MCT1005 INTRODUCTION TO LAW

The European Law Students' Association

MALTA

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Discuss how primary and subsidiary legislation is made.

Law is a social system. As Aristotle claimed, by virtue of our very nature, human beings are social animals, meaning we tend to live together in societies as that is the environment that best enables human flourishing. However, for there to be harmony amongst the various individuals we must move beyond what Hobbes deemed as the state of nature, whereby people value self-preservation above all, have limited benevolence and consider private appetite to be the measure of good and evil, making civilised and peaceful life impossible. This can only be achieved through the promulgation of laws made by a legitimate authority which every citizen owes obedience to, which govern people's actions and issue rights and obligations. These laws must be enacted for the benefit of the subjects and ought to develop depending on the needs of the people.

There are various types of law in any given society. One such type is known as primary law. This refers to codes, ordinances and acts of parliament, the name given to laws enacted from 1964 onwards following the establishment of self-government in Malta. These are promulgated by the state's centralised legislative authority: parliament, in a process which will be forthcomingly outlined. Ordinances refer to the laws passed before 1964 when Malta remained a British colony and codes differ from the two aforementioned constituents of primary law as they refer to substantive laws. However, a code has not been enacted in Malta since 1885.

Another type of law refers to subsidiary or delegated legislation. These laws are referred to as delegated legislation as they are not enacted by parliament but by another authority upon whom parliament delegates its law-making authority. It is important to note that as a *prima facie* rule, this delegated legislative power cannot be further delegated to another authority or person: '*delegatus non potest delegare*'. Moreover, this form of legislation cannot run contrary to primary laws and is inferior to laws enacted in parliament, thus why they have garnered the title of subsidiary laws. The responsibility of making subsidiary legislation generally falls into the hands of Ministers through an enabling act. This refers to a piece of legislation through which a legislative body grants an authoritative, legitimate entity the delegated power to issue subsidiary legislation. It is a highly limited power granted to select members of the executive who are bound by and obliged to follow the provisions in the aforementioned act. Subsidiary laws can be identified in regulations and by-laws.

The process of enacting primary legislation involves turning a bill into law which occurs in parliament. Any member of parliament can petition a bill but more often than not they are proposed by the government since it is the government that dictates the agenda. Firstly, the proposee, more often than not a Minister in charge of the sector to which the bill applies, begins proceedings through the use of green papers and white papers. A green paper usually takes the form of a consultation document and explains the idea which is going to be proposed simply. However, the criticism of the green papers is that they are often too simplistic and thus lead to people not being satisfied with proposals put forward. Therefore, following the introduction of

the green paper, the white paper would be presented including all objections received from the green paper, enabling the report to be more specific and thorough. Additionally, the white paper often includes details regarding the implementation of policies and has a bill attached to it. This allows for the Minister to advance and present an amended version of the bill which is discussed in cabinet and put up for further amendments before moving on to parliament.

In parliament, the first action is the Minister's presentation of the first reading of the bill. This acts as a warning to the chamber that they intend to pass a law. This can be a brand new law or an amendment to a law. The only thing read is the title of the bill being proposed. Following a vote taken in parliament, the bill is published in the government gazette so the public can see what parliament is proposing. Next, the second reading takes place where the parliamentarians discuss the scope and objectives of the bill. The Minister has an introductory statement and the Shadow Minister details the opposition's position. Here no details are discussed and amendments cannot be proposed. Once again a vote is taken before the bill moves to the Committee Stage. Here, a designated committee, in which the government has a majority, is formed. It made up of varying members depending on the nature and specifications of the bill. The bill is examined clause by clause and each clause is voted upon. At this stage, amendments can be presented. Should the bill be approved following a vote per clause, the chair of the Committee formally reports to the Speaker of the House that the bill has been approved and states whether it was with or without amendments. At this point, the bill is presented to parliament for the third time for the final reading which demonstrates to parliament the final inclusions of the bill. This is where the bill gets the final approval of parliament. It is prudent to be aware that at this stage, a two-thirds majority vote in favour is required to change the constitution, following Article 66. The bill is then sent by the Speaker to the President for the Presidential assent and following his signature, the final and official version is promulgated in the government gazette. This final stage is vital as a person cannot infringe upon any law unless it has been promulgated officially: '*nullum crimen sine lege*'

