CRL2007 SUBSTANTIVE CRIMINAL LAW 2

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GENERAL INTRODUCTION TO CRIMINAL LAW

We study the constitutive elements of every crime. We study the ingredients of crimes. What it entails, what are the necessary features/characteristics of the crime which must be proved by the prosecution to garner/ensure a conviction, that is, a decision by means of which a person is guilty. When we do Substantive Criminal Law, as opposed to procedural, we study the elements of these crimes. Crimes partake of the *actus reus* and *mens reus*, the act or omission accompanied by the requisite criminal intent and therefore, we will be analysing what is the act by means of which the crime is consummated/perpetrated and which is the criminal intent which must accompany the act for the crime to be proved before the competent Court, being either the Court of Magistrates as a Court of criminal judicature (guilt or otherwise), or else the trial by jury or the Court of Criminal Appeal (both if its inferior jurisdiction if it deals with appeals from the Court or Magistrates or it sits in its superior jurisdiction if it deals with appeals from trial by jury).

What are the sources?

1. **The law itself** – the law is crucial, in this case, Title VIII of the Criminal Code, sections 211-257. The law is an important source. Article 211 is very concise and deals with wilful homicide which carries the maximum punishment under our law, which is life imprisonment. With that being said, it is one of the shorter sections. It also important to note that one must see both the Maltese and the English version. For example, in homicide, the word 'maliciously' reflects the generic criminal intent, so the law needs to be ideally dissected because when we divide it, we understand it in an easy fashion. Sometimes, Courts too need to break down the law into pieces in order to determine the meaning of the law.

2. **Jurisprudence/case law** – the law will give you the general rule but the application of that general rule to a particular set of circumstances is something which Courts must do. So, when one studies case law, when one realises how Courts employ certain tests, for example in legitimate self-defence, the subjective test whereas in provocation, the objective test, one will realise how Courts will do this.

3. **The Mamo notes** – in some areas, vis-à-vis some crimes, the Mamo notes are very relevant because the legal principles enunciated by him are still applicable. Some other acts were criminalised after he wrote these notes.

4. **Works of jurists** – in citing jurisprudence, reference will be made to works of jurists. Many crimes are modelled on the Italian *Codice Penale*.

GENERAL INTRODUCTION TO TITLE VIII: OF CRIMES AGAINST THE PERSON

Life, personal safety, and reputation are inherent rights of man, interest inseparable from and fundamental to his personality. Injuries committed to such rights form the subject matter of this class of offences which, under Code, comprises:

1) Homicide;
2) Bodily harms;
3) Accidental affray;
4) Concealment of homicide or bodily harm, and of the concealment of dead bodies.
5) Abortion and administering of poisons or injurious substances;
6) Abandonment and exposure of children;
7) Traffic of persons;
8) Threats, private violence and harassment;
9) Disclosure of information received in confidence;
10) Abuse of elderly or dependant persons.

Our examination of this list of crimes will naturally being with those which **affect the security of man's person**, employing here that word in the sense of the living body of a human being. Of all such crimes that of homicide is necessarily the most important.

Homicide, in general is **the killing of a man by another man**, '*caedis hominis ab homine'.* But it may happen that the same effect (the death of a person) may be produced with the **deliberate intention** of causing death (wilful homicide), or with the intention of causing **merely a bodily harm** (homicide *praeter intentionem*), or without any intention but merely through **negligence** (involuntary or negligent homicide). All these are kinds of homicide which **entail criminal liability**, though different degrees, and it is the formal or mental element, which distinguishes the one from the other.

And then there are other homicides which are not criminal at all, i.e., the species of justifiable homicides, and other homicides which thought criminal are, for special reasons, less so, i.e., the species of excusable homicides. Be it noted that the meaning of excusable in our law does not strictly tally with that attributed to it, in the same connection by English lawyers.

Sub-title 1: OF WILFUL HOMICIDE

This is considered to be the gravest species of homicide, as Blackstone called it, *"the highest crime against the law of Nature that man is capable of committing."*

WILFUL HOMICIDE
Article 211(1)

> **211.** (1) Whosoever shall be guilty of wilful homicide shall be punished with imprisonment for life.

