LAW JOURNAL

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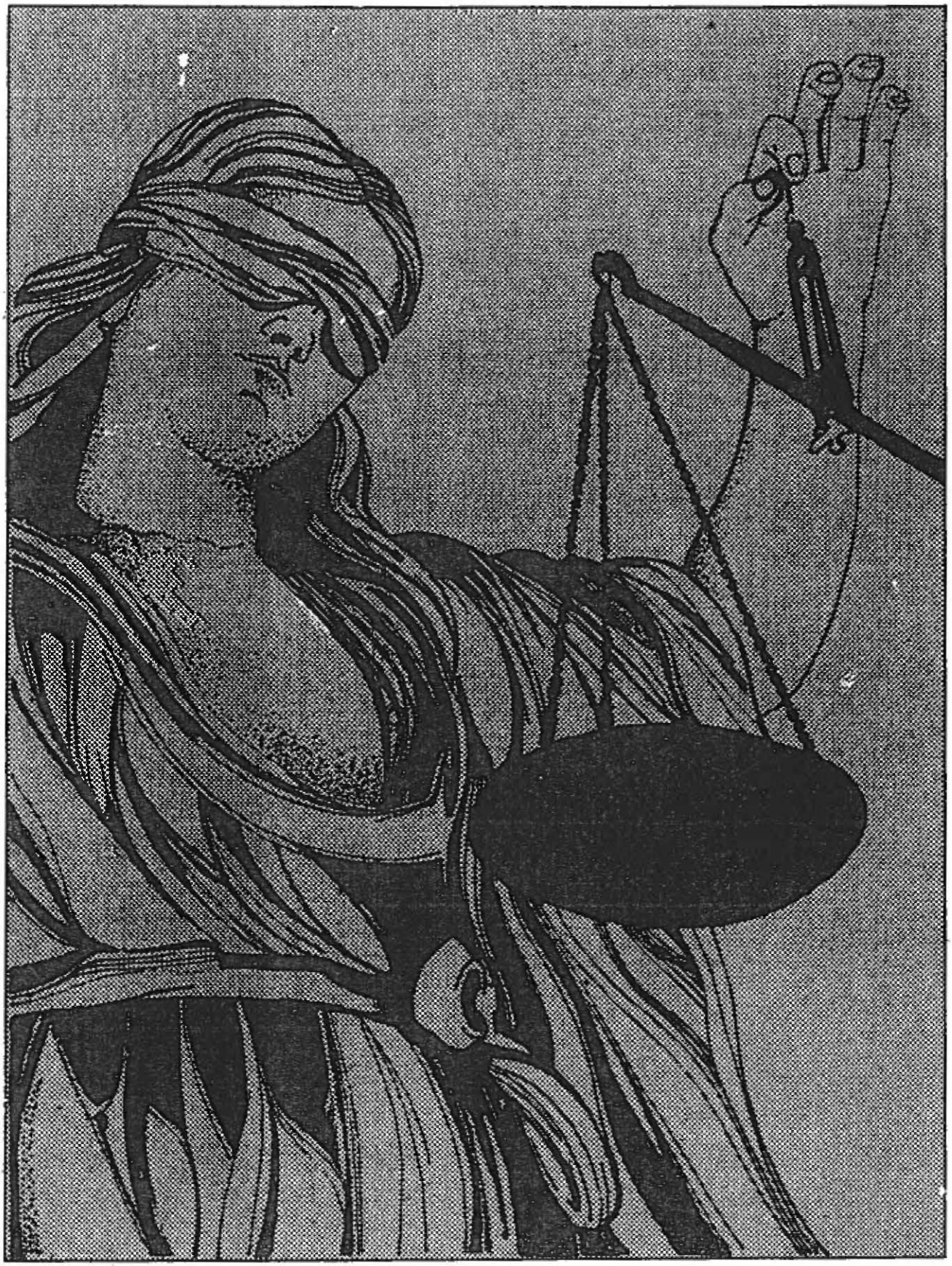

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LAW JOURNAL

VOL. 1 **MAY 1971**

C O N T E N T S :

EDITORIAL

It was with unbounded enthusiasm but with a vaguely felt awareness of difficulties that a handful of law students set out to revive a defunct Law Society and to issue a Law Journal worthy of its predecessors.

It must be admitted that of all the proposed functions of the Society, the issue of the journal has been the main preoccupation of most of the members of the Committee, and it is to a large extent thanks to them that this publication has been made possible.

Encouragement has been forthcoming from many quarters. Professors, lecturers and general practitioners of law have welcomed the reissue of the journal. Most of the material help has however been, to my disappointment, only of a financial nature. Not that such help has been refused, but it had been my original idea to include in the first issue a number of articles on specialised topics by the persons who have the necessary experience and practical approach. Our efforts to obtain contributions from lecturers and lawyers alike met with no success and it was eventually decided to make the first issue an exclusively student affair.

That the necessity of a law journal exists is undisputed. Law being essentially dynamic, (a trite phrase, but like most trite phrases, a true one) continuous progress is being made in most branches. It is through the appearance of new conditions which create new contingencies that law develops. It is up to Parliament, which, ideally, should represent the pulse of the nation, to amend or lay down the law and to bring it into line with new developments. This will, in many cases, not be as easy as it sounds. Academical discussion about the advantages and disadvantages of proposed legislation can help immensely towards a clear exposition of the legislation in issue. The benefit of expertise may be gained, the likely reaction to any legislative measure can be gauged through an informative article.

