CRL 2006 SUBSTANTIVE CRIMINAL LAW 1

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SUBSTANTIVE CRIMINAL LAW 1

Second Year

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Table of Contents

Pg. 4 – Theft

Pg. 25 – Fraud

Pg. 36 – Forgery

Pg. 63 – Computer Misuse

Pg. 77 – Abuse of Public Authority

Pg. 88 – *Ragion Fattasi*

Pg. 97 – Crimes Against the State

Theft

Unfortunate as it may seem, the **Criminal Code of Malta does not define the act of theft**. By layman's terms, theft connotes a violation against one's property, and the only thing the Criminal Code lists with regards to this strain of crime are the aggravations of said violation.

> "**The crime of theft may be aggravated –**
>
> (a) by "**violence**"; (b) by "**means**"; (c) by "**amount**"; (d) by "**person**"; (e) by "**place**"; (f) by "**time**"; (g) by "**the nature of the thing stolen**"."
>
> **Art. 261**, Criminal Code

Thus, one analysing the act of purloining here may draw out two types of said offence:

Simple Theft – the act of stealing, albeit destitute from all the aggravations listed above; and

Aggravated Theft – when a thief commits burglary decorated with one or more of the aggravations penned in **Art. 261**.

> "Theft, when not accompanied with any of the aggravating circumstances specified in article 261, is simple theft."
>
> **Art. 284**, Criminal Code

Maltese law alienates itself from English jurisprudence and opts *not* to adopt the English definition of theft, simply because **it fails to shed light on whether the original intention of theft was one of personal gain or not** at the time of the offence. Thus, Maltese law leans closer to Italian doctrine and adheres to **Carrara's theory** when examining the inherent characteristics of the true crime of theft:

"La contrattazione dolosa di una cosa altrui fatto invito domino con animo di farne lucro."

//

"The malicious taking of someone else's property without his consent in order to make a gain".

<u>CASE LAW</u> **– 'R v. Pisani'**
In this case, the Court ruled that although Maltese legislation remains ever so thirsty for a candid definition of 'theft', it is ultimately Carrara's philosophy which sates such a desire.

“La contrattazione…”

This refers to the physical verb of purloining an object, **alienating it from its original position and placing it somewhere else**.

Before delving into the characteristics of the burglar however, it makes sense to first identify which qualifications must be met for a person to be deemed owner of a stolen item.

Interestingly enough however, unlike Civil Law, Criminal Law does not concern itself with the nitty-gritty of who is (and is not) the owner or possessor of a stolen item. Criminal Law occupies a very straightforward stance: if you took something which is not yours to take, then you have committed theft. Thus, how the victim of the theft in question came into possession of the item stolen does not matter.

This theory of *contrattazione* maintains **3 points of view**:

Carrara – as already stipulated by him, an alleged thief must transport an object from its initial position with the **malicious intent of larceny** for the offence of theft to truly take place. Carrara places strict emphasis on the **element of movement**. Therefore, he proceeds unto introducing his concept of ***Amotio*** – which refers to the moment in which the stolen item moves from the **Sphere of Activity** of the owner and is transported into that of the criminal. Thus, Carrara shifts his main focus on the **element of Movement**.

However, this theory was never practical in court, so Carrara opted to formulate another stratum of his *Amotio* theory, of whose update now referred to the exact moment in time wherein the item one desires to steal is actually **touched by the thief**. At this precise moment, the crime of theft is commenced. Thus, Carrara, furnishes his argument by adding that the object being stolen **need not actually be transported away** from its original position for the crime of theft to take place; because once said object is defiled by the mere touch of the burglar, then the Court presumes that the proper owner has been suddenly denied rightful claim over his personal item.

Therefore, the presupposition that theft is the raw act of ‘taking something away from its original place’ is thus **consummated once the thief touches the object he intends on stealing**.

Pessina – his theory of ***Amotio de Loco ad Locum*** pertains to the proper owner’s **Sphere of Control**. Pessina acknowledges that simply detaching an object from its original space does NOT necessarily connote doing so with the intent of stealing said object. Thus (and unlike Carrara), Pessina contends that simply moving an object one desires to steal does NOT denote a true crime of theft – the object being stolen must dwell within the thief’s Sphere of Control for it to be regarded as stolen.

Impallomeni – his theory of ***Amotio de Loco ad Locum qui Destineravat*** suggests that, apart from denying a legitimate possessor his rightful claim to an object, a robbery cannot be complete unless the object being stolen successfully finds itself seated in the ultimate location intended for it by the burglar. Thus, Impallomeni emphasises on the elements of **movement**, **control**, and ultimate **destination**.

CASE LAW – **'Il-Pulizija v. Carmelo Felice'**
This case continued to outline the fact that **Maltese Courts abide by Carrara's theory** – stating that theft is completed once an object is detached from its owner's rightful possession, either **completely or momentarily**, with the latter owing to some form of involuntary desistance befalling the actions of the thief.

CASE LAW – **'Il-Pulizija v. Alfred Attard'**
The Court of Criminal Appeal stated that **completion of said crime applies even if the burglar ultimately returns the stolen object back to its original place**. Once an object is alienated from its original location, then the crime of theft becomes complete – regardless of whether said object is returned back or not.

"...dolosa..."

La contrattazione is heavily dependent on *dolus*. According to Carrara, the physical moving of an object being stolen **must be committed with malicious intent**, and must be **volitional**, NOT accidental. Theft committed accidentally or through negligence does not constitute a positive intent to commit said crime; therefore, one is led to believe that through such involuntariness, theft would be committed via a mistake of fact.

Antolisei promptly adds that if a person reasonably and believed that an **object was his** OR that it was **discarded by its owner** at the time of the alleged 'theft', then NO crime is identified.

CASE LAW – **'The Police v. Martin Galea'**
In this case, Court purported that if a person seizes possession of an item he reasonably believes to be **left astray by its owner**, or takes hold of what he genuinely deems to be a ***res nullius***, then the ***mens rea*** **revolving the offence does not materialise**. However, the agent must reasonably believe his actions to be just based on circumstantial evidence.

"...di una cosa..."

Manzini affirms that a **person cannot steal something which is incorporeal**; therefore, the subject being stolen must be tangible and movable. However, **Carrara** rebuts by arguing that an **immovable object may still be purloined if a portion of it was suddenly rendered movable**. However, this connotes an exception to Carrara's general rule that the **concept of theft relies heavily on the fact that the object being stolen must be tangible**.

Today's technological advancements make it difficult for the factor of tangibility to be perennially present in all cases of theft. For example, monies stored via online banking may still be stolen, even if their incorporeality crosses swords with the bias placed on the principle of corporeality upheld by Italian jurisprudence. And although one may still revoke a person's *rights*, such an act does not connote the crime of 'theft' – because they are of an incorporeal nature.

The item stolen must also have some kind of pecuniary value. However, this also means that some items may be excluded from the notion of theft on the basis of value – such as items which have been discarded (***res derelicta***).

<u>**CASE LAW**</u> **– 'The Police v. Chetcuti'**
The Court argued that apart from being tangible, **a stolen item must also bear value**. Therefore, an object bereft of monetary worth may never be subject to theft.

"…altrui…"

Thus, the item being purloined must be ***res aliena*** – signifying that said object was already owned by another at the time of the offence.

<u>**CASE LAW**</u> **– 'The Police v. Olaf Cini'**
Here, the Court recognised that the criminal act of **thievery may occur both to the detriment of the stolen item *and* its proper owner**.

A person taking something which is either not owned by anyone (***res nullius***) OR something which has been abandoned by its owner (***res derelicta***), then said person cannot be deemed a thief.

Carrara also contends that if an item is **co-owned**, then one cannot rightly identify a single owner – thus meaning that **such an item cannot be stolen**.

However, can a person purloin something that is his?

In some situations, a person may have something he owns detained lawfully by a particular authority. The object taken is still his, however, it would be contracted from his sphere of control. If that person takes back the mentioned item, then that would connote theft – even though the item retrieved is owned by the retriever. Although the item is owned by him, it would not be lawfully permissible to be in his possession. Therefore, would have still taken something he should not have taken – because there is a legal impediment placed against him from taking that item.

<u>**CASE LAW**</u> **– 'The Police v. Jean Claude Cassar'**
The Court of Criminal Appeal asserted that once a person seizes an object which is neither a *res nullius* nor a *res derelicta*, then the mentioned party becomes guilty to the crime of theft.

According to <u>**Art. 340 (c) of the Criminal Code**</u>, if a person finds something another has clearly misplaced, then the former has the duty of delivering said discovered object to a police station **within three days**. If the locator fails to do so, then he will be charged with **theft by finding**.

"…fatto invito domino…"

Carrara adds that for theft to occur, the taking of an object must happen ***invito domino*** – meaning that it was stolen **against the owner's will and consent**.

Therefore, if an owner gives a person consent for taking something belonging to the former, then the latter may never be deemed a thief; as long as the consent given was done so **freely** and **lucidly**.

This precludes instances of **presumed consent** – wherein certain persons need not ask permission for using certain objects depending on the situation (ex. a maid does not need to ask the owner of the house every time she wants to use the broom. Here therefore, using a broom without its owner's consent does NOT connote theft).

It is important to note that if an owner explicitly revokes permission, then one cannot defend with the notion of presumes consent, because it has been clearly states that no one should make use of a particular object.

However, if the owner of an object gives his consent whilst being bewitched by **fraud**, then the topic of discussion shifts from that of 'theft' to that of 'fraud'.

Finally, one cannot defend himself with the argument of him having stolen from a *possessor* of an object, and not an *owner*.

"…con animo di farne lucro."

The crime of theft, provided that all other prerequisites are satisfied, must be committed with one particular intention.

Thus, Carrara states that **one must commit theft with the element of gain in mind**.

The intent to make a gain is **generic** – because one need not specify the quantum of gain he or she wishes to achieve. **Gain is simply gain**, **regardless of how much of it is attained**.

The intent to make a gain does not need to be directed towards pecuniary property. In fact, jurists contend that **this element of gain is equal to any satisfaction that can be derived from taking that item**. It is any form of gratification enjoyed by the thief after having burgled a particular item.

An **exception to this rule** however is the **theft of water**, **electricity**, and **gas** – the last two being exceptional because they are **intangible**.

CASE LAW – 'The Police v. John Galea'
The Court explained that the mere crux of theft lies within the fact that the thief attains some sort of ***lucrum*** measured in economic benefit or personal satisfaction when seizing the personal assets of others.

Moreover, the tantalising notion of gain dwelling in a robber's mind **need not actually come to be** for theft to be consummated. Here, Carrara explicitly displays what the *mens rea* of a burglar must connote when trying to identify the crime of theft.

Theft for personal use (***fortum usus***) occurs when a person commits theft with the sole intention of using it for personal reasons, and then returning it to its owner after a maximum of 48 hours. To this end, the offence in question attains the status of '**contravention'**, thus also meaning that any punishment given to such an action becomes heavily reduced when compared to that of pure theft.

Aggravated Theft

As stated prior, **Art. 261** stipulates any and all aggravations one might commit in order to decorate their act of theft. When committing an aggravation, jurists contend that the offender portrays a more sinister degree of wickedness in his actions, thus resulting in an equally harsher punishment. Naturally, **more aggravations equate to a higher punishment**.

The inherent gist beheld by aggravations is that of **facilitating the ultimate commission of the crime**. Naturally therefore, if an aggravation fails to take effect upon the ultimate crime, then one cannot be held criminally responsible for it – because his actions have not actually been aggravated.

Maltese legislation lists all possible aggravations and also stipulates their respective punishments. In cases wherein there is an **abundance of aggravations**, the law caters for Judges and guides their hand unto how one should translate the punishment deserving of said bundle of exacerbations.

Carrara discerns between two types of aggravations:

1. ***Qualita naturale*** – aggravations immediately activated by the consummation of a burglary (ex. aggravation by the **amount** stolen).
2. ***Qualita politica*** – aggravations borne of an immensely criminal character worthy of a substantial increase in punishment (ex. aggravation by **violence**). The increase in punishment here pertains more to the **harm incurred on the wellbeing of society**, rather than the harm begotten by the theft itself.

Once again therefore, we shall be viewing what the Criminal Code deems as aggravations:

"**The crime of theft may be aggravated –**

(a) by "**violence**"; (b) by "**means**"; (c) by "**amount**"; (d) by "**person**"; (e) by "**place**"; (f) by "**time**"; (g) by "**the nature of the thing stolen**"."

Art. 261, Criminal Code

Art. 262 – Aggravation by *Violence*

A theft is aggravated by **violence** when –

> "**(a)** … 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)** … the thief presents himself **armed**, or where the thieves though unarmed **present themselves in a number of more than two**."
>
> **Art. 262**, Criminal Code

The most crucial element of aggravated theft by violence however is that said **ferocity is immediately followed by the theft itself**; although **Manzini** argues that violence may **not necessarily be incurred against the victim** of the theft for the aggravation to be consummated.

Sub-article (a) lists all violent acts one my incur on another.

CASE LAW – '**The Police v. Emanuele Delia'**
The Court here insisted that the **theft by violence connotes an actual attack**, and **NOT a reluctance to act** exhibited by the victim himself.

This section outlines vehement actions such as **murder** and **maiming**. The mere use of **threats** also constitutes an aggravation by violence, as long as it is proven that some sort of harm has been incurred on the victim.

"Threat is a serious manifestation of the intention to cause harm or an evil, made to the person who can receive the harm caused from this evil."

Manzini

A threat is thus deemed a threat once it proves to be **Efficient**; meaning that it has been perceived by the victim to be **believable**, **threatening**, and **terrifying**. Unless there is sufficient circumstantial evidence, threat perception is standardised by the fear threshold governing the **reasonable man**.

Antolisei contends that the malice imbued within a violent **threat need not be enforced** unto the victim for the aggravation to materialise – as long as the victim becomes so afeared by said threat that it sufficiently succeeds in facilitating the robbery.

Sub-article (b) speaks of violent aggravations activated either by the presence of **armaments** or by the sudden encounter of **three or more unarmed robbers at once**.

If an **offender presents himself as being armed** and the **victim truly believes** that said offender is actually equipped with weapons, then the **aggravation takes effect**.

With regards to **multiple perpetrators**, the concept of *Violenza Numerica* suddenly arises – asserting that multiple perpetrators working with each other must be **connected easily within close proximity**.

In emergencies therefore, each perpetrator may pitch in and assist the original offender due to their close and accessible propinquity. However, modern-day technological advancements might physically conceal certain accomplices under the guise of far proximity annulled by certain tools such as walkie-talkies.

The most essential factor, however, remains that of having the victim **perceive** a theft of whose looming existence depends on what appears to be **three or more transgressors**.

CASE LAW – 'The Police v. Manuel Camilleri'
Here, Court proclaimed that **not all the robbers need to be present simultaneously at the *locus delicti*** in order for the aggravation to be activated – **as long as the distance between them does not make it impossible for them to abet each other**.

Finally, **Antolisei** suggests that this hallowed '**immediate relationship**' beheld between the 'violence' and the 'theft' does not mean that both actions must happen *exactly* after each other, but that one action must follow the other in **due time according to an element of continuity which facilitates the crime at hand**.

Art. 263 – Aggravation by *Means*

A theft is aggravated by **means** when –

> "**(a)** … committed with <u>**internal**</u> or <u>**external breaking**</u>, with <u>**false keys**</u>, or by <u>**scaling**</u>;
>
> **(b)** … the thief makes use of any <u>**painting**</u>, <u>**mask**</u>, or other <u>**covering of the face**</u>, or any other <u>**disguise**</u> of garment or appearance, or when, in order to commit the theft, he takes the designation or <u>**puts on the dress of any civil or military officer**</u>, or alleges a <u>**fictitious order**</u> 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*."
>
> **Art. 263**, Criminal Code

<u>**Sub-article (a)**</u> mentions the blatant act of **breaking objects**.

This destruction does not apply to just *any* object – the force applied must befall an **obstacle denying the burglar entry to an enclosed space**, **of whose access may only be granted once the obstruction is eradicated** (ex. a wall). Ultimately, the breaking of such an object **must facilitate the commission of the crime**.

<u>**CASE LAW**</u> – '**The Police v. Cleo Azzopardi**'
The Court here affirmed Carrara's theory and drew out the principle that for aggravation by means to take effect, the **object broken must have been acting as some sort of deterrent to theft**. Therefore, the **force used must not have been practised on the stolen item itself**.

The following section (**Art. 264**) explains in detail what the definition of 'breaking' is. Such denotation includes: *breaking*, *demolishing*, *burning*, *wrenching*, *twisting*, and *forcing walls*.

Once again, Carrara here appeals to the notion of having an aggravation being categorised by its ***Qualita Politica***, meaning that its malicious nature is determined not by the degree of facilitation it bequeaths unto the commission of the crime itself, but by the harmful tendencies it plagues the wellbeing of society with.

This sub-article also references **false keys** – which are anything used with the intention of forcing open a lock.

"False keys are the instruments specially trained to activate the device of a closure."

Manzini

With regards to **scaling**, this connotes the physical exercise of climbing up walls.

<u>**Sub-article (b)**</u> diverges with the Italian notion of ***mezzo fraudulenti*** which, in essence, does not fall under the general idea of aggravations in a typical manner.

Firstly, this provision explores the guising of one's identity through **face painting** and **masks**. The concealment's effect must also instil a stronger sense of fear into the victim's amygdala.

This disguising may also take place when a robber **assumes the position of a civil or military office**r by fraudulently taking on such a person's appearance. The inherent malice in doing so stems from the sociological fact that **people tend to loosen up when in the company of someone representing order and safety** – such as a military officer. Thus, civilians would be far more susceptible to being persuaded into handing over an object to someone disguised as a civil officer.

Finally, it **matters not whether said the aforementioned disguises actually serve their purpose or not** – they will nevertheless give rise to an aggravation by means[1].

Art. 267 – Aggravation by *Amount*

A 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**)."
>
> **Art. 267**, Criminal Code

Admittedly, this amount is abysmally low compared to today's standard of life.

"The knowledge of the value of the thief is presumed until proven otherwise. But when there is evidence to the contrary, the magistrate cannot neglect the assessment."

Manzini

Therefore, this means that if, for example, a thief steals a vehicle pregnant with a bag loaded with jewellery, then the thief cannot be found guilty of an aggravation by amount introduced by that bag of jewellery – **as long as the thief was not aware of the valuables stashed in the object he originally wanted to purloin beforehand**.

Manzini asserts that when determining the **value** of a stolen object, one must heed its **market value as per the moment it was stolen**. Purchase price, sentimental value, and other non-pecuniary riches are all irrelevant when determining the value of a stolen item.

[1] **Art. 264** pertains to Breaking with regards to tampering with electricity, water, and gas pipes. The law here develops a iuris tantum presumption in assuming that the person dwelling in the mentioned household was aware of such tampering, and that it was actually said person's doing. Thus, the onus of proof falls unto the dweller when claiming that such tampering was carried out extraneous to his knowledge.

Art. 268 – Aggravation by *Person*

A theft is aggravated by **person** when committed –

> **(a)** … in any place **<u>by a servant to the prejudice of his master</u>**…
>
> **(b)** … **<u>by a guest</u>** or **<u>by any person of his family</u>**, **<u>in the house where he is receiving hospitality</u>**, or, under similar circumstances, **<u>by the host</u>** or by **<u>any person of his family</u>**…
>
> **(c)** … by any **<u>hotelkeeper</u>**, **<u>innkeeper</u>**, **<u>driver</u>** of a vehicle, **<u>boatman</u>**, or by any of their **<u>agents</u>**, **<u>servants</u>** or **<u>employees</u>**, in the hotel, inn, vehicle or boat …
>
> **(d)** … by any **<u>apprentice</u>**, **<u>fellow workman</u>**, **<u>journeyman</u>**, **<u>professor</u>**, **<u>artist</u>**, **<u>soldier</u>**, **<u>seaman</u>**, or **<u>any other employee</u>**, in the **<u>house</u>**, **<u>shop</u>**, **<u>workshop</u>**, **<u>quarters</u>**, **<u>ship</u>**, …
>
> **Art. 268**, Criminal Code

<u>Sub-article (a)</u> pertains to persons who already have an **established relationship between them**. Thus, the offender would be no mere stranger to the victim, and vice versa.

As seen in **Art. 268**, the **element of trust** between the thief and his target **facilitates the robbery** by a mile when compared to stealing from a complete alien. Moreover, the roles stipulated in the above provision suggest the fact that said **thieves would have an easier time accessing valuables owned by their victim**.

For instance, it would bode far easier for a servant to steal from his master whilst, for instance, dusting his master's vanity mirror. Thus, this aggravation connotes the **<u>moral</u> blasphemy exercised through an exploitation of trust** – something **Carrara** dubs as *tradita fiducia*.

An aggravation by person also implies that any **protection** employed by the owner of the stolen item for the sake of preserving said stolen item would be **bypassed by this element of trust**.

<u>CASE LAW</u> – 'The Police v. Emanuel Zammit'
The Court here emphasised on the **quality** quoting **Carrara**'s assertion that for a servant to activate this aggravation, he must happen to be **formally employed and receiving remuneration for his services** by the victim.

<u>Sub-article (b)</u> involves itself with thefts committed by **guests** or **family members of the victim**, who is providing them hospitality within his private domicile. Thus, the theft would be committed in prejudice to the host and/or his other kin.

And although the law gives us ample scenarios as to when an aggravation by person might come into effect, it nevertheless fails to reach omniscience. But neither would the reasonable man expect it to. Because life progresses on the daily, thus rendering it nigh impossible for legislation to keep up with it perfectly.

For instance, there is no legal mention of **shoplifting** being an aggravation by person due to the presumed trust between seller and buyer. However, this scenario might very well still constitute such an aggravation if a Judge opts to employ an interpretation borne by analogy.