The first sub-section presents us with the actual effect, that is the punishment, which is life imprisonment. One becomes immediately aware of the extent to which wilful homicide is a very grave and serious crime. Of course, what might be grave to oneself might not be grave to another. The perception of the gravity of the crime is a value driven proposition however, if you adopt the theory by means of which you consider gravity as a measurable criterion depending on the punishment, one will soon realise that wilful homicide is the gravest. This is because it leads to **an irreversible state of affairs** because the moment a human life is taken away, it cannot be brought back.

Whereas other crimes might not be remediable, such as very grievous bodily harm, wilful harm has irremediable effects. To a large extent, probably, this is another reason why it is categorised by the most serious crime. Needless to say, as Professor Mamo says, because of the nature of wilful homicide, we are dealing here with a very serious of a violation of a fundamental right, the right to life.

The moment a wilful homicide is perpetrated, it doesn't necessarily mean that the State is responsible for a violation of the right to life but the person who perpetrated the crime has effectively removed the life of the victim. This person has violated the possibility because after all, life is an opportunity, the integrity, the safety, of the person in all its manifestations.

Definition of "wilful homicide"
Article 211(2)

> (2) A person shall be guilty of wilful homicide if, maliciously, with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person.

This is a short provision of the law. One of the main important principles is legal certainty, especially here. If Criminal Law is important, if Criminal Law requires something for its very legitimacy, it is legal certainty. This is important because if, as a State, we are going to prosecute persons and imprison them if the prosecution leads to a conviction, one will only expect, in all fairness, that **the law is clear enough as to be able to ensure that such person really committed the crime** and that everyone is aware that a certain act with the intent is tantamount to a crime. It gives predictability and legitimacy to a law. That is why we have principles such a *nullum crime sine lege* and *nulla poena sine lege*. In Criminal Law, certainty is of paramount importance.

Elements –
1) A human life has to be taken away,
2) With an act or omission,
3) Maliciously (generic intent),
4) And this act or omission has to be accompanied by the criminal intent. The criminal intent in wilful homicide can be one of two –
   a. The intent to kill (*animus necandi*) that is a direct intent (*dolo determinato*);
   b. The intent to place the life of another in manifest jeopardy, which is positive indirect intent (*dolo indeterminato*).

Can you have wilful homicide if one of these four elements is missing? No, they are cumulative and not alternative. They all need to be satisfied by the prosecution. For a wilful homicide to be proved, all the four elements must be proved by the prosecution, otherwise you cannot have a decision convicting a person on wilful homicide.

1) **A human life being taken away**

So, for the crime of wilful homicide to subsist, a person has actually been killed by means of the act or omission. This condition implies that the crime cannot be committed **except upon a person in being, whatever his age, the condition of his mind or body, whether sane or insane, wounded, about to die from other causes, etc**: provided **he was still in a living state at the time of the killing**.

The victim must have been alive

Wounds inflicted upon a body when life is already extinct constitutes nothing but an impossible attempt. So, you cannot commit wilful homicide on someone who is already dead, and this applies **even though the person may have thought that the person is alive**.

The link of causation

Another important point to mention is that for wilful homicide to subsist, the human life has to be taken away by that act or omission. This is the link of **causation**. If a person dies and I have the vilest intentions in relation to this person, but this person dies by the acts or omission of another, I cannot be found guilty. The act or omission has to lead to the taking away of the human life of the victim (causation).

Circumstantial evidence when corpse is not found

The question that arises is how can the prosecution prove this, if the corpse is not found? Given the standard of proof required in Criminal Law, that is, proof beyond reasonable doubt, for you to be able to understand how a Court can still convict an individual for taking away a human life without direct evidence (the *corpus delicti*) of the death of a person. Practically the only way this can be done is by **circumstantial evidence**. They are not pieces of direct evidence but are relatively indirect. What is good about them, and many a time prosecutors rely on this evidence, is that if you get bits and pieces of evidence and put them all together, you can create a collage and it would make sense. What is crucial in this type of evidence is that it has to point in the same direction, '*Il-provi indizjarji jridu jkunu univoci u inkontrovertibli*.' So, for circumstantial evidence to lead me to believe, as a judge or juror, that the accused has caused the death of another, I need to be sure, to the level of proof beyond reasonable doubt, that the victim has been killed and is therefore, dead.

