any given jurisdiction.

(-) Agreement on the Mode of Action (Modus Operandi)
This constitutes the formal condition of liability - the *mens rea.* As previously mentioned, it is upon this criterion that Maltese and English Common Law differ. Under the former, Article 48A(2) introduces the concept of the 'mode of action', making it so that in order for persons to be found guilty of conspiracy, the prosecution must prove:
- Agreement between conspirators
- The intent to commit the crime
- The mode of action agreed upon by the conspirators

The mode of action does not refer to preparatory acts which come after the agreement is in place but refers to the planning stage where conspirators agree upon the particulars. This must be

complete and not dependent on unforeseeable circumstances. Should such conditions exist, meaning the plan is incomplete or dependent on variable circumstances, then no mode of action has been agreed upon. There is no need for the commencement of the execution of the crime to begin, i.e. putting the plan into action, as that would enter into the realm of criminal attempts.

Under the latter, it must be proven that between co-conspirators, there is the intent and agreement to commit a substantive crime and that the conspirators were determined to commit such a crime. The outlines of such are detailed in the court judgment delivered on the basis of the case **'R v. Aspinall' (1876)**.

The mode of action ought not to be confused with the commencement of the execution of the crime as found when analysing the notion of attempt.

There is no mention of the mode of action indicating that the onus of proof is higher on the prosecution when proving conspiracy to commit a crime under Maltese law as they must prove beyond a reasonable doubt the criteria listed above.

It is important to specify that in relation to conspiracy, one cannot have attempted conspiracy as once the mode of action has been agreed upon the crime of conspiracy is complete.

Before 2002, conspiracy as contemplated under Maltese law were limited to specific instances prescribed by law. These included Article 57 of the Criminal Code as well as through Article 22(1) of Chapter 101 of the Laws of Malta: The Dangerous Drugs Ordinance and Chapter 31 of the Laws of Malta: Medical Kindred Professions Ordinance. Article 57 discusses conspiracy to commit the crimes discussed in the previous two articles, therefore, Articles 55 and 56 relating to sedition and treason respectively.

Article 57:
"(1) Whosoever shall take part in a conspiracy having for its object any of the crimes referred to in the last preceding two articles, shall, on conviction, be liable to imprisonment for a term from three to six years.
(2) Where, besides the mere conspiracy, preparatory measures for carrying the crime into effect shall also have been taken, the punishment shall be of imprisonment for a term from five to nine years."

It is important to note that there exists a distinct between attempt, complicity and conspiracy - they are not the same. If the commencement of the execution of the crime has begun, then the offence of conspiracy will be inserted under the charge of attempt under Maltese procedural law.

Whoever conspires with the object of committing the acts listed through Article 55 and Article 56 is found guilty of Article 57. Therefore, under Maltese Law, the substantive crime of conspiracy against the state exists and is contemplated as soon as the means employed for carrying out the common purpose have been agreed upon or settled between two or more persons. Bare intention is not sufficient - it is necessary that the persons taking part int he conspiracy should have devised and agreed upon the means for acting.

Generally, "*preparatory measures"* were discussed in relation to attempt. In this regard, a distinction was made between preparatory acts and the commencement of the execution of the crime. Usually, in cases of attempt, preparatory acts are never punished. The exception to this lies in Article 57(2) which provides for punishment for engaging in mere preparatory acts. This is owing to the fact that the supreme security of the state itself requires maximum protection and therefore, the legislator contemplated a scenario in which the state is protected from possible attacks before the individuals have embarked upon the accomplishment of their plan.
The author Roberti points out that certain crimes directly attack society and that the supreme interest of the state demands that misdeeds be stopped on the way in order that the fatal goal is not reached."

Therefore, in order to generate conspiracy under Article 57(1), there must be intent together with the agreement of the mode of action. Commencing preparatory acts enables there to be aggravated conspiracy under Article 57(2).

Article 58 indicates when the crime of conspiracy begins.

Article 58:
"*A conspiracy shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons."*

This indicates the importance of the 'mode of action' in the crime of conspiracy as outlined above. There is no conspiracy without mode of action. Substantively, according to this article, the offence is completed as soon as the means to be employed have been agreed upon. It is not necessary that anything is done in furtherance of the mode of action. If the furtherance has occurred, Article 57(2) applies and the persons will be guilty of aggravated conspiracy.

HISTORICAL PERSPECTIVE OF THE CRIME OF CONSPIRACY
The crime of conspiracy under English Law first began as an agreement of prsons who came together to carry out acts for vexatious purposes. It was dealt with as a civil wrong and then as an indictment. It initially went hand in hand with attempt but is now treated separately.
Archibald argued that conspiracy is "an agreement of two or more persons to do an unlawful act or a lawful act with unlawful means."

The Maltese Law concept of conspiracy is based on Article 89 of the French Criminal Code of 1810. This is the way is was proposed in the 1835 report of the UK Commissioner:
"*Chiunque prendessa parte in una conspirazione che avessa per oggetto qualunche dei crimine contemplate in articoli 88 o 89 sarà punito… se pero oltre la semplice conspirazione avesse avuto al luogo anche mezzi preparatori xxx esecutivi la pena sarà lavoro forzati perpetui.*"

The original 1835 report of the Law of Commissioners as they propose the definition of conspiracy is now reflected in Article 57 and 58 in our Criminal Code.

Article 155 of the Code of the Two Sicilies, which was the result of a particular empire comprising Naples and Sicily, "*la cospirazione esiste nel momento che i mezzi qualunque di aggire siano stati concertati e concusi fra due o piu individui*".
In conspiracy, the element of "at least two" is always present. This is a requisite for conspiracy. One cannot conspire with themselves. It is interesting also to note that husbands and wives are

precluded from conspiring with one another seeing as they are considered to be one entity. This was established through the British court case **Rex v. Mawji.**

Article 67 also ought to be considered as it is another instance where conspiracy is mentioned in the Criminal Code. Here, what is of interest, is the term "*common design".* This is important in view of the fact that until 2002, our law linked conspiracy with specific crimes, unlike English Law which provided for the general offence of conspiracy. After 2002, however, the general crime of conspiracy was introduced.

Article 67:
"*Any crime committed by any of the persons mentioned in article 63, shall, for the purposes of punishment, be considered as being accompanied with public violence if in the commission of the crime such persons shall have acted in pursuance of a common design."*

PERMANENT COMMISSION AGAINST CORRUPTION - 1988 AND THE COURT OF STAR CHAMBER
In Maltese statute books, there exists a law setting up the Permanent Commission Against Corruption. While it has never been enforced, there exists a provision dealing with the conspiracy to commit corrupt offences under Article 6(1)(c) of the Permanent Commission Against Corruption Act of 1988.

Article 6(1)(c):
"*The following shall be corrupt practices under this Act: conspiracy to commit any acts or omissions which constitute any of the aforesaid offences. A conspiracy shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between two or more persons"*

Once again there is the emphasis on *"two or more persons".*

The Court of Star Chamber in England was set up in the Middle Ages. This was a specialised court for criminal conspiracy. This court perfected the concept of the crime of conspiracy and widened its scope. So much so that many crimes which are now commonly prosecuted, such as attempt, conspiracy, criminal libel, and perjury, were originally developed by the Court of Star Chamber, along with its more common role of dealing with riots and sedition.The Star Chamber was originally established to ensure the fair enforcement of laws against socially and politically prominent people so powerful that ordinary courts might hesitate to convict them of their crimes. However, it became synonymous with social and political oppression through the arbitrary use and abuse of the power it wielded.

The Maltese law in this respect is a hybrid law with Continental and Common law elements. The Continental element was included principally by the French Code Penal.

The crime of '*associazione per delinquere'* found under Article 416 of the Italian Criminal Code is similar to the Maltese understanding of conspiracy but it is different.

Article 416 - *"Associazione per delinquere"*
"*Quando tre o piu persone si associano allo scopo di commettere piu delitti, coloro che promuovono o costituiscono od organizzano l associazione sono puniti, per cio solo, con la reclusione da tre a sette anni.*
Per il solo fatto di partecipare all associazione, la pena e della reclusione da uno a cinque anni.

I capi soggiacciono alla stessa pena stabilita per i promotori.
Se gli associati scorrono in armi le campagne o le pubbliche vie si applica la reclusione da cinque a quindici anni. La pena e aumentata se il numero degli associati e di dieci o piu."

Republic of Malta v. Steven John Caddick (Court of Criminal Appeal - 06.03.03)
This case outlines conspiracy in Malta very clearly in relation to the Dangerous Drug Ordinance. Chief Justice Emeritus Vincent De Gaetano in his analysis writes that one of the appellants is guilty of conspiracy for "*having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the Dangerous Drug Ordinance, and specifically of importing and dealing in any manner in cocaine, and of having promoted, constituted, organized and financed such conspiracy".*

Moreover, in the judgment, the criteria of conspiracy are outlined: "*the three elements that had to be proved for the crime of conspiracy to result, were the agreement between two or more persons, the intention [to commit the crime] and the agreed plan of action; and, as also correctly stated by the First Court, "it is irrelevant whether that agreement was ever put into practice"".*

Article 59

Article 59:
"*(1) Whosoever, by any speech delivered in any public place or at any public meeting, shall directly provoke the perpetration of any of the crimes referred to in this Title, shall, on conviction, be liable to the punishment for the crime provoked by him, diminished by one degree.*
(2) If the provocation shall produce no effect, the punishment shall be decreased from one to three degrees."

Article 59 deals with provocation to perpetrate crimes versus the safety of the Government. It is interesting to note that while Article 59 deals with the act of provoking, Article 68 deals with the act of inciting and Article 69 deals with the act of instigation against public tranquility.

Article 68 (1):
"*(1) Whosoever shall incite an assembly of persons, who when so incited shall be ten or more in number, for the purpose of committing an offence, shall, for the mere fact of the incitement, be liable, on conviction, to imprisonment for a term from one to three months or to a fine (multa).*"

Article 69:
"*Whosoever shall publicly instigate any other person to commit an offence, shall, for the mere fact of the instigation, be liable, on conviction, to - …*"

In the Maltese text, the word '*ixxewwex*' stands to encompass these three acts.
However, there are distinctions between them. Instigation must be voluntary in order for the crime under Article 69 to arise whereas the provocation discussed through Article 59 may be accidental.