As we have noted parliament enacts the law, however, the process of implementation is in the hands of the executive. This is an indication of the doctrine of the separation of powers and is in line with the rule of law. There are several bodies which ensure compliance with the law such as the various authorities, for example, the MFSA. This is because the government cannot regulate itself and thus, these authorities ensure transparency. Implementation is often entrusted to independent public authorities called regulators to ensure that the government is truly a subject of the law. The law needs to be complied with regardless of a person's status within society, otherwise, this lends to systematic abuse of the rule of law and the formation of an anarchic society.

We consider the law to be legally binding, meaning that not complying with it evokes legal consequences. This binding nature of the law is relevant with reference to both primary and subsidiary legislation. Other sources of law, however, may not be legally binding and the difference between the two is fundamental as enforceability and compliance are qualities that are only applicable to that which is legally binding. The classification of a source of law as legally binding or not is dependent on the following conditions: where the law originates from (as law is only binding when it is enacted by a lawmaking body that has legitimate authority), how the law

is enforced and how the law is implemented. For example, one cannot be accused of a legal breach nor can a person make a legal claim on policy, however, one cannot infringe upon the law without experiencing legal ramifications.

When regarding the legislative process as a whole, it is prudent to question why it is necessary for parliament to delegate their law-making powers and why subsidiary legislation is enacted. We note that delegated legislation is a suitable alternative to parliamentary law-making in that it aids in solving the difficulty of finding the parliamentary time to enact legislation. Moreover, it enables necessary legislative processes to continue when parliament is not in session. This manner of enacting legislation is more flexible and should it prove impractical can easily be revoked. Furthermore, subsidiary legislation is often highly specific and specialised and thus are not readily susceptible to be discussed in parliament. It is, therefore, preferable to allow specific Ministers to tackle them in consultation with experts in the field. The enactment of this type of legislation is also useful in providing further regulation which may have been overlooked when enacting primary legislation.

Despite the numerous advantages, this process has several points of criticism levelled against it, primarily the criticism that it goes against the doctrine of the separation of powers as it amounts to the executive legislating. Moreover, critics take issue with the fact that often primarily legislation is enacted in skeleton form leaving the details to be ironed out via subsidiary legislation. However, it is often the details of the legislation that are the most pressing concern of the general public and having them decided by subsidiary legislation results in the elected representatives unable to outline the will of their constituents in parliament. A preoccupation also exists with regards to the available controls over this type of legislation. Despite parliament not delegating full control of this form of legislation, it has no control over what the delegates make of their assigned power. However, a form of judicial review provided for by Art469A (1) of the Code of Organisation and Civil Procedure through the Civil Court, First Hall, may enquire into the validity of any particular subsidiary legislation. An example of this is the case of *Louis F. Cassar pro et noe. v. the Prime Minister et,* in which it was decided subsidiary legislation going contrary to the parent act could not be enacted.

This process outlining the development of primary and subsidiary legislation is observed consistently within legal systems that follow the Civil Law tradition, which are almost universal throughout Europe. Both primary and secondary legislation are of vital importance is the legal sphere and enable the legislative process to function smoothly. Despite disadvantages that may be presented regarding this legislative process, it is a system whose advantages outweigh its deficiencies enabling the creation of laws which establish order within society and support the prosperity of mankind.

Examine the sources of civil law.

When analysing any type of law, it is important to be cognizant of the sources entailing it. In this essay, the various sources constituting the foundations of civil law shall be considered as well as the observation that despite the sources tending to be regarding vertically in order of importance, they operate horizontally in terms of vitality in practice.