Maltese law in particular, is at present in need of detailed consideration. Much has, for instance, been written on the layman's point of view as regards the retention of capital punishment. A clear, concise, legal exposition would be of great help. While on the field of criminal law, an interesting article could consider the significance of a recent trial by jury where the principle was upheld that the fact whether the accused is insane at the time of the commission of the offence is a matter of fact to be decided exclusively by the jury. In the case in point, the jury disregarded expert medical evidence which considered that the accused was perfectly sane at the material time.

Complaints are heard daily about the unfairness of the legislation about lease. The 1939 Ordinance was introduced to protect the tenant

and to avoid lack of accomodation. Nowadays the position has been pushed to an illogical extreme and the tenant is so well protected that there is no incentive for any property-owner to lease his property. The 1959 *Decontrol Ordinance purported to remedy this situation, but since it only applies to property built after* 1959 *or to property which had been vacant or owner-occupied in* 1959, *it does not, in reality, go a long way towards remedying matters.*

It is, one must admit, not an easy decision to balance the interests of the entrepeneur in the building industry with the necessary hardship accruing to the tenant.

A general reform of the laws of Civil Procedure has been attempted from time to time and the general consensus of opinion among lawyers is that in most matters a more modern approach should be adopted. This will work in favour of a more practical and speedy execution of justice.

In the sphere of Private International Law, important topics touching the status of spouses in mixed marriages and several aspects of transfer of property as well as the evergreen problem of domicile need clear exposition.

These are just a few of the problems which can form interesting articles and invaluable contributions. It is hoped that contributions from experts in the particular lines will make the Law Journal a living organ of the law in our nation; a method of development of our legal system.

Our thanks go to all those who have helped to make this publication possible. Special mention must be made of Professor F. Cremona whose encouragement and particularly handsome financial contribution have proved invaluable to this venture.

GODWIN MUSCAT AZZOPARDI

The Married Woman In Maltese Law

JOSEPH A. SCHEMBRI
Dip. Not. Public

We are now in 1971 and in this last decade we have experienced what has become known as "Aggiornamento". The changes that we have witnessed were so many and so diverse that one cannot possibly enumerate them all, without running the risk of forgetting a few. One, however, which has struck me as a great step in the right direction is the equality of pay for both sexes in Malta by a target date which is now very near. In the Malta Constitution of 1964 we find in various sections the phrase "without distinction as to sex . . . ". So the position of the woman and of the man, very rightly, is becoming, with the development of time, very similar. Suddenly, however, when a woman becomes a wife, she automatically loses several of her rights and privileges and becomes subject to her "beloved". This could have been right in the times when our law was enacted. but to-day when the mentality of husband and wife has changed from that of master and servant to one of equality, to one of companionship, where the wife also has the right to her say in the family, why is it that the wife is still subject to all these incapacities? The reasons may be various, perhaps mainly historical; I propose to deal with the facts as they exist to-day in our law which is definitely in need of reform.

In section 7 of our Civil Code we read that "the wife cannot sue or be sued without the consent or assistance of her husband, or in default thereof, without the authority of the Court of Voluntary Jurisdiction". Why is the right of sueing deprived to a woman simply because she chose to marry? Has she contracted to become civilly incapable? Again in Section 9 of the same code we read "Saving any other provision of this Code or any other law it shall not be lawful for the wife to alienate property, or to contract any obligation or to acquire property under any title whatsoever, whether onerous or gratuitous, without the consent and intervention of the husband.". But by section 10 and 11 the wife may obtain what is called a "general authority" but such general authority may be revoked at any time by the grantor. What authority is this if it may be revoked, I would not say capriciously, certainly, by the court but surely at any time, as the law says? The spouses, perhaps for good measure, are also forbidden from stipulating that any such authority, once granted, would be irrevocable.

All these provisions of the law perhaps find their basis on the other fundamental rule of Maltese Law, which is so often unfortunately the cause of so much trouble between spouses and therefore also a cause for personal separation; namely that the husband is the head of the household. The 20th Century has seen the development of the concept, which to my mind is a good one, of co-operation, understanding, love and respect between spouses rather than the auctoritarian, selfish, egoistic husband of the last centuries. To-day the family is based on two and not just "him". If the Maltese Legislature were to amend this provision of the law, namely of giving equal status or dignity to both spouses, then we can really say that the other provisions which follow as a consequence thereof, may be changed.

In section 1008 of the Civil Code we

find under the title "Of the Capacity of Contracting Parties" those persons which are under a legal disability and in subsection (3) we find also the married woman. This subsection in particular is giving particular difficulty to the new residents because by their own personal law, the married woman "enjoys" no such disability and they find it a hard nut to crack. They do not see the reason behind this incapacity; in fact they find it "superfluous", "complicating", "stupid", "ridiculous", "simply beyond me", "childish", "utterly domineering", "frustrating".

In section 1303 of the same Code we read that the husband alone shall have, during the marriage, the administration of the dotal property. Thus the husband is not considered to be the owner of his wife's dowry — she continues to enjoy such right, — but he is her administrator. Whatever the wife brings with her "ad sustinenda onera matrimonii" becomes automatically administered by her husband. Although she may have proved to be a very good administrator of her own property, when she was still signing her surname, her marriage puts her in the absurd incapacity of being considered no longer capable to hold such office. Her new status is now incompatible with her former one. The law, admittedly, puts certain safeguards with regard to the husband's administration but they are irrelevant for this article. With or without these safeguards a married woman is no longer capable of exercising her rights of ownership over her own property.