Article 59 makes use of the adverb "*directly"* in connection to the act of provocation which implies that the provocation must be effective - there must be a direct causal connection between the provocation and the commission of the crime - the instigation must have been intentional aimed at the commission of that crime.

Therefore, the publicity must be actual, i.e. directed to the public in a place which is accessible to them. In the case **Police v. Carmelo et** three types of public places were identified: public places by nature (which include roads, squares and places with right of passage), public places by destination (such as theatres and schools which are open and accessible) and public places by accident.

There is also a direct reference to the word "*speech"* which implies the use of words - intelligible articulate sounds which express understandable ideas and meaning. This means that one cannot provoke the public making use of a language not understood by the masses. If this is attempted, the crime under Article 59 doesn't manifest.

The reason behind his law is to avoid people provoking the perpetration of one or more of the crimes versus the safety of the government which are the most serious crimes in the code. The law is so keen to protect from such crimes, it even punishes instigations that don't materialise. Therefore, the law considered provocation as a substantive offence s*ui generis* even if it is without effect. This simply results in a diminution of punishment.

Here it is prudent to make reference to Chapter 68 of the Laws of Malta, The Public Meetings Ordinance. This relates to Article 59 seeing as the crime subsists by means of provocation by any speech "*delivered in any public place or at any public meeting.".* This ordinance was drafted in 1931 owing to the Language Question which had a great impact on the social and political climate of Malta.

Through this ordinance, a public meeting is defined through Article 2.

Article 2:
"*In this Ordinance - "meeting" or "public meeting" means any gathering of more than twenty persons assembled for the public discussion of any matter in any public street, square or open space and includes a demonstration."*

What is important here is the qualification that a public meeting is characterised by its aim of enabling "*public discussions".* This qualification excludes the mass meetings organised by political parties from constituting as public meetings in accordance with Chapter 68.

It is also prudent to regard Chapter 71 of the Laws of Malta: The Seditious Propaganda Ordinance through which seditious material is defined under Article 2.

Article 2:
"*In this Ordinance, unless the context otherwise requires - "seditious matter" means any printed or written matter, sign orvisible representation contained in any newspaper, poster, book, letter, parcel or other document and any gramophone record or recorded tape which is likely or may have a tendency directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise -*

(a) to seduce any member of the forces from his allegiance or his duty or to cause disaffection in these forces towards the State of Malta;

(b) to bring into hatred or contempt or to excite disaffection against the person of the President of Malta or against the Government or the Constitution;

(c) to incite persons in Malta to take up arms against the Government or to attempt otherwise than by lawful means to compel the Government to change its measures or counsels or to obstruct the exercise of its lawful authority;

(d) to raise discontent or disaffection among the inhabitants of Malta; or

(e) to promote feelings of ill will and hostility between different classes or races of such inhabitants:

Provided that no such matter, representation, record or tape shall be deemed seditious matter by reason only that it is likely, or may have a tendency, to show that the President of Malta or the Government has been misled or mistaken in the measures, or administrative or other action taken by any of them, or to point out errors or defects in, or to incite persons to attempt by lawful means the alteration of any matter by law established; "postal article" means any letter, postcard, package, newspaper, printed matter, parcel and any article or thing conveyable by post and shall include a cablegram, radiogram or telex communications."

Article 60

Article 60:

"*In the crimes referred to in the preceding articles of this Title, any of the offenders who shall, before the commission of the crime or before any attempt to commit the crime, and prior to the commencement of any proceedings, give information thereof to the Government or to the authorities of the Government, shall be exempted from punishment."*

This is an exemption article and stands to apply to Articles 55, 56, 57, 58 and 59, i.e. all preceding articles under Title I bis 'Of Crimes Against the Safety of the Government'.
Here, as long an individual provides information before the commission of the crime or before the crime is attempted occurs, they are exempt from punishment.

The intention of the law is to avoid crimes against the safety of the Government from being perpetrated by offering immunity to persons concerned in the crime who, before the commencement or attempt reveals the details of the crime. This implies that the person giving the information is a principle or accomplice to the crime.

Many authors have taken criticism to such an article, noting that by granting impunity to a co-offender "*the law sanctions betrayal which all laws should look upon with disfavour"*. Moreover, these authors point out that "*the law confesses its weakness [through such an article] as it invokes the assistance of the delinquent".* Furthermore, the "*promise of impunity… encourages the delinquents to undertake [the crime] in the hope that each of them will be able to avoid the punishment by disclosing it when he finds that success is impossible and detection easy."* However, it is also noted that in the interest of the community as a whole, it is beneficial to "*sow the seed of diffidence amongst delinquents".* Instilling fear that one of those involved in a crime against the safety of the government might turn and operate as an informer against the others may deter the commission of such crimes.

Moreover, it is essential in accordance with the policy of the law inexorably to provide persons with a chance to escape punishment when no actual harm has been done.

In a French judgment handed down by the Court of Cassation it was determined that it not sufficient for an informer to indicate accomplices but that that at least one must be arrested/

charged for the offences against the safety of the Government. This judgment qualified that which amounts to giving information. This is because the person who is then arrested must assert the truthfulness of the information provided by the informant and if no one is arrested there is no way to assess whether the information being provided is truthful or not. This relates to the term "*proceedings"* found in this article - this doesn't relate to criminal proceedings but to the first steps taken which the Government and authorities take for the discovery of offences or the extra-judicial compilation of evidence.

If the informant is already arrested they don't benefit from this exemption under Article 60 even if they provide information in relation to this article. Moreover, through the case **Police v. Giuseppa size Joyce Bartolo** it was determined that if a police investigation has already begun, then Article 60 is no longer applicable.

Problems in this case arise in the case of crimes which are punishable even when the mere agreement to the means and preparatory acts constitute a crime in themselves. This article dens't give immunity to conspiracy as that is a formal offence completed the moment the agreement on the mode of action takes place.

There are conditions in place which allow for a person to submit such information anonymously and still benefit from the exemption so long as there is no doubt it was him who wrote the letter, the information provided aids the police arrest at least one person involved in the crime to corroborate the information being provided and at least one person on the information provided is charged with any crime against the safety of the Government.

Article 61

Article 61:
"*Whosoever, knowing that any of the crimes referred to in the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months."*

This articles provides for the punishment of any individual who is aware that the crimes listed in Articles 55, 56, 57, 58 and 59, i.e. all preceding articles under Title I bis 'Of Crimes Against the Safety of the Government', and doesn't disclose that information to the authorities. The individual doesn't need to be one of the co-conspirators.

This is one such instance in the law whereby a citizen is obliged to inform the police of the preparation of a crime which is about to be committed and therefore deviates from the general principle of Criminal Law that failure to disclose is not punishable.

This is similar to English law whereby even if no active assistance is given to a person who has committed treason, anyone who knows of his guilt that can give information which might lead to his arrest will commit an offence if he omits to communicate that information.

This relates to crimes which one knows is intended to be committed and not information in relation to crimes which have already been committed.

The crime arising under Article 61 doesn't amount to complicity. The mere concealment of an offence committed or the mere omission to reveal an offence doesn't in itself constitute complicity. There cannot be complicity without some ac time proceeding on the part of one person towards the commission of an offence by another.

Article 62

Article 62:
"*The provisions of the last preceding article shall not apply to the husband or wife, the ascendants or descendants, the brother or sister, the father-in-law or mother-in-law, the son-in-law or daughter-in-law, the uncle or aunt, the nephew or niece, and the brother-in-law or sister-in-law of a principal or an accomplice in the crime so not disclosed.*"

This provision provides for an exception to Article 61 in that a citizen's obligation to inform the police regarding the preparation of a crime doesn't apply if the person who is planning on executing the crime has one of the stipulated relationships with the citizen, including:
- Marital relationships;
- Ascendants
- Descendants
- Uncles
- Aunts
- Nieces
- Nephews
- Brothers-in-law
- Sisters-in-law

This indicates the law's respect for a principles of dignity and of the sentiments of trust and concord which is necessary in order to maintain a family.

In relation to Articles 61 and 62, there are a number of principles under UK law that will likely apply in such cases. For example:
(1) The accused must know the offence is against the security of the state and is about to be committed.
(2) The accused need not have played an active part.
(3) The accused must have failed or refused to perform their duties when there was reasonable opportunity to do so.
(4) There is exists the defence to claim confidentiality afforded to a lawyer etc.

The knowledge must be prior to the commencement of a crime, if after there is no obligation to disclose into it. Moreover, one cannot be punished for general knowledge of a crime against the safety of the Government without knowledge of the persons engaged in the crime or the particulars of the criminal design.

SUMMARY
- Treason
- Sedition (including seditious propaganda)
- Conspiracy to commit the aforementioned crimes

- The Exemptions the Law allow for

01.11.2021 - Title II: Of Crimes Against the Public Peace
This title is perhaps more useful than the preceding title seeing as its content are practically employed regularly. This is because maintaining public peace is necessary for a functioning society. This is ultimately the end-goal of Criminal Law - ensuring the public peace of the community seeing as every criminal offence constitutes a form of public wrong which creates public mischief, referred to as "*danno morale o mediato"* and diminishes the sense of security enjoyed by the public.

However, we note that the crimes listed under this title, produce more immediate effects of disturbance of the public peace which lead to more widespread danger. Such crimes undermine the fundamental principles upon which the stability of ordered society and civilisation are based.

Such crimes speak of acts of a seditious and riotous character which aren't accompanied by an intention to commit an offence which amounts to High Treason however, they are injurious enough to both the establishment and to public safety to go unnoticed within the Criminal Code. These were the crimes spoken of by Andrew Jameson who suggested that such actions be included in 1842.

Article 63

Article 63:
"Any offence committed by three or more persons assembled with intent to commit an offence, and two of whom carry arms proper, shall be deemed to be accompanied with public violence."

