

# **Diploma in Law**

## **Lecture 10: Judicial Procedure**

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**Diploma in Law  
(Malta)**

# Revision: Subizzjoni v Kontumacija

- Both the procedures of subizzjoni and kontumacija involve a party failing to appear in court.
- Kontumacija implies that such party will not enjoy the right to produce evidence in his favour, or to file pleas, or to contest or cross-examine evidence, and is taken to entail a contestation of all allegations and arguments brought by the plaintiff.
- On the other hand, subizzjoni implies an admission and acceptance of the questions posed.



# Kontra-subizzjoni

- The party to whose oath reference is made may defer back the questions or any part thereof to the party referring (kontra-subizzjoni).
- Article 716 provides for the possibility of 'kontra-subizzjoni', that is, the power of the party to whose oath reference is made to refer back the questions or any part thereof to the oath of the party referring. This power may however only be availed of if the matter relates to a 'factum proprium' of the party deferring – that is, to any act whatsoever in which the party referring participated or of which he has personal knowledge.
- This is an important faculty, because where the party to whose oath a reference is made fails to either to refer back the questions put to him or he refuses to answer such questions, such questions shall be deemed to be proved in favour of the party referring.
- On the other hand, if the questions have been deferred back to the adversary and such party refuses to answer them, the questions shall be proved against the latter.



- So where the party to whose oath a reference is made refuses to answer the questions or fails to defer them back to the oath of his adversary, the questions shall be deemed to be proved in favour of the party referring. But where the questions have been deferred back to the party referring and such party refuses to answer them, the questions shall be deemed to be proved against him.
- In both circumstances, of course, this may be used as evidence.
- The party referring or deferring may not withdraw the questions if the adversary declares that he is prepared to answer.



# Uses of Subizzjoni

- The uses of subizzjoni are as such twofold:
- (1) Where another party is regularly not attending, or fails to appear for a good cause;
- (2) To force the court to give a deferment of the case, provided that the conditions for subizzjoni are fulfilled.



# Weight of Evidence

- The weight attributed to such evidence (emanating from the answers of kapitoli) depends on the court in question. Certain judges react against this procedure, whilst some have held that when there is evidence contrary to the evidence obtained by reference to the oath of the other party, such evidence is to be disregarded.



- Where the evidence produced is NOT of itself sufficient to establish the proof required, and the court is of the opinion that such evidence, if supplemented by the oath of the party, would establish to its satisfaction the proof required, it shall be lawful for the court to require a suppletory oath, provided for in Article 720, which also constitutes a form of evidence which, however, may only be produced upon the initiative of the judge and only in particular circumstances. The court may require the suppletory oath where the evidence produced is not sufficient to establish the proof required and the court is of the opinion that such evidence, if supplemented by the oath of the party, would establish to its satisfaction the proof required.



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# The Court of Voluntary Jurisdiction

- The Civil Court (Voluntary Jurisdiction section) is often considered as the successor of the Second Hall of the Civil Court, with exception to family matters. It exists to deal with those cases in which the parties do not seek to litigate a matter, but apply to the court voluntarily; this as opposed to the other courts whereby, if called into suit, the party must unavoidably submit himself to the said court's authority.



- However, despite this, the CoVJ does indeed deal with contentious matter, such as those falling under Article 6A of the Civil Code (disagreements between spouses). The CoVJ gives decrees rather than judgements, which are valid for six months and, to be extended accordingly, must be given the due blessing of the court. Decrees are essentially provisional orders, so that there is no right of appeal from the said CoVJ, although a party may challenge a decree by bringing an action before the First Hall Civil Court, with this not being time barred

- Within the CoVJ, proceedings are held before a judge, with the procedure being less formal than in a contentious court and also more flexible. The general rule is that according to Article 39(4) of the Constitution, proceedings before the CoVJ are private, with all records open to the public except those on adoption (these can only be accessed with the court's permission).