By section 1838 of the same code a married woman is incapable of disposing of or receiving property by donation. So much so that if, notwithstanding this, she does dispose of or receive property, without her husband's consent or without the authority of the Court of Voluntary Jurisdiction (if he is a minor, absent, insane or interdicted, or if he refuses without just cause his consent) her act is declared null for all purposes of law. So this is another incapacity which is added to "protect" the married woman.

I have only, so far, touched one branch of law. With regard to Criminal Law, sections 206 and 207, referring to the crime of Adultery by wife and by husband respectively, impose different conditions. In the case of the wife it is enough, for her to be convicted of this crime, to have "misbehaved" just once. The fact that she could have been under a mental strain due to the persistent and unbecoming "behaviour" of her husband is no excuse although it might be taken notice of by the judge. But if the opposite were the case, if the husband "misbehaves" once with a woman, this does not amount to adultery, for according to law he must "keep a concubine in the conjugal house or notoriously elsewhere". This difference of criterion might be perhaps due to the consequences which might arise, which are admittedly different for each spouse. But whereas the husband might, for argument's sake, go "to the office" once a week with a different "secretary" — this not amounting to concubinage — the wife may not do so. I am not advocating that husbands and wives should have "secretaries" but if they do have and there is the complaint of the other spouse I do not see why the husbands should enjoy a greater protection of the law!

Going to another branch of Maltese Law, i.e. Commercial Law, we find another incapacity attributed to a married woman "propter sexus fragilitatem". A married woman cannot carry on trade without her husband's consent or without the Court's authority (Secs. 12 and 14) and here again this consent, which may be express or implied may be revoked by means of a public deed

duly served on the wife. So here again the wife may have no business of her own, may not be a broker, unless she shall have previously obtained the husband's consent. Someone may say that the place of the wife is at home — to cook and bring up her children. I am not completely against this view but one must admit that not all husbands do earn enough money to keep both ends meeting, especially when they have a family of five or six. The wife should be allowed fairer treatment and freer exercise of her free will.

It might be argued that if we were to allow the wife to go one way and the husband to go another, we would be creating the grounds for trouble. I think that this is not exactly correct for the more one leaves things to be sorted out by agreement, the more it is easier for there to be agreement. Imposition from above merely foments anger and revenge. The spouses would surely agree on what is right for them.

Our generation is finding it difficult to admit these general and various incapacities on a wife, and many have questioned the reasons behinds our provisions of the law. It is a fact that today's wife is not like her mother — completely dependent on her husband. Many work and earn a good income and they continue to work even when they marry. Because of our principle of the community of acquests whatever the spouses earn is, so to speak, "pooled" and then administered by the husband, therby causing the wife to have to go and ask the husband for whatever she needs. It is true that husbands should be reasonable individuals and satisfy their wives' legitimate requests, but unfortunately not all husbands are that reasonable and by not being so, the wife is thereby placed in the anomalous position of having to go and "beg" him for her needs and for the needs of the family.

Public Emergency

ANTHONY BARBARA

A state of public emergency is a situation of exceptional and imminent danger or crisis which affects the whole nation and constitutes a threat to the organised life of the community. However, the concept of a state of public emergency is in some measure a flexible one. Indeed, the crux of the problem of defining a state of emergency is not really the basic notion of what a state of emergency is but rather the extent to which a government may tolerate a potentially dangerous situation before declaring a state of emergency. In more concrete terms this refers to the margin of appreciation of what amounts to a state of emergency and what does not. In this respect a survey of what constitutes a state of public emergency in the United Kingdom, Malta and in the European Convention on Human Rights seems opportune.

In the United Kingdom emergency powers aim at maintaining law and order both in wartime and in peacetime. In the first case, as soon as a state of hostilities is declared — incidentally the ordinary courts have jurisdiction to pronounce on whether it existed or not — Martial Law supersedes common law in the affected areas.

The Defence of the Realm Acts conferred extraordinary powers to the military authorities and the U.K. Government. The Emergency Powers (Defence) Act, 1939 likewise bestowed exceptional powers upon the Government. Indeed, S(1)(1) stated that H.M. could make by Order in Council any regulations "as appear to him to be necessary or expedient for serving the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which H.M. may be engaged, and for maintaining supplies and services essential to the life of the community".

On the other hand, the most important peacetime statute in the United Kingdom covering a state of public emergency is the Emergency Powers Act, 1920 as subsequently amended. By means of this Act H.M. may by proclamation declare a state of emergency: "If at any time it appears to H.M. that there have occurred or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel, light or with the means of locomotion, to deprive the community or any substantial portion of the community, of the essentials of life." Besides, H.M. in Council may by Order issue regulations: "for securing the essentials of life to the community".

Therefore, it appears that in the United Kingdom emergency powers come into play normally in four main instances. A state of public emergency is declared firstly in time of war, secondly, in case of internal agitation or calamity, thirdly, for the preservation of essential commodities and finally for the continued operation of transport facilities.

The Malta Constitution, 1964 deals with what a period of public emergency means in Section 42(2). There is a state of public emergency — subject to the approval by Parliament of the action of the Executive within a reasonably short time — when:—

"(a) Malta is engaged in any war;

(b) there is in force a proclamation by the Governor-General declaring that a state of public emer-

gency exists;
or

(c) there is in force a resolution of the House of Representatives supported by the votes of not less than two-thirds of all Members of the House declaring that democratic institutions in Malta are threatened by subversion."