We note that violence, when unjust, is always in and of itself unlawful. Violence can be of two kinds: private or public. When speaking of the former, we discuss a form of violence which is present against the person or the liberty of one or more determinate individuals. The latter, on the other hand, threatens the liberty and security of an indeterminate number of persons either through themselves or in the authority which presides over their well-being. This constitutes a crime against public tranquility and stands to aggravate all other offences which it accompanies.

In order for such an offence to arise, it must be committed by not less than three people who have assembled together with the intent to commit such an offence. This means that they must have joined together in order to commit an offence, the commission of which must have formed the subject of the common design of not less than three of those joined together. Moreover, we note that the legislator specifies that two or more must be carrying 'arms proper'.

According to the author Roberti, the number of offenders has a significant influence on increasing the seriousness of a crime because it:
1. Facilitates its execution
2. Contributes in a unique way to the increasing social damage that results from the crime itself - the damage inherent in the decrease in the confidence that each person places in the social order.
3. Ensures the fatal outcome of the crime and increasingly spreads consternation and fear in the mind's of the public.

This article introduces us to several important concepts including "arms proper" and "*accompanied with public violence*". This is applicable also to the aggravation of theft. It is

important to note that the persons assembled need not be aware that the other is carrying arms proper.

The punishment for the mere fact of assembling is provided for in Article 66.

Article 64

Article 64:
"(*1) Arms proper are all fire-arms and all other weapons, instruments and utensils which are mainly intended for defensive or offensive purposes.*
(2) All other weapons, instruments or utensils are not considered as arms, except when they are actually made use of for any offensive or defensive purpose, in which case they are called arms improper."

This article defines what 'arms proper' are and distinguishes them from 'arms improper'. This distinction is important seeing as the use of either one carries with it different legal consequences. In terms of arms proper, it is important that they are duly registered etc. and the use of such a weapon improperly is more grave than the use of arms improper.

In relation to fire-arms and other instruments, Article 64 doesn't require there to be personal injury and also fails to distinguish between an offence against the person and an offence against the property.

Today, we regard The Arms Act, Chapter 480 of the Laws of Malta, as the legislation which governs the law relating to arms, without prejudice to other relevant legislation, for example the Criminal Code. Prior to this act's enactment, Chapter 66 of the Laws of Malta, The Weapons Act, performed this function. This piece of legislation was subsumed into Chapter 480 in 2006.

The Arms Act defined for our purposes "*firearm*" as made reference to in Article 64 of the Criminal Code under Article 2.

Article 2:
"*unless the context otherwise requires*: "*firearm" means any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless such item falls under Schedule III, items 1, 3 or 4. An object shall be considered to be capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant if:*
(a) it has the appearance of a firearm; and
(b) as a result of its construction or the material from which it is made, it can be so converted".

Further terms are clarified through this article including what is meant by "*ammunition"* and "*gun powder".*

Article 3 of this Act further provides for classifications of prohibitions with relations to arms proper and ammunitions which aids in the practical application of Article 64.

Article 3:
"Without prejudice to the provisions of this Act -

(a) the acquisition, possession for whatever purpose, keeping or importation of the arms proper and ammunition referred to in Schedule I shall be prohibited; and
(b) the manufacture, disposal under whatsoever title, hiring, offering for sale or hire, or the lending or giving to a person of any of the arms proper listed in Schedule I shall also be prohibited."

The licenses for fire-arms have to be given importance and the non-compliance to such licenses amount to breach of the law under such Act.

Article 585 of the Italian Criminal Code refers to "*armi di sparo"* as opposed to "*armi di fuoco"* and this is more or less the equivalent to the Maltese legal understanding of arms proper. In addition, there is also the reference to "*strumenti da punto"* and other such instruments. The latter classification is similar to the Maltese legal understanding of arms improper.

In the judgment **Republic of Malta v. Carmelo Mizzi**, the notion of useless weapons were discussed. In this case, it was deemed that the revolver in question was completely useless seeing as it was jammed in such a way that it couldn't fire at all. In this case, the court made reference to the notion of intent in carrying and making use of such a firearm and not to the actual use in itself.

The developments made in the law with regards to arms proper can be regarded through the license to carry knives. In the 1958 case **Police v. Corporal John Allen Peat**, the Corporal needed a pointed instrument to clean his pipe, and therefore, he carried a pen-knife. The law enforced at the time, Chapter 66, did not cater for the regulation of such an object however. Subsequently, the defendant was acquitted in the Court of Magistrates and this point of view held following the appeal from the prosecution. Currently Article 6 of the Arms Act deals with the license to carry knives and Article 7 deals with exceptions to this Article which mark pen-knives, knives used for the purposes of trade and the such to be knives which don't require the carrying of a licence. Knives used in the home are regulated through their own provision by virtue of Article 8 and also don't require licensing.

Article 6:
"*Saving the provisions of article 8 no person shall carry outside any premises or appurtenance thereof, a knife or cutting or pointed instrument of any description without a licence or permit from the Commissioner.*"

In terms of punishment, when regarding The Arms Act, Article 61 is of particular importance especially in relation to that which is discussed by virtue of Article 21 of the Criminal Code.

Article 61:
"*The provisions of the Probation Act and of article 21 of the Criminal Code shall not be applicable to any offence against any of the provisions of this Act.*"

Article 21:
"*Saving the provisions of article 492, the court may, for special and exceptional reasons to be expressly stated in detail in the decision, apply in its discretion any lesser punishment which it deems adequate, notwithstanding that a minimum punishment is prescribed in the article contemplating the particular offence or under the provisions of article 20, saving the provisions of article 7.*"

Therefore, the law gives the court discretion to go below the minimum punishment in the case of special reasons to be mentioned in the judgment. However, Article 61 of the Arms Act note that if one has been found guilty of carrying a fire arm unlawfully, special reasonings submitted to the court in order to reduce punishment will not be considered. Therefore, Article 21 and the Prohibition Act are precluded from being applied.

The reason as to why the law specifies that arms ought to be 'arms proper' is that only when such weapons are brought into play is the public specially alarmed, thus the aggravation subsists.

Article 65

Article 65:
"*(1) The punishment for an offence accompanied with public violence, shall be higher by one degree than the punishment provided for the same offence when not accompanied with public violence.*
(2) In no case shall the punishment be less than that provided in article 66."

This article demonstrates the value attributed to the commission of an offence "*accompanied with public violence".* This is discerned owing to the effect that this accompaniment has on the punishment a person convicted of such an offence is liable to. This is an umbrella provision which is very general whereby the law states that in relation to the "*public violence"* as per Article 63, when out of the three persons, two are carrying arms proper, then that in itself is considered an act of violence.

The term "Knowingly"
This term is of utmost importance in our criminal code because the law does not expect the impossible and does not presume anything. One of the first cases of the use of drugs and the qualification of knowingly means is Police v Charles Clifton (5th July 1982: Lino Agius). Agius gives a proper definition of what the term 'knowingly' refers to.

Article 66

Article 66
"*The persons assembled as provided in article 63 shall, for the mere fact of having so assembled, be liable to imprisonment for a term from one to three months."*

This article refers back to Article 63 and the crime contained therein and maintains that for the mere fact of having assembled, offenders could be liable to imprisonment for a term of one to three months. This stipulation of time is also important in relation to Article 65 whereby it is outlined that if any crime is "*accompanied with public violence",* the punishment for such a crime cannot be less than the frame of time outlined here.

Here, we note that this offence is constituted and is completed by the mere act of the assembling of the three or more persons under the said circumstances. It is not necessary that any attempt of the offence should have been committed. Thus, this combination in itself if considered to be an offence *sui generis.*

Article 67

Article 67:
"*Any crime committed by any of the persons mentioned in article 63, shall, for the purposes of punishment, be considered as being accompanied with public violence if in the commission of the crime such persons shall have acted in pursuance of a common design.*"

Article 68

Article 68:
"*(1) Whosoever shall incite an assembly of persons, who when so incited shall be ten or more in number, for the purpose of committing an offence, shall, for the mere fact of the incitement, be liable, on conviction, to imprisonment for a term from one to three months or to a fine (multa).*
(2) Whosoever shall take an active part in an assembly of ten or more persons for the purpose of committing an offence, although the said assembly may not have been incited by any one in particular, shall, on conviction, be liable to imprisonment for a term from three days to three months or to a fine (multa).
(3) Where the offence which such assembly of persons intended to commit is committed, then, if the punishment established for the offence is less than the punishments aforesaid, these punishments shall be applied with an increase of one degree; if, however, the punishment established for the offence is greater than, or equal to, the punishments aforesaid, then that punishment shall be applied with an increase of one degree."

Article 68 deals with unlawful assembly and is usually made use of in cases dealing with fights during feasts etc. It deals with the action of 'inciting'. As was decided through the case of **Police v. Ganni Bugeja (15.01.1955)**, all that the law needs in order for the crime of incitement to commit a crime to manifest is a group of ten or more people that are gathered owing to the direct effect of the instigation. Therefore, if the incitement occurs when there already is present a crowd of people amounting to ten or more, this crime doesn't manifest itself.

In this case, the act of incitement is given more weight than taking an active part as discussed through Article 68 (2). The legislator comes down more heavily on the inciter rather than on the active participant. Under this article, there are two separate offences contemplated:

1. The incitement of a group of ten or more people to commit an offence, be it a crime or contravention.
2. Taking an active part in an assembly.

The offence is complete as soon as ten or more persons assemble together as the result of the incitement with the object of committing an offence.