Art. 269 – Aggravation by *Place*

A theft is aggravated by **place** when 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 countryside** outside inhabited areas;
>
> **(d)** … in any **store or arsenal of the Government**…;
>
> **(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**."
>
> **Art. 269**, Criminal Code

Sub-article (a) speaks of **places dedicated for divine worship**. These venues must be as **formally acknowledged by the State** places for worship, thus duly chronicled in the State's register. Past jurists contended that the item stolen must also be sacred. However, modern day jurists retort by stating that the **item stolen need not be sacred for this aggravation to be activated** – as long as it is stolen from a divine location.

CASE LAW – 'L'Avvocato della Corona v. Enrico Agius'
This judgement founded that fact that although the law mentions places of worship, it does **not make any reference to its appurtenances**.

Sub-article (d) refers to thefts committed within a **Government-owned store or arsenal**. These places simply serve as warehouses wherein Government stores items it has purchased. Moreover, any other place utilised for the **storage of goods destined for the convenience of the public** are also regarded in like manner to Government-owned stores.

Sub-article (e) pertains to **ships or vessels that have been specifically anchored**. Therefore, stealing a ship dwelling outside of anchorage does not connote the same offence/aggravation.

Sub-article (g) mentions '**dwelling-houses**', which are pieces of property used specifically for residency, and NOT business purposes. An "appurtenance" to such a domicile refers to an object related to an activity one performs within the confines of a home. Ultimately, the **key characteristic a dwelling-house enjoys is that of being designed for the simply purpose of hosting people inside of it**, regardless of having attained that purpose or not.

Carrara defines this aggravation by drawing out three main points:

- ***La Violazione del Domicilio*** (the violation of one's domicile)
- ***Il Pericolo Personale*** (peril directed towards persons)
- ***La Superata Difesa Privata*** (outdated private defence)

Manzini describes this aggravation as the manifestation of a **thief's audacity** to commit an offence within four walls intended for the asylum of goods and the preservation of persons.

Art. 270 – Aggravation by *Time*

A theft is aggravated by **time** when –

> "… it is committed in the **night**, that is to say, **between sunset and sunrise**."
>
> **Art. 270**, Criminal Code

Professor Mamo suggests that this aggravation is borne by the fact that a thief operating at night has his escape **facilitated under cover of darkness**.

Arabia contended that as the time of theft determines the juridical existence of said offence, then **so does night-time suggest the existence of its aggravation**.

However, what happens if a thief commences a robbery in broad daylight, and concludes it under the moonlight? Jurists claim that if a **greater portion of night-time** was dedicated to the commission of the crime, then the aggravation by time ensues. This is because such a factor suggests that the alleged thief intended on attaining his goal under the guise of darkness.

Maltese Courts assume this perspective.

Art. 271 – Aggravation by the *Nature of Thing Stolen*

A theft is aggravated by the **nature of the thing stolen** when committed on –

> "**(a)** … **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)** … **beehives**;
>
> **(c)** … any kind of **cattle**, large or small, in any pasture-ground, farmhouse or stable, provided the value be not less than €2.33c;
>
> **(d)** … any **cordage**, or other things essentially required for the navigation or for the safety of ships or vessels;
>
> **(e)** … any **net** or other tackle **cast in the sea**, for the purpose of fishing;
>
> **(f)** … any **article or ornament of clothing** which is at the time **on the person of any child under nine years of age**;
>
> **(g)** … **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)** … on **nuclear material**…;
>
> **(i)** … on **any public record**…"
>
> **Art. 271**, Criminal Code

This list is **exhaustive**.

With regards to **<u>sub-article (a)</u>**, **Professor Mamo** claims that as this aggravation arises when the **object being eyed is exposed to danger**, then the law punishes the thief in a more severe manner due to him imposing a **greater difficulty for the victim to guard against such theft**. Moreover, this failure to guard may also arise from the necessity to flee imposed on the victim in **hazardous situations borne of fire**, **flood**, **invasion**, and **other fatal perils**. However, Mamo reminds that if this **compelling force ceases**, and the capacity for protecting one's possessions is revived, then the **aggravation falls flat**.

CHECKPOINT

NO Definition of Theft

Simple Theft vs Aggravated Theft

Carrara: *La contrattazione dolosa di una cosa altrui fatto invito domino con animo di farne lucro // The malicious taking of someone else's property without his consent in order to make a gain.*

R. v. Pisani

"La contrattazione…"

The Physical Act of purloining an object and moving it from its Original Position

Carrara: *Amotio*, Element of Movement

Pessina: *Amotio de Loco ad Locum*, Sphere of Control

Impallomeni: *Amotio de Loco ad Locum qui Destineravat*, Movement & Control & Destination

Il-Pulizija v. Carmelo Felice

Il- Pulizija v. Alfred Attard

"…dolosa…"

Malicious Intent and Volition

Antolisei: If person believes that Object was His OR Object was Discarded, then there is NO offence

Il-Pulizija v. Martin Galea

"…di una cosa…"

Manzini: One cannot steal something Incorporeal

Item stolen must have Pecuniary Value

"…altrui…"

Item stolen must be *res aliena*

Il-Pulizija v. Olaf Cini

Taking a *res nullius* OR a *res derelicta* is NOT Theft

Carrara: Difficult to Steal something Co-Owned

Stealing something that is One's Own

Il-Pulizija v. Jean Claude Cassar

Theft by Finding

"…fatto invito domino…"

Against the Owner's Will / Consent

Presumed Consent

"…con animo di farne lucro"

Generic Intent to Make Gain

Pecuniary & Non-Pecuniary Gain

Theft of Water, Gas, and Electricity

Il-Pulizija v. John Galea

fortum usus

Aggravated Theft

Facilitation of the Crime

Qualita Naturale & *Qualita Politica*

Aggravation by *Violence*

Violence MUST be Succeeded by the Theft

Manzini: The Violence need NOT be Exercised on the Victim

Il-Pulizija v. Emanuele Delia

Manzini: *Threat is a serious manifestation of the intention to cause harm or an evil, made to the person who can receive the harm caused from this evil.*

Threat must be Efficient, Believable, and Threatening

Antolisei: The Threat need NOT be Consummated

Armaments

Violenza Numerica

Il-Pulizija v. Manuel Camilleri

Antolisei: Immediate Relationship between Violence and Theft

Aggravation by *Means*

Destruction of Objects Impeding Access to Thing Stolen

Il-Pulizija v. Cleo Azzopardi

Breaking, Demolishing, Burning, Wrenching, Twisting, Forcing Walls

Qualita Politica

False Keys

Mezzo Fraudulenti

Assumption of Ulterior Identity

Aggravation by *Amount*

€232.94 / LM100

Manzini: *The knowledge of the value of the thief is presumed until proven otherwise. But when there is evidence to the contrary, the magistrate cannot neglect the assessment.*

Value = Market Value

Aggravation by *Person*

Abuse of the Trust in an Established Relationship between Persons

Tradita Fiducia

Il-Pulizija v. Emanuel Zammit

Guests / Family Members

Aggravation by *Place*

Places of Worship

L'Avvocato della Corona v. Enrico Agius

Government-Owned Store / Arsenal

Anchored Ships / Vessels

'Dwelling Houses'

La Violazione del Domicilio

Il Pericolo Personale

La Superata Difesa Privata

Manzini: This aggravation is a manifestation of the thief's Audacity

Aggravation by *Time*

Night (i.e. between Sunset and Sunrise)

Prof. Mamo: Darkness offers cover

Arabia: Night-time proves the existence of this aggravation

Greater portion of time of offence takes precedence

Aggravation by the *Nature of Thing Stolen*

Exhaustive List

Prof. Mamo: Things Exposed to Danger are more difficult for the Owner to Protect

Fraud

Once again, the **Criminal Code fails to give us an explicit definition of fraud in general**. The only contribution it does towards explaining this offence is by providing a catalogue of possible scenarios which connote the offence of fraud.

The only discerning factor delineating the difference between theft and fraud is the element of **forcible *contrattazione*** – which is only found in the former offence.

Thus, theft connotes the physical taking away of an item, whereas the act of fraud lies bereft of such a mandatory requisite. **And this is the most important difference between the two**.

Instead of physically and actively detaching an owner from his item, fraud gives rise to a situation wherein the **owner wilfully gives a particular object to a fraudster beguiled by false pretences**. Thus, there is an **element of consent** brought about only by a degree of **deception**.

The offence of fraud thus becomes an **offence against one's property**, as a fraudster directs his malicious actions unto another person's right to property or ownership through such a crime.

However, jurists contend that the most important factor constituting a crime of fraud is that of **unjust gain** through **trickery** and **deception** – which are consummated only through the ***actus reus*** of this particular offence described in the many colourful provisions appurtenant to fraud.

There are many strains emanating from this offence, as will be seen below.

NB: **Aggravated fraud**, in a general sense, is listed in **Art. 310**. In this section, **punishments scale in accordance with the amount** concerned in the offence.

The following offences are all different and contain different requisites for them to be consummated. However, they all fall under the classification of fraud.

Misappropriation

"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**."

Art. 293, Criminal Code

The most important references extracted from this provision are those suggesting '**misapplication**' and '**conversion**'.

The ***actus reus*** of '**misapplication**' occurs when one uses something for purposes other than the ones intended for it. As a result of this misapplication, there is a '**conversion**' from its intended use and results to it producing an alternative result which is beneficial for the person misapplying or anyone else.

Therefore, this strain of fraud connotes the **conversion of an item entrusted to the fraudster to an unjust gain, benefitting either the mentioned fraudster or others**, **through a misapplication borne by illegality or simple wrongfulness**.

The **essential elements** of misappropriation are thus accrued by the collective effort of **misapplication**, **trust**, **conversion**, **unjust gain**, and the holistic ***mens rea*** **to defraud**.

Ultimately, misappropriation arises when an **owner entrusts a person with an item for the sole purpose of receiving it back** OR **receiving something in kind**, and the latter individual **misapplies the item entrusted to him by using it for means extraneous to the owner's volition**; such as keeping it or bartering it for determinations borne solely by the fraudster.

Misappropriation does not apply when an owner gives an item to a person, and duly commissions a third party to supervise said person in possession of the item given to him by the owner. **This is because there is clearly no trust involved**.

Due to the law mentioning the verbs of 'delivering' and 'entrusting', jurists surmise that misappropriation may only be affected on both **movable** and **immovable objects** – as long as they are **corporeal**.

Naturally therefore, something incorporeal (ex. a service) may never be logically subjected to misappropriation.

On a sidenote however, criminal law is evolving, as is the world – and the delivery, entrustment, and ultimate misapplication of, say, a trade secret, is very possible in modern scenarios. However, the application of the notion of misappropriation on a concept revolving around something incorporeal such as a secret has not yet been accepted by the courts.

Italian jurists contend that in trying to establish this element of **entrustment** or **delivery**, one needs to delve into the Italian merits of ***affidamento*** and ***consegna***.

In determining whether something has been entrusted to someone, one needs to establish what Italian doctrine terms as ***'la contiguita fisica dell'oggetto'*** – which is the degree of closeness dwelling between a person and a particular item. Therefore, if it can be successfully stated that, as a result of this relational proximity one could exercise control over the destiny of a particular item, then that person can be deemed to be in entrustment of the item in question.

Ultimately, the offence of **misappropriation becomes complete once the actual taking of an item <u>already vested in the possession of the fraudster</u> takes place**.

<u>CASE LAW</u> – 'The Police v. Giuseppe Cachia'
This judgement complements the above, emphasising on the fact that the **item taken must have already been residing within the possession of the fraudster for misappropriation to occur**. If not, then the crime would be that of that, and not of fraud.
<u>CASE LAW</u> – 'The Police v. Neville Grech'
Here, the defendant failed to return a **freezer** back to his employer after having used it to sell ice-cream. The Court **convicted said party of misappropriation**, but **did not award him a sentence**.

Finally, it is important to note that misappropriation under **Art. 293 is NOT prosecutable unless ushered by the injured party**.

Aggravated Misappropriation

The following article provides the circumstances under which the offence of misappropriation is exacerbated –

> "… where the offence referred to in [Art.293] is committed on things **<u>entrusted</u>** or delivered to the offender **<u>by reason of his profession</u>**, **<u>trade</u>**, **<u>business</u>**, **<u>management</u>**, **<u>office</u>** or **<u>service or in consequence of a necessary deposit</u>**, criminal proceedings shall be instituted ***<u>ex officio</u>***…"
>
> **Art. 294**, Criminal Code

This article describes the most aggravating ingredient – that of having an **owner of an item entrust the mentioned object to a prospective fraudster by virtue of the latter's trade or profession**.

Thus, this is considered to be legal sacrilege due to the **higher degree of wickedness** through the misuse of one's trade or profession in facilitating this offence. For example, a **public notary** misappropriating his clients' funds which have been entrusted unto him activates this aggravation.

Whilst the inherent offence of misappropriation under **Art. 293** becomes prosecutable only by the **overt complaint** of the injured party, **such a principle falls flat in the face of this aggravation**. Thus, proceedings are ignited ***ex officio*** after identifying this exacerbation.

Embezzlement

This offence is found under a different limb of the Criminal Code – '**Of Malversation by Public Officers and Servants**' – due to its possibility of being committed by Public Officers.

> "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** […] **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.
>
> **Art. 127 (1)**, Criminal Code

The ***modus operandi*** of this offence is **akin to that of misappropriation**; however, this strain of offence is **committed by a Public Officer** or **Servant** who 'misapplies' money. Therefore, **this offence cannot be committed by an ordinary citizen**.

This crime connotes the act of **taking money from a cash depository**. Thus, this type of offence does not connote your typical malicious ***contractatio*** (theft), but falls between the domains of theft and misuse. The term '**purloin**' here (***sotrarre***) does not connote traditional burglary, but rather suggests an act by which the offender used a sum of money left under his care for personal use.

The punishment of such an offence is **much graver** due to the fact that, apart from being involved within the remit of one's trade and profession, the **offender in question a Government official**.

Obtaining Money by False Pretences (Truffa)

Unlike concepts we have studied thus far, the law here implements a vast definition encompassing many scenarios one might erect due to his obtaining money by false pretences –

> "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."
>
> **Art. 308**, Criminal Code

Clearly, the law provides a very colourful dish of false pretences one might opt to employ in order to make unjust monetary gain – such as **unlawful practices**, **deceit**, **fictitious enterprises**, and **imaginary power**.

For instance, **donning another's name to make an unlawful gain** is one of the simplest forms of deception.

Another example of deceit would be a '**false enterprise**' begotten by the **formation of a fictitious corporation** persuading others into **investing in such a fake company**.

All in all, however, Art. 308 renders one a fraud if he **deceives his victim and makes an unlawful gain prejudicial to that mentioned victim**. Therefore, and unlike misappropriation, there are no notions of delivery or entrustment. **The gain can be anything** – tangible, intangible, pecuniary, and non-pecuniary.

Most importantly, the offender here is creating an **expectation** the victim falls prey to.

Mise-en-Scène

Italian and **French jurists** have been known to challenge the idea of having a person found guilty of obtaining money by false pretences – because it ultimately depends on the **gullibility of the victim**, rather than the malice of the offender.

Afterall, the crime of fraud requires a meticulous amount of planning decorated with a disgusting display of **trickery** and **deceit** – and the notion of being punished for something which, although regarded to be an extension of fraud, lies bereft of many characteristics contributing to the inherent makeup of said fraud, would seem a bit unfair.

Therefore, this begs the question**: is it fair to punish a person for simply showing a degree of malice**? And this question is echoed through many jurists' contentions that it cannot be the case that for every minor misrepresentation of something, the crime of fraud is present.

But to answer this question, let us give heed to one of **Cicero's** tales, which recounts the story of a certain **Titius** romanticising with the idea of purchasing a villa situated by the sea.

Upon viewing the estate, **Cannius**, the agent striving to sell the house to Titius, resorted to unorthodox methods in order to ascertain the purchase. With a shrewd intent, Cannius opted to exploit Titius' fondness for fishing. Thus, he commissioned a couple of people to go out to sea, armed with naught but a hat and a fishing pole, and pretend to fish – so that on the day of the viewing, Titius would look unto the sea from the villa's balcony and notice how lucrative marine wildlife was in the area.

The catch, however, was that in truth, the sea was devoid of any wildlife. Thus, Cannius had deceived Titius into thinking that buying the villa would facilitate his lust for fishing.

Regrettably, Titius did buy the villa, only to be massively disappointed upon realising that the sea adjoining the expensive house was bereft of the only thing that ushered him into buying the villa in the first place.

Thus, Cicero introduces us to an **element of deceit** which would be deemed highly contemptable by any person with a capacity for morals, because Cannius had actively devised a meticulous plan by fabricating false pretences to support the hoax of a lucrative marine area. And this is what connotes a ***mise-en-scène***, which is French for '**putting on a scene**'.

With this in mind therefore, certain jurists contend that the element of **putting on a scene is essential for one to be convicted of the offence of fraud through false pretences**, as simply **acting in a fraudulent manner is too unfair a requisite for constituting punishable criminal liability**.

Conversely, a handful of other jurists assert that, although it is preferable to have a mise-en-scène in order to help oneself identify the crime of fraud, it is not actually an essential factor.

Carrara dissects this notion in half and states that there is a whole myriad of methods by which one might employ deception to obtain money by false pretences. For him, **if one assumes a fictitious role or identity, words are not enough to constitute fraud**, because there must be something of substance behind that attempt at deception: a **mise-en-scène**. Thus, this differs from a situation wherein one creates a **chimerical device that is deceiving in itself**.

Ultimately, **the law does not require any form of furtherance to be made for fraud through false pretences to be consummated**. Essentially therefore, a mise-en-scène is not actually necessary. For practicality's sake however, Maltese courts have contended that **some form of mise-en-scène**, **no matter how basic**, **is still required**. At the end of the day, there must exist some element of substance for which one can be sent to jail. Therefore, in the interpretation of a fraudulent action, a mise-en-scène is always sought after by the courts – regardless of how basic it is.

Technically however, the ***dura lex sed lex* mentality** affirms that the law can still find a person guilty of fraud even if a most basic form of mise-en-scène is not present. Thus, this shines the brightest light on the fact that the most essential factor constituting fraud by false pretences is NOT a mise-en-scène, but rather is the presence of some strain of gain which might either be pecuniary or non-pecuniary.

Frode Innominato

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).

Art. 309, *Criminal Code*

This article serves as an **umbrella provision**, but it refers also to a **residual offence**.

The legislator here understood that it is impossible to define and delimit the unlimited extent of human creativity. It is impossible to envision all the ways man can come up with in order to commit fraud, therefore, an umbrella provision such as Art. 309 is inherently necessitated.

Therefore, this article stipulates that any performance of fraud not envisioned in the other provisions heralded by the sub-title in question is strictly criminal; despite their non-declaration in the Code.

CASE LAW – 'The Police v. Godfrey Formosa'
The main facts of this case were that the defendant organised an enterprise wherein he promised to energise a whole Gozitan village using solar power. However, when he accrued documents chronicling the fiscal number of money he required from government tariffs and other remuneration, the mentioned numbers did not seem to make sense.

Therefore, he was charged criminally in court under both Art. 308 AND Art. 309.

Needless to say, although the law allows for alternative charges to be made, this was a monumental legal farce – because given that Art. 309 serves as an umbrella term, the uncertainty in the prosecution's charges shone brightly once it got paired with Art. 308.

Therefore, this case highlighted the fact that **Art. 309 may be invoked ONLY if the facts of an alleged crime do not fall under either Art. 308 or Art. 293**. Moreover, **one CANNOT give residual alternatives at the end of the case**. Thus, Art. 309 cannot be invoked impetuously. And it is the job of the prosecution to charge the accused with the correct provision.

Aggravations

There are **common aggravations for all offences borne of fraud** – mostly pertaining to the element of **value**, thus scaling to the item in question ***pro rata***.

> "(a) when the amount of damage caused by the offender **exceeds five thousand euro (€5,000)**, 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 (€5,000),** the punishment shall be that of imprisonment from six months to four years;
>
> (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**."
>
> **Art. 310**, *Criminal Code*

It is also important to give heed to Art. 293 and 294. **Art. 294**, pertaining to misappropriation, **can ONLY be instituted on the complaint of the injured party** – which is **inverse to other offences of fraud, which can be instituted by anyone *ex officio***.

However, **Art. 294**, which pertains solely to **aggravated misappropriation**, can still kick in, thus changing the whole playing field. Whenever the offence of misappropriation occurs on things which can be given or entrusted by virtue of one's profession or business, the offence of misappropriation becomes aggravated, and the punishment increases. Thus, **the offence becomes one which is prosecutable *ex officio***.

Distinctions between Theft, Misappropriation, & Obtaining Money by False Pretences

	Theft	Misappropriation	Obtaining Money by False Pretences
The Misplacing	Presupposes a taking *(contractatio).* We understand that the object is NOT already in the possession of the offender. **Theft is consummated when the offender lays his hands on the item to be purloined**.	Requires that the offender is **entrusted** or **delivered** the item which is subject of misappropriation. In this case, **possession is freely given by the victim to the offender**.	The owner gives the item subject to fraud albeit **unwillingly** – because the **owner's consent would have been afflicted by deceit**, thus negating free will. It is only a result of this deceit that the owner parts with the object and gives it to the offender.
The Intent	The intent to make a gain (***animo lucrandi***).	The intent to **convert another's item** to one's **own benefit** or to the **benefit of another**.	The intent to make **actual gain**.
The Time of Consummation	When the offender **touches the object**.	When the **conversion is made**.	When **actual gain has been made after the deceit has been employed**.
The Subject	Only **Movables** due to the presupposition of *contractatio*.	Both **Movables** and **Immovables –** provided that they are **Corporeal**.	Both **Corporeal** and **Incorporeal** items, including **Rights**.