# Applications

- Orders or directions in civil matters that are duly made to the CoVJ must be made by means of an application signed by the applicant himself or an advocate, notary or legal procurator. Upon the receipt of an application, the powers of the CoVJ come to the fore because the judge is granted certain faculties, among which one finds:



- (1) The power to order the production of documents necessary and relevant to the application;
- (2) The power to examine the applicant or any other person on oath or otherwise;
- (3) The power to order any person to appear on a given day, at a stated time, to be examined on the subject-matter of the application;
- (4) The power to accept any person who spontaneously appears to give information to the court (with such power, of course, contrasting heavily with the procedure as found in the First Hall Civil Court and other courts of contentious jurisdiction).

# Functions

- The first basic function of the court is to inform itself about the subject-matter of the application to the maximum of its abilities. The second basic function of the court is to issue decrees, with the legislator here also ensuring that the necessary powers are granted to the court in order to perform its judicial functions effectively. Another function of the CoVJ is to give terms of authorisation, such as when minors can enter into a deed.



# Competence - Interdiction & Incapacitation

- Interdiction is a court order by which a person completely loses his legal capacity to enter into any civil or commercial act, with any such act having to be carried out by a curator as appointed by the court to represent the interdicted person. Incapacitation is a court order by which a person loses his legal capacity to enter into certain specific civil or commercial acts, but is still able to perform acts in regard to which he is not incapacitated



# Provisions relating to Interdiction

- Article 520(1) states that a demand in this regard of persons who have a mental illness is made by an application to the CoVJ. Such application shall contain a statement of the facts on which the demand is founded and an indication of the witnesses (if any) to such facts. Furthermore, any documents in support of the demand shall be filed together with the application.





- The person presenting the application before the court must have a genuine link with the person he is seeking to interdict or incapacitate, meaning that only four categories of people can put in a request in this regard:
  - (a) A husband against his wife, or vice-versa;
  - (b) Any person related to another person by consanguinity;
  - (c) Any person who is related by affinity to the person whose interdiction or incapacitation is demanded, and who may be called upon to supply maintenance to such person;
  - (d) The Attorney General, in the case of idiocy or other mental infirmities, unless the demand has already been made by the class of people above



- The CoVJ is granted the power to summon the person whose interdiction or incapacitation is demanded, with the court itself being able to question the said 'candidate' and cause him to be examined by one or more experts. In all cases, however, the court may appoint a temporary curator to take charge of his person and property; with the appointment of a permanent curator taking place if the person involved is interdicted or incapacitated. Such permanent curator may, on his demand, be entitled to remuneration.
- In such cases, the court's main function is to ensure that the person in question's interests are effectively protected.
- The application for interdiction must always indicate the curator nominated, who must enter into a general legal hypothec on one of their properties.



# Provisions relating to Incapacitation

- If no sufficient cause for an interdiction is made to appear, it shall be lawful for the court to order that the person whose interdiction is demanded be incapacitated. Incapacitation can be from various things, including:
  - (i) suing or being sued;
  - (ii) borrowing any money;
  - (iii) receiving any capital;
  - (iv) transferring or hypothecating property; or
  - (v) performing any act other than acts of mere administration.



- The law nonetheless implies that these acts can be performed, provided that there is the help of a curator as appointed by the same decree. However, it is also lawful for the court, when pronouncing incapacitation, to also incapacitate a person from performing all or any of the acts of mere administration, entrusting the performance thereof to a curator. This is therefore seen as a form of a 'third option' for the court, as opposed to either accepting the fully-fledged application for interdiction, or duly dismissing it.



# Provisions Common to both Interdiction and Incapacitation

- Article 525(1) states that interdiction or incapacitation shall take effect from the day of the relative decree, and any act performed by the said interdicted or incapacitated person subsequent to the issuing of such decree or even subsequent to the appointment of the temporary curator shall be null. Any act performed prior to the interdiction or incapacitation may be annulled if it can be proven that the cause of interdiction or incapacitation existed at the time of the performance of the act.
- Interdiction or incapacitation shall be duly revoked when the causes of such cease to exist by another decree of the CoVJ. A person's interdiction or incapacitation might have serious consequences on a third party found to be in good faith, and therefore it is critical that there is an element of publicity when such a decree is pronounced by the court.