In terms of Article 68(2), the material element of this offence rests in the active participation in an assembly of more than ten people with the intent of the assembly being that of carrying out an offence. The elements of this crime are as follows:

a) The taking of an active part in an assembly
b) The assembly of ten or more people
c) That the assembly occurred with the object of committing an offence

It is important to note that with regards to the formal element, it is not necessary that the offence should have been attempted or contemplated. The necessary need for intent means that if

someone is accidentally in the crowd, unless the person manifests some gesture of ascent to take part, it doesn't constitute a crime under Article 68. The article will only stand to apply if the person takes an active part and manifests this acceptance through an external gesture. This was determined through the case **Police v. Carmelo Saliba et** whereby it was decided that the accused needed to have shown some form of action that denoted their acceptance to participate in the action. It must be proven that the accused decided to act in such a manner voluntarily and therefore, physical presence at the scene of of the crime is insufficient. In the case it was noted that "*il delitto in chi al para 2do dell'articolo 71 (now 68) delle leggi criminali si consuma pel solo fatto di formar parte dell'attruppamento allorché' questo si rivela come tale. Non si richiedono ne' convenzione prestabilite, ne' consensi espressi, ne' ordini di gerarchia o di disciplina fra gli attruppati."* What is being noted is that this offence subsists solely owing to the fact that a person formed an active part of the seditious assembly. They didn't need to be priorly involved in the plan or for any such condition to arise.
In this case, it was also noted that it is not required to prove actual disturbance of the public peace for this article to apply but what must be proven is that the acts of the defendant were such to produce the disturbance the law seeks to prevent. Premeditation is not required in order for this to be effective.

The burden of proof that the accused did not participate or form part of such an unlawful assembly including the presentation of a satisfactory explanation as to why he was present in such circumstances is on the accused as was finalised in the case of **Police v. Bigeni** as was established by Justice Harding.

The case of **Il- Pulizija v. Grazio (17.03.1945. - Court of Criminal Appeal)** stands to reinforce that which was decided in the Caruana Curran case approximately 30 years later and deals with external gestures that indicate acceptance. It is noted that there is no need for prior agreement in order for Article 68 to arise, an accidental meeting having the common design and purpose is suffice. In addition, there is no need for words as applause and encouragement is enough in order that this crime arises.

This was reinforced in the case of **Il-Pulizija v. Emanuel Spiteri (Court of Criminal Appeal)** which revolved around the Independence Day celebrations of the Nationalist Party when they were in opposition. Through this case it was determined that being present out of mere curiosity is not enough to constitute the offence seeing as the law requires the will or "*ir-rieda*" to be present. Moreover, it was established that there is no need for a chain of command in such a scenario. (*There is no need to be found guilty under Article 68 in order to do something - even applauding 'approvazzjoni')*

In the case of **Police v. Carmelo Farrugia et (06.05.1976 - Court of Criminal Appeal)**, the accused were charged under Article 68 after a situation arose in relation to a public disturbance caused by a political activity of the opposition party in 1976. The accused were found guilty at the court of first instance. During the appeal proceedings the court repeats the charge being dealt with and states that nowhere in the initial judgment did it clarify that there was a common design. The court argued that there must be a common design of the ten or more assembled persons and not only of one in order for the crime under Article 68 to arise.

ARTICLE 68 UNDER THE LIGHT OF ENGLISH COMMON LAW

Under English Common Law, we note the development of the notions of 'riot', 'rout', 'unlawful assembly' and 'affray' by the English Courts. These four offences were abolished by the Public Order Act of 1986 which argued that such changes would make public order legislation more practical and effective to use and would make it more understandable to courts and juries alike. The Act statutorily replaced these offences, except for rout, with riots, violent disorders and affrays.

Affray relates to a joint offence whereby two persons are engaged in a fight. In accordance with the UK judgment **Button v. DPP (1966)** the Court held that an afar doesn't necessarily need to occur in a public place but can take place in any area where the substantial portion of the general public has access. Moreover, the courts held through the case of **Taylor v. DPP (1973)** that a person can be found guilty of affray if they violently attack another, whether that person subsists or not. This indicates that there is no need for reciprocity. These judgments enabled the establishment of the criteria of the offence of affray:

1. Unlawful fighting or unlawful violence used by one or more persons against another or others or an unlawful display of force by one or more persons against another or others without actual violence;
2. Such actions must occur in a public place or in the presence of at least one person who is terrified in a private space.
3. The actions must have taken place in an unlawful manner so much so that a bystander of reasonably firm character might reasonably be terrified.

This offence is therefore underpinned by the stirring of public alarm.

In the case of **Kamara v. DPP**, the appellants contended that in order for this offence to arise, fear must be instilled in the people outside the building. This was rejected by the House of Lords owing to the fact that an unlawful assembly could be committed in a private building as long as the people present are alarmed.

In 1981, the Court of Criminal Appeal in the UK, in **R v Howell**, gave a definition as follows of Public Alarm: "*whenever harm is actually done or is likely to be done, to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly, or other disturbance"*

Further Reading:
1989 Criminal Law Review

1. **Public Order: R v. Fleming and Robinson**
2. **Public Order: R v. Ball**
3. **Public Order: Atkin v. D.P.P**
4. **Public Order: R v. Mahrouf**

Beatty v. Gillbanks: QBD (13.06.1882) UK Case

Calleja v. Balzan: Reflections on Public Order - Vincent De Gaetano

Joins together the fundamental freedom of expression and the provisions of public order. This case illustrates the conflict between the rights of the individual and the public interest and questions whether the rights of the individual prevail over the right of the community when the restrictions are reasonable. In 1975 a new marriage law was introduced in Malta whereby, for the first time, Civil Law marriages were introduced and Catholic marriages would begin to be governed by Civil Law as opposed to Canon Law. At the time, in Mosta, the community decided to celebrate the feast of Santa Maria by placing a crown on the titular painting of the Church. Here, "church and civil dignitaries were to share a common platform". The Monseigneur, who was a firm objector to the new law, organised a small protest during the

ceremony of the crowning of Our Lady with posters that people were instructed to make visible to the participants of the ceremony. A group of people were against this demonstration as they believed he was introducing a political message in a religious ceremony and thus his actions were reported to the Inspector with people threatening to take action themselves if he would not. In the interest of public order, the Inspector went up to the Monseigneur and asked for him to hand over the poster. When the latter refused, the Inspector snatched and tore the poster. Monseigneur Calleja then sued Balzan in court sating that the Inspector's actions breached his fundamental right to freedom of expression.

In his writings, Chief Justice Emeritus De Gaetano notes that issues of public order "are not necessarily tied to situations of public meetings, processions and public demonstrations and manifestations" but admits that such scenarios present "a greater risk of concentrated public disorder."

The discussion here requires some consideration into that which amounts to a 'breach of the peace' in relation to the maintenance of public order. Perhaps the most "authoritative definition' in this regard was determined through the case **R. v. Howell**:
"We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance."
This understanding was upheld in a Maltese context through the judgement **Police v. Carmela Scinto et.** dealing with the Preservation of Public Emergency Ordinance, 1958: "*Any person who… conducts himself in a manner likely to cause a breach of the peace, shall be guilty of an offence."*
Therefore, it can be concluded that the term "*public order and peace"* as made use of in the Criminal Code means the "absence of danger to the safety of individuals or to the safety of property as well as the absence of reasonable apprehension of such danger, the danger arising from violence, or from threats of violence, or from some other disturbance or state of facts."
Moreover, it is the duty of the Police to prevent this public order and peace.

The Constitutional Court determined that the Monseigneur's actions didn't amount to a breach of the peace as his actions weren't violent or menacing nor could they inspire fear for the personal safety of an individual or the safety of property. The court continued by stating that owing to this, the Inspector's actions were not reasonable by the standards of the Criminal Code seeing as it goes against the fundamental principles of freedom or expression and peaceful assembly to prohibit Monseigneur Calleja from expressing his views owing to the threats of violent and unlawful activities of others. This is because "a peaceful and lawful activity does not become unlawful or merit suppression because of the violent and unlawful activity of others." De Gaetano argues that if anything, the others threatening public disorder ought to be suppressed. Therefore, the actions of the Inspector were deemed to be "unreasonable by the standards of the Criminal Code" as his actions were not done under the authority of law.

Article 68 dealing with unlawful assembly can be compared with Article 73 which deals with committing a crime with seditious intent with a minimum of three people.

08.11.2021
UNDERSTANDING SUSPENDED SENTENCES
In 1990, Parliament legislated Article 28A which deals with suspended sentences:

Article 28A:
"*(1) Subject to sub-articles (2) to (7) and to articles 28B to 28I, a court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than four years from the date of the order, the offender commits another offence punishable with imprisonment and thereafter a court competent to do so orders under article 28B that the original sentence shall take effect; and in this article and whenever it occurs in articles 28B to 28G and in article 28I "operational period", in relation to a suspended sentence, means the period so specified…*"

Therefore, if a person is convicted and sentenced to imprisonment for a time amounting to 1 day up until 2 years, section 28A can be applied. If one is convicted to more than two years imprisonment, this option is no longer available. The period of suspension must be for a minimum of 1 year to a maximum of 4 years. If during this period of suspension, the person commits another offence punishable with imprisonment, (therefore, the person must commit a crime and not a contravention), they must serve time for the new offence and the old offence.

Article 28H then deals with that which is known as the Compensation Order. This is many times applied for at the request of the *parte civile.* It is a very wide provision which argues that a person who has a suspended sentence doesn't need to pay the compensation owed *ad eternum* but must do so in accordance with the fixed time limit determined by the court which must be within 6 months. If the compensation order is not settled within this time frame the person enjoying a period of suspension must go to jail as the suspended sentence can no longer be enforced.

Article 28H:
"*(1)When making an order for suspended sentence under subarticle (1) of article 28A, the court may enter in such order a direction obliging the offender to make restitution to the injured party of anything stolen or knowingly received or obtained by fraud or other unlawful gain by the offender to the detriment of such party by or through the offence to which the suspended sentence relates, or to pay to such party such sum of money as may be determined by the court in that direction as compensation for any such loss as aforesaid or for any damages or other injury or harm caused to such party by or through the offence; and any such order may include both a direction to make restitution and, in default, to pay as aforesaid.*
(2) In any case in which it enters such a direction in its order under article 28A(1) the court shall, in that direction, fix the time- limit, not being longer than six months from the date of the direction, within which the restitution or payment of compensation specified in the direction shall be made by the offender.
(4) If the offender fails to comply with a direction entered under this article within the time fixed by the court in that direction, the court shall on the sworn application of the party to whom such restitution or compensation is due, to be served on the offender, appoint a date and time not later than seven days from the date of service of the application, for hearing the parties.
(5) If the court, after such hearing, is satisfied that the offender has failed to comply with its direction under this article, it shall order that the suspended sentence shall take effect…"

Article 69

Article 69:
"*Whosoever shall publicly instigate any other person to commit an offence, shall, for the mere fact of the instigation, be liable, on conviction, to -*

(a) imprisonment for a term from two to five years, in the case of a crime liable to a punishment higher than the punishment of imprisonment for a term of three years; or
(b) imprisonment for a term not exceeding two years, in the case of a crime liable to the punishment of imprisonment for a term not exceeding three years; or
(c) a fine (multa) or detention, in the case of any other offence."