CHECKPOINT

Fraud

NO Definition of Fraud in Criminal Code

Difference between Fraud and Theft

Owner Wilfully gives Item through Deception

Unjust Gain through Trickery and Deception

Aggravated Fraud – *Art. 310*

Misappropriation

Misapplication & Conversion

Essential Elements of Misapplication, Trust, Conversion, Unjust Gain, and the Intent to Defraud

Owner must Entrust or Deliver something to the Defendant to Receive it Back or for Something in Kind

Misappropriation may happen on Corporeal Movables and Corporeal Immovables

Affidamento & Consegna

La contiguita' dell'oggetto

Misappropriation is consummated once the Actual Taking of the Item in the Possession of the Entrusted takes place

Il-Pulizija v. Giuseppe Cachia

Il-Pulizija v. Neville Grech

Art. 293 must be activated by Injured Party

Aggravated Misappropriation

Facilitation through one's Trade / Profession

Proceedings take place *ex officio* once this crime is consummated

Embezzlement

Committed by a Public Officer / Servant

Taking money from a Cash Depository

Embezzlement between Theft and Misuse

sotrarre

Aggravated punishment due to Status of Offender

Obtaining Money by False Pretences (*Truffa*)

Unjust Monetary Gain

Unlawful Practices, Deceit, Fictitious Enterprises, Imaginary Power

NO notion of Entrustment / Delivery

Gain can be Corporeal/Incorporeal/Pecuniary/Non-Pecuniary

Mise-en-Scène

Gullibility of Victim

Is it fair to punish a person for simply showing a Degree of Malice?

Cicero: Titius and Cannius

Element of Deceit by Putting on a Scene

Some jurists contend that mise-en-scène is Essential for Fraud

Some jurists contend that mise-en-scène NOT Essential for Fraud

Carrara: There must be a Deceiving Chimerical Device

dura lex sed lex

Frode Innominato

Umbrella Provision, *Art. 309*

Residual Offence

Il-Pulizija v. Godfrey Formosa

Art. 309 ONLY INVOKED if offence does not fall under Art. 308 OR Art. 293

Aggravations

Common Aggravation for all offences of Fraud, *Art. 310*

Distinctions between Theft, Misappropriation, & Obtaining Money by False Pretences

Forgery

Forgery is a crime that **defiles public trust**. When society trusts a document, it does so through the ancillary expectation of validity, certainty, genuineness, and good faith. Therefore, once that document is forged, the trust society placed within said document becomes besmirched.

Forgery **does not connote a single offence**. In fact, there is a whole class of offences found under **Art. 166-190** of the *Criminal Code*. And the provisions relating to this topic are concerned with the **material objects** (papers, stamps, seals, public/private writings, etc.)

Most importantly, the offence of forgery is committed when one:

- **Alters** or **edits** an **original and genuine document**; or
- **Counterfeits** or **recreates** an entirely new document which does not accurately reflect what the original document it is copied from stipulates.

For the crime of forgery, the **truth contained in the document must be altered**. If not, then there is no crime.

The Document

The **essential element of forgery** is the **document** as *understood within the ambit of Criminal Law*. The absence of a document may never lead to a case of forgery.

Antolisei defines a document as –

"Any writing made by a person identified in it, which contains **statements of fact** or **declarations of will**."

Manzini however, delves deeper by asserting asserts that a document is –

"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 of a juridical claim **to prove a juridical relevant fact** in a procedural, or other juridical, relationship".
Maltese courts, however, tend to adhere to **Kenny**'s definition of a document –

"A **writing in any form**, **on any material**, which **communicates to some person or persons**, a **human statement** whether of **fact** or **will**".

Let us dissect this definition.

“A writing in any form…”

This means that if the writing is **capable of communicating ideas**, whether through **letters**, **numbers**, **symbols**, or any other medium by which one might convey information, then the first essential factor of what constitutes a document is present.
The writing **may also be invisible**, as long as legibility may be retained through any effective means.

This notion also applies to situations wherein there is information **stored by mechanical or electronic means**. The British legislator spotted a prospective snag upon the introduction of computers unto the modern world. When heeding the law at that time, one would observe that the term *“document”* failed to encompass such new machinations. Therefore, the word *“document”* was transposed into the term *“instrument”* – so as to encapsulate any documents bearing a computational nature.

Naturally, the Maltese followed suit:

“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**.” **Art. 189A**, *Criminal Code*

Therefore, the crime of forgery may be carried out on such mediums as well.

CASE LAW: ***‘R. v. Spiru Quintano et’*, 1954.**
This judgement underlined that although every piece of evidence constitutes a ‘document’ in criminal law (such as a piece clothing), the crime of forgery necessitates that there must be some kind of **scripture**.

“…on any material…”

This means that the document in question can be **handwritten**, **typed**, **chiselled**, or **etched**, or **engraved** on **any object capable of being written on**. Naturally, such a specification is **not limited to movable items**. Materials may thus also connote **immovable property**, such as walls and trees.

“…which communicates to some person or persons…”

If the content of the document can only be understood by its author, then that document can never be regarded as an item susceptible to the purposes of forgery – **because one cannot forge something he cannot fathom**.

For instance, an **invented language known only to its creator** may never be forged. Therefore, the alteration of a document that can only be understood by its author is **NOT** a chronicle capable of being forged.

The information that is being conveyed in such a crucial document must either be **understood by everyone in general**, or at least comprehended by a **group of people**.

Kenny recognises the fact that some items capable of being forged may still be inconceivable for the general public, even though they might be written in plain lexis. For instance, the layperson may never truly grasp the contents of an architectural plan – only an architect and other persons hailing from the same profession may understand such a document.

Therefore, the document may either be **understood by everyone**, or a **particular set of people**. But **if only understood by its author, then that document may never be forged**.

"…whether of fact or will…"

This means that the content of a document must reflect the inherent idea of what the author is attempting to express. Thus, this refers to the author's **expression of will** or **attestation of a particular truth**.

CASE LAW: ***'R v. Closs'***, 1857.

This case delineated the fact that a **painting can never be subject to forgery** because the **item forged must convey a single idea or expression** – and the ideas conveyed by paintings are highly equivocal.

CASE LAW: ***'Il-Pulizija v. Paul Galea***, 1997.

This case defines a document as a **writing attributable to an identifiable person** bearing an **exposition of facts** or a **declaration of will** through **alphabetical lexis**, **numbers**, or **cryptographs** either **understood by all or a select few**. The writing may be **handwritten**, **electronic**, **erasable**, **permanent**, and drafted **on any media capable of bearing the intended message**, even if temporarily.

The Content (Tenore) of the Document

The content is there to prove something, hence why persons tend to pen down discussions and agreements they had with other people. **Writings thus provide permanent and authentic proof of facts.**

Particular writings serve as **evidence of their own contents**. For instance, a **Public Deed** in the form of a contract of sale is self-evident of its own content because it exhibits the consummation of the sale in question. Thus, if a person presents such a Deed in court, no other parties are required to attest to the verity of the sale – because the **Public Deed is self-evident** *(per se notum)*.

Conversely, private writings would require the strengthening of other evidence in a court of law.

This does not mean that such writings are bereft of value, but the fact that they were not written with the **preordained purpose of being evidential instruments** (such as Public Deeds) renders them in want of supplementation when scrutinised in court.

The content of a document may be of 2 strains:

1. A **narration of facts** ***(dokumenti narrattivi)***; or
2. An **expression of will** (***dokumenti dizposittivi)***.

When a document is used to prove a juridical claim, **it is irrelevant whether that document was made with the preordained purpose of proving that particular fact**. Therefore, if a person is required to prove something in court, he can always use a document to prove his juridical claims – even though the document he ultimately provides as evidence was not made with the preordained purpose of it being employed in a court of law. However, any private writings being used for the purposes of proving particular juridical claims **have to be sworn upon by oath**.

With all this in mind, it necessarily connotes that a document is never limited to the preordained purpose of proving a juridical claim. In fact, it can be used for an array of intentions.

And this nicely brings us to observing the 2 types of documents:

1. **Dokumenti Intenzjonali** – made with the preordained intent of displaying something in particular; and

2. **Dokumenti Okkazjonali** - NOT made with any preordained purpose, but are nonetheless still capable of being employed to prove a juridical claim.

The Signature

A paper bearing **a person's signature** dwelling in an infinite sea of blankness is **not recognised as a document**. However, the law stipulates that in certain cases, the solitary presence of a signature still manages to endow the below-mentioned documents with a **complete character**:

> "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."
>
> **Art. 167 (3)**, *Criminal Code*

Thus, this provision seeks to protect those documents which, although are absolved from any content, are still considered to be complete and susceptible to forgery.

Smith & Hogan stipulate that any document bearing a signature paired with both its **place of origin** and its **date of writing**, then that document is complete and forgeable.

Manzini contends that if altering the date of a document leaves no ultimate effect on the document, then **that would not amount to forgery**.

Glanville Williams also states that if a person is given an empty cheque and proceeds to fill it with a digit contrary to the wishes of the person who initially gave him the cheque in question, then forgery is identified.

However, our law can never agree with this – because an empty cheque bearing a solitary signature connotes a significant lack of content, meaning that the mentioned cheque would be of an incomplete character, and thus **NOT susceptible to forgery**. The notion of filling a cheque with the incorrect numbers might befall Art. 297 relating to fraudulent practices, but is in NO way tied to forgery.

A contrario sensu, if a person **alters the numbers of a cheque** which had been already filled in by the person giving it to him, then **forgery is identified** – because that document was decorated with all the ingredients required to render it complete.

Finally, the law contends that **a signature need not be in full**. If an **abbreviation**, or **nickname** attributable to an ***identifiable*** **author** is provided, then such a monogram suffices to constitute a signature. A public authority using a stamp he is allowed to use when on his workplace, then that stamp is considered to be serving the same purpose of a full-blown signature. Thus, **one might still forge a stamp**.

The Author

The **identifiable author of a document** is also of crucial importance when analysing the crime of forgery. This is because the **aforementioned *tenore* must be attributable to a detectible person**.

The author need not necessarily be a natural person. The content may be attributable to, say, an **authority** (ex. a person signing on behalf of the Planning Authority by virtue of a mandate). In relation to this, one might also encounter the **power of attorney** – which is a type of mandate that allows a person to delegate his legal authority to someone else. However, one must always envisage the Latin maxim of ***delegatus non potest delegare***, which bans the notion of having a person delegating powers already delegated unto him.

If the author is undiscernible, then the document in question may never be subject to forgery. **Uncertainty of the author is tantamount to uncertainty of the document**.

CASE LAW: ***'Il-Pulizija vs John Lawrence Formosa'***

This judgement underlined that a **document must be attributable to an identifiable author** for it to be susceptible to the crime of forgery. Anonymous writing may never be subject to forgery – but **if the author of a document can be subsequently identified, then the mentioned document may thus be forged**.

In essence, this hallowed author **is NOT the person who penned or typed the document**, but is actually **he who signed off the content of said document** – because by signing it, the author is **displaying his awareness** of the content withheld within the mentioned document, and is thus **assuming responsibility** for what the document is stipulating.

Void & Voidable Documents

A document that is **void** bears **no legal effects**, and is absolved from such legal influence ***ab initio***. Courts must first ascertain whether a document is *void* or *voidable* before even pondering about the possibility of any harm derived from the forging of such a document.

Conversely, a **voidable document** continues to produce legal effects **up until a court of law deems it void**. Thus, a voidable document is not inherently void – but it might be rendered as such at a subsequent stage.

Carrara and **Manzini** argue that **a void document may never be subject to forgery**, because due to its impotence, such a negated manuscript does not bear the power of ensuing any harm if forged. However, a voidable document still yielding legal effects is definitely susceptible to the purposes of forgery. Conversely, **Antolisei** begs to differ. For him, it matters not whether the document forged was void or voidable, or whether harm was ensued or not – **the crime of forgery has been consummated nonetheless**. Moreover, Antolisei adds that an **already-forged document may still be susceptible to more forgery**.

Public & Private Documents

The difference between public and private documents is of utmost importance when dissecting the crime of forgery.

For starters, the **punishment for forging public documents is harsher than that given for the forgery of private writings**. This is because public documents are already deemed to be *per se notum* – thus proof of their own contents, made with the preordained purpose of substantiating a juridical claim.
Contrarily, private writings require additional proof via a testimony under oath in order to be deemed legitimate.

Secondly, when assessing the alleged forgery of a public document, it does not matter whether any gain was attained by the forger OR that any harm was induced after said document was forged – because **the forging of a public document is, in itself, enough to warrant the full crime and punishment**. Conversely, when it comes to **private writings**, **one must prove the two mentioned elements of gain and harm** for the defendant to be punished fully.

<u>**CASE LAW**</u>**:** ***'Il-Pulizija vs Tomas Mikalauskas'***

This judgement asserted that –

"In the case of forgery of public documents the law aims at **punishing the violation of public trust** – **irrespective of the harm** – **actual or potential**. Public documents are intrinsically apt to **create rights or to transfer rights** and, therefore, **their forgery is presumed always to cause harm**, whether this harm materialised or not. The **potential of causing harm is therefore NOT an essential ingredient of the crime of forgery** that has to be proved by the prosecution."

With regards to what constitutes a public document, our Criminal Code is silent. However, the Civil Code contends that:

"A public deed is an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully **authorised to attribute public faith thereto**."

Art. 1232 (2), *Civil Code*

Crivellari promptly adds that a public deed is simply a document created in those forms which **constitute a guarantee to all**. Therefore, the common factor revolving around laws and jurists' take on what a public deed is that its form serves as a guarantee to all – thus connoting **public faith**.

However, one must note that ***every public deed is a public document, but not every public document is a public deed***.

Another point outlining the difference between public and private documents is that when trying to ascertain whether forgery has been committed on a public document or not, the forgery itself is enough to prove that notion. However, if there is a general lack of the elements of gain or harm ensued in the alleged forgery of a private document, then forgery may never be identified.

<u>**CASE LAW**</u>**:** ***'Il-Pulizija vs Boateng'***
The court here asserted that although the element of causing harm is not a constituent element of the crime of forgery of public documents, **the possibility to deceive is considered a crucial ingredient in the mentioned crime – regardless of whether it pertains to *public* or *private* documents**. Thus, the replica of the forged document must be potent of deceiving persons using ordinary observation.

Prof. Mamo also muses that if the manner one committed forgery in was of a noticeably **clumsy character (*ictu oculi*)**, then the **crime of forgery is negated**. However, if the victim of the crime in question is reasonably deceived, then the defendant cannot defend by raising *"the question of the manner of execution of the falsity"*.

In legal circles, there is a significant emphasis on the **format** and preparation of public documents. Take, for example, public deeds; they not only include the **name and surname of the signer** but also provide information about their **immediate family**.

Additionally, **all necessary parties must sign a public deed simultaneously, unlike private writings which may be signed on different days**. Another procedural requirement is that **a notary must be present to read and elucidate the contents of a public deed**, including pertinent details such as the **location** where it was signed.

These formalities distinguish a public deed from a private writing, lending it a distinct and elevated status.

<u>**CASE LAW**</u>**:** ***'The Queen v. Giuseppe Zahra', 1953.***
In this instance, the document under scrutiny was a **driving license**. The court established that the mentioned license had been meticulously prepared with all the necessary formalities. This encompassed the noteworthy detail that the **signature of the police commissioner**, being a public official, was affixed using a **stamp**. Consequently therefore, in this scenario, **the signature was effectively replaced by the stamp**. By virtue of the **public officer endorsing this license**, he vested it with **credibility**. Thus, the concept of a public document has been clarified in this context.

CASE LAW: ***'Il-Pulizija v. Carmelo Borg', 1984.***
In this case, the query regarding whether a bank draft issued by the Central Bank of Malta can be classified as a public document arose. **The court unequivocally affirmed its categorization as such** – because it was **issued by an employee of the Central Bank**, who is recognized as a **public officer operating within a governmental institution**. Thus, a bank draft is effectively and fundamentally considered a public document.

Hence, it is evident that when it comes to addressing *defences* related to forgery, the **initial crucial step is discerning the nature of the purportedly forged item**: whether it falls under the category of a **public document** or a **private writing**.

However, if a public document is forged but lacks a specific formality, does this omission **nullify the document**, or would it simply r**elegate it to the status of a private writing**?

Ultimately, there is a lack of unanimous consensus among court judgments on this matter. Nevertheless, what remains paramount is the careful consideration of the significance of the absent formality within the public document before arriving at any conclusions.

Private Writings

Antolisei defines private writings by elimination, stating that:

Ogni documento che non presenta le caratteristiche di documento pubblico é un atto privato.

//

Any document that does not have the characteristics of a public document is a private writing.

Manzini, however, presents a more comprehensive definition, even though it addresses situations that are highly unlikely.

According to Manzini, **private writings**:

1. Possess the **character of original documents or copie**s, as specified by law, which **are capable of substantiating any fact or legal relationship**. These are drawn up by **private individuals** without the involvement of an officially certifying public officer.

2. **Include acts that are fundamentally private**, either received or drafted by a public officer who lacks the authority to do so OR is acting beyond the scope of his official duties. The emphasis here lies on the public officer's **incompetence** or **unauthorized drafting** of the document.

3. **Do not possess the legal force of public acts due to a deficiency in form**, provided they are duly signed by the involved parties.

This definition delves into the question of whether a defect or absence of formality in a public document renders it void or classifies it as a private writing. In this context, it is imperative to assess the significance and impact of the missing formality before arriving at any conclusions.

Art. 187 of the Criminal Code comprises the forgery of private writings. However, the means of perpetrating the crime of **Art. 187** must be understood through **Art. 179** *mutatis mutandis* (therefore including false signatures, alteration of writing, etc).

The Civil Code does not explicitly describe what a private writing is, but **Art. 633 of the COCP** describes it as such:

> "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."
>
> **Art. 633**, *COCP*

Ultimately, the Criminal Code says that these scenarios are erected by private writings such as **promises of lease**, **sale**, and **loans**. However, the Criminal Code falls short of defining these writings.

To recap, if a **public officer**, due to **incompetence** or an irregularity, fails to observe a required formality in drafting a document, yet said document is **still duly signed** by the pertinent parties, it is **categorized as a private writing**. Consequently, in this scenario, **a public document is demoted to the status of a private writing**, though it retains its intrinsic value and substance.

Private writings are legally safeguarded either in their original form or as certified true copies. Therefore, **forgery of a private writing can pertain to either the document itself or to a certified true copy of that private writing**. For instance, if one were to forge a photocopy of a lease agreement (considered a private writing), it may not be readily discernible as a forgery.

Additionally, in a **public document**, there exists **only one authentic and original copy**. In contrast, **with private writings, it is customary to include a provision indicating that the document has been executed in two or more *duplicates***. These duplicates do not bear the status of mere copies; **they are distinct originals**.

For example, in a lease agreement, involving the lessor, lessee, and tenant, there could be three distinct originals. These duplicates are NOT replicas of the original; **they are true and complete versions**. Thus, any act of forgery would constitute tampering with the authentic version, irrespective of which particular duplicate that document is.

Ultimately, the forge**ry of a private document must tend to cause injury or procure gain.**

CASE LAW: ***'Il-Pulizija v. Patrick Spiteri', 2004.***

This case stands out because the accused obtained a copy of a public deed, altered specific elements, and authenticated it as a valid copy, essentially assuming the role of a notary.

This, of course, involved forging the notary's signature. The prosecution pointed out that the accused utilised this document, while the defence raised the question of whether it could still be considered a public document. This is because, **although it was a copy of a public deed, it lacked a legitimate certification**.

Therefore, if this certification is an essential formality for a document to qualify as a public deed, and it is absent, can the document still hold the status of a public deed?

The court continued by asserting that although the signature was not issued by a public official because the signature of that same public official had been forged, **such a fact does NOT necessarily render the document void**.

Ultimately, the court stipulated that **a lack of formalities within a public document does not always necessarily relegate it to the status of a private writing**. It all depends on the nature of the missing formality. If the name of the signer's mother was omitted, such a nigh irrelevant fact does not necessarily beget the demotion of the document's character. It would still remain a public document. However, if a more major formality is missing (such as the date of the document), then the relegation of such a document would be reasonably considered.

"Biex dokument jikkwalifika bhala wiehed pubbliku u awtentiku hu mehtieg bhala regola generali li jkun dokument:

*(1) destinat li jaghti **fidi pubblika** tal- kontenut tieghu;*
*(2) **maghmul bil-formalitajiet mehtiega**;*
*(3) **rilaxxjat minn ufficjal pubbliku** li ghandu s-setgha skond il-ligi li jaghti fidi pubblika lil dak il-att.*

Hekk ukoll, meta wiehed jirreferi ghall-"formalitajiet mehtiega", ma jfissirx neccessarjament li nuqqas zghir ta' formalita` […] igib bhala konsegwenza li dak l-att ma jkunx wiehed pubbliku jew wiehed awtentiku: **wiehed ghandu jhares lejn dak li hu essenzjali ghall-forma u mhux dak li hu marginali**."

The Elements of the Crime of Forgery

In forgery we have 4 essential elements that must exist for the crime to be consummated:

1. The ***actus reus***
2. The criminal intent (***dolo***).
3. The **imitation of the truth**.
4. The damage (***il danno***).

It is important to note that the last two elements do not apply to all documents.

The Actus Reus

This refers to the **actual alteration of the truth**; and it must take place **through a writing**, or else ***on*** **a writing**. Therefore, the alteration that is happening is happening on the document itself.

This, therefore, reminds us of the fact that if the presence of a document is lacking, the crime of forgery may never materialise. So, if a fact or agreement between parties remains largely unwritten and is simply agreed upon by verbal communication, such a fact or agreement may never lead to a crime of forgery.