Provisions (a) and (c) are explicit and do not give rise to any serious problem. However, provision (b) is a very general one and it seems to give the Governor-General, usually on the advice of the Prime Minister, great discretion on what constitutes a state of public emergency. In this regard, it appears that the Malta Government is guided by the precedents which occurred in Malta when a state of public emergency was declared and also by emergency regulations enacted when Malta was still under British rule. To some extent these are similar to those prevailing at present in the United Kingdom. However, these regulations are now superseded by the Malta Constitution, 1964. Still, in so far as it is not inconsistent with the provisions of the Malta Constitution, the Public Emergency Act VIII of 1963 is applicable especially in the case of provision (b) of Sec. 42(2) of the Malta Constitution. Sec. 4(1) of the Public Emergency Act, 1963 is as follows: "The Governor (-General), acting in accordance with the advice of the Prime Minister may, subject to the provisions of the Malta (Constitution) Order in Council, 1961, or any other constitutional instrument amending or replacing same, make such regulations as appear to him acting as aforesaid to be necessary or expedient for securing the public safety, the defence of Malta, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community".

It appears, consequently, that the Malta Government is empowered to declare a state of public emergency in the following cases: (1) In the case of war for securing public safety and the defence of Malta; (2) for the maintenance of public order; (3) to suppress mutiny, rebellion and riot; (4) to maintain essential supplies and services, and finally (5) to safeguard from subversion Malta's democratic institutions.

A most important unifying factor in Europe on what constitutes a state of public emergency is the European Convention on Human Rights. Article 15(1) of the convention runs as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation . . . ". A "public emergency threatening the life of the nation" has been defined by the European Court of Human Rights in the Lawless Case (1st July, 1961) as: "un situation de crise ou de danger exceptional et imminent que effecte l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'Etat" (in the English text: 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed'). It will be noticed that the notion of "imminent" danger, which is represented in the French but not directly in the English text of the judgement, must be given weight because it is the French text which is authentic.

Such a public emergency may then be seen to have, in particular, the following characteristics:—

(1) It must be actual or imminent;
(2) Its effects must involve the whole

nation;

(3) The continuation of the organised life of the community must be threatened;

(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health and order, are plainly inadequate.

When a state of public emergency is declared the rights of the citizens are, to a considerable extent, curtailed as in case of detention of persons; or entry and search of any premises. Consequently, it is extremely important to have as far as possible an accurate definition of what amounts to a state of emergency. Bearing this in mind, the European Convention on Human Rights should be looked upon as a unifying European model for a correct interpretation of what a public emergency is in democratic countries.

Error As A Vice Of Consent In Contracts

A COMPARATIVE STUDY

by NOEL ARRIGO

For the notion of obligation it is very useful to refer to Roman Law, where the subject was reasonably well developed. French, Italian and Maltese Law on the subject are very similar to Roman Law as modified by French Customary Law. Pothier and Domat, who were commentators of Roman Law were followed by the draftmen of the French Code and through it we have got the concept of vices and defects of consent into our Law.

The main vices or defects of consent are three: Error, Fraud and Violence. French Law also includes lesion, but this is more an element of 'causa' than of consent. These vices of consent, strictly speaking and with particular reference to our law make the contract not void but voidable, depending on the will of the person who has been in error or defrauded.

Generally speaking error means the false notion of a thing or contradiction between an idea and its object. "Where a man consents, believing that he is consenting to something entirely different, he can hardly be said to have consented at all to the actual transaction". (1) In this case there is apparent and not real agreement.

It is very useful to look at the Roman Law of contracts before trying to determine what the French, Italian and our laws say on the subject. The rules of Roman Law relating to the concept of vice of consent are a compromise between the difficult question as to whether the law is concerned with a man's real intention or with the intention as he has expressed it.

There was in Roman Law a distinction between 'stricti juris' contracts as, for example, the 'stipulatio', and other contracts. In the first the mistaken identity of the party would invalidate: likewise the identity of the subject matter, but mistakes as to the qualities of the subject matter were immaterial. In the other contracts the rule was that a fundamental mistake voided the contract but there was no exact definition of which mistake was to be considered fundamental. Many cases were dealt with, and commentators distinguished four kinds of error — In persona, In negotio, In Corpore, and In substantia.

Error as to the person always invalidated. This is not exactly so in modern law. The French Code says "mistake as to the person with whom one intends to contract does not cause the contract to be void unless the consideration of this person was the principal cause of the agreement." This principle is reproduced by our law in Sec. 1019 sub-sec 2. In the second place, error as to the nature of the transaction as, for example, when one of the parties intended loan, the other sale, invalidated.

Error as the identity of what was sold invalidated, while error as to the qualities of a thing was not ignored as in the 'stricti juris' contracts, but it only nullified the contract if it was very important; that is 'error in substantia' as opposed to 'error concomitans'. A lot of writers think that the distinction was first introduced by Justinian

"quotes in substantia erratur nullus est consensus". This distinction is not found in the sources but in the texts of the Corpus Juris and it was applied mostly to sale, as for example, a table of bronze which both parties think is of gold. However, it could even be that only one party was in error. In this case if his error was reasonable in the circumstances 'justas et probabilis error' the concept also applied. Furthermore, there is no reason why this should apply only to the buyer, it can also apply to the seller who should, however, usually know what he is selling. In Roman Law the doctrine of 'error in substantia' was probably applied only to two cases; When a thing was not of the stipulated material and also When there was a mistake as to the sex of a slave. In modern laws this has been extended to all cases where the quality is essential. It is not necessary that there should have been any misrepresentation by the seller. This would be the vice of fraud and not of error. The mistake must not be extended to the contract it is not what I think I am buying (this is my responsibility), but what the thing was sold as, that is the material factor.