- Therefore, a notice specifying the terms of the inhibition must be published in the Government Gazette, with such note of interdiction or incapacitation being entered by every notary in a book kept for purpose. The registrar of the courts shall also keep a book containing the particulars of the persons interdicted or incapacitated, including a summary of the decree of interdiction or incapacitation. The registrar shall publish the names as found in such book in the Government Gazette before the end of the month of January each year; this book shall be accessible to any person wishing to see it.



# The Publication of Inventory

- The best example where the publication of the inventory comes into play would be when one accepts inheritance with the benefit of inventory. However, these provisions are applicable to any inventory which is to be made under the authority of the CoVJ.
- Article 541 states that for a person to officially declare that he is accepting an inheritance, whether testamentary or ab intestato, with the benefit of inventory, he must file a note before the CoVJ. Upon the filing of such note, the person desiring to make up the inventory shall swear, before the registrar, that he will faithfully describe the estate, with the administering of such oath being mentioned at the foot of the note.





- The inventory shall contain a description of all the estate, specifying in detail all wearing apparel and household goods, gold and silver articles, jewellery, money and other movable property, debts due to the deceased, all rights of action and all immovable property, as well as other debts or liabilities of the estate. The values of the movable property should also be stated according to a valuation made by experts, although this requisite can be disposed of.
- Where a valuation is thought to be incorrect, such as in the case of missing items or the lack of a proper description, the inventory can be challenged before a contentious court (normally the First Hall Civil Court). The court, by means of a decree, is responsible for fixing a place, day and time for the publication of the inventory by a notary to be nominated by the applicant. In the said decree, the court shall direct all parties interested in the publication of the said inventory to be present in this regard.



- The registrar shall also publish a notice in the Government Gazette and in a daily newspaper inviting all those parties interested to be present at the publication of the inventory.
- Despite all this, the inventory, after its publication, may be impugned by any person interested, even though such person may have been present at the publication of the said inventory.
- The default of compliance of the above, with the intent to cause prejudice to any party interested, shall deprive the heir of the benefit of inventory.



# The Declaration of the Opening of Succession

- The procedure relating to the opening of a succession differs greatly between civil law and common law systems. In civil law systems, the inheritance vests in the heirs, while legatees can make a demand for their claim, and the spouse and descendants can make a claim for the reserved portion. This is, of course, the system that is adopted under Maltese law.
- The declaration of the opening of succession does not establish what each person is to get from the inheritance, or its content; but establishes that the persons claiming are entitled to be called to the succession and their respective shares.



# The Procedure

- In the absence of opposition, the declaration of the opening of a succession may be made before the CoVJ, upon an application, in favour of any person in whose name a claim thereto is made. Therefore, a contrario sensu, if there is opposition to such claim being made, then the CoVJ cannot open the said succession. When such an application is filed with the court, this must be accompanied by testamentary searches and a will, the latter, of course, if applicable.



- Upon the filing of an application, the court shall issue banns to be published in the Government Gazette and at least one daily newspaper, and be posted at the entrance of the building where the court sits. Such banns will call upon all parties interested to enter their opposition by a note, within a time period of between eight days and one month, to be fixed by the judge, with such time commencing from the day on which the banns are posted up or last published in the said Gazette or periodical. If opposition is filed, the question will be referred to a contentious court.
- The registrar shall also publish a summary of the contents of the banns, to be published in the Government Gazette and affixed in the place where government notices are duly placed in the city, suburb or district in which the deceased resided at the time of death
- The court may nonetheless order that the said notice be affixed in any other place

# Examination of the Claim

- During the time limit within which to file an opposition to the claim, and during the hearing of an application, the CoVJ has the power to make any special order to protect the hereditary rights or property of the deceased from prejudice or deterioration.
- After the expiration of the said time, the court shall, in the absence of opposition, examine the claim of the applicant. If the claim is justified, the court shall allow the demand and declare the succession opened in the applicant's favour
- The court also may, at the request of the applicant, also establish the identity of any other person called to the inheritance and his relative share therein, within its decree. Where an application opposing the claim has been filed, the court shall examine the grounds of opposition and either grant the order applied for, or refer the parties to a court of contentious jurisdiction. However, in such case, it nonetheless cannot open the succession in favour of the said applicant



- The declaration of the opening of a succession shall not operate so as to bar any other person entitled thereto from claiming the inheritance or any portion thereof before the competent court of contentious jurisdiction.