When discussing the *actus reus*, one naturally refers to the element of **falsity** – which is the primary essence of the consummated crime itself. In order to determine if one has forgery or not, one must make a distinction between three different types of falsities; namely: **material falsity**, **personal falsity**, and **ideological falsity**.

Therefore, when determining which type of falsity is present, one can thus also identify whether the crime of forgery has been consummated or not.

Material Falsity

When one speaks of material falsity, he also refers to a situation wherein a **document is telling a lie about itself**. Therefore, the document in question is NOT telling a lie in general, but must purport a falsity exclusively related to its own character.

So, material falsity occurs when a **change**, **alteration**, **cancellation**, or **amendment** has been made to a document, all without the authorisation of the original author of the mentioned document.

In tandem with material falsity, one also considers **counterfeiting** – which is the creation of a document that is not faithful to what the legitimate author had in mind when drafting the original document.

Per sake of exemplification, an instance of counterfeiting would be if a person alters his university degree into stating that he or she is qualified in more fields than the one/s specified in that particular certificate. Therefore, this connotes the creation of a new document which has differences that were not authorised by the original author of that document.

Thus, there is material falsity whenever the **alteration of the truth falls on the writing itself**.

<u>CASE LAW</u>: *'Il-Pulizija v. Yassin Najah', 2021.*
In this case, the court referred to the jurist Kenny, asserting that: "It has been stated that a document is NOT forged when it merely contains statements which are false, but **only when it falsely purports to be itself that which is not**. The simplest and most effective by which to express this rule is to state that for the purposes of the law of forgery, **the writing must tell a lie about itself**".

<u>CASE LAW</u>: *'Il-Pulizija v. John Galea', 2010.*
The court here said that: "Biex ikun hemm falsifikazzjoni, jehtieg li jkun hemm; a) **dokument li fih ikun hemm 'counterfeiting'**; jew b) **tibdil ta' dokument genwin**".

<u>CASE LAW</u>: *'Il-Pulizija v. Alfred Sammut', 2010.*
This case was also quoted in '***Il-Pulizija v. Michael Carter***', stating that: "Il-falsifikazzjoni tista' ssir sew **billi jigi falsifikat dokument**, **kollhu jew parti**, kif ukoll billi jigi **alterat dokument genwin**."

With material falsity therefore, one finds the core of forgery – as it encompasses the most classical ways by which the crime of forgery may be consummated.

<u>Ideological Falsity – Art. 188</u>

An ideological falsity DOES NOT connote forgery. In this stratum of falsity therefore, one has a **genuine document that contains statements of falsehood**.

Hence, in situations of ideological falsity, one might identify a lie being contended in the document in question. Thus, **the document is not required to tell a lie about itself**. It is the inherent content of the document that poses a problem, not the document *per se*.

The crux of this notion is the **lie of the individual** – NOT the document lying about itself. Therefore, although an ideological falsity connotes a document possessing a falsehood, it does not necessarily imply the crime of forgery.

Many authors draw their own conclusions when discussing ideological falsity. Manzini differentiates between **ideological falsity** and **material falsity**, highlighting the concepts of ***non genuinita'*** and ***non vericita'***.

Non genuinita' deals with material falsity because the document inspected would not be genuine – meaning that it is a false document, although it still might have a certain degree of verity within it.

Non vericita' refers to ideological falsity wherein although the document is of a genuine character, it lacks a substantial amount of truthfulness. And this is exactly why **forgery does not apply to ideological falsity**.
In considering Manzini's differentiation between *genuinita'* and *vericita'*, one must keep this distinction in mind in the forthcoming case:

<u>**CASE LAW**</u>**:** ***'Il-Pulizija v. Paul Muscat'*, 2004.**
In this instance, the court elucidated Manzini's differentiation between *non genuinita'* and *non vericita'*, stating that material falsity occurs when the document is not authentic. Conversely, ideological falsity occurs when the document is genuinely sourced but lacks veracity.

<u>**CASE LAW**</u>**:** ***'Il-Pulizija v. Paul Galea'*, 1997.**
In this case, the judge made a **distinction between material and ideological falsification**: "Falsifikazzjoni materjali jigi ffalsifikat fl-**ESSENZA** tieghu, u falz ideologiku d-dokument ikun iffalsifikat fis-**SUSTANZA** tieghu."

Expanding on this, **Antolisei** builds upon Manzini's assertion by adding that a **document is considered genuine when it originates from the person who is purported to be its author**. Moreover, the document must not have undergone any form of alteration or modification after it has been definitively formed. **Kenny concurs with this perspective**.

<u>**CASE LAW**</u>**:** ***'Il-Pulizija v. Raymond Caruana'*; *'Il-Pulizija v. Glen Debattista'*; *'Il-Pulizija v. Michael Cohen'*.**
These cases all asserted the same thing, contending that: "Id-differenza bejn il-falz materjali u l-falz ideologiku hi spjegata mill-awturi b'dan il-mod: filwaqt li fil-kaz tal-falz materjali id-dokument jigi ffalsifikat fl-essenza tieghu, fil-kaz tal-falz ideologiku, id-dokument ikun falsifikat biss fis-sustanza tieghu, u, cioe', fil-kontenut tieghu. Ikun hemm falsifikazzjoni materjali meta' d-dokument ikun wiehed mhux genwin, jigifieri meta d-dokument ikun issubixxa alterazzjonijiet wara l-formazzjoni definittiva tieghu."

Personal Falsity

This kind of falseness may definitely lead to forgery.

In the realm of personal falsity, distorting the truth is not just about a person's quality, but rather, it pertains to the very existence and essence of that individual.

Personal falseness involves a fabrication or distortion not just of a person's traits, but of their very essence. Therefore, in cases of personal falseness, we encounter a **simulation of identity**.

As a result, personal falseness occurs when someone is feigning to be someone else. However, if this deception remains verbal, forgery does not occur because there is no tangible document involved. While fraud may be a factor in such situations, forgery is not. Thus, personal falsity connotes a **change in the quality of a person**.

This situation might also give rise to **nominal falseness**, which concerns the person's name.

Simulation

As we have seen up till now, the crime of forgery refers to the alteration of a substance or circumstance of an act. Conversely however, **simulation** is whenever a party stipulates a falsity to a public officer who innocently registers that falsity as a truth in a document.

One must also remember that a public officer does not necessarily render a document public merely because it is registered by him. A public document is defined in **1232 (2) of the Civil Code**. A document becomes a public document once there is public faith bestowed upon it, such as whenever it is stamped by an insignia from an authority.

Art. 189 of the Criminal Code

This provision serves as an umbrella provision for any other type of forgery not provided for already.

The Mens Rea

This *mens rea* equivocally stands as the most essential element of forgery – a subject that sparks diverse perspectives regarding the requisite intent involved in such acts.
Some scholars assert that the mere generic intent to deceive suffices, while others argue for a more nuanced position, positing that an **additional layer of intent, particularly the specific intent to defraud, is indispensable**.

A prevailing inclination among scholars aligns with the ***dolus in res ipsa*** approach, contending that **intent is inherently intertwined with the very act of forgery**.

Consequently, the **act of engaging in forgery inherently manifests the criminal intent**. Jurists draw a further distinction between generic and specific intent – with proponents emphasizing the paramount importance of specific intent. Another layer of complexity also emerges as jurists highlight the **importance of identifying whether one is dealing with a private writing or a public document before even attempting to delineate what strain of intent he or she is dealing with**.

Kenny, for instance, discerns between public documents and private writings, asserting that an **intent to deceive suffices for public documents**. In the realm of **private writings, however, a more intricate requirement surfaces: not merely an intent to deceive but rather an intent to defraud**. This distinction hinges on the subtle difference between deceiving and defrauding.

Deceiving involves inducing another to believe a falsehood as truth, while **defrauding** implies a more sophisticated act of deprivation through deceit. Therefore, in **private writings**, the act is one of **defrauding**, where **harm is inflicted** through deceit, **gains are made**, and **prejudice is incurred**.

Carrara contributes to this discourse by contending that the requisite intent transcends generic willingness and understanding of the committed act. Carrara argues that the **perpetrator must possess an awareness that their actions contravene the law** and, secondly, that the **perpetration could be or is potentially harmful to a third party**. Hence, according to Carrara, **generic intent is insufficient**; the perpetrator must be cognizant that their actions breach the law and carry the potential for harm to third parties.

This potential harm, identified by Carrara as ***intentio nocendi***, introduces a critical dimension to the evaluation of intent in forgery.

CASE LAW: ***'Il-Pulizija v. Arthur Cancio',*** **2017**.
The court here made reference to Carrara's theory, stating that **it is not enough if he who falsifies a document had the intention to falsify; it is crucial for he who falsifies to know that his falsification is contrary to law and can potentially cause harm to others**.

CASE LAW: ***'Il-Pulizija v. John Lawrence Formosa'*****, 2020.**
"Carrara izid u jghid li **mhux bizzejjed li dak li jghamel il-falsifikazzjoni kellu l-intenzjoni li jiffalsifika**, pero' li kien jaf li dik il-falsifikazzjoni kienet kontra l-ligi u l-potenzjalita' setghet tikkaguna pregudizzju."

Crivellari articulates that the **essence of criminal intent in forgery lies in the cognizance of the act**, awareness of its unlawfulness, and the deliberate intent to fabricate falsehood or alter the truth. In essence, committing forgery necessitates nothing more than a **generic intent characterised by willingness and comprehension**.

Crivellari does **NOT** consider the intent to cause harm or the potentiality of such to form part of the criminal intent. Instead, he regards the intention to cause harm as part of the **motive**.

Proponents of the ***dolus in res ipsa*** theory assert that **criminal intent is inherently and inseparably intertwined with the very act of forgery**. Hence, when executing forgery, the agent inherently exhibits criminal intent through the act itself. The commission of forgery is thus deemed as self-evident proof of the criminal intent.
Maltese law does not brandish many judgements indicating what sort of intent is required in forgery. However, our legislation still drops a few hints as to what the strain of intent should be.

Forgery offences are situated under **Title V** of the Criminal Code — **Crimes Against Public Trust**. The significance lies in the fact that, had the requisite intent been to defraud, these offences would logically be classified under **Title IX** — **Crimes Against Property and Public Safety**. This distinction underscores the legal emphasis on preserving public trust rather than property.

This leads us to believe that **unless the law stipulates that the intent required is one to defraud, then one assumes that the intent required is that to deceive**. The Maltese courts, having consistently aligned with Italian jurisprudence, maintain this reasoning, rooted in the belief that the intent to deceive, according to Italian legal principles, is inherent in the act of forgery itself. This perspective also encapsulates the *dolus in res ipsa* maxim.

However, there are certain articles which pose a challenge to the general idea of forgery:

Art. 180: This addresses the fraudulent alteration of acts by a **public officer**, prompting the question of whether the use of the term "fraudulent" implies an intent to defraud. However, under Art. 180, this is not the case.

The term "**fraudulent**" here is NOT intended to signify the necessity of an intent to defraud, but rather, to connote **malicious knowledge** or an act contrary to the law. In this context, negligence remains unpunished. The inclusion of the term "fraudulently" clarifies that the legislator intended to penalise those who knowingly commit such acts, excluding negligence from punishment. Thus, in Art. 180, despite the use of "fraudulently," there is no requirement for an intent to defraud.

Art. 182: A subtle consideration emerges in here, wherein the individual mentioned may be deemed **negligent** rather than intentionally deceptive. Here, the concept of negligence introduces a challenge to the *dolus res ipsa* theory – as the intent to deceive encounters an obstacle when addressing instances of negligence rather than deliberate intent.

What makes Art. 182 special is its explicit clarification that, even though it seeks to penalise both negligence and wilful acts, there is a distinction between sub-articles (1) and (2). **The legislator did not intend to treat someone guilty of a negligent act in the same manner as one who wilfully carries out the act**.

<u>Art. 187</u>: This pertains to the **forgery of private writings** intending to cause injury or procure gain. In Art. 187, the terminology used does NOT refer to the intentional element, but rather emphasises **the material conduct of the offence**. The legislator here signifies that the **type of forgery committed must bring about harm to a third party**. It *is* possible that there was no explicit intention to cause harm in carrying out the offence, but the chosen form of forgery has the potential to result in harm inflicted upon a third party.

The Imitation of the Truth

Certain authors contend that the imitation of truth is a fundamental component of forgery, while others hold a contrary view. However, within **Maltese law**, the essentiality of imitating the truth for the completion of the crime appears **less apparent**.

It is crucial to distinguish between the imitation of truth and the falsification of truth. **Imitation** involves the endeavour to closely resemble the original document during the act of forgery, whereas the **falsification** of truth entails altering the original document or signature itself.

In the perspective of **Manzini** and **Antolisei**, the imitation of truth is not an indispensable element, as they argue that **forgery can still occur even if the falsification does not closely resemble the truth**. For them, the imitation of truth primarily holds **evidential value** rather than being a strict legal requirement. Thus, they posit that the imitation of truth serves as **evidence of the perpetrator's intention**, illustrating a deliberate effort to deceive. Hence, Manzini and Antolisei suggest that forgery can exist without strict adherence to imitating the truth.

Authors favouring the notion of the imitation of truth as an essential element often consider the **potentiality of causing harm**. They argue that – if one does not strive to closely imitate the original, then how can the offence of forgery ever be consummated?
This brings attention to the concept of **Falso Grossolano** – which refers to instances wherein forgery is so glaringly obvious that it would immediately catch the eye. Supporters of the imitation of truth theory argue that gross forgery, so blatant that it could never deceive anyone, **does NOT constitute the crime of forgery**.

Even **Carrara** acknowledges that **changes so evident and gross negate the possibility of genuine forgery.** Here therefore, the intersection between the imitation of the truth and the potential to cause harm becomes apparent, with the courts seemingly leaning towards requiring the **potentiality to cause harm concerning private writings**. Conversely, for the **forgery of public documents, the act of forgery, regardless of its grossness or fidelity to the truth, is deemed sufficient to fulfil the offence**. Authors like **Roberti** support this perspective.

In summary, it appears that **Maltese courts have embraced the theory of Falso Grossolano concerning private writings**. However, this theory **does NOT extend to public documents**. The courts seem to assert that, for public documents, the degree of falsification is inconsequential; once the falsification is executed, the offence is deemed complete.

In contrast, the theory of Falso Grossolano gains traction in private writings, where the degree of alteration may determine the presence or absence of forgery, particularly if the alteration is so conspicuous that a reasonable person would have realised that it deviates from the original.

CASE LAW: ***'Rex v. Lorenzo Cassar'*, 1941.**
The forgery here related to a **lotto ticket**. At this moment in time, the courts had not yet established a distinction between private writings and public documents insofar as ascertaining whether there could be Falso Grossolano in one or the other. Moving on in time however, later judgements started making a delineation between public documents and private writings; and this stance is still adopted today. This is because as **soon as there is forgery of a public document, one immediately instils prejudice against public trust**. Thus, once there is the alteration of a public document, it is enough to constitute forgery – regardless of whether that forgery is gross or not.

CASE LAW: ***'Rex v. Victoria Gauci'*, 1943.**
The court conceded that the alteration carried out was one of a **gross nature**. However, since public trust was affected, it became irrelevant to continue investigating whether there was harm caused or not. **The fact that this concerned a public document was, in itself, enough to constitute the crime of forgery**.

CASE LAW: ***'Il-Pulizija v. Carmelo Borg',*** 1984.
This judgement continued to ascertain that the theory of **Falso Grossolano does NOT apply when one is dealing with public documents**.

When dealing with **private writings**, if one has a gross falsity which has **actually managed to deceive**, the deceit is no longer potential, but is **actual**. In such a case, it is useless delving into whether that gross falsity could have deceived or not – because we have a state of fact that such a falsity has actually managed to deceive. Here therefore, we have moved past the theory of Falso Grossolano - because the deceit has been actualised.

CASE LAW: ***'Rex v. Mary Azzopardi'.***
This case concerned a private writing which was very grossly and evidently forged. However, it actually managed to deceive the victim. Therefore, the theory of **Falso Grossolano could NOT be applied**, because the deception was no longer potential and the victim was entrapped within the deceiving snare of the forgery – regardless of the fact that the mentioned snare was very weak due to its being gross.

The Damage (il danno)

Once again, we have conflicting jurists dwelling on both polarities of the spectrum – some advocating that this element is essential for the crime of forgery, and some not. Certain authors contend that the inherent attempt to cause prejudice, whether successful or not, does not matter.

Maltese law also delineates between public and private documents. For the former, the forgery is enough, but in the latter, one also requires the potentiality to cause harm.

CHECKPOINT

Forgery

Defiles Public Trust

Altering / Editing original Documents

Counterfeiting / Recreating new Documents

The Document

The Document is the Essential Element of Forgery

Antolisei: *Documents contain statements of fact or declarations of will.*

Manzini: *Documents are written on suitable means by determinate authors, and contain declarations of will or attestations of the truth to prove a juridical fact*.

Kenny: *A writing in any form on any material which communicates to some person or persons, a human statement whether of fact or will.*

"A writing in any form…"

Capability of Communicating Ideas

Letters, Numbers, Symbols

Invisible Writing

Information Stored Electronically

R. v. Spiru Quintano

"…on any material…"

Handwritten, Typed, Chiselled, Etched, Engraved

NOT Limited to Movable Property

"…which communicates to some person or persons…"

Document must be Capable of being Understood

Invented Language

Kenny: The Document can be understood by EVERYONE or PARTICULAR PEOPLE

"…whether of fact or will."

Expression of Will / Attestation of Truth

R. v. Closs

Il-Pulizija v. Paul Galea

The Content (*Tenore*) of the Document

Content is there to Prove Something

Public Documents are Proof of their Own Contents (*per se notum*)

Private Writings require Supporting Evidence

Dokumenti Narrattivi

Dokumenti Dizposittivi

Dokumenti Intenzjonali

Dokumenti Okkazjonali

The Signature

NO Signature = NO Document

Smith & Hogan: Signature + Place of Origin + Date of Writing = Complete Document

Manzini: If altering the Date of Writing is ineffective, then there is NO Forgery

Glanville Williams: If a person writes numbers in another person's Empty Cheque, then there is Forgery (Maltese Law DENIES this because an Empty Cheque is NOT a Complete Document). Altering Numbers ALREADY WRITTEN on cheque is Forgery.

Abbreviation / Nicknames

Stamps

The Author

Tenore must be attributable to an Author

Author may not be a Natural Person

Uncertainty of Author = Uncertainty of Document

Il-Pulizija v. John Lawrence Formosa

Author is He Who Signs

Void & Voidable Documents

Void Document = NO Legal Effects *ab initio*

Voidable Document = Produces Legal Effects until Court Voids it

Carrara & Manzini: Void Document CANNOT be Forged

Antolisei: Void Document CAN be Forged, and Forged Documents are still susceptible to more Forgery

Public & Private Documents

Punishment Higher for Forging Public Documents

It does NOT matter if Gain was attained from Forging Public Documents

Gain and Harm must be proven in Private Writings

Il-Pulizija v. Tomas Mikalauskas

Public Document Definition – *Art. 1232 (2)*, Civil Code

Crivellari: A Public Deed bears Public Faith because it provides a Guarantee to All

Il-Pulizija v. Boateng

Prof. Mamo: *ictu oculi* negates crime

Reasonable Deception

Formalities of Public Deeds

The Queen v. Giuseppe Zahra

Il-Pulizija v. Carmelo Borg

Missing Formalities = Voided Document? OR = Relegation to Private Writing?

Private Writings

Art. 187 of Forging Private Writing must be read with *Art. 179*

<u>Antolisei</u>: *Any document that does not have the characteristics of a public document is a private writing.*

Manzini: Private Writings may Substantiate Facts, are drawn up between Private Persons, include Private Acts, do NOT possess Legal Force of Public Acts

Private Writing Definition – *Art. 633*, COCP

Public Document may be demoted to Private Writing if it has a Faulty Format

Forgery can happen to a Private Writing OR its Certified True Copy/ies

Public Document only has 1 Authentic Copy

Il-Pulizija v. Patrick Spiteri

The Elements of the Crime of Forgery

The *Actus Reus*

The *Mens Rea*

The Imitation of the Truth

The Damage (*il danno*)

Last 2 do not apply to ALL documents

The *Actus Reus*

The Alteration of the Truth on a Writing

Material Falsity – Document telling a lie about itself

Il-Pulizija v. Yassin Najah

Il-Pulizija v. John Galea

Il-Pulizija v. Alfred Sammut

Ideological Falsity – Document containing statements of falsehood (NO FORGERY)

Manzini: *non genuinita' & non vericita'*

Il-Pulizija v. Paul Muscat

Il-Pulizija v. Paul Galea

Antolisei & **Kenny**: Document is Genuine when it originates from the Author

Il-Pulizija v. Raymond Caruana, Il-Pulizija v. Glen Debattista, Il-Pulizija v. Michael Cohen

Personal Falsity: Change in the quality of the person

Simulation of Identity

Nominal Falseness

Simulation

Aer. 189 of the Criminal Code

Umbrella Provision

The *Mens Rea*

Contrasting views on Generic Intent and Specific Intent to Defraud

dolus in res ipsa

Kenny: Intent to Deceive for Public Documents, Intent to Defraud for Private Writings

Deceiving = Inducing another to believe a falsehood

Defrauding = Act of deprivation through deceit

Carrara: Agent must have Specific Intent in having *intentio nocendi*

Il-Pulizija v. Arthur Cancio

Il-Pulizija v. John Lawrence Formosa

Crivellari: Criminal Intent lies in Cognizance of Act. Specific Intention to harm pertains to Motive ONLY.