Article 69 deals with public instigation to commit an offence, either a crime or a contravention, even if such instigation has no effect. It must be noted that a public instigation to commit an offence is in itself punished even though the offence forming the subject of instigation is not effectively committed. Therefore, it is punished *sui generis* and punishment is measured in accordance with the offence instigated.

Instigation refers to the instilling of an idea in a person's mind irrespective of the means used. Any form of incitement if a threat to public peace as it requires that actual injury to the rights of others are repressed.

With regards to the public element of the instigation, Maine holds that the provocation commencement in a private place is not punishable because fear can only be sufficiently created in a public place. The private nature of a place where instigation may take place doesn't satisfy this. Such a position is upheld by Mamo who argued that even in a public place with a few people the criteria necessary for the offence under Article 69 to manifest are still not satisfied. In order to regard whether the a place fulfils the criteria making it a 'public space', regard must be given to the nature of the place and to the number of persons present at the time. Therefore, the place must be accessible and there must be the presence of a crowd of people which enables the rise of apprehension and danger the legislator is trying to prevent.

Since this article was modelled heavily on Article 246 of the Italian Penal Code of 1889, it is useful to regard their interpretation of this public element in order to understand better how it ought to be viewed. It was argued that "*la circostanza della pubblicita' soltanto deriva un vero pericolo di disordine sociale. Sarebbe infatti contrario ad ogni principio di libertà stabilire sanzione penali contro quelle manifestazioni che, avvenendo in privato rimangono quasi nei limiti del pensiero."* This notes the essentiality of the public element and the inanity which would arise in the contemplation of punishment for actions taking place in private which remain almost within the realm of thought.

The means by which the instigation may be committed is not specified. Therefore, the means contemplated include all those which are calculated to the effect of the intended purpose and remain consistent with the notion of publicity.

The second criteria for such an offence refers to the fact that the object for the instigation ought to be the commencement of a criminal offence. The instigation therefore must be traceable to a determinate offence and must be engaged into with the intention of the commission of the offence. There must also be an element of persuasion or pressure to commit the offence: mere suggestion to commit an offence is not enough for this element to be met.

The crime subsists whether the offence instigated is a crime or contravention - the difference lies in punishment.

Article 70

Article 70:
"*Whosoever shall publicly incite any other person to disobey the law, shall, on conviction, be liable to imprisonment for a term not exceeding three months or to a fine (multa), or, in minor cases, to detention or to a fine (ammenda).*"

This article deals with the offence of publicly inciting others to break the law - Apologia del delitto modelled after Article 257 of the Italian Penal Code. In order for this offence to arise it is sufficient that the person knows what the law is and publicly encourages actions that go against what the law prescribes, i.e. to encourage disobedience knowingly.

This doesn't prevent full and free discussion of any public matter or free and liberal public criticism of the law as this is the right of every citizen. This provision only enters into play once an individual plainly and deliberately the limits of frank and candid honest discussions when it degenerates int public incitement to disobey the law.

The main difference with Article 69 is the difference between manipulation and the conversion of an idea into tangible action.

Article 71

Article 71:
"*Whosoever shall, by any unlawful means not amounting to the crime referred to in article 56, endeavour to compel the President of Malta or the Government of Malta, to change his or their measures or counsels, shall, on conviction, be liable to imprisonment for a term from six months to two years*"

A person will be found guilty of a crime under this article if they, by unlawful means not amounting to the crime of insurrection dealt with under Article 56 endeavours to compel the President or the Government of Malta to change their measures or counsels. This offence arises where use is made of unlawful means designed to bring pressure to bear upon the Government with a view of compelling them to alter their decisions or arrangements with regards to the state or intimidate them into doing what would not otherwise have done.

Article 71 was dealt with when discussing Article 56 which is directly mentioned within it. Article 71 deals with a different crime to that of Article 56, but the two are very similar. While in the latter there is a reference to the specific action of "*taking up arms",* Article 71 doesn't stand to include this action. Therefore, if someone commits the same material offence as outlined through Article 56 without "*taking up arms*" they are not guilty an offence under Article 71.

Article 72

Article 72:
"*Whosoever shall use any defamatory, insulting, or disparaging words, acts or gestures in contempt of the person of the President of Malta, or shall censure or disrespectfully mention or represent the said President, by words, signs, or visible representations, or by any other means not provided for in the law relating to the Press, shall, on conviction, be liable to imprisonment for a term from one to three months or to a fine (multa).*"

The President, considered the head of the body politic, keeps the members of the state united and this is dependent on the love and esteem of the members of the state towards him. Therefore, any contempt of his person or dignity may tend to lessen him in the esteem of citizens as this may be perceived as an attack on the Government and may weaken it leading to possible public disorder.

The contempt may be effected by words, gestures or other visible representations and stands to include also the spreading of scandalous stories about him or implying that he lacks intelligence or integrity. In general, anything which may serve to diminish his esteem among citizens.

The element of publicity is notably absent seeing as the offence doesn't derive its criminality from the place where it is committed but from the act itself which is able to produce scandal.

Article 73

Article 73:
"*If three or more persons shall unlawfully assemble, or being unlawfully assembled, shall continue so together, with intent, by public speeches, exhibition of flags, inscriptions, or other means or devices whatsoever, to excite hatred or contempt towards the person of the President of Malta or towards the Government of Malta, or to excite other persons to attempt to alter any matter established by law, otherwise than by lawful means, every person so offending shall, on conviction, be liable to imprisonment for a term from six to eighteen months.*"

This article deals with the crime of unlawful assembly with seditious and violent intent. This offence comes into existence if three of more people unlawfully assembly with the intent to incite hatred or contempt towards the President of Malta or the Government, or to excite others to attempt to alter by undemocratic means any matter established by law. The that can be used to do this are contemplated at law and outlined non-exhaustively through the Article itself.

As mentioned, this article bears resemblance to Article 68 which deals with unlawful assembly but is punished more severely. Here, it is not only necessary that person assemble together, but it is required that the persons continue their meeting. Their common design must be manifested by the modes mentioned in this article. Therefore, the *actus reus* must fall thin such modes.

Lord Holt argued that "*If men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government then to endeavour to procure animosities as to the management of it; this has always been looked upon as - crime, and no government can be safe unless it is punished.*"

While in Article 68 it was determined that at least ten people need to assemble for the offence to materialise, in this case, the minimum number is three for a seditious assembly.

Article 74

Article 74:
"*If two or more persons shall conspire to excite hatred or contempt towards the person of the President of Malta or towards the Government of Malta, or to incite other persons to attempt the alteration of any matter established by law, otherwise than by lawful means, every person so offending shall, on conviction, be liable to imprisonment for a term from six to eighteen months.*"

This article develops the notion of seditious conspiracy and the punishment relates to the mere act of conspiracy and can be anywhere from six months to eighteen months in prison. Since this article is dealing with conspiracy, the offence subsists the moment in which any mode of action is planned and agreed upon.

This article strikes right at the heart of the concept of Rule of Law seeing as democracy cannot be exercised through violent means. Change is synonymous with democracy, however that change cannot be achieved in an unlawful manner. It is essential in a democracy that the rule of law is upheld and not rule by law.

If two or more persons shall conspire to excite hatred or contempt of the President and the Government of Malta to to incite other persons to attempt the alteration of any matter established by law, other than by lawful means, every person shall be punished. The law punishes the ere act of conspiracy having for it's object the above mentioned.

22.11.2021

Article 75 (Deleted)

Article 75:
"Whosoever, by speeches delivered in any public place or at any public meeting, shall falsely impute misconduct in administering the Government of Malta to a person employed or concerned in the administration of the Government of Malta, shall, on conviction, be liable to imprisonment for a term from one to three months or to a fine (multa)."

This article deals with the false imputation of misconduct in the administration of a Government.

Here, the agent imputing such misconduct should have knowledge that their utterances are falsely made and not based on truth. The misconduct must refer to the administration of the Government of Malta carried out by the victim or injured party. The false imputation of misconduct must be directed towards such a person in his capacity under such an administration.

Article 11 of the Press Act, Chapter 248 of the Laws of Malta, deals with Defamatory Libel. Article 12(1) allows for a person charged with defamatory libel to bring truthfulness of his assertions as a plea of justification in a number of circumstances - *exeptio veritatis.*

Article 11:
"Save as otherwise provided in this Act, whosoever shall, by any means mentioned in article 3, libel any person, shall be liable on conviction to
a fine (multa)."

Article 12(1):
"(*1) In any action for a defamatory libel under article 11, the truth of the matters charged may be enquired into if the accused, in the preliminary stage of the proceedings, assumes full responsibility for the alleged libel and declares in his defence that he wishes to prove the truth of the facts attributed by him to the aggrieved party:*

Provided that the truth of the matters charged may be enquired into only if the person aggrieved - …"

The law contemplates a number of circumstances through in which this plea of justification may be raised depending on the position of the aggrieved party.

The term "*speeches"* in Article 75 is qualified by the word *"public".* Therefore, the speeches must be of a public character determined by the number of persons present and the effectiveness of the publicity. This is regulated under Article 2 of the Public Meetings Ordinance.

Mamo holds that it is immaterial whether public speeches impute the misconduct to the officers in question directly to indirectly.

Article 76

Article 76:
"*(1) Whosoever shall administer, or cause to be administered or taken, any oath or engagement intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose, shall, on conviction, be liable to imprisonment for a term from seven months to two years.*
(2) The punishment established in subarticle (1) shall also apply, where the oath or engagement is intended to bind the person taking the same in any of the modes following:
(a) to obey the orders of any committee or body of men not lawfully constituted, or of any leader or other person not having authority by law for that purpose;
(b) not to inform or give evidence against any associate or other person, or not to reveal or discover any illegal act done, attempted, or intended to be done by such person or any other."