# Appointment of Tutors, Curators and Administrators

- Any person may apply to the CoVJ for the appointment of a tutor or curator to a:
  - (a) minor;
  - (b) vacant inheritance;
  - (c) absent person; or
  - (d) any other administrator



- This is as opposed to the appointment of a curator when someone is being interdicted – indeed, in this case, there is no discretion, and it is the court that appoints the said curator.
- Where minors or incapable persons are concerned, certain acts, including acts of disposal and most acts of administration, require consent of the court; meaning that such tutors and curators would also require the consent of the court.
- It is lawful for the court, on good cause being shown, to exempt any tutor, curator or other administrator from continuing in their said role. Likewise, it is lawful for the court, of its own motion or upon the demand of any person, to suspend any tutor, curator or administrator from the exercise of his office, pending an action for removal or for any just cause; and to appoint another tutor, curator or administrator in his stead. Such suspension shall continue until revoked by the court which issued the relative order or, upon proceedings taken by the suspended tutor, curator or administrator, it is revoked by a court of contentious jurisdiction.



# The Presentation and Publication of Secret Wills

- The paper on which a secret will is written, or the paper used as its envelope, must be closed and sealed, and the testator must declare that it contains his will. Such a secret will must be delivered by the testator to a notary, or, in the presence of the judge or magistrate sitting in the CoVJ, the registrar of the said court.
- The will shall be deemed to have been made on the day on which it is so delivered. The notary who receives a secret will shall draw up an act of delivery, recording therein the declaration of the testator (above) on the paper itself on which the will is written or on the paper used as its envelope. The act of delivery shall be signed by the testator, the witnesses and the notary.



- Where the testator declares that he cannot write or does not know how to write, the notary shall enter such declaration at the foot of the act, which is equivalent to the signature. A notary who has received a secret will shall, within four days from the day of delivery, present such will to the CoVJ for preservation by the registrar. The registrar shall then, in the presence of the judge, receive any secret will presented to him by any testator or notary, and shall give a receipt thereof.

- The registrar must note down various particulars on the paper which the will is written or the paper used as an envelope, with the note of such particulars being signed by the registrar, countersigned by the testator or notary, and signed by the judge:
- (a) The date of the presentation of the will;
- (b) The name, surname, the name of the father and place of residence of the testator;
- (c) By whom the will is presented, i.e. whether it is the testator himself, or a notary, and in the latter case, the name and surname of the notary who duly presented it;
- (d) If the will is presented by the testator, his declaration that the paper so presented contains his will;
- (e) The circumstance of the presence of the judge at the presentation of the will



- The registrar shall, within twenty-four hours, register such particulars in a book that is kept for the purpose. A copy of the said book shall be kept by the judge who shall, at least once every three months, compare the registered particulars with the wills which must be in the custody of the registrar.
- The judge cannot allow the registrar to receive from any notary any secret will if it is not endorsed with the act of delivery made by the testator to the notary. This is also applicable if the will does not contain the declaration required by law to the effect that the paper delivered to the notary contains the will of the person from whom the notary has received such paper.



# Provisions Relating to the Time in the Interim

- A secret will may not be withdrawn before the time comes for its opening, except by the testator himself or by an attorney specifically authorised for that purpose. The testator or attorney withdrawing the will shall sign in the presence of the judge, in the margin or at the foot of entry in the registrar's book (above), a declaration that he has withdrawn the said will. Such declaration must also be countersigned by the judge.