In modern law we must distinguish between proper and improper error. The latter occurs where the parties are in error with regard to one of the essential requisites of a contract e.g.: the object or causa. In this case error is only of secondary consideration. Proper error is error when it acts on the consent of the parties and not on the other requisites of a contract and produces directly the voidness of the contract. A further distinction is necessary between 1. errore ostantivo 2. error in substantia and 3. error concomitans. The first two are essential errors, the last is accidental. The first one makes a contract void, the second only voidable whilst the third does not invalidate a contract but allows only for different judicial remedies according to the type of contract.

Neither the French, nor the Italian nor our Code make any mention of the errore ostantivo. The latter is in fact derived from natural equity, from Roman Law and from doctrine. This type of error excludes and not only vitiates consent and it produces the absolute voidness of the contract. This is because the exterior manifestations which produce consent are not in correspondence with the interior sentiments. Here the consent is void and, although for different reasons, is comparable to the consent given by a minor or an interdicted person. It is one thing when two people or one of them have agreed as to the nature or the object of a contract, but are in error as to one of its qualities, but quite a different thing when the parties are in error as to the nature of the contract or of the object itself. In the former case the error does not nullify the consent, although the contract may be annuled at the instance of one party. In the latter case the consent is non-existent and the contract is void and not voidable. Errore ostantivo, as can be seen, is merely the Roman Law concept of 'error in negotio' and 'error in ipso corpore' and also includes, according to early writers, mistake with regard to the price of a thing.

Again in modern laws, in which error is the principal vice of consent, there is no distinction between the error of one party or of both, but only a distinction between 'errore essenziale' and 'non essenziale'. While admitting the fact that error can have the effect of invalidating a contract we must keep in mind two considerations. Firstly in order that we might hold that error could reasonably invalidate we must consider whether the party in error would have entered into the contract or not had he not been in error. Secondly the rights

acquired by the other party and by third parties must be protected and, therefore, it is also necessary that the error must be excusable and determining. This was held to be so in the case of Frendo vs. Chetcuti decided by the 1st Hall in 1952 and confirmed in Appeal: "hemm bżonn illi l-iżball ikun invinċibili u li jkun ukoll skużabili. L-imprudenza u l-leġġerezza tal-kontraenti mhix raġuni ta' annullament ta' kuntratt".

As we have already said our Code only deals with certain types of error. In fact according to sec. 1018 "An error of law shall not void the contract, unless it was the sole or principal inducement thereof". Also Sec. 1019 provides 1. "an error of fact shall not void the contract unless it effects the substance itself of the thing which is the subject matter of the agreement" and 2. "the agreement shall not be void if the error relates solely to the person with whom the agreement has been made unless the consideration of the person has been the principal inducement thereof.

As can be seen our Law only deals with substantial error, error of law and to a certain extent with error as regards the person. This classification is very similar to that of Italian Law and therefore what is said about the different kinds of error in Italian doctrine can be applied to our law. I propose first to deal with error of law since this was in theory not admitted by Roman Law nor by the early commentators, although in practice many exceptions were made in order to preserve equity. Nowadays the question is merely a matter of degree. An error of fact is more easily excusable but this does not make an error of law completely inexcusable. To hold otherwise would be unjust especially since certain provisions of the law are by no means clear. Besides, the philosophy behind the maxim 'ignorance of the law is no defence', a maxim which applies especially in criminal law, is to prevent the law from becoming ineffectual. This can hardly be said to occur when one pleads, and proves error of the law in contracting. Here one does not want to avoid the law but merely to annul a contract which, in good faith was not done according to law. Despite this, this type of error was not included in the Code Napoleon, which only allowed error as to the substance and that as to the person. Two different interpretations were given to this clause. The first applied the rigour of Roman Law and denied the possibility of error of law, the other interpeted a reference to an error of substance as applying both to a substance of law and of fact. This latter view is the view followed by the Italian Code in Sec. 1109, by our Code in Sec. 1018 and also by our case law as, for example, in the case of Mifsud vs Polidano in 1944, where the Court held "l-iżball ta' dritt jikkostitwixxi vizzju tal-kunsens u jġib innullita tal-konvenzjoni, meta jkun ilkawża unika jew prinċipali ta' dik ilkonvenzjoni". This however produces the anomaly that while an error of law, if it is 'causa unica o determinante', always produces a vice of consent, an error of fact does not unless it refers to the substance or the person.

An error of fact is any error which does not relate to a provision of the law. The Romans, as we have seen, distinguished between 'error in substania' and 'error concomitans'. For them, however, and unlike us 'error in substantia' produced absolute nullity and not annulability. This seems to be equivalent to the doctrine of 'errore ostantivo' which, as we have mentioned, is not included in our Code. When we come to deal with substantial error, that is, error as to the quality of the object, we are faced with a variance of opinions both in doctrine and in French and Italian judgements as to what the mean-

ing of "sostanza" really is. It is certain that this is the opposite of accidental, and means that the object which I think I am buying is so different in one of its essential qualities from the object which I actually get as to make it practically a different object. Giorgi takes the view that because of the fact that the criterion we adopt is that whether the party would have still contracted had he known of the mistake, we must follow a subjective test; that is of the person who is in error, in order to see whether 'error in substantia' exists. This is the doctrine which we have also adopted and which is contrary to the objective test followed by Roman Law. It is a just and equitable doctrine and has everything in its favour except the feasibility of proof. That the doctrine of 'error in substantia' has also been accepted by our Courts is shown by various judgements of which we may quote Portanier vs Dalli of 1936, "biex jagħti lok għat-thassir tal-kunratt l-iżball ta' fatt irid ikun żball sostanzjali" — referring to mistake as to the quality of the thing and quoting to its favour an Italian judgement (Palumbo vs Giannone 1928) which applied as its criterion not whether the thing was made more onerous by the mistake, but the mistake constituted a vice only if it was such as to preclude or diminish the use of the thing according to its natural destination or to that intended by the parties.