This article deals with unlawful oaths. This article is based on Article 1 of the UK Unlawful Oaths Act of 1797. The oath must be intended to bind the person to perform one or more of the things mentioned in this article: to obey the orders of any committee or body of men not lawfully constituted or any lead not having requisite authority or not to inform or give evidence against any associates or other person or not to reveal or discover any illegal act done, attempted or intended to be done by such person or any other.

Mamo holds that if such purpose is carried out or attempted, the person administering the oath is punished as well as the person causing the administration of the oath. This person may be held liable as an accomplice. This is because this article punishes the mere act of administration of an oath to another in such a way that it encompasses the actions of others also.

The term of imprisonment envisaged by this article is between seven months and two years. This shall also apply where the oath or engagement is intended to bind the person undertaking the actions in Article 76(2)(a) and 76(2)(b).

Article 77

Article 77:
"*The punishment established in the last preceding article shall apply to any person who shall take any such oath or engagement as provided in that article, unless he shall have been compelled thereto:*

Provided that compulsion shall not justify or excuse any person taking such oath or engagement, unless he shall, within four days after such compulsion shall cease, report the fact to the public authorities."

This article is ancillary to Article 76 and focuses on the person taking the oath. It notes that punishment shall also apply in cases whereby a person who takes such an oath or enters into such an engagement as per Article 76, does so without having been compelled to. The act of being compelled to do so is qualified by a person reporting the fact to the authorities within four days of its occurrence.

Therefore, if a person enters into such an oath or engagement voluntarily, they are liable to punishment and are not exempt from criminal responsibility under Article 33(b).

Article 33(b):
"*Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person -*
(b) was constrained thereto by an external force which he could not resist."

Article 78

Article 78:
"Whosoever shall endeavour to seduce any person serving in the Armed Forces of Malta from his duty and allegiance to the Republic of Malta, or to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on conviction, be liable to imprisonment for a term from nine months to three years."

This article deals with the crime of inciting to mutiny and is framed on Article 1 of the Incitement to Mutiny Act of 1797 of the UK Law. It is noteworthy that many articles under this title owe their origins to centuries old laws customs and statues.

Under this article, for the mere fact of attempting the crime contemplated within Article 78, the crime of complicity arises as the individual has strengthened the will of the person to mutiny. The person engaging in the crime under Article 78 becomes an accomplice.

Article 79

Article 79:
"(*1) If three or more persons shall assemble or shall continue together, for any purpose whatsoever, in such manner and under such circumstances of violence, threats, tumults, numbers, display of arms or otherwise, as are calculated to create terror and alarm among persons in Malta, every such assembly shall be deemed unlawful, and every person forming part of such assembly shall, on conviction, be liable to imprisonment for a term from four to twelve months.*
(2) Where the unlawful assembly shall proceed, either wholly or in part, to execute their common design, or shall attempt so to do, any person so assembling shall, on conviction, be liable to imprisonment for a term from six to eighteen months."

Article 79 contemplates the crime of tumultuous assembly. In order for this to arise, the notion of terror amongst the public is an integral element. Mere disturbance of the public peace and order is insufficient.

This crime subsists when three of more people come together and commit the actions outlined through Article 79 effectively, i.e. carrying out a purpose which is likely to involve violence and inspires terror. Bailey J. comments that when regarding this offence, one must "*look not only to the purpose for which they meet but also to the manner in which they come, and to the means which they are using.*" This means that tumultuous assembly is not restricted to gatherings met together purposefully for the commission of a crime or for arousing seditious feeling. "*However innocent may be the object for which a meeting is convened, it will nonetheless be considered to be a tumultuous assembly if the persons who take part in it act in such a way as to give firm and rational men a reasonable ground for fearing that some breach of the peace will be committed… But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably in act and intent, the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully and thereby to create a breach of the peace does not render their assembly an unlawful one."*

Therefore, the lawfulness of the common purpose doesn't not exclude the offence if the manner of the meeting endangers the public peace and causes alarm.

The mere fact of their having thus met will constitute the misdemeanour of unlawful assembly. According to Kenny: "*Consequently if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which*
it came together involved neither violence nor any other illegality."

In this case, *"calculating"* does not mean merely intending to create terror but tending to create.

Article 79 can be substantively compared to Articles 68, 73,74 and 79.

The case of **Police v. Paul Mifsud** distinguished between the criteria for a tumultuous assembly and an unlawful assembly as contemplated through Article 68. It was decided that the notion of fear was the determining characteristic. The court argued that it is enough for half the people present to be inflicted with such an alarm or to believe that there is the potential for such alarm. Therefore, in order for a tumultuous assembly to arise, *in terrorem populi,* which translates to the terror of the people, is necessary.

In accordance with Article 79(2), when the plan is executed, wholly or in part, the sentences is increased.

Article 80

Article 80:
"If twelve or more persons being unlawfully assembled together to the disturbance of the public peace, and being formally warned or required by any competent authority to disperse themselves and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more, unlawfully remain or continue together for the space of one hour after such public

warning shall have been given, every such offender shall, on conviction, be liable to imprisonment for a term from nine months to three years."

Article 80 incorporates the common law offences of unlawful assembly, riot and rout.
In the poem 'Paradise Lost' by John Milton to describe disorganised organisation, he writes "riot upon riot, rout on rout, confusion worse confounded". What is interesting to identify is the distinction made by the poet between 'riot' and 'rout'.
An unlawful assembly develops into a rout as soon as the assembled persons perform any act towards the carrying out of the illegal purpose which has made the assembly so unlawful.
The rout becomes a riot as soon as the illegal purpose is put into effect forcibly by men mutually intending to resits any opposition.

This article contains the only crime under this subtitle where time is a factor which is mentioned seeing as the mere fact of the people having met will constitute the crime. This offence in this articles manifests itself when the amount of people gathered is at least twelve. The English judge Bailey argues that we "must look not only to the purpose for which they meet but also the manner in which they come and to the means which they are using. However innocent may be the object for which a meeting is convened, it will become unlawful assembly if those who take part act in such a way as to give firm and rational men a reasonable ground for fearing that some breach of the peace will be committed."

Therefore, in relation to this article three things must be regarded:
(a) Purpose
(b) Manner
(c) Means

The punishment for this offence is quite harsh as anyone found guilty of a crime under Article 80 is liable to serving up to three years in prison.

Article 79(2) outlines the aggravating circumstances which notes that when the plan for an unlawful assembly is executed, wholly or in part, the sentences is increased.

It is immaterial and irrelevant whether the common purpose of the assembly is lawful or unlawful if the manner of the meeting endangers the public peace and causes alarm.

The modern UK offence similar to Article 80 refers to riotous assembly.

Article 81

Article 81:
"*There shall not be deemed to be an unlawful assembly under the provisions of the preceding articles, where three or more persons shall assemble for the common purpose of assisting in the defence of the possession of the dwelling-house or other property of any one of them or in the defence of the person of any one of them although they may execute or endeavour to execute such purpose, or otherwise conduct themselves violently and tumultuously, or in such manner and under such circumstances as are calculated to create terror and alarm among persons in Malta.*"

This article can be considered an 'escape clause' as it is the mechanism employed by the Criminal Code to defend someone participating in an unlawful or tumultuous assembly.

The fact that this article protects against "*the provisions of the proceedings articles"* means it stands to apply even to Article 68 dealing with *l-attruppament.*

Article 82

Article 82:
"*Whosoever shall maliciously spread false news which is likely to alarm public opinion or disturb public good order or the public peace or to create a commotion among the public or among certain classes of the public, shall, on conviction, be liable to imprisonment for a term from one to three months."*

This article, which was amended recently in 2018, deals with protection against the spreading of fake news and how this relates to one's freedom of speech and the maintenance of the public order.

"*Maliciously"* is a key word as it qualifies the actions necessary for this offence to arise. It denotes the fact that one is spreading fake news with the knowledge that the news is false.
The term *"likely"* is also important as this is based on the reasonable man test, the *bonus pater familias.*

Article 82A

Article 82A:
"(*1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial or religious hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial or religious hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.*
(2) For the purposes of the foregoing sub-article "violence or racial or religious hatred" means violence or racial or religious hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion."

This article was introduced in 2002 to combat the phenomenon of racial injustice and racist behaviour but has now been extended to protect against discrimination in various forms.

There exists case law on this subject, of special importance are the Normal Lowell judgments.

In the case of **Police v. Brandon Bartolo (17.01.2019)** it was determined that the offence contemplated in Article 82A of the Criminal Code doesn't require that the person who wrote or published the derogatory or abusive statements to have the 'intention' of insulting or exposing to contempt any person or group of persons. It is sufficient if what has been printed or shared has the capacity to insult or expose contempt. Therefore, the offence may arise if a reader of ordinary intellect loses esteem for the person or group of persons based on the statements they are met with.

Article 82B

Article 82B:
"*Whosoever publicly condones, denies or grossly trivialises genocide, crimes against humanity and war crimes directed against a group of persons or a member of such a group defined by reference to race, colour, religion, citizenship, descent or national or ethnic origin when the conduct is carried out in a manner -*
(a) likely to incite to violence or hatred against such a group or a member of such a group;
(b) likely to disturb public order or which is threatening, abusive or insulting,
shall, on conviction, be liable to imprisonment for a term from eight months to two years".

This article was added in 2002 to protect against certain isolated cases of individuals condoning, denying or trivialising the phenomenon of genocides, crimes against humanity and war crimes.

Article 83

Article 83:
"*Any person who establishes, maintains on his own or with other persons or belongs to any association of persons who are organised and trained or organised and equipped for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object shall be guilty of an offence and liable, on conviction, to a fine (multa) not exceeding five thousand euro (€5000) or to imprisonment for a term from nine months to five years, or to both such fine and imprisonment."*

This article was added in 1959 and deals with the use of violence for a political scope. It seeks to prevent an association of persons organised, trained and equipped who display force to achieve and promote a political objective. This is because the use of force is the anthesis of political disclose, rule of law and democratic values. It is the use of force which enables this offence of arise.