The written law as a source has established supremacy, developing into the most prevalent and pervasive source of law. Written laws are continuously evolving to match the needs of society allowing them to receive recognition as arguably the most important legislative source. Their written nature ensures their longevity which is an integral part of their significance. The written law enjoys primacy over all other sources of law, however, as of May 2004, when Malta became a member of the European Union, the laws of the EU were given supremacy, allowing for them to prevail over domestic law. The preeminence of EU legislation as a source of written law was established by the European Union Act. Articles three and four note that as of Malta's ascension into the EU, the treaties on the functioning of the EU as well as existing and future acts adopted by the EU will become legally binding and made a part of domestic legislation. Therefore, provisions of EU law are laws which the courts of Malta are bound and entitled to make use of when making judgments.

We note that there are various manners through which EU law influences the development of civil law. One such example would be through Rome 1 which deals with contractual agreements and allows for parties to choose which jurisdictions they would like to press charges under. Furthermore, through EU legislation succession regulations, cohabitation laws, as well as the right to have a will drawn up governed by the laws of the country one is born in despite the location they currently reside, are all civil law developments which are influenced by the laws enacted by the EU.

Aside from primary sources of written law, it is prevalent to discuss whether guidelines, which are routinely published by institutions such as the MFSA, including guidance notes and implementation procedures have the force of law behind them? In some cases, for example, guidances regarding the FIAU and money laundering, they do have the force of law behind them while others do not. However, courts do give serious weight to the notices regardless. It is also relevant to question whether soft law, i.e. rules of professional conduct and ethical behaviour, has the force of law behind it? We can contrast soft law with black letter law, which refers to instances where the law is expressly written. Soft laws often do not have a direct legal sanction and therefore do not have the force of law. However, in situations where these rules carry significant weight, they may be regarded as influencing and determining factors allowing them to impact legal decision-makers without having the official force of law behind them.

The second source of law is Customary Law. Custom refers to a repeated practice which carries on for a period of time that is related to the will of the people. Legal custom is a source of law which is legally binding whereby through the act of repeated conduct over a significant period of time, a belief is created in those involved that that which is occurring is a matter of legal

obligation and therefore, the behaviour ought to be repeated. This develops due to the nature of the law itself. Law is a social phenomenon which regulates social situations, thus, where there is society there is law.

This source of law is not a social custom, however. It is a legal consideration that despite not being enacted by Parliament has the force of law behind it. When a particular behaviour transmutes into a legally binding custom, it attaches to itself legal consequences if not observed and is, therefore, enforceable in a court of law. The traditional aspects of customs state that the practice must be 'ab antiquo', meaning that it must have behind it a significant amount of time. Nowadays, this quality is recognised to be sufficiently met if the practice has been observed over a period long enough to satisfy the claim that it is consistently repeated. This is because practises form much quicker in modern societies due to our lifestyles and the speed of commercial transactions. Moreover, it is understood that a custom must be 'opinio sive juris necessitatis' which puts forward the belief that the affected parties are bound as a matter of law to engage in particular practices. Not abiding by legal customs carries with it the same ramifications as violating a legal obligation.

It is important to note that the commercial code and commercial law regarding the customs of the trade and their usages, apply in precedence to and override the civil code. This is an indication of the importance of customary law in commercial matters. An example of this can be found when analysing banking customary practises which enjoy juridical recognition. A more specific insight is provided for vis-a-vis the customs regarding overdrafts, which refer to revolving facilities involving business withdrawals and deposits. Here, lenders are allowed to charge interest on interest. They are distinct from loans which are reducing facility which use simple interest that cannot be capitalised or compounded.

Customs are further protected through the written legislature. Article 993 of the Civil Code provides that contracts have to be carried out in good faith and that all which is required by custom is deemed to be included. Additionally, Article 1007 of the same code stipulates that customary clauses are to be included in contracts. Other examples of how customary law is protected can be seen via international conventions such as the Hamburg Rules which codify legal customs regarding the transport of goods by sea or the Rotterdam Rules.