The concept of error as to the person is found in the French, Italian, Swiss and German Codes besides our own. However, in order to vitiate consent the identity of the person must be material or, to be more precise, the contract must have been conducted in consideration of that given person as would, for example, generaly be the case in matrimony or donation. Where there is this error however, Pothier thinks that an obligation would still lie but based on equity and not on the contract. Doctrine has interpreted all this as including not only error as to the identity of the person but also with regard to his essential qualities. Here again the underlying thought is the fact that I am entering into a contract assuming that person to have such qualities, and, that I would not so enter if I knew that he did not possess them. However, it is important to remember that error with regard to the capacity of person is never excusable.

A difficult question discussed by textwriters is in which contracts can the identity of the person be considered as substantial? Although in the ultimate analysis it is for the judge to decide whether the 'error in persona' has vitiated consent, writers have tried to classify those contracts, where the identity and quality of the person are definitely material. First amongst these, for obvious reasons, are contracts of a gratuitous title and the contracts of partnership, mandate and deposit. According to the said Codes an error when compromising to be material must be an error of fact referring either to the person or to the object: an error of law does not, in such cases, invalidate. Finally, according to Giorgi, 'error in persona' is determining in contracts of an onerous title which have for their object an act, positive or negative, which is 'non fungibile', when we understand the latter as meaning an act for the completion of which certain special qualities of a determinate person are required. On the contrary' error in persona' where the object consists in 'un fatto fungibile', as for example, the raising of a wall, or in contracts of an onerous title which have for their object the delivery of a thing, does not make the contract void. However, even in the latter case, we must make an exception for those qualities considered as belonging to the substance of the

thing as, for example, the buying of a manuscript of a renowned author.

When discussing the question whether an error with regard to the motive can vitiate consent we are walking on very thin ice. Those who hold motive to be a determining element and, therefo e, an error with regard to it as nullifying the contract base themselves on the wording of the Italian Code "che non vi possa essere alcuna obligazione senza causa". But the Romans and authors of the Italian Code did not mean by 'causa' the motive but "i momenti di fatto". Puffendorf thought that mistaken motive would make the contract void and gave the example of a party buying horses having been informed that his have perished. Here, he says, the parties tacitly agree that the truth of the information is a condition for the validity of the contract, and I can withdraw if this is proved false: only I have to compensate for damages. But as Barbeyrac says if this is a condition the contract would be absolutely null and 'defectu conditionis' no damages would lie. We cannot annul a contract, like we cannot a legacy, because the motive of the party when contracting or when giving a legacy does not materialize.

Giorgi says that we must speak with caution when we say that error as to the motive does not vitiate consent. The same occurs when we interpret 'error in substantia' subjectively, that is the prime motive of the contract is the idea that I am obtaining something which has certain qualities. It is for these reasons that Giorgi concludes "che dobbiamo ritener vera la massima, che l'errore sui motivi non vizia il consenso, purche s'intenda restrittivamente a quei soli motivi, che non furono la causa determinante del contratto". With ail due respect to Giorgi, I think that a distinction is necessary between the motive of a person in contracting and error with regard to that motive. If my motive in contracting is a particular person or one who has certain qualities and it results that I was in error as to that person or those qualities, it is one thing, and in the cases allowed by law the contract can be rescinded. However, it is a different situation if my motives for dealing with such and such a person are mistaken, even if such motives are the determining reason for which I contract. It would be highly unjust to make the other party suffer a recission of the contract solely because I was mistaken with regard to my motives for entering into the contract.

To sum up a few points with regard to error generally, we might conclude that error has obviously to be proved and it also has to be excusable. Furthermore as we have already said, and although some writers of renown such as Toullier do not agree, error can be unilateral as well as bilateral. The latter condition has never, not even in Roman Law, been enumerated as a necessary condition for the vitiation of consent in any law. On the contrary the Swiss and German Codes expressly mention that it can be unilateral. In this case, however, the injured party has on action according to Giorgi 'ex delicto' but more probably 'ex quasi delicto' on the grounds of unjustified enrichment.

Finally it is important to determine to what prescription the action of rescission for a vice of consent is subject. According to our law as exemplified in the Connatasi vs Tabone Case of 1945 "L-azzjoni għall-rexissjoni ta' Kuntratt minħabba vjolenza, żball, qerq, stat ta' mara miżżewġa, interdizzjoni jew minorità, hija suġġetta għall-preskrizzjoni ta' sentejn, meta l-liġi għal xi raġuni partikulari, ma tistabbilix preskrizzjoni aqsar."

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(1) Buckland.

The Study Of Law In A Social Context

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Law is of an essentially social character. The set of legal norms enacted by the legislator for the orderly regulation of social relationship between the several members of the community, serves to co-ordinate human activity. Therefore law should in no way be regarded as a static set of legal rules, but as a continuous socio-legal process. The study of law in this sense: as a continuous evolution, as found interpreted, applied created and evolved to the point when it acquires legally binding validity, ought to be encouraged. Such a study may perhaps lead us to a systematic knowledge of the impact of law on social conduct and may possibly show us how society, through its various manifestations, helps to fashion the legal norms which, in turn, come to be enforced by organized society.