Article 83A

This article was added in 2002 to combat organised crime and organised criminality within Malta and is multifaceted, i.e. it is constituted of many elements.

Article 83A(1):
"(*1) Any person who -*
(a) promotes, constitutes, organises or finances an organization with a view to commit criminal offences liable to the punishment of imprisonment for a term of four years or more; or
(*b) knowing or having reasonable cause to suspect the aim or general activity of the organization set up for the purpose mentioned in paragraph (a), actively takes part in the organisation's criminal activities, including but not limited to the provision of information or material means or the recruitment of new members,*
shall be guilty of an offence and shall liable, on conviction, to the punishment of imprisonment for a term from four to nine years."

Article 83A(1)(a) deals with the commission of criminal offences liable to a term of imprisonment of four years or more, for example homicide or money laundering. This ought not to be confused with conspiracy. This article refers to gangs of organised criminality whereby the mere fact of

belonging to an organisation carries a term of imprisonment of two to seven years as is stipulated through Article 83A(2). If the organisation is made up of more than ten persons, the punishment is further increased.
For one to form part of this organisation, one doesn't need a private writing or a public deed or any official document of this nature. Even a handshake can suffice.

Article 83A(4) deals with a form of Corporate Criminal Liability.
"*Where the person found guilty of an offence under this title is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable as follows:*

(a) where the offence of which the person was found guilty is the offence in sub-article (1), to the payment of a fine (multa) of not less than thirty-four thousand and nine hundred and forty euro and sixty cents (34,940.60) and not more than one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (116,468.67);
(b) where the offence of which the person was found guilty is the offence in suba-rticle (2), to the payment of a fine (multa) of not less than twenty-three thousand and two hundred and ninety-three euro and seventy-three cents (23,293.73) and not more than sixty-nine thousand and eight hundred and eighty-one euro and twenty cents (69,881.20);
(c) where the offence of which the person was found guilty is punishable as provided in sub-article (3) of this article -
(i) where the offence is that provided in sub-article (1), to the punishment of a fine (multa) of not less than forty-six thousand and five hundred and eighty-seven euro and forty-seven cents (46,587.47) and not more than one million and one hundred and sixty-four thousand and six hundred and eighty-six euro and seventy cents (1,164,686.70);
(ii) where the offence is that provided in sub-article (2), to the punishment of a fine (multa) of not less than thirty-four thousand and nine hundred and forty euro and sixty cents (34,940.60) and not more than one hundred and sixteen thousand and four hundred and sixty-eight euro and sixty-seven cents (116,468.67)."

Article 83A(5) is extremely important in reference to the establishment of jurisdiction and ought to be regarded in conjunction with that which was discussed in relation to Article 5 of the Maltese Criminal Code.
"*The criminal action for an offence against the provisions of this article may be prosecuted in Malta notwithstanding that the organization of persons is based or pursues its criminal activities outside Malta.*"

Article 83C

Article 83C:
"*Whenever an offence is committed for the benefit, in part or in whole, of a body corporate by a person who has the power of representation of the body corporate, authority to take decisions on behalf of the body corporate, or authority to exercise control of the body corporate, without prejudice to any other punishment to which the body corporate may be liable under any other provision of this Code or of any other law, the said body corporate may be subject to:*

(a) exclusion from entitlement to public benefits or aid;
(b) the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;
(c) placing under judicial supervision;
(d) the compulsory winding up of the body corporate; or
(e) the temporary or permanent closure of any establishment which may have been used for the commission of the offence:
Provided that the provisions of this article shall not apply where the punishment mentioned in this article is already provided for under this Code or any other law."

Article 83C deals with offences committed by a body corporate and is another example of Corporate Criminal Responsibility.

Title III: Of Crimes Against the Administration of Justice
Subtitle I - Of the Usurpation of Public authority and of the Powers thereof
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Article 84

Article 84:
"*Whosoever shall assume any public function, whether civil or military, without being entitled thereto, and shall perform any act thereof, shall, on conviction, be liable to imprisonment for a term from four months to one year."*

This article is the first under Title III: Of Crimes Against the Administration of Justice and the only one under the first subtitle: Of the Usurpation of Public Authority and of the Powers Thereof.

It is important that this Article is distinguished from and is simultaneously compared to Article 56(1)(d). Where the usurpation of the executive powers of the Government has for its purposes the subversion of the Government then treason and insurrection arises under Article 56(1)(d). When this is not the purpose of the offender, then the crime committed is under Article 84. It extends to any manifestation properly belonging to the activities of a public authority, even if such manifestations are temporary. This action may be committed by any individual including a private citizen or a public officer.

In this case, the criminal intent is essential as it provides for distinction between the two articles, a distinction that is replete with consequence in terms of punishment. For this offence to arise, the knowledge of exercising a function with which the agent is not legally vested and the consciousness of exercising this without title powers attaching to public authority is necessary. The crime would not arise owing to inadvertence or mistake.

It is evident that the functioning of social authority doesn't work if all private individuals are allowed to invade its operations and pose as representatives without being duly authorised to perform such functions.

Article 84 is based on Article 258 of the Code Penal of France and Article 164 of the Neapolitan Code.

It is important to note that Article 84 differs from Article 134 as the latter discusses the continuation of the exercise of power unlawfully.

Article 134:
"*Any public officer or servant who, having been dismissed, interdicted, or suspended, and having had due notice thereof, continues in the exercise of his office or employment, shall, on conviction, be liable to imprisonment for a term from one to six months.*"

Article 85

Under Title III there is a provision which of fundamental importance. It is one of the most quoted articles of the Criminal Code in court and is essential to have the rule of law.

Article 85:
"(1) Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months:

Provided that the court may, at its discretion, in lieu of the above punishment, award a fine (multa):
Provided further that it shall be a defence for the person accused of this offence to prove that such disturbance was done as a temporary measure imposed by actual necessity either in lawful self-defence or in the lawful defence of another person:

Provided further that in cases of arbitrary or forced evictions of an occupant from the property which he occupies as his primary residence, including any unpermitted entry into the property, removal of furniture, appliances or personal belongings from the property, or the suspension or interruption of water and electricity services, in whichever manner, including the installation of devices which enable the owner to suspend the direct supply of water and electricity services to the property, the fine (multa) shall not be less than one thousand five hundred euro (€1,500) and not more than four thousand euro (€4,000).
(2) The provisions of article 377(5) shall apply in the case of any conviction under sub-article (1) and when the conduct of the offender has resulted in a person being despoiled the Court shall apply the provisions of that sub-article in order to ensure that the person despoiled is fully revested in the position before he was despoiled."

When analysing this article, we ought to start with an analysis of the Latin dictum *"omnes legum servi sumus ut liberi esse possimus".* This means that one must be a servant of the law in order than one may be free. This is the most succinct explanation of the relationship between the virtue of commutative justice, the rule of law, and liberty. There is an inherent paradoxical nature embedded into this dictum as it argues that in order that we may be free there must exist laws that govern our actions, i.e. limitations to the freedom one would expect to find in a statue of nature as envisaged by Locke.
This was uttered by Cicero in a very famous trial of his.

This article prohibits the compulsory enforcement of any legal right without lawful authority - i.e. prohibits one from taking the law into their own hands.

This provision outlines a duty every citizen is bound to follow - to apply to the competent authorities for the re-instatement or recognition of a right which others may have violated or disputed. This is necessary in order to keep the public peace.

This is importance as one of the best manners where the law incorporates this dictum is Article 85 - Ragion Fattasi. This essentially refers to the arbitrary exercise of a pretended right whereby one takes the law into their own hands as was clarified in the judgment **Police v. Anthony Micallef**.

In the judgement **The Police v. Deidre Nyasa Rolfe Hornyold Strickland (10.12.2021 - Court of Criminal Appeal)**, judge Aaron Bugeja gives a brilliant expose on the topic found on page 12.

This crime is based on Article 168 of the Code of the Two Sicilies. Moreover, the Maltese courts have followed the writings of Carrara on this subject.

There are two consecutive ingredients that must be present in order for this crime to arise:
1. A pretended right
2. The possibility to have recourse to a competent authority.

The latter is not expressly mentioned in the article itself, however, the court still make reference to this ingredient often.

In the landmark judgment delivered by Judge William Harding **Police v. Giuseppe Bonavia (COA) (14.10.1944)**, there were four elements which arose in relation to this offence of Ragion Fattasi.

(1) There must be present the external act of depriving another of a right of a thing which he enjoys and this must be done in spite of opposition, expressed or implied by another person. The enjoyment noted in this scenario of the third party may be of a personal or a real right. Therefore, it is not necessary that the victim enjoys ownership over the time. A mere right of enjoyment is enough to satisfy the first element as was discussed in the case of **Police v. George Zahra.** In this regard, it is also possible for the object to be movable or immovable. The important thing here is that there is opposition from the victim.

(2) There must be a belief on the part of the agent performing such an action that he is exercising a genuine right, i.e. a right that is his in performing this action. This mental element of the agent is something which distinguishes the crime of Ragion Fattasi from other similar offences and gives this offence specific character. In **Police v. Carmen Grech**, it was noted that it isn't necessary to have the existence of a right. It is enough if such right is pretended.

The pretended right could stand to include the demanding of an obligation to be fulfilled, such as the payment of a debt, as occurred in the case of **Police v. Siddy Sangari (COA)**, or a pretended right over a servitude such as with regards to the right of passage of a water course as was confirmed by the case **Police v. Grezzju Camilleri**.

Therefore, the enquiry into the motive of the doer is essential. If it is establishes that the act was done in such honest belief and without any improper motive, it is not material that the claimed right is not actually competent to the agent or not enforceable at law.

(3) There must be consciousness on the part of the agent of his self-authorising when that action should be performed by a competent and lawful authority. Therefore, it requires a person taking into his own hands that which should have been given or remitted by a lawful action.
Every individual has the right to have recourse to court when he wants to certain a pretended right on a person or thing, be it movable or immovable. This means that a person can be given the chance to put a claim forward in front of a court with the chance at a favourable judgment.