It is the right of any lawyer to indicate that customs were applicable and not followed through upon in any case. They must be raised, alleged and proved based on the practice of the trade in the courts of law. In the case of a legal custom, the court ex officio, will not raise any potential issues on its initiative. To better understand, the following relates to traditional jargon regarding different forms of customary law. Firstly, 'Consuetudo Secunduem Legem' refers to a practice that develops in line with the law and doesn't go beyond it. 'Consuetudo Praetr Legem' indicates a situation whereby the custom is consistent with the law yet goes beyond the written law. Finally, 'Consuetudo Contra Legem' refers to a practice which potentially can repeal a law. This, however, is not accepted in the Maltese jurisdiction.

The third source of law is jurisprudence. This raises the question as to whether court judgments are a source of law in of themselves. This extends beyond the borders of civil law and has many

implications regarding the role of judges and the function of the courts: should the business of the court be to legislate or adjudicate? In civil law jurisdictions, the consensus, influenced largely by the notion of separation of powers the following: a judge ought to decide cases making use of the law, and the judgement which they provide is to be considered law between the involved parties. However, the judgment as law should not extend to affect those beyond the implicated people. Therefore, the main role of the judiciary is principally to apply the law.

The legal doctrine 'stare decisis' refers to the English Common Law doctrine of binding precedent, a defining feature of Common Law systems. While the courts may not be politically or institutionally legislators, they do create law in a process fundamentally different from that of formal legislators. Examples of institutions which undertake this process are the American and English Supreme Courts and the European Court of Human Rights. These important high courts have an agenda, which often is implicit. Therefore, they do more than just decide cases: they set trends and give policy orientations. The process of application and interpretation of the law is not mechanical and through this process of applying specific laws to the facts of cases often, new law is indirectly created. This is known as creative jurisprudence.

Malta, however, is a Civil Law jurisdiction, despite the great influence of Common Law systems we have experienced owing to the British occupation. Within the Civil Law jurisdiction, judgments have a persuasive authority yet we do not have a formal system of precedent and higher courts do not have binding effects on lower courts.

The fourth source is that of Jurdicial Negotia and it is that source of civil law which is the product of the contractual will of individuals. Contracts negotiated and fulfilled between parties creates the law; that which the parties agree upon is law. This ought not to be confused with customary law. The parallelism manifests as both are a direct result of human action and intervention. However, the fundamental distinction is that customary law deals with behaviour based on legal obligation while with juridical negotia one enters a contract voluntarily and is not forced to do so due to a violable, transgressible legal tradition.

A debated source of law is the writings of respected and authoritative jurists and academics. Their function is to analyse, develop and criticise the law, but, there are situations where the academic writings of highly authoritative jurists are referred to and cited in court judgments. Intuitively, academic writings carry immense influence and are often understood to be the correct interpretation of the law. One may argue that however respected academic writing may be, it is not a formal source and should not be considered as such. However, in practice, the influence and determining power that academic writing has in shaping the application of the law and its interpretation makes it very close to being an indirect not formal source of law. Whether these writings are considered a formal source of law or not, it is impossible to dispute that they are highly influential when it comes to the process of law-making.

Another debatable source of law is that of equity: is it legitimate for a court to decide a case simply based on equity, i.e. what a judge may consider to be fair in any given circumstance, or should the judge simple apply the law as written? The law is general and abstract, meaning it does not have specific situations contemplated. Applying the law in its generality can risk the

creation of unfair situations, hence the role of equity is important. However, it is not a source of law, but an unavoidable element involved in the process of fair law application and interpretation.

The final discussion revolves around European Private Law. This includes the works of European jurists, academics, practitioners and judges who work on common European legal heritage, traditions, common principles and values applicable to the various European Civil Law systems. Through this source, the Draft Common Frame of Reference (DCFR) was created which refers to a toolbox for judges on these basic values. These studies enabled the harmonization of various civil laws such as the laws of contracts, sales, guarantees etc. in all European jurisdictions. While this is not considered a formal source of law, it does form part of the intellectual baggage that a civil lawyer ought to be aware of. It is relevant to be mentioned as an indirect influence.

The civil law framework is broad and, as we have noted, is influenced and composed of various sources, each of which is irreplaceable and indelibly shapes the legal system as we understand it. The various sources of civil law are the foundation enabling civil law to be the bedrock of legal institutions, doctrines and transactions at the basis of civil society and commercial law.