The study of written general legal norms as applied to the individual exigencies, as tempered by the judge's sense of equity would therefore help us to understand:—

i) how legal norms in fact function in the community for which they have been enacted; and
ii) how social organization in turn helps to fashion and temper the lagal process itself.

Although legal norms, as part of the established socal rules, serve to co-ordinate social relationships, they do not operate automatically. They function successfully or otherwise, in so far as the community or its several component individuals appeal to them, interpret them and finally apply them to their social exigencies.

The numerous studies carried out in oth r c untries have proved instrumental in establishing the following general principle: at each point at which the legal system is linked to the larger society, the legal processes at that point necessarily reflect the structure of the larger society. At each point therefore where the law is in any way linked to the larger community the legal process betrays the impact of stratificati n, the division into social strata with varying degrees of prestige.

In this way the jury — an institution purposely designed to link the legal p ocess to the community — is specifically conceived to protect the ordinary man from arbitrary action by irresponsible or unresponsive officials. But although the jury is a democratic institution, it necessarily reproduces the stratification obtaining in a given community and thus the stratification system of the community affects the legal process through these jury men. (1)

It would not therefore be amiss to attempt through empirical investigation a scientific study about the people who are usually called to serve on juries, their social conditions, and how far a given social background would exert influence on the deliberations of jurymen. It would be indeed interesting to establish the extent to which such persons apply the written legal norms and how far they rely on their personal intuitive sense of justice during their delibera-

tions. One should seek to understand the obscure consequences of a trial by jury on the actual operation of our system of criminal law, and subordinately, the extent to which this process is accounted for in the pattern of social life.

It has been established that stratification influences the legal process at other points at which the legal system comes into contact with the larger society. The selection of members of the legal profession and selection of claims to be litigated have both been proved to be influenced by social stratification. It is logical therefore to conclude that by shaping and establishing the raw materials with which the legal system has to operate, social stratification tends to play an important and significant role in the moulding of the entire legal process. (2)

The study of law as a process necessarily leads one into the problem of "conceptual" as opposed to "functional" rights. The critics of purely conceptual theory have always asserted that law is not a system of dead written norms or logically related concepts and rules. On the contrary law is intended to achieve important social purposes. Judicial interpretation of the existing law is an essentially creative activity. It is the classical way of the adaptation of law to contemporary social ends because it is necessarily responsive to social needs and pressures. However such an activity should be systematically channeled and effectively controlled that it may serve arising social functions. The study of law as functional rights in the last analysis, is not a mere critical attack upon rigid conceptualism, but a positive attempt to understand how written law is applied to implement social aims through the imposition of control by the political enforcement of legal norms.

For this reason it would be interesting to attempt a study of the impact of law on **conduct.** This impact is not to be confined to the results obtained from enforcement of the law by administrative authority. It would be feasible to see how far private groups utilize the law to secure their private interest. However the really important question is not **whether** law can affect conduct, but rather **under what conditions,** law affects conduct and through which mechanism is such influence of the law exerted. Indeed the effectiveness of the law in changing conduct may not depend entirely either on the degree to which the law corresponds to the obtaining social attitudes in the community or on the severity of the penal sanctions applied to enforce the law.

In respect of community attitude the best one can say is that the notion is intricate and knotty. One has to distinguish between various community attitudes towards any given law and more especially in respect of the necessity or desirability of such a law, its fairness, the right of the legislator to enact such a law and finally whether it remains equitable when applied to particular instances.

Modern Scholars have further distinguished between the willingness of the community to obey the law from its desire to obey such a law. People may not like to pay taxes but the legitimate right of the state to impose them has not been generally challenged. (3)

Moreover it is important to appreciate that the community is not a homogeneous group of individuals. Several factions may exist forming a complicated network of opposed interests, beliefs, and patterns of conduct with varying degrees of organization. What may seem to one sector as illegitimate and unfairly onerous may be regarded by another group as an indispensable condition for the effective and ethical development of the community. Therefore one must first try to under-

stand the relevant features of any given community before attempting to evaluate the effect any given law is going to have on conduct. This helps one in establishing whether certain specialized groups have a vested interest in seeing the law adequately implemented, whether such groups are adequately organized to press their respective demands, and if so organized whether they have access to effective channels of influence on the country's administrative and political set up.

In the same way it is necessary to identify in the community any group of potential violators and discover any defensive strategies, if any, which may be resorted to by such groups.

Thus, although generally law is a response to attitudes somewhere in the community, to establish its effectiveness it is essential to determine the degree to which religious, cultural and political leverage is available to its upholders, as a result of their influential position in the administrative and organizational set-up.

Social organization, many times, provides us with the answer behind the success of modern state governments, as for instance, in collecting taxes. This cannot be easily explained in terms of public acceptance.

The modern governments' highly successful implementation of such laws as income tax is largely due to the increasingly organised systems of access to tax payers. Indeed this has been successfully implemented through the application of systems of reporting and withholding of the income of others by private citizens at stratgic check points in the community.

Law must therefore be understood as an essentially social process but this implies that legal norms acquire a new, functional meaning as they are used, applied, interpreted and ultimately, through regular and habitual use, embodied in the institutional structure of society. Life in the modern state is essentially organised around fundamental institutions which provide coherence to organized life in the community. Such institutions are defined and regulated by law. It would be interesting to draw up an account of the manner in which those engaged in application and interpretation of the law and private groups or individuals use the law to establish and regulate conduct through the gradual evolution of social institutions.