Maltese Courts embrace *dolus in res ipsa*

Art. 180 – "Fraudulently" does NOT connote Intent to Defraud

Art. 182 – Punishment for Negligence less than for Wilfulness

Art. 187 – In Private Writings there must be Harm incurred on third-parties

The Imitation of the Truth

Maltese Law does not Necessitate the Imitation of the Truth

Imitation vs Falsification

Manzini & **Antolisei**: Imitation of the Truth is NOT an indispensable element

Carrara: *Falso Grossolano* (NO Forgery)

Roberti: *Falso Grossolano* on Public Documents STILL connotes Forgery

Maltese Courts support Carrara and Roberti

Rex v. Lorenzo Cassar

Rex v. Victoria Gauci

Il-Pulizija v. Carmelo Borg

If *Falso Grossolano* manages to Deceive, then Deception is Actual and Forgery is present

Rex v. Mary Azzopardi

The Damage (*il danno*)

Maltese Law does not necessitate the Damage (*danno*)

Potentiality to Cause Harm is INDISPENSABLE for Private Writings ONLY

Computer Misuse

The increased susceptibility of computers to misuse has significantly heightened the potential for criminal activities. This vulnerability stems from the continuous expansion of the computer's capabilities, both in terms of storage and processing power, coupled with the growing affordability of this technology.

Additionally, the prevalence of remote login systems, enabling access and manipulation of data, has facilitated unauthorised entry into remote or 'off-site' systems. Furthermore, the widespread adoption of **'Always-On'** connections has introduced a significant security challenge.

The Crime of Computer Misuse

Grabowsky highlighted that:

> "Computer-related crime, like crime in general, may be explained by the conjunction of three factors: **motivation**, **opportunity** and the **absence of capable guardianship**".

When trying to define computer misuse, there is an international inclination to adopt the **OECD classification**, as expanded by the Council of Europe, which includes:

a) Offences against the **confidentiality**, **integrity**, and **availability** of computer data and systems (ex. *unauthorised access*, *illegal interception*, *data interference*, etc.);
b) **Computer-related** offences (*which are NOT the subject of recent additions to Maltese legislation*); and
c) **Content-related** offences (ex. *child pornography*).

CASE LAW: *'Il-Pulizija v. Leonard Cutajar'*
In this case, the court denoted that: ***"An increasing degree of interest and disquiet has become apparent in recent years in relation to the implications of, and the possible misuse of, the computerisation that plays an ever-growing role in public, commercial and indeed private life."***

Maltese Legislation

Defining computer misuse poses a formidable challenge due to the intricate and rapidly evolving nature of the technology underlying such offences. The term 'computer misuse' itself has often been interchangeably, albeit inaccurately, used with labels like **'computer crime'** or **'computer-related crime**.' Consequently, the **lack of universally agreed-upon definitions** has led to the prevalence of functional definitions, rather than a cohesive global understanding of 'computer misuse.'

In the initial **White Paper on the Legislative Framework for Information Practices**, it is evident that Maltese legislator has opted for the term 'computer misuse,' as opposed to other dubbings employed by other countries – such as 'computer crime'. Within this scope, therefore, the legislator strived to criminalise **offences relating to the misuse of computers and related paraphernalia**.

Thus, the White Paper shows the intrinsic desire of the legislator when propounded this limb of legislation, specifying the necessitation of such legislation in a perennially developing world by stating that:

> "Although data may represent valuable information to its owner, existing laws on damage, vandalism and theft may prove an inadequate safeguard as it (data) is an incorporeal object".

<u>CASE LAW</u>: *'Il-Pulizija v. Jeanelle Grima'*

This case underlined the inherent definitions of computer offences, and also delineated the intention of the legislator when drafting laws relating to this offence.

Therefore, when drafting a Bill regarding computer misuse, **the legislator based the Maltese model on the convention of the European Council for Cybercrime and UK Legislation** – which we now know as **<u>Sub-Title V of the Criminal Code of Malta</u>**.

In this case, the defendant had authorised access to particular data, but used that authorisation to access data which was not intended for her to access. Therefore, this connoted **unauthorised use of authorised access**.

The **2001 Budapest Cybercrime Convention** is another limb of legislation in the form of an international treaty which aims at addressing crimes committed via the internet. Its main objective is that of creating a **common criminal policy** on computer misuse by harmonizing national laws related to computer crimes, defining offences such as illegal access and data interference, providing procedural measures for investigations, promoting international cooperation among participating countries, protecting human rights, and facilitating the extradition of individuals accused of cybercrimes.

The Actors

Perpetrators within this regard are contemplated to be very perilous for certain companies and entities insofar as having certain sensitive information be leaked.

For instance, the idea of **Insider Threat** is that a person working for a company accesses a computer without any authorisation and leaks particular data upon which a company's success may depend upon, or else uses that confidential information for personal gain.

CASE LAW: ***The Cisco Systems Inc. Case***
The defendants in this case were found to have ***'exceeded their authorised access to computer systems'*** of the company they worked for in order to issue an approximate amount of **$8 million in company stocks** themselves.

Hackers are also strains of perpetrators which might befall the offence of computer misuse, also paired with individuals who deliberately spread viruses to computers in order to corrupt or steal certain sensitive information – commonly referred to as **Virus Writers**.

Ultimately, actors of computer misuse might also bear **terroristic tendencies** and commit a computational crime on a scale so grand that it might pose a significant threat to the personal data of persons, and even to the security of states.

The Computer

Before delving deep into the crime of computer misuse, it only connotes logic to first understand what a computer is.

> “"computer" means an **electronic device** that performs **logical**, **arithmetic** and **memory functions** by manipulating electronic or magnetic impulses, and includes all **input**, **output**, **processing**, **storage**, **software** and **communication facilities** that are **connected or related to a computer in a computer system** or computer network;”
>
> **Art. 337B (1)**, *Criminal Code*

Fundamentally therefore, Maltese law identifies a computer as a machine which is inherently capable of carrying out ALL functions pertaining to **logic**, **maths**, and **memory**. Thus, it must have elements of a **smart device**.

Our definition closely aligns with that found in the **Wisconsin Criminal Code**. As per this definition, a computer encompasses electronic devices conducting logical, arithmetic, and memory functions through electronic impulses, and extends to cover input, output, processing, storage, software, and communication facilities related to both computer systems and networks.

The **Council of Europe** broadens this definition to include '***any device or a group of inter-connected or related devices***.' However, the abovementioned **Budapest Cybercrime Convention** diverges by emphasising a computer as something that, '***pursuant to a program, performs automatic processing of data***.' This implies operation without human intervention, executing a computer program comprising instructions to achieve the intended outcome.

The **UK definition** of a computer is much wider than that compared to the denotation provided by Maltese legislation.

Finally, one is **NOT CONVICTED** of this crime if it was product of **negligence** or **recklessness**.

The Mens Rea

There are 2 essential cognitive elements one must bear when committing computer misuse: the **generic intent to secure access to any data held on any computer**, and the **knowledge that the act of accessing is one of an unauthorised nature**.

> "(1) A person who without authorisation does any of the following acts shall be guilty of an offence against this article -
>
> (2) For the purposes of this Sub-title:
>
> (a) a **person shall be deemed to act without authorisation if he is not duly authorised by an entitled person**;"
>
> **Art. 337C (2)**, *Criminal Code*

The original **White Paper proposed by the legislator suggested that the accused be presumed to have acted in an unauthorised manner** when being arraigned for computer misuse – which can be juxtaposed with other like mentalities in the Criminal Code, such as the offence of **breaking water pipes**, which is *prima face* understood to be evidence of theft of water unless proven contrary; or else with the **Drug Ordinances Act** – which explicitly stipulates that it is no defence for the accused to plead ignorance of the substance he or she was carrying or trafficking.

However, presuming guilt in the criminal law sphere normally connotes an infringement of one's fundamental human rights; therefore, **Art. 337F (6)** of the Criminal Code departed greatly from the White Paper draft.

As it stands, the *onus probandi* for proving the necessity for authorisation for a committed act rests with the accused, relieving the prosecution from providing evidence to establish the requisite authorisation. Thus, the accused must substantiate the possession of such authorisation, and **mere uncorroborated testimony is insufficient for this purpose**.

This stipulation is deemed more "politically correct" than the initial draft – as it **eases the burdens of the prosecution whilst still preserving, to the maximum extent possible, the defendant's presumption of innocence**.

In the context of computer misuse cases therefore, establishing a *mens rea* generally hinges on determining authorisation.

> "(6) **It shall not be necessary for the prosecution to negative by evidence any authorisation required** under this Sub-title and the **burden of proving any such authorisation shall lie with the person alleging such authorisation**:
>
> Provided that this burden shall not be considered to have been discharged with the mere uncorroborated testimony of the person charged."
>
> **Art. 337F (6)**, *Criminal Code*

The promulgation of this provision was necessitated after it was unearthed that oftentimes, it was quite easy for the alleged offender to claim lack of intent by asserting accidental entry into a computer system (just as happened in the **Paul Bedworth Case**).

Blackstone's *Criminal Practice* determines that **unauthorised access** occurs when:

(a) **a person is not himself entitled to control access** of the kind in question to the program or data; and
(b) **a person does not have consent to access by him** of the kind in question to the program or data from any person who is so entitled.

Reed and Angel's *Computer Law* also stipulates that:

> "First, there must be **intent to secure access to any program or data held in any computer**. Second, **the person must know at the time that he commits the *actus reus* that the access he intends to secure is unauthorised**. The intent does not have to be directed at any particular program."

Richard Card's *Criminal Law* asserts that:

> "Access of any kind by a person is **unauthorised if he is not entitled to control access of the kind in question to the program or data** and **he does not have access of the kind in question to the program or data** and **he does not have consent to such access from any person who is so entitled**."

However, this discussion raises a crucial question regarding the accused's awareness of unauthorised access (which ultimately purports a criminal intent).

Thus, **it is debated whether a computer user should be made aware regarding the possibility of trespassing on digital grounds with the requisite authorisation by a simple warning given by the computer itself**. This notion would definitely prove to be pivotal for facilitating the process of prosecution.

For instance, if an intranet carries a warning message explicitly stating that unauthorised access is illegal and punishable by law, the inherent presence of such notice would thus suffice to establish the prohibition of further access.

<u>CASE LAW</u>: ***'Il-Pulizija v. Louis Ellul'***
In this case, the defendant was accused with having **accessed his wife's computer** in order to obtain certain information he could use against her in separation proceedings occurring in the Family Court. This case was of a very original nature, and no jurisprudence was available to aid the adjudicator in dishing out a verdict. However, the most important factor upon which the judgement of the court hinged was the **element of unauthorised access** – which was as plain as day in this case. The defendant pled that he did nothing wrong because he was the **administrator of the computer**, and that he never used his wife's password to, unbeknownst to her, access the data he sought on this device. However, the court declared that the defendant abused from his role of administrator to access data which was not his to access. The court also found the defendant **guilty** on the basis of having accessed certain sensitive information for very questionable purposes through unauthorised means.

The Actus Reus

The first element of the *actus reus* is **causing a computer to perform any function**. Under **<u>Art. 337C (1)</u>**, 'performing a function' on a control ultimately connotes:

- **Using a Computer and Accessing its Documents without Authorisation**
- **Modifying**
- **Displaying**
- **Copying**
- **Moving**
- **Hindering Access**
- **Disrupting a Function**
- **Taking Possession of Data**
- **Altering Data**
- **Disclosing Passwords**
- **Intercepting Data**
- **Creating/Selling Tools for Illegal Access**

Ultimately, the defendant must have used the computer as a medium and platform to perform a function by **causing movement in the binary script** which ultimately governs the entire running of the mentioned computer.

In **British** and **American** legal contexts, the definition of performing a function remains somewhat ambiguous. However, in Malta, and as seen above, a comprehensive list of functions has been established.
The concept of function is construed broadly, encompassing **any interaction with a computer** – even moving a mouse a cursor across a computer's home screen.
Thus, this also includes actions such as **scrolling**, **saving**, **deleting**, **recording**, or any other similar activity. The act of touching a trackpad or mouse is considered a function, however, **merely viewing information on a computer screen without any associated physical interaction does NOT qualify as the performance of a function**.

Additionally, **modifying computer hardware** is also, in itself, an act prohibited under **Art. 337D**.

What follows is a summation of the crux embedded within **Art. 337C (1)**.

Unauthorised Access to Computers & Modifying Data

This type of computer misuse is the most common occurrence and involves unauthorised access to information (data, software, or documentation).

The law prohibits unauthorised access through various means (LAN, Intranet, Internet) and any device used for access. For the offence to occur, there must be the unauthorised access, use, copying, or modification of data, software, or supporting documentation within the victimised computer.

The actions of 'use, copying, or modification' are individually sufficient to constitute a criminal act, as they involve assuming control over valuable and volatile data in today's information society.

Outputting Data

The UK Computer Misuse Act defines 'output' as an indication of access, considering any form of data, software, or documentation output as requiring access.

The Act specifies that the nature of the output is irrelevant, because the act of output itself is deemed illegal. The concept of output encompasses various actions like display on a VDU, printing, backup on CD, infra-red transfer, remote download, etc.

Copying Data

This offense involves the unauthorised duplication of data, software, or documentation from one chosen location to another determined by the unauthorised user. Moving data within a system's hard drive does NOT fall under this section, but reproducing data and transferring the copied version to a different storage medium or location constitutes an offence under this provision.

A pertinent crime is computer espionage, characterised by copying data from the victimised machine to the perpetrator's for potential use or examination. Notably, the section also prohibits the unauthorized copying of software.

Hindering Access to Data

The hindering of access has been a longstanding concern in the computing community, as evidenced by the **Council of Europe's Recommendation No.89(9).**

In today's information-dependent society, hindering or preventing access has become a serious offence, as exemplified in '***US v S. Dennis***', 2001. This obstruction occurs when an authorised user is deliberately impeded from timely and reliable access to data or a system.

The Wisconsin Criminal Code and the UK Computer Misuse Act both address this offence, with legislative language akin to local laws, emphasising intentional actions causing service interruptions or hindering access to programs or data on computers. Email bombing and virus propagation are two methods of how data hinderance may be achieved.

System Impairment

Part IV of the White Paper criminalises the insertion and dissemination of viruses by actions that 'impair the operation of any software or the integrity or reliability of data.'

Some U.S. states have specific laws addressing viruses, while Switzerland's law covers creating, importing, and distributing malicious programs. The UK Computer Misuse Act also includes a provision against impairing any system.

Taking Possession of Data

The law also criminalises actions involving the theft of incorporeal structures such as data or software. The term 'theft' is used broadly, encompassing both taking possession of and making use of such materials.

Unauthorised Modification

This crime follows the acts of moving, altering, destroying, erasing, or installing any data without any authorisation.

Disclosing Passwords

This provision aims to curb the sharing of passwords within the hacking community, often contributing to criminal sub-cultures. In '***US v Gregory'***, the defendant disclosed passwords leading to financial harm and compromised accounts, thus breaching the principles of the provision in question.

The law encompasses any form of password – including those for software or PINs for ATM access. The Budapest Convention also echoes this – criminalising the production, sale, or making available of computer passwords without authorisation.

Notably, preparatory acts such as possessing passwords are also deemed punishable offences – thus aligning with the intended crime.

Using Passwords of Other People

This section is frequently illustrated by the '***US v Diekman***' case involving hacking into NASA computers. In that case, Diekman hacked numerous computers, admitting to accessing systems at JPL, Stanford, Harvard, Cornell University, and more.

The analogy of 'receiving stolen goods' is apt, as possessing illegitimate data, even if the possessor did not commit the initial crime of attaining such data illegitimately, should be unlawful. In the '***US v Miffleton***' case, the accused possessed various passwords without using them, thus exemplifying the above notion.

A unique addition in Maltese law is a clause on impersonation by email, addressing email spoofing. This covers various forms of spoofing attempts that deceive users and trick them into divulging sensitive information, aligning with the law's focus on protecting personal and confidential access information.

Hardware Misuse

Any **unauthorised** act involving the **modification**, **destruction**, or **possession** of computer hardware, supplies, or systems is deemed an offence under Art. 337(D) of Maltese law.

The White Paper justifies this provision, emphasising that while the **intrinsic value of the equipment** may be small, the **resulting damage** to the system can be substantial. This aligns with similar legal approaches, such as in California, where statutory provisions were enacted to combat theft of semiconductor chips.

The Maltese legislator adopted these provisions from the **Wisconsin Criminal Code**.

CASE LAW: ***'Il-Pulizija v. Leeroy Balzan'***
This case delineated that **giving a password of a computer** to another person is equal to performing a function.

CASE LAW: ***'The Citibank Case', 1994.***
This case was subject to, as **Citibank** became a victim of an illicit computer scam, resulting in the **siphoning off of $12 million** from the electronic funds of its customers. The offender attracted prosecution under **Art. 337C (1)(i)** after having exploited codes and passwords belonging to legitimate Citibank customers to infiltrate the bank's computer system.

<u>CASE LAW</u>: ***'Il-Pulizija v. Tony Sammut'***

This case shows the importance of having the prosecution charge the accused with the right offence listed in the significantly long list of what is deemed as 'performing a function' under the sub articles of **<u>Art. 337C</u>**. In fact, the defendant was ultimately acquitted after having been charged wrongly under **<u>sub-article (a)</u>** instead of **<u>sub-article (e)</u>**.

<u>CASE LAW</u>: ***'Il-Pulizija v. Francesca Galea', 2021.***

In this case, the defendant was a lawyer working with **DF Marine Consultancy Services Ltd.** and was accused of having committed computer misuse after **sending work emails to her private email** via a computer owned by the mentioned company, exactly after forwarding a letter of resignation to her boss, and a bit before founding a completely new company which dabbles in the same legal area.

The defendant pled that she only forwarded the emails because she wanted to complete some work from home, and completely negated any allegations that she did so using any *mala fede*. Thus, the **main gist of this case was to discern the intentional element of the accused**.

In this case, the Court deemed that the defendant had to **use common sense to understand that her actions were unauthorised**. This shone even brighter because the defendant accessed documents which had absolutely no relation to the work she claimed she was doing.

Ultimately, **the Court confirmed the sentence upon appeal stage** – especially since the act of forwarding the emails was, in itself, questionable, even if the act was not inherently done with the primary purpose of causing any damage to DF Marine Consultancy Services Ltd.

<u>CASE LAW</u>: *'Il-Pulizija v. Jimmy Paul Saliba'*

The defendant sold and repaired computers for a living. He was tasked by an individual to instal parts for computers for a Local Council; however, this mandate was not authorised by the Local Council itself, so the Council refused to pay the invoice the defendant issued out to them.

The defendant made it clear to the Local Council that, although he had installed the computers and their parts, they were still his property – because he was not paid for them. However, the Local Council argued that they had not officially mandated the installation, and that the pieces of equipment he had brought were so expensive that they could buy even better and more modern items with that money. In a fit of rage, the defendant decided to travel to the Local Council and retrieve his property, which had already been being used by employees of the Local Council.

The defendant was ultimately accused of **unauthorised access to computer software** after having taken the computers back to his private domain. However, he pled that he did not retrieve the computers to access or alter any data found on such devices, because his intention was simply that to retrieve goods he was not paid for giving.

The court noted that, contrary to the accusations made by the Local Council, the **defendant had NOT damaged or destroyed any computer hardware simply by removing a hard drive from the devices in question**. Thus, the defendant was only found guilty of ***ragion fattasi*** for taking the law in his own hands instead of solving the matter calmly and reasonably; and was ordered to pay a fine of €5.

CHECKPOINT

The Crime of Computer Misuse

'Always-On' Connections

<u>Grabowsky</u>: Computer-related crim = Motivation, Opportunity, and Absence of Capable Guardianship

OECD Classification

Offences against Confidentiality, Integrity, and Availability

Computer-Related Offences

Content-Related Offences

Il-Pulizija v. Leonard Cutajar

Maltese Legislation

Computer Crime vs Computer-Related Crime

White Paper on the Legislative Framework for Information Practices

<u>White Paper</u>: Laws on Damage, Vandalism, and Theft are Inadequate for Computer Misuse

Il-Pulizija v. Jeanelle Grima

2001 Budapest Cybercrime Convention

The Actors

Insider Threat

The Cisco Systems Inc. Case

Hackers

Virus Writers

The Computer

Logic, Maths, Memory

Wisconsin Criminal Coode

<u>Council of Europe</u>: *Any device or a group of inter-connected or related devices.*

<u>2001 Budapest Convention</u>: *Pursuant to a program, performs automatic processing of data.*

UK Definition much wider

The *Mens Rea*

Generic Intent to Secure Access on Computer
Knowledge of Authorisation
White Paper: Accused should be presumed to have been Unauthorised
Onus of Authorisation is on the one alleging it
Accidental Entry Defence (*The Paul Bedworth Case*)
Blackstone: Unauthorised Access is when agent is NOT Entitled to control access AND when agent does NOT have Consent of access
Reed & Angel: There must be Intent to Secure Data, and the Knowledge that the *actus reus* is unauthorised
Richard Card: Access is Unauthorised if there is NO Entitlement, NO pre-established Access, or NO Consent
Should computer gives Warning of Trespass?
Il-Pulizija v. Louis Ellul

The *Actus Reus*

Perform any Function
Art. 337C Exhaustive List

Unauthorised Access to Computers & Modifying Data

Outputting Data

Copying Data

Hindering Access to Data

System Impairment

Taking Possession of Data

Unauthorised Modification

Disclosing Passwords

Using Passwords of Other People

Hardware Misuse

Unauthorised Modification, Destruction, Possession of Hardware

White Paper: Value of Equipment not necessarily Commensurate to the Damage Incurred

Wisconsin Criminal Code

Il-Pulizija v. Leeroy Balzan

The Citibank Case

Il-Pulizija v. Tony Sammut

Il-Pulizija v. Francesca Galea

Il-Pulizija v. Jimmy Paul Saliba

Abuse of Public Authority

Abuse of Public Authority is regulated under **Sub-Title IV of Part II of the Criminal Code** (**Art. 112 – 141**).