# Provisions Relating to the Publication of the Secret Wills

- An application and the testator's death certificate is needed to open the said will. Where a will is to be opened, the court shall, upon the application of any party interested, appoint the day, time and place for the opening and publication of the will, and order that all interested parties be summoned.
- Parties known are summoned by application while parties unknown are summoned by means of banns to be posted at the entrance of the building where the court sits, as well as published in the Government Gazette and in a daily newspaper.
- The opening and publication of a will shall not take place before the expiration of four days from the date of service of the said application, or four days from the date of the posting up of the banns and their publication, whichever is the later.
- The will shall be opened by the registrar in the presence of the judge, after the signatures affixed by the judge and the registrar at the foot of the note of the particulars have all been verified.



- After the will is opened, it is published in the presence of the judge and the registrar, by the notary who had presented it or by a notary selected by the party who made the application for the opening of the will.
- When the will is published, it shall be delivered to the notary by whom the publication of the will shall have been made. The notary shall then, in the presence of the judge, sign a receipt in the book of the registrar, with such receipt being countersigned by the judge. Wills delivered to the notary by whom the publication of the will shall have been made shall not be deemed to be cancelled from the book of the registrar.





# Publication of Secret wills that have not been Published

- Where any secret wills have been received by the registrar but have not yet been withdrawn by the testators, or opened or published 150 years later, the registrar shall prepare and publish a list of such wills in the Government Gazette.
- After the publication of the said list, the court shall establish a day and time in which the wills mentioned in the list shall be opened in public without the necessity of them being read. The court will then order that the said wills are transmitted to the archivist of Notarial Acts, who shall register such wills in a book to be kept by him. The court will then draw up a procès-verbal of the opening of the said will, which shall only state the date and place of their opening, and whether the document published actually contains a will or otherwise.
- A copy of such procès-verbal and the will/s in question shall be transmitted to the archivist of Notarial Acts, with such wills being open to inspection and the issuing of copies from that date.





# Execution of Acts in Pursuance of the CoVJ's Decrees

- Decrees issued by the CoVJ have the force of law and hence must be adhered to;
- Any form of non-compliance with, or going beyond, the terms of authorisation of a decree brings about nullity;
- A decree authorising or acknowledging some status is dependent on a subsequent act of the parties involved in order to be valid.



- The COCP says that emancipation is effected by virtue of the decree by which it is granted, but if the court, in the said decree, orders that such emancipation be effected by means of a notarial deed, the decree shall not become operative until such deed is executed.
- Any agreement, the validity of which is dependent upon the authorisation or leave granted by the court, shall, under pain of nullity, be effected by means of a notarial deed. This means that all agreements subjected to the authorisation or leave of the court must be effected in this manner.



- A decree of the court shall not make valid any obligation assumed by any minor in any contract in which other parties have expressly bound themselves to indemnify such minor, unless such contract is registered in the Public Registry within one month from the date of the decree or from the day stated in the decree.
- Any decree granting authorisation or leave to enter into any agreement, or to make any waiver, shall cease to be operative if the deed relating to such agreement or waiver is not executed within six months from the date of decree or from the day stated in the decree.
- The registrar shall cause every obligation with hypothecation of property entered in the acts of the court to be registered in the Public Registry, within four days from the date of such obligation, unless within such time the registration shall have been made by any other person.



# Situations of the CoVJ being Akin to a Contentious Court

- As has been mentioned before, the CoVJ is intrinsically private in nature because certain delicate matters are kept outside of the public sphere. While the powers of the CoVJ are limited, it has been granted powers, in recent years, to decide on cases which, of their nature, are contentious.
- These exceptions are quite rare and occur mainly in the Family Law branch of civil legislation, such as powers relating to adoption decrees. The reason behind this is that in an adoption decree, there is really no contestation, so it would be uncharacteristic of the First Hall Civil Court to decide whether a person applying for adoption should indeed adopt.
- Hence, the CoVJ decides whether the adoption will be beneficial for the welfare of the person adopted and whether the person adopting understands the nature and effect of an adoption decree.





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