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(1) Bias, Probability and Trial by Jury — W.S. Robinson American Socioligical Review, XV 1950

(2) Leon Mayhew — Law and Equal Opportunity. Harward University Press 1968

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Legal Aspects Of Air Piracy

The recent hijacking of a number of planes by an independent group calling themselves the "Popular Front for the Liberation of Palestine" makes still more remote the chances of peace in the Middle East. With the greatest confidence and with virtual impunity this small group has managed to confuse an already confused issue still further and their action brings out as clearly as nothing else can, the impotence of powers like England and America before the actions of a small band of outlaws.

Thousands have condemned their actions, U Thant has called it "a savage and inhuman act" but air services have been disrupted, a sense of insecurity has been introduced into air traffic and the lives of 264 persons hung in the balance for four days.

Up to a few years ago, air piracy had been an act committed by a few possibly unbalanced criminals. Now it has assumed a political complexion. The first incident occurred in Greece, where on the 22 July 1970 in Athens a Palestinian commando threatened to blow up a Boeing 727 unless the Greek Government released seven Arabs who had been detained in Greece for sabotage against Israelis and the **El Al** office in Athens. The Greek Government delivered the seven Arabs.

On the 6th September came the forced landing of a DC-8 of Swissair and a Boeing 707 of TWA on a primitive airfield at Zarka in Northern Jordan. On the same day a Pan Am Boeing 747 Jumbo Jet was taken to Cairo airfield and all £10 million worth of it blown up.

Finaly on the 9th September a VC 10 of BOAC was also forced down at Zarka. This enabled the Liberation Front to blackmail the Governments of the U.K., of the Federal Republic of Germany and of Switzerland into releasing seven hostages.

The incidents have been embarrassing to major powers and they raise the important issue of the practical fulfilment of International Law.

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International Law is difficult to enforce because it is, of its very nature. concerned with a multitude of states with different political ideologies. It is not antithetical to speak of law as being intimately wound up with political ideologies since law is essentially the product of contingencies arising out of political and social circumstances. International agreement on important matters, although urgently required, has been restricted to a minimum. The problem before us raises this issue of unification although there are other basic factors involved. It must be noted however, that in this particular case the problem is more complex than usual. Here we have to deal, not with a recalcitrant state, but with a **sui generis** organisation with no defined territorial base.

Under Public International Law a state has the right to protect its citizens wherever they may be. If, for instance, State A unlawfully detains nationals of State B, State A can take steps to procure their release. Over the centuries machinery has been evolved for attaining the peaceful settlement of such matters between states: for example, reference may be made to an **ad hoc** Arbitration tribunal, to the mediation of a friendly state or of an In-

ternational Organisation and so on. In the matter at issue. how ver, it is not a sta e which has committed the unlawfu detention. While State B in the above example could, if all else failed, or for that matter, before anything else was tried (and this depends on the basic details of military power, political ideology and the "aggression factor" of its leaders) take reprisals against State A, this is impossible in the case of the "Liberation Front". The only possible way of exerting pressure lies in the holding of hostages as England held Leila Khaled; but this, of course, has a very limited application.

The fact that the guerilla ensemble is not a state **ut sic** brings out another interesting aspect. Given the fact that it is otherwise impossible to stem this spate of international outlawry, can the Front, or for that matter, any other hijacker, be regarded as a perpetrator of a crime "jure gentium"? This concept implies that, in the words of J.G. Starke

"inasmuch as by general admission, the offence is contrary to the interests of the international community it is treated as a delict **jure gentium** and all states are entitled to apprehend and punish the offenders."

Hitherto the concept has been extended to piracy, war crimes and traffic in drugs, women and children. By analogy to piracy at sea, one could conceivably call hijackers "the common enemy of mankind". The Convention on the High Seas of April 29, 1958 defines piracy as "any illegal acts of violence, detention or any act of depradation committed for private ends by those aboard a private ship or private aircraft . . . " The facts fit into this definition nicely and afford good ground for defining hi-jacking as an international crime.

This seems to be the line taken by the Convention "On Offences and certain other acts committed on board aircraft" convened at Tokyo in 1963. Moreover, following recent events, the Council of Europe entrusted its Legal ffairs Committee to make a report to the Consultative Assembly "on air safety and unlawful seizure of aircraft" nd a report was presented by Mr. Piket (Dr. J. Cassar Galea was on the Committee) on the 19th of September 970.

The recommendation of the Consul tative Assembly emphasised "the duty of every state into which a civil aircraft is forcibly abducted promptly to release the aircraft, passengers and crew to punish severly or to ensure the severe punishment of persons convicted of the offence of air piracy and to dissociate itself from acts of political terrorism directed against commercial air lines, regardless of political circumstances involved".

It is submitted that the last phrase is utopian and could have been omitted. It is the regard for political conseqeunces which has negatived much of the work done by the United Nations and other international Organisations The Recommendation goes on to state that an effective solution to the pro blem can only be reached if Governments are determined to co-operate in its control and it urges member states to ensure that their respective municipal laws contain adequate provisions against all acts of unlawful interference with civil aircraft.

It is here that international agreement can be effective. It is basically at the national level that international problems are solved and a water-tight system in each state will effectively prove an antidote to hijacking. Presumably each state should not limit its jurisdiction to its own nationals or to those persons domiciled within its territory in this matter. States should punish these offenders, whatever their

domicile or nationality, on the basis of International Criminal Law.

It is not a valid argument to exclude piracy from the category of crime jure gentium because the intention behind the hijacking is political, since here it is not only Israelis who suffer, but also innocent passengers of different nationalities. Moreover nothing can justify the taking of life unnecessarily and the wanton destruction of £10 million worth of man's ingenuity.