Unlawful Exaction

Art. 112

> "Any officer or person **employed in any public administration**, or any person employed **by or under the Government**, whether authorised 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."
>
> **Art. 112**, *Criminal Code*

The crime of unlawful exaction is thus consummated once **3** particular elements are present:

1. The agent must be a **public officer**.
2. The exaction must be **unlawful**.
3. The unlawful exaction must occur **under the colour of the agent's office**.

Most essentially therefore, for this crime to result, the person conducting this crime **must be a public officer**.

The inherent definition of a public officer is left very wide in the Criminal Code. However, the main gist of what constitutes a public officer abuts the notion of **any person who is directly or indirectly employed by the Government**. Thus, the first defence usually raised in court is that the agent is NOT a public officer on the Government's payroll.

1. The Public Officer

Under the Criminal Code, a public officer is defined as:

> "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."
>
> **Art. 92**, *Criminal Code*

However, this definition is supplemented by other delineations embedded within other limbs of the Laws of Malta – such as the **Public Administration Act** (**Cap. 595**) which widens the definition of a public officer by contending that **a public officer is any person hailing from the public administration in general** – thus connoting persons working in **ministries**, **departments**, **specialised units**, **Government agencies**, **Government entities**, and **commissions**. With these definitions therefore, one might extend what the role of a public officer entails.

Thus, all entities regarded to be public officers are compelled to recognise the significance of their office – because if they abuse of it, then elements such as corruption are prone to ensue.

CASE LAW: ***'Il-Pulizija v. Edward Caruana'***
The Court of First Instance determined that the arraigned person was not actually a public officer. However, the Court of Appeal overturned this judgement by stipulating that **one is construed a public officer depending on all the possible sources of information defining his or her role** – such as legislation, government websites, etc.

Ultimately, it is crucial for the definition of a public officer to be left relatively wide, because offences borne of a corrupt nature may be committed by all kinds of official servants, whether paid by the government or by the public – by salary or fees – or serving gratuitously.

Anthony Mamo

CASE LAW: ***'Il-Pulizija v. Ivan Muscat', 2015.***
The defendant in this case happened to be a **clerk in a Maritime Authority**. The court here asserted that, given that the mentioned Authority was operating in the name of the Government, it mattered not what ranking the defendant occupied within the Authority in question – because **the sole fact that the Authority was functioning on behalf of the Government was sufficient to render all its employees as public officers**. Thus, the decisions the defendant took within the confines of his office were therefore still considered to be borne with the responsibility of a public officer – regardless of his being a simple clerk.

CASE LAW: ***'Il-Pulizija v. Carmel Chircop'***
The court here stipulated that a public officer is employed by the state, is paid by the state, and is **thus linked to the Government**. Therefore, whatever he does within the confines of his office, he does so linked to the Government.

2. The Unlawful Exaction

This offence is completed as soon as the accused demands something which is unlawful. Here therefore, the **mere demand** is sufficient for the offence of unlawful exaction to subsist. Thus, this also connotes that in this crime, there is only one *actus reus* – the demand itself.

Ultimately, there is **no need for the officer to receive he demanded**. Once the demand has been made, it is unimportant whether such a request was satisfied, because the plea itself already consummates the offence of unlawful exaction.

Moreover, the demand of the public officer must not seem suspicious for the layman being demanded from. In this scenario therefore, the **public officer asks for something unlawful**, **whereas the private person has no idea that he is being asked something unlawful**.

3. Under the Colour of his Office

Prof. Mamo contends that **the act must be one which the officer does in the exercise of his functions**. The unlawful exaction thus instils a sense of grievance in the private person, making him believe that by order of the Government, he is being compelled to pay exorbitant fees due to unreasonable impositions.

CASE LAW: ***'Il-Pulizija v. Geraldo Sacco'***
The judge in this case highlighted the inherent **difference between exaction and corruption**, thus insinuating that in the former, **the public officer makes it seem as if his demand is completely legal and legitimate to the private person** (the victim).

Extortion

Art. 113

> "Where the unlawful exaction referred to in the last preceding article, is committed by means of **threats** or **abuse of authority**, it shall be deemed to be an extortion, and the offender shall, on conviction, be liable to imprisonment for a term from thirteen months to three years."
>
> **Art. 113**, *Criminal Code*

The crime of extortion is identical to that of unlawful exaction, albeit decorated with the aggrav**ation of threat or violence which ultimately facilitate the exaction made**. The agent here thus induces the person into giving that which he would otherwise opt not to give.

Threats may be communicated through **words** or **gestures**, and can be made towards **persons**, **property**, or **pertinent third parties**. If there is no threat therefore, the crime is that of unlawful exaction under **Art. 112**. And it is important to delineate between **Art. 112** and **Art. 113** for the purposes of the penalty awarded. In **Art. 112** therefore, the demand is enough; but in **Art. 113**, the demand must be furnished with a threat. Finally, **Art. 114** proposes an aggravated circumstance wherein the prior two articles are accompanied by acts liable to other punishments – thus increasing the penalty awarded.

Corruption

Art. 115

Corruption is one of the most difficult crimes to trace due to its agent striving to be inconspicuous as possible.

> "(1) Any public officer or servant who, **in connection with his office** or employment, requests, **receives or accepts for himself or for any other person**, any **reward** or **promise** or offer of any reward in money or other valuable consideration or of any other advantage to which he is not entitled, shall, on conviction, be liable to punishment as follows:
>
> (a) where the object of the reward, promise or offer, be **to induce the officer or servant to do what he is in duty bound to do**, the punishment shall be imprisonment for a term from six months to three years;
>
> (b) where the object be to i**nduce the officer or servant to forbear from doing what he is in duty bound to do**, the punishment shall, for the mere acceptance of the reward, promise or offer, be imprisonment for a term from nine months to five years;
>
> (c) where, besides accepting the reward, promise, or offer, the officer or servant **actually fails** to do what he is in duty bound to do, the punishment shall be imprisonment for a term from one year to eight years.
>
> **Art. 115**, *Criminal Code*

In unlawful exaction, one finds the sole requisite of a demand. In the crime of corruption however, one notices that the law describes the act of **requesting**, **receiving**, and **accepting**. Therefore, the offence of corruption normally requires **2 persons** for it to be consummated.

In corruption, the public officer is committing a request, a reception, and an acceptance. Moreover, in this circumstance, **the private person is not a victim – but rather, an accomplice**; because he is negotiating with the agent to attain an illicit gain.
However, the private person here is regulated under a different section of the Criminal Code – mainly wherein such person tempts the public officer to fall for corrupt practices.

Thus, the elements of corruption are the following:

1. The offender must be a **public officer/servant**.
2. The public officer **requests**, **receives**, or **accepts** for **himself** or for **any other person** a **reward** or **promise**.
3. The act must be committed in connection with the agent's **office** or **employment**.
4. The purpose of the act must be **to do or fail one's duty**.

1. The Public Officer

Once again here, one must consider the abovementioned stipulations of what denotes a 'public officer'. In summation however, and as purported by Harding, this crime refers to:

> **"…public officers or persons employed under the Government."**

2. The Promise/Reward

The officer becomes corrupt once he makes himself subject to any promise or reward and accepts it either after asking for it or having it offered to him. Also, it is **not necessary for the reward to be made to the public officer personally**. Therefore, the crime subsists if the public officer in question acts through an intermediary – provided that the intermediary acts with the consent of the public officer.

CASE LAW: ***'Il-Pulizija v. Mario Camilleri'***
The court here held that once there is an offer hanging in front of the public officer's face, and the public officer does not halt his falling for temptation by abiding by what he is offered, then this shows that **he is indirectly accepting what he is being offered**.

CASE LAW: ***'Il-Pulizija v. Liliana Galea'***
This case outlines that there cannot be an arrangement between a public officer and a private person after an act has been made. Therefore, **the offer or promise must be made BEFORE the act**.

Additionally, **Pessina** remarks that:

> "There is **no need for the private interest of the public official in corruption to always be monetary**. The satisfaction of any desire, need, whether direct and personal or indirect, is sufficient. No distinction can be made as to whether the given or promised benefit is large or small."

In fact, the old Italian Test of ***altra' utilita'*** (any other benefit or utility) may be applied to identify whether a public officer has attained any advantage, be it pecuniary or not, from the illicit act in question.

Ultimately, it is extremely **important for some type of reward to exist** – because if a public officer acts illicitly simply upon one's request, undressed from any type of incentive, then the crime of corruption is NOT identified.

3. Under the Colour of his Office

The act in respect of which the reward is accepted must fall **within the functions of the public officer**. It is utterly indispensable that the act in question is one which the officer does in the exercise of his duties. In fact, an old Italian adage contends that one must perform this crime ***in occasiono del suo officio od impiego***.

The act in question should be one that the public officer has the **authority to perform**, either directly within their jurisdiction, or as part of their delegated functions.

In essence, the acceptance of a reward should be associated with an action where the officer, by virtue of their position, could provide directions, make arrangements, or influence the decision in any manner.

4. The Commission or Omission of One's Duty

The penalty awarded also differs according to whether there is a **commission** or **omission** of one's duties which are pertinent to the colours of his office.

In a scenario of commission, the law aims to **safeguard the integrity of public service** and the reputation of the judiciary, ensuring that they maintain the respect they deserve. Public officers are obligated to execute their duties with utmost impartiality, refraining from pursuing personal interests or additional compensation beyond what the law permits for their services.

In a situation of omission, there is an added concern about potential harm to the public service's reputation and the **risk of actual injury to the rights of individuals** or justice. The law considers this when imposing a **more severe punishment** to account for the aggravated nature of the offence. Thus, if the public officer fails in their duty, the punishment is escalated based on the gravity of the duty's neglect.

The 1889 Italian Criminal Code

The **1889 Italian Criminal Code** deliberated greatly on the whether the concept of corruption should exclusively encompass instances wherein the gift or promise pertains to an act **yet to be carried out** by the public officer, or if it should extend to **acts already completed**.

Advocates for the former viewpoint contended that accepting rewards or promises for **acts already performed**, while improper, does NOT inherently constitute a crime, and **disciplinary measures would suffice**. According to this perspective therefore, corruption revolves around subjecting the execution of official duties to the gifts of private individuals, and a **public officer cannot be corrupted for an act already accomplished**.

Contrarily, **opposing arguments** emphasised that even when rewards are accepted after completed acts, there is a breach of official duties because the performance of such acts must remain entirely devoid of any implication of corruption.

Ultimately, the latter rationale prevailed, leading to the formulation of **Art. 171 of the 1889 Italian Code**, which applied to both scenarios.

However, it appears that the same approach may not be applicable under our law. As stipulated in **Art. 114 (a)** and **Art. 114 (b)**, it seems that the crime of **corruption can only arise when the reward or offer is made to the public officer and accepted by them in connection with an act they are yet to perform**, **excluding acts already completed**.

Finally, the penalty awarded for this offence is aggravated depending on the role of the corrupted official. In fact, **Art. 118** contemplates the crime of corruption committed by **Members of the House of Representatives**. Thus, if a Member requests, receives, or accepts any reward or promise with the aim of influencing their conduct as a Member of the House, they may face imprisonment for a term ranging from **1 to 8 years**.

Bribery

Art. 120

The crime of bribery involving public officials occurs when someone (the **briber**) offers or promises a reward, typically in the form of money or valuable items, to a public official with the intention of influencing their actions in the performance of official duties. This act aims to secure favourable treatment, decisions, or actions from the public official, thus compromising the integrity and impartiality of the public service.

Given that only a public officer has the capacity to compromise an official act, they are rightfully regarded as the primary perpetrator in the crime of corruption. The individual offering bribes or attempting to corrupt is merely an **accomplice** – influencing or reinforcing the resolve of the public officer or employee through the provision of rewards or promises.

And just as the crime is deemed complete upon the public servant's mere acceptance of the reward or offer, a similar perspective applies to **the corrupter**.

Notably also, the law does not specify the forms in which bribery offers may be made, suggesting that this crime can occur without uttering words. **It may be consummated simply by sending money to the public officer**.

The Corrupter & The Attempt to Corrupt

Art. 120 of the Criminal Code of Malta explicitly applies the principles of **complicity** to the corrupter. Therefore, if the crime of corruption is consummated through the illicit collaboration between the public servant and the private individual, the latter also becomes subject to punishment.

Moreover, **Art. 120 (2)** addresses situations wherein the public servant has NOT committed the crime of corruption but has been subjected to an **attempt to corrupt**.

"When the public officer or servant **does NOT commit the crime**, the **person attempting to induce such officer** or servant to commit the crime shall, upon conviction, be liable to **hard labour** or **imprisonment** for a term not exceeding 3 months." **Art. 120 (2)**, *Criminal Code*

The **penalty for the corrupter** thus aligns with that of the public servant.

Many jurists have been crossing swords with regards to the above notion. Some argue that offering a reward to a public servant to influence his conduct, even if not accepted, constitutes **attempted corruption**. However, **Carrara** and **Pessina** both disagree to this concept, and state that **corruption involves the bilateral concurrence of the corrupter's act and the corrupted officer's acceptance of the reward or promise**. According to their view therefore, the mere offer without acceptance does not qualify as an act of execution, making the rules of attempt inapplicable.

CASE LAW: ***'Rex v. C. B.',* 1901.**
This case underlined that **applying the principles of complicity** to the briber in situations wherein the offer is not accepted, and the principal offence is thus **NOT committed**, would be **highly illogical**.

Therefore, **Art. 120 (2)** considers the **attempt to corrupt as a distinct offence**, occurring when a bribe is offered to a public servant, albeit without any acceptance to the offer emanating from the mentioned public servant. This differs from the principal crime of corruption, which involves the actual acceptance. **If the offer of bribery is not accepted, the public servant is NOT at fault, however the person making the offer is the one guilty of this specific crime**.

The Public Officer as the Initiator of the Request

Maino raises the question of whether a public officer, having proposed to sell out an act of office that is not accepted by the private person, would be guilty of attempted corruption.

He proceeds by answering himself in the affirmative and contends that that the unaccepted proposal made by the public officer constitutes an **attempt at corruption** because he undeniably plays the role of the author in the offence of corruption by having initiated the execution of the crime with his proposal.

Manzini agrees to this, and affirms that:

> “The unaccepted proposal of the public official constitutes an attempt of corruption because he undoubtedly has the quality of an author in the crime of corruption, and as such, he begins with his own proposal the execution of the crime itself."

The Private Person in Corruption & Unlawful Exaction

This discussion on corruption initiated by the public officer also necessitates a brief mention of distinguishing criteria between the crimes of corruption and illegal exaction.

In unlawful exaction, the private person who pays unjustly does so under the threat of public power. He is solely a victim and is immune from criminal responsibility. In corruption, the private person willingly gives or promises to give.

Carrara notes that **corrupt officers may demand money inexplicitly**, thus leaving it to be understood that they would accept it. Careful consideration is needed to establish whether the private person is a briber or a victim of illegal exaction. Thus, Carrara's observations become relevant in cases of doubt, where one should lean towards illegal exaction and impose punishment solely against the public officer.

CHECKPOINT

Unlawful Exaction

3 Elements: Public Officer, Unlawful Exaction, Colour of Office

Public Officer is any person directly / indirectly Employed by the Government

Il-Pulizija v. Edward Caruana

Prof. Mamo: *It is crucial for the definition of a public officer to be left wide.*

Il-Pulizija v. Ivan Muscat

Il-Pulizija v. Carmel Chircop

The Mere Demand

The Private Person

…in occasiono del suo officio od impiego

Il-Pulizija v. Geraldo Sacco

Extortion

Demand + Threat

Corruption

Requesting, Receiving, Accepting

Private Person is an Accomplice

4 Elements: Public Officer, Request/Reception/Acceptance of Promise/Reward, Under the Colour of his Office, to Fail /Do one's Duty

Promise / Reward may be made Indirectly

Il-Pulizija v. Mario Camilleri

Il-Pulizija v. Liliana Galea

Pessina: Reward can be Non-Pecuniary

…in occasiono del suo officio od impiego

Commission or Omission of Duty

The 1889 Italian Criminal Code

Bribery

Offer of Pecuniary / Valuable Gain

Private Person is Accomplice

The Corrupter & The Attempt to Corrupt

Penalty of the Corrupter

Carrara & Pessina: *Corruption involves the bilateral concurrence of the corrupter's act and the corrupted officer's acceptance of the reward or promise.*

Rex v. C. B.

If offer of Bribery NOT accepted, the offeror guilty of Attempted Corruption

The Public Officer as the Initiator of the Request

Maino & Manzini: An unaccepted proposal made by the Public Officer to sell out an act of office is Attempted Corruption

The Private Person in Corruption & Unlawful Exaction

Private Person in Unlawful Exaction = pays unjustly under threat of public power

Private Person in Corruption = willingly promises / rewards

Carrara: Corrupt Officers may demand money Inexplicitly

Ragion Fattasi

> "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 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"
>
> **Art. 85**, *Criminal Code*

Carrara contends that:

> "An act such as this turns into a crime whenever anyone who, **believing to have a right over something in another's possession**, or **over another individual**, exercises such a right despite the true or presumed opposition of the latter, with the aim of substituting their private force for public authority, without exceeding, however, in specific violations of other rights".

Therefore, the crime of *ragion fattasi* comprises an individual who, devoid of any intention to steal or inflict harm, unlawfully asserts and enforces this alleged right. Thus, this equates to **taking the law into one's own hands**.

The elements of this crime are 2; also dubbed by Italian jurists as the ***presupposti del delitto***:

1. **The pretended right**
2. The **possibility to be remedied by a competent authority**.

The second element is not expressly mentioned in the abovementioned **Art. 85**; however, it is heavily contemplated in the 1889 Italian Penal Code and the Zanardelli Code, and has been gained favourable reception by Maltese judges. The Maltese Criminal Code does not make reference to the second element because it was based on the **Code of the Two Sicilies** – which, in itself, also precluded such an ingredient for the crime.

However, this attracts its own share of criticism – because it implies that the current wording of **Art. 85** **abstains from the inherent gist of what *ragion fattasi* is**.

The Pretended Right

The agent must assume a pretended right, regardless of whether or not that right exists. This sheds light on the fact that the agent could have been rational and filed a civil case if he so believed that a particular right over something or someone was his – albeit he ultimately decides not to do so by taking the law into his own hands.

<u>CASE LAW</u>: *'Il-Pulizija v. Carmen Grech'*, 2009.
This case revolved around a property which was ultimately owned by the mother of the defendant's husband. This property was being used by the defendant and her husband as a matrimonial home, and the defendant, all whilst assuming that she had a right over the matrimonial home, seized her husband's keys in an attempt to preclude him from entering such home. The Court here asserted that: *"… proprjament **la l-appellenti u lanqas il-parti leża ma kellhom xi dritt ta' permanenza fl-okkupazzjoni tal-istess dar**.* *B'dana kollu jidher illi **l-appellanti ħadet il-ligï f'idejha** meta ddecïdiet illi tieħu, kif ammettiet li għamlet, iċ-ċwievet tal-parte cïvile u tgħidlu li hemmhekk mhux se jidħol iktar."*

A pretended right could be also based on a **real right**.

<u>CASE LAW</u>: *'Il-Pulizija v. George Zahra'*, 1958.
In this case, the accused bound himself to a lease agreement with another couple for a property. Despite receiving the keys from one of the lessees while the premises were still occupied by the other party, Zahra proceeded to forcibly remove the belongings of the occupying lessee. It turned that Zahra's status as the owner of the property did not grant him the authority to take unilateral action. If he believed he had the right to evict the lessee, he should have pursued the proper legal channels and sought intervention from the relevant authority. Thus, the court determined Zahra to be guilty of *ragion fattasi*.

A pretended right could also be based on an **obligation**.

<u>CASE LAW</u>: *'Il-Pulizija v. Siddy Sangari'*, 2010.
In this case, the accused faced charges of aggravated theft and slight bodily harm, and NOT *ragion fattasi*. However, both the Court of First Instance and the Court of Appeal acquitted Sangari of the first charge, asserting that the specificities of the case were ones of a nature related to *ragion fattasi*, and nothing else. The accused initially argued that he was **owed some money from the victim**, and upon visiting the mentioned victim's residence and demanding payment, the accused was rebutted with a refusal by the prospective victim. In response to this, the accused seized a laptop as collateral in order to make good for the money he claimed he was owed. The most important element of this judgement is that the court makes a striking difference when **discerning between theft and *ragion fattasi***. In fact, the accused was completely acquitted of all charges borne of theft. As **Maino** stipulates: "The charge of theft will not be applicable, but that of ***ragion fattasi* will apply to those who take something from their debtor to recover or secure their credit and to those who seize a disputed item believing they have a right to it**. This is because in such cases, the **awareness of the right excludes the intent of theft**, replacing the intention to gain illicit profit with the aim of avoiding harm to oneself".

A pretended right could also be based on a **servitude**.

<u>CASE LAW</u>: *'Il-Pulizija v. Grezzju Camilleri'*, 2010.
To prevent individuals from accessing a specific area where fireworks were being manufactured, the accused took measures to **block the passage**. To this, third parties who owned fields in that area found themselves unable to reach their fields due to the mentioned obstruction. The Court thus determined that the accused opted to take matters into his own hands, rather than approaching the appropriate authority to address the complainants' use of the passage. And despite being framed as a safety precaution, the actions of the accused were deemed an arbitrary exercise of a presumed right.

It is imperative to note that **<u>Art. 85</u>** precludes itself from making any reference to **personal rights**.

The Possibility to be Remedied by a Competent Authority

This element refers to the fact that it is **one's inherent *duty* to seek legal remedies** in order to ascertain any alleged right over a thing or person. Therefore, it continues to highlight the unjustifiability in the act of taking the law into one's own hands once one assumes a pretended right, whether truly existent or not.

Nuvolone contends that absolute certainty regarding the acceptance of the claimed right by the court is not necessary. It suffices that, when presented to the court, the claim does not appear evidently unfounded.