(4) This must occur in the absence of a more serious offence. There must be no title or claim. This is closely related to the aforementioned mental element of the agent of the crime as if the person is aware that he has no title over the thing in question, they will be charged with a more serious offence, such as theft or fraud.

These four elements amount to people taking the law into one's hands. It is therefore, incredibly important in maintaining the rule of law.

Exclusions can only be made on two basis:
1. *Vim vi repellere licet:* This means that it is lawful to repel with force. In this case, the exception is that one is permitted to meet force with force subject to the fact that such force cannot be exercised for the purpose of revenge but to defend one's possessions with proper limited to regaining possession. The actions of force must be immediate reactions to attacks on property. Such was commented in the case **Pulizija v. Paolo Mifsud.**
2. *Qui continuat non attentat:* This deals with cases of retention of possession. The material element consists in depriving another person of their right over a thing they are enjoying and therefore, the offence doesn't arise when the act merely consists of the retention of possession already enjoyed by the agent as was noted in the case **Pulizija v. Michael Portelli**. Therefore, under Article 85, we find protection that covers not just the owner but even persons who have the property on mere tolerance - one needs not be the owner to be protected under Article 85.

According to Carrara, "*The external act must deprive others against his will of a good he enjoys. This is in the current enjoyment of an asset and continues to enjoy it in spite of those who do not want to, not delinque because the law protects the 'status quo', which cannot be changed except by consent of the interested parties, or by decree of the judicial authority*

(Police v. Jona Caruana - 31.07.2018 398/2017)

Article 86

Article 86:
"*Whosoever, without a lawful order from the competent authorities, and saving the cases where the law authorises private individuals to apprehend offenders, arrests, detains or confines any person against the will of the same, or provides a place for carrying out such arrest, detention or confinement, shall, on conviction, be liable to imprisonment for a term from seven months to two years:*
Provided that the court may, in minor cases, award imprisonment for a term from one to three months or a fine (multa)."

Article 86 deals with illegal arrest, detention and confinement and is framed on Article 169 of the Neapolitan Code. The law distinguishes between the three words 'arrest', 'detention' and

'confinement', therefore, they are not synonymous. Each indicate a spacial manner in which an attempt can be made against the personal liberty of a person. The moment a person isn't free to go, to exercise one's freedom of movement, there exists arrest.

The law doesn't specify the purpose which may have led the offender in committing the crime. Even if there is a positive motive, the crime still arises.
Moreover, despite the fact that Article 86 specifies from its operation cases in which the law authorises private individuals to arrest others, it doesn't provide rules on such citizens arrest.

Roberti, the Italian author, give us three scenarios of 'arrest': "*Il reato esiste sia a quando alcuno si fermi nel mentre che agisce o cammina sia quando si faccia rimanere sua malgrado in quel luogo vi si trova sia quando si trasporti da un luogo ad un altro.*" Therefore, he postulates the following circumstances of arrest:

- Someone is stopped whilst going about their business;
- Someone is made to remain where they are against their will;
- Someone is taken from one place to another.

Therefore, a person can be arrested without detention and confinement proving that the three words are different and not synonymous. In fact, the illegal arrest may subsist as an offence even though it is not followed by detention or confinement.

Article 86 is a continuing offence. This means it involves conduct which is in violation of the law and such conduct is protracted uninterruptedly and without change over a period of time. Such conduct results in a state of things in violation of the law or in violation of a right or duty which is also protracted over a period of time uninterruptedly and without change to the continuous nature of the wrongful conduct. The crime here subsists until the person who has been arrested illegally is freed. The prescription begins running from the moment the arrest no longer subsists.

For this offence to arise, one must have acted wilfully and knowingly. The material element of this crime consists in arresting, detaining or confining any person against his will, without a lawful order from the competent authority; or in providing the place for such arrest, detainment or confinement. Not every order from the authorities that will exculpate a person accused of this offence. It must be a lawful order regular in itself in form and in substance as well as granted by a competent authority according to Jameson.

Article 86 saves from its own operation the cases where the law authorises private individuals to arrest offenders. These cases are established through Article 106 of the French Code of Procedure. This article lays down that not only the members of the public force, but also any and every other person was bound to arrest any offender caught in the act of followed by the hue and cry, in order to take him before the competent authority, without the necessity of any warrant, provided only the offence was liable to certain grave punishments. No such provisions are expressly listed in Maltese Procedural Law.
Under English law, a private person without a warrant may arrest:

1) Any person who, in his presence commits a treason or felony or dangerous wounding. The law goes so far as to require the citizen to do his best to arrest such a criminal.
2) Any person who he reasonably suspects of having committed a treason or felony or dangerous wounding providing that this very crime has been actually committed by someone. Here, the citizen is not commanded to do so.

3) Any private person to arrest anyone whom he 'finds' committing certain specified offences.

Article 87

Article 87:
"(1) The punishment for the crime referred to in the last preceding article, shall be imprisonment for a term from thirteen months to three years in each of the following cases
(a) if the detention or confinement continues for more than twenty days;
(b) if the arrest is effected with the unauthorized use of a uniform, or under an assumed name, or under a warrant falsely purporting to be issued by a public authority;
(c) if the individual arrested, detained or confined, is subjected to any bodily harm, or is threatened with death;
(d) if the detention or confinement is continued by the offender notwithstanding his knowledge that a writ or warrant for the release or delivery of the person detained or confined has been issued by the competent authority;
(e) if the crime is committed with the object of extorting money or effects, or of compelling any other person to agree to any transfer of property belonging to such person;
(f) if the crime is committed for the purpose of forcing another person to do or to omit an act, which, if voluntarily done or omitted, would be a crime;
(g) if the crime is committed as a means of compelling a person to do an act or to submit to treatment injurious to the modesty of that person's sex;
(h) if the crime is committed on the person of the father, mother or on any person mentioned in article 202(h).
(2) Where a person who commits the crime referred to in the last preceding article threatens to kill, to injure or to continue to detain or confine the person arrested, detained or confined, with the object of compelling a state, an international governmental organisation or person to do or to abstain from doing an act he shall be liable to the punishment of imprisonment from seven years to life."

This article deals with the aggravating circumstances in relation to Article 86. The use of any such scenario to enable the facilitation of the crime or if the crime is completed for any reason outlined at law, the consequences are graver.

Article 88

Article 88:
"Where the bodily harm referred to in paragraph (c) of the last preceding article is liable to a punishment higher than the punishment of imprisonment for a term of two years, or is committed or accompanied with any kind of torture, the punishment shall be imprisonment for a term from four to six years."

This article provides further explanation to the aggravating circumstance mentioned in Article 87(1)(c).

Article 89

Article 89:
"The punishment for the illegal arrest, detention or confinement of a person, without the concurrence of any of the circumstances mentioned in article 87(b), (c), (d), (e), (f) and (g), and in

the last preceding article, shall be imprisonment for a term from seven months to one year, where the offender, before the commencement of any proceedings at law, restores to liberty the person arrested, detained or confined, within twenty-four hours after the arrest, detention or confinement, provided that during this interval the offender has not attained the object for which such person has been arrested, detained or confined."

This article deals with the extenuating circumstances that may arise in relation to the aforementioned crime. There is a decrease in punishment in certain scenarios contemplated at law. The object of such a reduction of punishment is to give the offender a strong motive to release his prisoner within a short time. Four conditions must be satisfied in this case:

(i) The arrest, detention or confinement must not be aggravated;
(ii) The release must follow within twenty-four hours;
(iii) Before the inception of any proceedings;
(iv) The offender must not have in the meantime achieved the purpose he had in view in perpetrating the arrest, detention or confinement.

If the release takes place after proceedings of any sort in connection with the crime, the benefit is not available. This is because the law presumed that the desistance from the further continuance of the crime is merely the effect of fear inspired by the action of justice and not of returning good-feeling or other voluntary reasonings.

Article 90

Article 90:
"Whosoever unlawfully and forcibly removes any person to any other country, or wrongfully detains, arrests or confines any citizen of Malta in any other country, shall, on conviction, be liable to the punishment laid down in article 87."

This article deals with the concept of kidnapping.

Subtitle II - Of Offences of Outrage and Violence v. Public Officers
The characterisers of offences under this subtitle are of two kinds:
- Injury to a private individual
- Direct and immediate injury to the administration which he represents.

The dolo in such cases is *animus iniuriandi.*

Article 91 - Violence against public officers in the exercise of his functions

Article 92 - Indication of what a public officer is: Anyone lawfully apt to administer any part of executive power of the government or public service imposed by law either judicially or administratively or through both. The law gives some protection to public officers and servants.

Article 93 - Threats to a Judge or Magistrate (differs from the notion of contempt of court outlined in Article 998 of the COCP). The two are afforded the same protection and the severity of the crime and the subsequent consequences are analysed depending on the object of the offence. Several scenarios are contemplated at law - the object of vilification could be to damage and diminish the reputation of the judge or to threaten the commission of a crime (if it is writing it carries a harsher

punishment), amongst others. Any insult or threat applies to this article even though it may be very vague.

Article 94 - Bodily Harm against any person mentioned in the preceding article.

Article 95 - Insults, threats or bodily harm against a person on duty. The *mens rea* and the *actus reus* is the same as in Article 93, the only different is the person upon whom the outrage is communicated.

Article 96 - Assault of resistance. There are different consequences depending on the number engaged in such actions. The violence contemplated in this article isn't of such a nature that it amounts to public violence. The elements of this offence are as follows:

- Must be an attack (involving violence/active force) and resistance. Mere disobedience doesn't suffice in this case. The *mens rea* must be the obstruction of the executive of the law.
- Capacity of the person v. whom the attack is resisted, meaning an actual force of threat - insults aren't sufficient as noted in **Police v. Giuseppe Debono**.

Article 97 - Aggravating circumstances surrounding Article 96 that deal with effecting the crime with a weapon.

Article 98 - When crimes of Article 96 include public violence and the subsequent increase in punishment.