CASE LAW: ***'Il-Pulizija v. Anthony Micallef'*, 2007.**
This case drew out the fact that the crime of ***ragion fattasi*** **is an offence against the administration of justice**.

Exceptions to the Crime of Ragion Fattasi

One is NOT guilty of *ragion fattasi* if he acts upon the basis of the following maxims:

1. *Vim Vi Repellere Licet*

This principle contends that it is **admissible to greet force with force**. Therefore, this maxim addresses the legitimate action of repelling force with force, albeit always under the overarching condition that such force is employed N**OT as a form of retaliation**, but to safeguard one's belongings. The force applied must also be one that adheres to reasonable limits, staying within the necessary and appropriate boundaries to reclaim possession. Otherwise, exceeding these limits would transform the action into an arbitrary exercise of an assumed right.

CASE LAW: ***'Il-Pulizija v. Paolo Mifsud'*, 2007.**
The circumstances involved the accused's sister **planting beans in a field** under the possession of the mentioned accused. And in an effort to reclaim control of his field, the defendant ploughed these beans. The Court of Appeal argued that the accused was safeg**uarding the existing state of affairs**, and as such, the principle of ***Vim Vi Repellere Licet*** was deemed applicable.

<u>CASE LAW</u>: *'Il-Pulizija v. George Galea'*, 2008.

The defendant, who was the **proprietor of a maisonette**, maintained a contractual obligation to permit a third-party, who owned another maisonette, to install a television aerial on his roof. Additionally, the defendant was obliged to allow all necessary repairs to take place.

However, without the consent of the accused, the mentioned third party proceeded to also install a satellite dish on the accused's roof. And when the third-party individual sought permission from the defendant to conduct repairs on the unauthorised satellite dish, the mentioned defendant refused to grant access to his roof.

The Court purported that the principle of ***Vim Vi Repellere Licet*** applied here due to the fact that the third-party executed an act which was NOT agreed upon contractually by the defendant.

<u>CASE LAW</u>: *'Il-Pulizija v. Jane Deguara'*, 2003.

The circumstances involved the defendant and her **husband purchasing a property using funds provided by the defendant's mother**. The mother ultimately resided in this property without paying rent for several years, but was vacated due to its deteriorated condition.

During separation proceedings, the husband changed the locks leading access to the house, and was thus slapped with charges of *ragion fattasi*. Subsequently, he provided a key these changed locks to his wife, who herself then proceeded to change the locks placed by the husband.

The Court here rejected the argument asserting that the defendant's actions aimed at restoring her mother's exclusive possession of the house. The Court held that:

"It is clear that for the principles contained in these maxims to be applicable, the **opposition to the threatened spoliation or the retaking of possession must be immediate**. Thus, if the landlord has forcibly evicted the person in possession of the premises by changing the lock to the door of the said premises while the possessor was out, the latter may force again the new lock and retake possession of the premises upon becoming aware of what has happened. He would not be guilty of the offence under **<u>Art. 85</u>**. But if the person who was in actual possession **does nothing as soon as he becomes aware of the change**, he cannot return two, three or four days later and break into the premises in exercise of his pretended right to re-acquire possession of the place.

The raison d'etre for these principles is that because of the actual threat of spoliation one cannot have recourse to the proper authorities – and therefore one has acted immediately to retain or to re-acquire possession. **But if there is a certain lapse of time, then the law requires reference to the proper authorities**".

In this case, the defendant waited **2 months** to regain possession of the premises, and was thus precluded from using the principle of *Vim Vi Repellere Licet* to her advantage.

2. *Qui Continuat non Attentat*

In this regard, **Prof. Mamo** asserts that:

> "The material element consists in depriving another person of a right or thing he is enjoying. Therefore, **the offence does not arise where the act consists in the retention of possession already enjoyed by the agent**. *Qui Continuat non Attentat*."

CASE LAW: *'Il-Pulizija v. Michael Portelli'*, 2006.
The defendant, who was the **possessor of a particular piece of land**, took down a gate affixed to his mentioned land to safeguard his possession. The Court ultimately acquitted the accused, asserting that "***the accused remained within the bounds of the possession he held and assured himself that nothing was done except to protect his right*s**."

Ragion Fattasi vs *Truffa & Frode Innominato*

CASE LAW: *'Il-Pulizija v. Giuseppe Schrainer'*, 1956.
The defendant was employed by a third-party and decided to seek recompense for **unpaid wages covering 2 days of work**. To claim the owed amount, the accused visited his employer's residence and falsely informed his wife that her husband had sent him to collect a **piece of bread** and **£1.10**. The Court discussed the potential classification of this act as *truffa*. However, to meet the criteria for *truffa*, it was ascertained that the **deceptive act must be coupled with an intention to fraudulently obtain money for an unjust gain**. The Court also explored the possibility of *frode innominato*; and it was unearthed that **this offence also necessitated the presence of an intention to achieve an unjust gain** – which was ultimately NOT the intention of the accused, because his only objective was to receive his unpaid wages.

Ragion Fattasi vs *Theft*

<u>CASE LAW</u>: *'Il-Pulizija v. John Galea et'*, 2003.
In this case, the Court purported that the **intention to perform an act of theft not only consist of the desire to take an object, but also to cause some kind some harm**. The Court thus proceeded to explain that the constitutive elements of **<u>Art. 85</u>** are 4: 1) a **violent act depriving someone of something they are enjoying**; 2) the **belief that the act is being carried out in the exercise of a right;** 3) **compulsion in the agent who is taking the law into their own hands** to do so through the public authority; and

Ragion Fattasi vs *Voluntary Damage to Property*

The crucial factor when determining the difference between these two offences hinges on the **agent's intent**. If the agent aims to assert a right that is merely pretended, and in doing so, causes harm to the property of a third party, the charge is that of ragion *fattasi* rather than that of voluntary damage to property.

<u>CASE LAW</u>: *'Il-Pulizija v. Carmelo Farrugia'*, 1956.
The facts alleged in this case's Bill of Indictment suggested the commission of the offence of voluntary damage to property, which is an offence entirely separate and distinct from that of *ragion fattasi*. While it is true that the same material act can give rise to both the offence of *ragion fattasi* and voluntary damage or property, **it CANNOT be conclusively stated that the offence of *ragion fattasi* is encompassed and involved in voluntary damage or vice versa**. For offences to be considered encompassed and involved in each other, all the elements of one must be found in the other. And precisely because of the crucial role of intention – of whose classification is different for both the offence of voluntary damage to one's property and for *ragion fattasi* – these two offences cannot be considered to encompass one another.

CHECKPOINT

Art. 85, Criminal Code

NO Intent to Steal / Cause Damage
Exercise of Pretended Right
Disturb Enjoyment of another Person
Carrara: *This offence is when one believes to have a right over something in another's possession, or against another individual.*
Taking the Law into your Own Hands
presupposti del delitto
1889 Italian Penal Code / Zanardelli Code / Code of Two Sicilies

The Pretended Right

Il-Pulizija v. Carmen Grech
Real Rights
Il-Pulizija v. George Zahra
Obligations
Il-Pulizija v. Siddy Sangari
Maino: *Ragion Fattasi will apply to those who take something from their debtor to recover or secure their credit and to those who seize a disputed item believing they have a right to it.*
Servitudes
Il-Pulizija v. Grezzju Camilleri
NO Mention of Personal Rights

The Possibility to be Remedied by a Competent Authority

Duty to seek Legal Remedy
Nuvolone: *Absolute certainty of claimed right NOT necessary*.
Il-Pulizija v. Anthony Micallef

Exceptions to the Crime of *Ragion Fattasi*

Vim Vi Repellere Licet
Il-Pulizija v. Paolo Mifsud
Il-Pulizija v. George Galea
Il-Pulizija v. Jane Deguara
Qui Continuat non Attentat
Prof. Mamo: *The offence does not arise where the act consists in the retention of possession already enjoyed by the agent.*
Il-Pulizija v. Michael Portelli

Ragion Fattasi vs *Truffa* & *Frode Innominato*

Il-Pulizija v. Giuseppe Schrainer

Ragion Fattasi vs Theft

Il-Pulizija v. John Galea et

Theft consists of Taking an Object and causing some degree of Harm

Ragion Fattasi vs Voluntary Damage to Property

Intent of the Agent

Il-Pulizija v. Carmelo Farrugia

Crimes Against the State

Treason

Treason, in British English, is the act of betraying one's own country or sovereign, typically by engaging in activities aimed at overthrowing the government, collaborating with its enemies, or acting against the interests of the state. It is a serious offence and is often associated with actions that pose a direct threat to the security or integrity of the nation.

The word 'treason' fails to make any appearance in the Criminal Code of Malta. However, the essence of **treason** can be found in the following provision:

> "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."
>
> **Art. 55**, *Criminal Code*

However, **this provision tackles direct attempts made on the life of the President of Malta**. Therefore, no applicable case law is found in this regard – because the President's life has never been intentionally put in manifest jeopardy in Malta.

Nonetheless however, **Art. 55 is a treasonable offence**, albeit not ***expressis verbis***.

When taking a peek at how history unfolded, one notices the existence of **Act 1351 of England** – which ultimately serves as the inherent bedrock of Art. 55 of the Criminal Code of Malta. Moreover, the foundations of Act 1351 are, in themselves, influenced by the **Roman Law of Justinian** – which makes reference to two stratums of treason: ***perduellio*** and ***seditio***.

However, one must note that the **crime of sedition is NOT exactly tantamount to the crime of treason**, however, the line delineating the two may, in some instance, be very faint.

A **coup d'état** is not necessarily identical to treason under our Criminal Law either, because such a notion can be described to be native to International Law and Constitutional Law.

Art. 55 does not imply the need for a specific intent for one to be guilty of the performed crime. Proving a generic intent to carry out the mentioned act is sufficient. In fact, jurists contend 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**."*

Roman Law Influence

The Roman Republic established the ***lex maiestatis*** – which encompasses crimes committed against the Roman Emperor, the People, and the State itself. This law has been so successfully influential that is has been transposed to other countries and their laws.

The *lex maiestatis* established a court designated for presiding over ***crimen in minutiae maiestatis*** – which refers to acts diminishing the honour and integrity of the Roman People, and thus also, the *lex maiestatis* itself. However, this concept was dragged to extremes wherein, for instance, killing an animal dwelling on grounds owned by the Roman State would result in people being awarded the death penalty by virtue of treason. Thus, the promulgated Act of 1351 sought to diminish this extremity and introduce rationality in Common Law legislation.

In his assertions, Manzini distinguishes between ***perduellio*** (treason) and ***crimen maiestatis*** (sedition), stating that the former refers to **any hostile attack against the state by an internal enemy**. However, this definition was broadened by the *crimen in minutiae maiestatis* – thus updated the connotations of treason to **taking up arms against the state**, **insurrection**, **plotting against the life of the Emperor**, and **destroying statues of the Emperor**.

Germanic Influence

Early Germanic law distinguished between two types of treason - **betrayal of one's tribe by aiding its enemies** or **by cowardice in battle**, and the **betrayal of one's lord**. The most essential and common characteristic between these two is the **breach of trust**.

In the 11th Century, Roman Law resurged unto Western Europe. Thus, France erected its crime of ***laesae maiestatis*** – which was the French counterpart of the Roman *crimen maiestatis*. However, this *laesae maiestatis* is more akin to the Roman notion of *seditio* rather than *perduellio*.

Most importantly however, one must note that **English Law is a concoction of both Roman Law and Germanic ideologies**. The Roman aspect bestows the element of ***maiestas*** (i.e., to insult those boasting public authority), whereas the Germanic aspect maintained the idea of **betrayal by a person against his lord**.

Insurrection & Coup d'état

Insurrection refers to a violent uprising or rebellion against established authority, typically with the aim of overthrowing the existing government or social order. It involves a concerted and often organised effort by a group of individuals or factions seeking to challenge, resist, or overthrow the government through the use of force, protests, or other forms of armed resistance. Insurrection is characterised by a defiance of authority and an attempt to bring about significant political or social change through active opposition.

Art. 56 (1)(a)

“(1) 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**: (a) **taking up arms against the Government of Malta** for the purpose of subverting it; **Art. 56 (1)**, *Criminal Code*

Art. 56 (1) (a) connotes a **specific intent** *(“…for the purpose of…”)*. The act of *“taking up arms”* is not defined; however, **Art. 64** discerns between arms proper and arms improper:

Arms Proper – weapons or devices intended for offensive or defensive purposes.
Arms Improper – instruments not naturally considered to be weapons, but can be used as such for any offensive or defensive purposes.

Ultimately, one needs only take up arms against the Government for him to be found guilty of insurrection. It does not matter if those arms are Proper or Improper.

CASE LAW: ***‘Rex v. Hardy’***
This case established that t**he object of insurrection is the sole determining factor of whether one is guilty of it or not**. The means, force, or number of people involved are not essential characteristics of the crime of insurrection.

CASE LAW: ***‘Regina v. Galliger’***
This was a typical instance of treason against one’s Queen by attempting to **subvert said Head of State using explosives**.

It is good to note that the main influencing factor of our crimes of treason in the Criminal Code of Malta – which is the **1930 Italian Criminal Code** – mentions ‘**subversive associations**’. Interestingly enough however, we do not have a counterpart for this definition in our domestic Code.

Although not present in our Criminal Code however, the idea of an association subverting the Government is still paramount when contemplating the notion of sedition.
Thus, **Manzini** defines a subversive association as a **group of people who act in ways devoid of democratic or constitutional values aimed at causing a reform in governance**.

This above list in Art. 56 is **exhaustive** and NOT indicative, and it mentions the **5 main acts of high** treason adopted from the **1351 Treason Act of England** seen below.

The word ‘**subvert**’ connotes an undemocratic act of violence one deploys in order to cause a shift in the governance of a state. In 1844, **Andrew Jameson** noted that the word ‘subvert’ was too vague when it came to describing acts of high treason. Therefore, he advocated for a very intricate definition of what ‘subvert’ should connote in our Criminal Code.

The crime of treason may be **reduced by one or two degrees** if the ultimate crime is halted due to some kind of voluntary desistance. The desistance must be committed wilfully, thus connoting a ***Delitto Tentato***.

Attempting this crime bears the same punishment which would have been awarded had the mentioned crime been consummated.

Finally, the ‘Government of Malta’ is not properly defined under this article. Therefore, it would be **unwise to assume an extensive approach to this definition**. For example, an attack on the judiciary – which is an organ of the state – would not make sense were it to be interpreted as an attack made on the Government of Malta. Contrarily, it would be rational to suppose that **carrying out a violent act on the executive branch of the state connotes treason**.

Art. 56 (1)(b)

“(b) **bearing arms in the service of any foreign Power** against the Republic of Malta;

A declaration of war **does not need to be of an international character**. Also, the act of **bearing arms** is NOT akin to the act of **taking up arms**.

In this regard, the Italian Criminal Code mentions ‘***il cittadino***’, whereas the Maltese Criminal Code does not delve so specifically, and simply mentions “**whosoever**”.

Manzini contends that the act of bearing up arms is synonymous with the Latin term ***arma ferre*** – which was first employed in the **Roman *lex maiestatis***. The Germanic Code of ere translated this notion into referring to any person forming involved in some sort of military force – regardless of whether that person’s capacity is of a combatant nature or not. Therefore, this leads us to believe that acting seditiously does not require oneself to be an active combatant within an enemy force – **his presence in such an enemy force is enough to constitute sedition**.

Once again, this can be seen in the **Carmelo Borg Pisani case**; wherein he pled that he did not carry any arms. He was denied this defence by virtue of the contention that it does not make a difference whether one carries arms or not in order to be found guilty of this crime, as long as he or she forms part of an enemy unit. Thus, **mere enlistment with enemy forces connotes the bearing up of arms**.

CASE LAW: ***'Rex v. Casement'***
Here, the court held 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 King constitutes giving aid and comfort to the King's enemies".*** Therefore, being enlisted with the King's enemies and comforting them with your support is already enough to constitute guilt.

Art. 56 (1)(c)

(c) **aiding the enemies of the Republic of Malta** in any other manner whatsoever against the said Republic;

Here, '**enemies**' must be interpreted through **Palzon's** definition of **true belligerent forces**. Therefore, this connotes that complying with terrorist forces against one's state falls under this denotation. Ultimately, a **general feeling of hostility** must be communicated.

CASE LAW: ***'Rex v. Lynch'***
This case noted that the aid given to these belligerent forces must be either be through **financial support**, **espionage**, **sabotage**, or the **supplying of equipment**.

Art. 56 (1)(d)

(d) **usurping or unlawfully assuming any of the executive powers** of the Government of Malta, for the purpose of subverting it;

This legislative limb requires a **specific intent** displayed by the phrase *"…for the purpose of…"*.

Usurpation connotes the utilisation of illegal means to assume power. No force or violence is mentioned in this sub-article, so one can assume that acts of 'bribery' are encompassed within this notion. The usurpation mentioned must happen against the executive forces of Malta: **Ministers**, **Parliamentary Secretaries**, **Armed Forces**, etc.

Art. 56 (1)(e)

(e) **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 provision mentions the act of **taking up arms** – which is heavily implied in **Art. 71**. However, while Art. 56 (10)(e) makes explicit reference to the taking up of arms, Art. 71 does not directly mention such a verb – due to its inherent nature belonging to a different crime.

<u>**CASE LAW**</u>: ***'Rex v. Carmelo Borg Pisani'*, 1942.**
Borg Pisani was accused of **high treason** after having acted as a **spy** in World War II against the **country he owed allegiance to**. Despite Borg Pisani's assertion that he had relinquished his British citizenship by surrendering his passport and obtaining Italian citizenship, a claim that could have granted him the status of a prisoner of war, the military court did not accept it. Thus, in 1942, he was openly sentenced to death for charges related to **espionage**, **taking up arms against the government**, and participating in a **conspiracy to overthrow it**.

The 1351 Treason Act of England

Prior to the promulgation of this Act, **Common Law took the notion of treason way too seriously** – awarding death penalties to persons nigh arbitrarily.

Thus, the subsequent promulgation of the **1351 Treason Act of England** saw the introduction of two strains of treason: **high treason** and **petit treason**.

High treason connotes a **breach of trust due to the king from his subject**. Thus, the **founding principle of this notion is one's allegiance to his king**. And the main thinking behind this hallowed allegiance was that if someone enjoys the king's protection, then he owes that ruler his fidelity. This sense of allegiance also became automatically implied once an Englishman attained 14 years of age.

Conversely, **petit treason** was when a **subject of the crown killed another person bearing a more superior public status** – such as a wife killing her husband.

This Treason Act thus set the stage for **7 types of treason** – two of which were later reduced to the status of 'felony'.

The 5 types of high treason are as follows:

1. **Compassing or imagining the death** of one's King, his wife, his eldest son, or his heir.
2. **Violated** the King's companion, the King's eldest daughter if she was unmarried, or the wife of the King's eldest son.
3. **Levied war** against the King in his own Kingdom.
4. **Aided the King's enemies** within his own dominion, or elsewhere.
5. Killed the **Chancellor**, **Treasurer**, or one of the King's **Judges**.

The 2 remaining stratums of treason were reduced to felonies:

6. **Counterfeiting the King's money**.
7. **Bringing counterfeit money** into the King's realm.

These last 2 felonies may be seen in our Criminal Code when dealing with forgery (**Art. 113**), whereas the other 5 constituents are embedded within **Art. 56**.

Kenny commends the 1351 Act because of the **constitutional securities** it conferred – also pointing out the fact that this Act brought about the rare instance of having a **statutory definition supersede notions borne by Common Law at such an early stage in history**.

Attempts on the Safety of the President

Art. 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**."
>
> **Art. 55**, *Criminal Code*

This article aims to safeguard the Head of State in Malta by imposing a more severe punishment than what would be applicable to similar crimes against ordinary citizens. Thus, this provision underlines the idea that the **President is the embodiment of the country** and a figure directly associated with all three branches of the State.

This provision draws inspiration from the **UK Treasons Act of 1975**, which focuses on harm inflicted upon the person of the King or Queen.

The ***actus reus*** of this crime is pertinent to **killing the President**, **seizing his liberty**, and **placing his life in manifest jeopardy by through grievous bodily harm**.

Maltese Law does not explicitly discern between **physical** or **moral liberty**; therefore, it would be wise to play it safe and consider both.

The **formal element** of this crime requires the agent to be fully aware of the fact that he is deliberately exercising such an offence against the President of Malta. **Specific intent is NOT required**, because the generic intent to cause harm suffices for incrimination.

When the President is on leave, an **Acting President** assumes his role and qualifies for protection under **Art. 55**.

Under Maltese Law, the offence **can be committed by anyone** posing a threat to or harming the security of the state.

Finally, **Art. 4** of the ***Press Act*** complements this provision by criminalising **incitement to take away the life or liberty of the President**, irrespective of whether the incitement leads to the actual commission of the offence. This provision also extends to Ministers of the Government, providing an additional layer of legal protection.

Sedition

The etymology of sedition comes from the Latin '*sed*' (a separation, a parting of), and '*itio*' (to go) – thus painting the picture of **one's departure from the body politic and his respective allegiance to his head of state**.

Once again however, no express definition of sedition may be found in our Criminal Code. However, **Cap. 71 of the Law of Malta** offers a definition of '**seditious matter**':

> ""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**, […] –
>
> (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** […];
>
> (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."
>
> **Art. 2**, *Seditious Propaganda (Prohibition) Ordinance*

This definition is akin to **Sir Stephen**'s definition embedded within the **Digest of the Criminal Law of England**, which is also a country that does not boast a definition of sedition – it only describes what '**seditious libel**' is.

It is also interesting to note, whereas the Maltese Criminal Code mentions subversion as an all-encompassing notion, the Italian Criminal Code notes a difference between ***eversione*** and ***sovversione***. Certain definitions such as these do not dwell within our Criminal Code – mainly because these elements were introduced and reinforced in the Criminal Code of Italy after the harrowing events of the kidnapping of the Prime Minister Aldo Moro.

Manzini defines *eversione* as a violent display intended to cause change, whereas **Antolisei** remarks that *eversione* refers to instances wherein persons seize the law in their hands, thus perverting any notions of the Rule of Law in a state.

Sedition in Scots Law

Back then, Scots Law was heavily influenced by Roman law and English law. However, the **1793 Scotland Trials** held by **Lord Bracksfield** proved to be of utmost importance to the topic of sedition.

The 1793 Trials were the first product of Scots Law to make reference to the crime of sedition, *per se*. According to Scots Law, the crime of **sedition was completed as soon as the words were spoken or published, regardless of whether or not the actual disturbance ensued.**

This is important to highlight because it aligns with the contravention of breaking public peace embedded in **Art. 338** of our Criminal Code. Therefore, one notices that the roots of our Art. 338 may be traced back to the theories abutting sedition, many centuries prior.

In fact, the ***Codex Justinianus*** describes sedition as '***contra pubblica quietem***' – which, once again, is very similar to our Art. 338 describing the breach of public peace.

'***L-ghagha tan-nies***' and the **uproar/alarm/fear** for the safety of the people becomes the essential ingredient for the consummation of this contravention, and is thus the same crucial ingredient stipulated in writings pertaining to sedition penned many moons ago.

The employment of words in Scots Law are calculated to refer to any disaffection being uttered by the offender. The **element of recklessness** is enough to constitute this crime, since **a reasonable man ought to realise his actions**.

Fundamentally, the law strives to point out the fact that the **tendency** of the crime of sedition takes precedence when compared to the inherent intention of it. **The words leading to public alarm, regardless of the intent, is what thus constitutes the crime of sedition**. It is sufficient to consummate this crime if the words used have the tendency to cause public disorder.

In fact, when heeding modern laws, one finds similar laws pertaining to crimes of **incitement to violence** and the **incitement of racial hatred** – lucidly displaying the fact that **words (and their tendency) are enough to constitute a crime**.

Therefore, **sedition is associated with public disorder**. It does not strike at the very heart of the state, because doing so would connote treason. Thus, and *a contrario sensu* to sedition, **treason is calculated when one actually succeeds at injuring a public authority**.

The underlying concept of sedition is therefore the **breach of trust**, **breach of public allegiance**, and the subsequent **presence of public disorder**.

Roman Law also adds on to the topic of sedition by stating that '***quo seditio tumultus quae ad versus rem pubblica in fiat***', meaning that **any person who commits seditio or causes a tumult is considered to be against the Republic**. Thus, this also connotes that anyone who commits sedition becomes guilty of a ***crimen lex maiestatis*** – which, to remind, is the blatant lessening body politics' majesty.

Smith & Hogan address the crime of tumult and employ an **emphasis on numbers** committed to performing this crime, thus breaching public peace.

Berger defines sedition in Roman Law as '**open resistance in a rather large number of persons with the use of armed or unarmed force against magistrates. It is a violent disturbance of a popular assembly or of a meeting of the senate**.'

This is very important because it clearly displays the roots of Art. 56 of our Criminal Code in relation to Art. 68 of ***attruppament***:

> "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)."
>
> **Art. 68**, *Criminal Code*

The bottom-line of all this is that a certain degree of force and a significant number of people are both essential requirements for the crime of sedition. Therefore there is a **qualitative aspect** (force), and a **quantitative one** (numbers).

CASE LAW: ***'Queen of Scotland v. John Grant'***
In this case, Lord Justice Clark defined sedition as "**wilfully**, **unlawfully**, and **mischievously**, and **in violation of the party's allegiance**, and **in breach of the peace and to the public danger**, uttering **language calculated to produce popular disaffection**, **disloyalty**, **resistance to lawful authorities**, and in more aggravated cases, **violence** and **insurrection**."

Provocation to Commit Crimes Against State

Art. 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 1 to 3 degrees.
>
> **Art. 59**, *Criminal Code*

The underlying purpose of this provision is to prevent individuals from inciting crimes threatening the safety of the government – which are considered to be the most sinister strains of offences in Criminal Law. Thus, the legislator is particularly vigilant in safeguarding the government by as much as possible mitigating any potential public disorder resulting from particular provocation – even if the actual material criminal act does not ultimately transpire.

Art. 59 criminalises the inherent act of provocation – even if that which is provoked does not materialise. Thus, **this train of thought is inverse to that applied to the crime of complicity** – wherein the person provoking is NOT criminally liable if the provoked criminal act does not transpire.

The essential elements of this offence largely revolve around the delivering of a **public speech** in a **public place** at a **public meeting**, which is in itself used as a platform to provoke and instigate crimes against the State.

This provocation can only occur through **spoken words**.

Moreover, a **public place** is considered to be one wherein there is a significant number of persons present, also furnished the circumstances of facilitating the influencing of the crowd's emotions. Ultimately, the law does not explicitly define what a 'speech' or 'public place' is.

However, **Art. 2** of the *Public Meeting Ordinance* might lend a helping hand to judges and magistrates struggling to identify the true nature of a public space or building.

Interestingly enough also, **recorded messages** of oral speeches also fall under Art. 59 as long as they satisfy the requisite of their being played in a public place.

Roberti contends that **direct provocation** necessitates a deliberate and intentional causal connection between the provocation and the commission of the crime. Therefore, **the provocation must be aimed at inciting the crime**.

CASE LAW: ***'Il-Pulizija v. Carmelo Micallef'***
In this case, the Court identified **3 strains of public places**: 1. By **Nature** (roads, passages, village squares) 2. By **Destination** (schools, shopping centres, theatres) 3. By **Accident** (houses, roofs, balconies)

CASE LAW: ***'Rex v. Manwel Cucciardi'***
The Court here delineated the fact that the **publicity of a place is construed from its potentiality to be publicly accessible**.

Failure to Disclose Crimes Against State

Art. 61 & Art. 62

"Whosoever, **knowing** that any of the crimes referred to in the preceding sections of this Title is about to be committed, shall not, **within 24 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 from a term from 9 to 18 months."

Art. 61, *Criminal Code*

"The provisions of the last preceding section 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."

Art. 62, *Criminal Code*

UK Law has developed particular notions which revolve around this offence of gatekeeping information regarding an imminent danger to the safety of one's government:

1. The defendant must possess **foreknowledge** that an offence against the security of the state is imminent.

2. The defendant must have **concealed** or **kept their knowledge secret**.

3. The defendant must **fail** or **refuse to perform their duties** when a reasonable opportunity to do so is present.

The failure to report treason **does NOT necessitate motives** such as seeking gain, reward, advantage, or profit for the accused. Moreover, the defendant required **NO active participation in the crime at hand** to be found liable for this offence.

Using the defence of **professional secrecy** applicable to lawyers, doctors, and men of the cloth is admissible in this regard.

The defendant is convicted once the prosecution proves that he was fully aware of the impending crime threatening the safety of the State **before its execution** – because if the knowledge is attained after the offence has been consummated, then the obligation to advise the pertinent authorities is negated.

The substance of the knowledge must be one that is **genuine**, **legitimate**, and **convincing**. Thus, it must usher the reasonable man into believing it. This knowledge is attained directly (ex. by confession), or indirectly (ex. by eavesdropping).

Moreover, the knowledge attained must be **detailed** and **specific**, and not effectively whimsical.

The defendant **cannot evade punishment by contending that he tried to dissuade the agent of the crime**. The "mere omission" of warning the authorities is that which is punishable under this provision. And given the sensitivity of the nature of the crime, this goes against the general idea that failing to disclose a crime is not, in itself, criminal.

Prof. Mamo asserts that:

"The law has paid a tribute to the **principle of dignity of man** and of the sentiments of trust and concord which is so **necessary to maintain in the family**."

Ultimately, **Roberti** explains that the supreme interest of State security requires proactive protection even before potential wrongdoers embark on their criminal enterprise due to the risks associated with delay.

Conspiracy

The notion of conspiracy finds its roots in British Common Law. Originally, this offence was introduced into Maltese legislation in 2002 through **Art. 48A**.

Conspiracy is the **planning** and **agreement** to commit a crime between parties, which is a notion stemming from UK common law – therefore it originates from a jurisdiction which does not base itself on Carrara's theory; thus, the notion of having a *mens rea* and an *actus reus* in order for criminal liability to subsist becomes somewhat difficult to grasp – because in this instance, the material and formal element may be a bit difficult to discern.

Ultimately, it is generally accepted in Malta that the ***actus reus* is the physical act of agreeing** on committing the crime.

There are **4 requirements** needed to be satisfied in order for one to be criminally liable for the offence of conspiracy:

1. **Act of Agreement**: this act represents the acceptance of the collective intention to commit a crime (of whose intention can be accepted via **speech**, **writing**, and **other forms of communication**). Agreement by **passivity** and **silence** may also be regarded as a valid settlement between parties.

2. **Persons Agreeing**: at least a party of **2+ persons** must take shape. However, the conspirators need not have a prior-established relationship with each other. For instance, in 1943, **Carmelo Borg Pisani** was accused with conspiring with members of the Italian regime to overthrow the government. To this, Borg Pisani argued that he did not know the members of the Italian regime (the co-conspirators), therefore, he asserted that he was not, in essence, conspiring. However, the court decided that one need not know his or her co-conspirators on a personal level to form a conspiracy.
3. **Purpose Agreed Upon**: the purpose agreed upon must be **liable to imprisonment**. One cannot be charged with conspiracy if the act he is allegedly conspiring to commit does not yield a character punishable by imprisonment. Therefore, for instance, **one cannot conspire to commit a contravention**.

4. **The *Modus Operandi***: this pertains to the *mens rea* behind the offence. In Maltese Law, the prosecution must prove the agreement and determination of the co-conspirators to commit the crime, AND the *modus operandi*. Put simply, this *modus operandi* is a detailed plan of action, describing every step of when, how, where and when the offence conspired will take place. And a simple agreement on this *modus operandi* is the final box needed to be ticked in order for persons to be charged with conspiracy. Moreover, the agreed-upon *modus operandi* must be fulfillable for it to be successfully conspired upon.

Kenny argues that conspiracy is purely a mental state – the mere agreement of two or more men's minds. However, it would be impossible for two or more men to come to an agreement without communicating their common intentions by speech or gesture. Thus, the physical external element is present.

<u>CASE LAW</u>: *'The Republic of Malta vs Steven John Lewis Marsden'*, 2009.
The defendant was arrested for possessing **narcotic pills**. However, the pills in question were not ecstasy, and were thus, not illegal in the eyes of the laws of Malta. Therefore, Marsden could not be charged with drug trafficking (and nor for the attempt of it). The Court then decreed that for Marsden to be convicted of conspiring to import illegal pills, the prosecution had to prove beyond reasonable doubt that Marsden was in agreement with one or more persons to bring narcotics into Malta in order for them to import the pills someplace else. Moreover, as the pills in question were not even illegal in Malta, the court asserted that the prosecution had to also prove that, on top of having the accused co-conspire with another person, the other person in question had the intention of important illegal drugs in mind.

Voluntary desistance does not apply to conspiracy. This is because a crime of conspiracy is completed upon the moment of agreement on the *modus operandi* – therefore, there is no going back after that; no ample degree of voluntary desistance may take back such a permanent and abstract notion of the past.

Art. 57 and **Art. 58** are pertinent to understand conspiracy in particular relation to crimes against one's own State. And the **essential elements** of such an offence revolve around the inherent **participation** in a conspiracy, and that the object of such a conspiracy is annexed either to the idea of **insurrection** or **threatening the safety of the President**.

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Simple conspiracy occurs when it lacks subsequent preparatory measures, whereas **aggravated conspiracy** involves the simple act of conspiracy accompanied by preparatory actions for the execution of the crime.

Moreover, **distinguishing between attempt and conspiracy** is absolutely vital. While conspiracy hinges on the agreement on an unlawful purpose and the mode of action, attempt necessitates the demonstration of such criminal intent through preparatory acts followed by the commencement of execution toward the crime's consummation.

Seditious Conspiracy

This notion is underlined in our Criminal Code:

"If two or more persons shall **conspire to incite other persons** to attempt the alteration of any matter established by law, by violent means, every person so offending shall, on conviction, be liable to imprisonment for a term from six to eighteen months."

Art. 74, *Criminal Cod*

Unlawful Assembly (Attruppament)

Art. 68

"Whosoever shall incite an assembly of persons, who when so incited shall be **10 or more in number**, for the purpose of committing an offence, shall, for the mere fact of incitement, be liable on conviction, to imprisonment for a term from 1 to 3 months or to a fine (multa)."

Art. 68, *Criminal Code*

Attruppament is consummated when **10+ people assemble** due to incitement, even if the intended offence does not even transpire.

<u>CASE LAW</u>: ***'Il-Pulizija v. Ganni Bugeja'***

This case purported that **10+ people are not necessarily required to assemble directly because of the incitement in question**.

"Whosoever shall take an **active part in an assembly of 10 or more persons for the purpose of committing an offence**, although the said assembly may not have been incited by anyone in particular, shall, on conviction be liable to imprisonment for a term from 3 days to 3 months or to a fine (multa)."

Art. 68 (2), *Criminal Code*

The punishment awarded for merely taking active part in the assembly is less severe than that awarded for incitement itself. Thus, the **inciter is penalised heavier than the participant**. Ultimately, the essential element of this 'active participation' is simply being present in a gathering of 10+ persons intending on committing an offence. **Accidentally happening to be in a crowd** does NOT qualify as taking active part.

<u>CASE LAW</u>: ***'Il-Pulizija v. Saliba'***

This judgement underlined that actual disturbance of public peace is NOT necessary, because the **potential to cause such public disturbance is enough to constitute criminal liability**.

<u>CASE LAW</u>: ***'Il-Pulizija v. Zammit'***

This case simply asserted that the **reasonable man** must get the impression that the assembly formed is hazardous for public peace and safety for such an assembly to be deemed unlawful.

<u>CASE LAW</u>: '*Il-Pulizija v. Annetto Said*'
Ultimately, it was noted here that the mentioned assembly need not actually carry out the act they intend to commit for them to be criminally liable for unlawful assembly. **Actually succeeding in executing the act simply connotes an aggravation**.

<u>CASE LAW</u>: '*Il-Pulizija v. Carmelo Callus*'
This case contended that the **clear approval** and **voluntary participation** of persons allegedly taking part in an unlawful assembly are essential for them to be found criminally liable. Accidental participation renders one not guilty of such an offence.

<u>CASE LAW</u>: '*Il-Pulizija v. Bigeni*'
This case clarified that the ***onus probandi*** **is shifted on the defendant to prove that he was not participating in a suspicious assembly if he was spotted in one**.

<u>CASE LAW</u>: '*Il-Pulizija v. Debono*'
This case declared that **members of an unlawful assembly are still liable for it, even if the population of such an assembly dwindles down to below 10 people at the time of the commission of the intended crime**.

Finally, the **formal element** of this crime does not demand that the offence be attempted or completed.

The 1986 Public Order Act

This act defined and delineated the offence of affray – which is an English derivative of a French term connoting the act of '**putting someone in terror**'. The importance behind this Act is underlined in the fact that it helps outline the ***ratio legis*** behind the offence of breaching public peace in our Criminal Code:

Every person is guilty of a contravention against public order, who – (dd) in any manner not otherwise provided for in this Code, **wilfully disturbs the public good order or the public peace**. **Art. 338 (dd)**, *Criminal Code*

The Common Law definition of affray was thus defined by the 1986 Public Order Act of the UK – a source of law commonly referred to by Maltese judges:

> (1)A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.
>
> (2) Where 2 or more persons use or threaten the unlawful violence […]
>
> (3) For the purposes of this section a threat cannot be made by the use of words alone.
>
> (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
>
> (5) Affray may be committed in private as well as in public places.
>
> **Art. 3**, *1986 UK Public Order Act*

Thus, Maltese judgements commonly referred to this definition when observing alleged acts of breach of public peace. To this, in fact, Judge De Gaetano entwines the notions of affray with the circumstances provided in a particular case:

CASE LAW: ***'Calleja v. Balzan'***

In this case, numerous controversial posters were being hung by Mr Calleja in a response of outrage directed at the newly promulgated 1975 Marriage Act of Malta which made established the possibility for civil marriages to be consummated.

Inspector Balzan was informed of the controversial posters, and demanded that Mr Calleja put them all down. But in a display of defiance, Mr Calleja refused to do so.

Calleja was thus arraigned in court under Art. 338 (dd) for an alleged breach of public peace. However, he filed a constitutional appeal after having been judged through a subjective lens by the First Hall, and had his appeal upheld by the constitutional court once the mentioned court adopted an objective stance when carrying out a test of reasonableness.

CASE LAW: ***'Field v. Receiver of Metropolitan Police', 1907.***

In this case, the court said that the elements of riot were:

1. A **minimum of 3 persons** involved.
2. The presence of either a **lawful or unlawful common purpose**.
3. An **execution or inception of the common purpose**.
4. An **intent to help one another by force**, if necessary, against any person who may oppose them in the execution of their common purpose.
5. The use of force displayed in such a manner as to **alarm at least one person of reasonable fairness or courage**.

CHECKPOINT

Treason

The word 'Treason' is NOT mentioned in the Criminal Code

Art. 55, attacks on the President

Roman Law of Justinian, *perduellio* and *seditio*

Treason ≠ Sedition

NO Specific Intent in *Art. 55*

Roman Law Influence

lex maiestatis

crimen in minutiae maiestatis

<u>Manzini</u>: *perduellio* (treason) = hostile attack on State by internal enemy, *crimen maiestatis* (sedition) = taking up arms against the State or jeopardising the life of the Emperor

Germanic Influence

Treason 1 = Betrayal of own Tribe by aiding enemies and Cowardice in Battle

Treason 2 = Betraying one's Lord

French *laesae maiestatis*

Insurrection & *Coup d'état*

Uprising against Authority

Art. 56 (1)(a)

Specific Intent of Taking Up Arms

Arms Proper

Arms Improper

Rex v. Hardy

Regina v. Galliger

1930 Italian Criminal Code: Subversive Associations

Manzini: *a Subversive Association is undemocratic and aims to cause a Reform in governance.*

Andrew Jameson: '*To subvert' is too vague an explanation to connote High Treason.*

Desistance (*delitto tentato*)

Violence on the Executive organ connotes Treason

Art. 56 (1)(b)

Bearing up Arms

Manzini: *arma ferre*

Presence in enemy force is sufficient for Sedition (Carmelo Borg Pisani Case)

Rex v. Casement

Art. 56 (1)(c)

Aiding the Enemies of Malta

Palzon: 'Enemy' = true belligerent force

Rex v. Lynch

Art. 56 (1)(d)

Specific Intent to Usurp Executive Power

Art. 56 (1)(e)

Taking up Arms to compel Malta to change Measures / Counsels

Rex v. Carmelo Borg Pisani

The 1351 Treason Act of England

High Treason – breach of trust of the King

Petit Treason – Subject killed a Superior Subject

Compassing / Imagining death of King

Violating King's companion / daughter

Levying War against the King in his own Kingdom

Aiding King's Enemies

Killing Chancellor / Judge / Treasurer

Counterfeiting King's Money

Bringing Counterfeit Money in Kingdom

Kenny: *The 1351 Act bears Constitutional Security.*

Attempts on the Safety of the President

President is the Embodiment of the State

Actus Reus – kill, seize liberty, or endanger President

Physical & Moral Liberty

Generic Intent ONLY

Acting President

Art. 4, Press Act – Incitement

Sedition

Seditious Propaganda (Prohibition) Ordinance

To Seduce members of the Forces against their State

To bring Hatred / Contempt

To Incite to Take up Arms

To Raise Discontent

To Promote Ill Will / Hostility

Sir Stephen: seditious libel

eversione & *sovversione*

Manzini: *eversione* = violent display to stir change

Antolisei: *eversione* = when persons take the law in their own hands

Sedition in Scots Law

Sedition immediately complete when Words are spoken / published

Art. 338 – disturbing public peace

Code of Justinian: Sedition = *contra pubblica quietem*

L-ghagha tan-nies / Public Alarm and Disorder

quo seditio tumultus quae ad versus rem pubblica in fiat

Smith & Hogan: *Crime of Tumult is contingent on its numbers.*

Berger: *Sedition is Open Resistance by a large number of persons against Magistrates.*

Qualitative Aspect (force) & Quantitative Aspect (numbers)

Provocation to Commit Crimes Against the State

Provocation on its own is Punishable

Public Speech, Public Place, Public Meeting

Spoken Words

Recorded Messages

Roberti: *Provocation must be aimed at Inciting the crime.*

Il-Pulizija v. Carmelo Micallef

Rex v. Manwel Cucciardi

Failure to Disclose Crimes Against the State

The Mere Omission is Punishable

UK Law: the defendant must possess Foreknowledge, must have Concealed it, and must have Absconded from performing his Duties when he could have

Defence of Professional Secrecy

Knowledge must be Genuine, Legitimate, Convincing

Knowledge must be attained BEFORE the crime happens

Roberti: *State requires Proactive Protection.*

Conspiracy

Seditious Conspiracy

Unlawful Assembly (*Attruppament*)

10+ People

Il-Pulizija v. Ganni Bugeja

Active Participation vs Accidental Participation

Il-Pulizija v. Saliba

Il-Pulizija v. Zammit

Il-Pulizija v. Annetto Said

Il-Pulizija v. Carmelo Callus

Il-Pulizija v. Bigeni

Il-Pulizija v. Debono

Incited Offence need NOT transpire

The 1986 Public Order Act

Affray

Calleja v. Balzan

Field v. Receiver of Metropolitan Police

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