For example, in an Italian murder of Mariella Cimo by her husband Salvatore di Grazia, the body of Mariella was never found (no *corpus delicti*), but all that was known was that she disappeared and was last seen by her neighbour. Owing to this, the prosecution relied on the following circumstantial evidence to present their case – (1) testimonies, (2) depositions of relatives and neighbours who confirmed that the couple had matrimonial problems, (3) neighbours conforming that they heard the victim complain, shout and ask for help in incidents where domestic violence was perpetrated in fact, the woman had previously filed police reports to this effect, (4) CCTV footage which showed someone of the stature, height, and mannerisms of the husband with great difficulty placing a garbage bag which seemed very heavy into the boot of his car, and (5) the actions of the husband after the disappearance which was contrary to his ordinary demeaner. This case shows you that you can still have circumstances by means of which wilful homicide is proved **even in the absence of the actual body which is found and the corpse**.

In the case, COCA 11/01/2019 – Bill of indictment 15/2018*,* the Court went on to cite from another judgement, *Repubblika ta' Malta v. George Spiteri* (COCA 05/07/2002) where the Court said,

"Circumstantial evidence must only and absolutely point in the same direction in order to be valid and admissible, that is, to reasonably reach the conclusion establishing guilt on the basis of proof beyond reasonable doubt. The Court must be morally convinced that such pieces of evidence mean (and they can only mean so) that the accused is guilty of the charges tendered in his regard. Hence, any reasonable doubt benefits the accused in terms of law. If there is more than at least one possibility which can raise doubts as to whether the accused is not guilty, such guilt cannot be found since ***the circumstantial evidence must lead to only one conclusion*** *as is stated by our Courts such as in Pulużija v. Michael Ellul Vincenti* (COCA 30/10/2013). *Circumstantial evidence can be very important, actually necessary for the prosecution since they lead to only one conclusion: when a person commits a crime, such person generally conceals the evidence, and the situations may subsist wherein there are no eyewitnesses but there subsist various pieces of circumstantial evidence which all point to the responsibility of the accused as the only person who could have committed the crime.*

Moreover, on the point of circumstantial evidence, in the judgement of the New Zealand Court of Appeal in the case *Rex v. Horry* (1952), the Court said, *"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body not any trace of the body has been found and that in accuses has made no confession of any participation in the crime. before he can be convicted of the crime, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."*

So, circumstantial evidence can be crucially important and unless it points in one and the same direction, it will not lead to clear proof which can lead to a conviction.

2) **With an act or omission of man destroying life**

This refers to the fact that life has been taken away by an act of man. As stated by Blackstone, *"The killing may be by poisoning, striking, starving, drowning, and of a thousand other forms of death by which human life can be overcome."*

No specific means

This leads to the points that the law does not specify the means by which the life of the victim is taken away by the perpetrator. When we speak of a human life taken away, the law does not tell us how this is done. So, the approach of the law is not exhaustive, there is no list of methods/means. You can do so by **any method**.

Insofar as the diversity and multiple methods which can be used, in *Repubblika ta' Malta v. Nizzar Musatafa Algadi* (COCA 09/01/2019) COCA, the Court said,

"Margret Mifsud was killed by the pinning of the chest wall when she was lying down on the seat with her back reclined. The perpetrator sat down on her chest which was literally pinned to the seat, hence impeding the expansion of the chest itself. This is obviously a case of homicide, caused by cardiorespiratory failure secondary to traumatic asphyxia. It cannot be an accident because when someone sits on your chest, he realises you are losing breath. If such person does not want your death, he will stop rather than remain sitting down on your chest. He was trusted by the victim, but he certainly had no romantic motives or intentions. It seems that during the sexual encounter, the victim allowed the accused to lounge onto her chest. If the accused wanted sexual pleasures, he would have immediately realised that he could cause the victim serious harm and he would have disengaged. From this forensic examination, it is obvious that the accused had the intention to kill or to place the life of the victim in manifest jeopardy. In fact, post facto, he changed the position of the dead victim from one lying down to one sitting down in order to simulate a natural death. This results from the blood residue on the victim's face which bled and dried within the nose in the direction of her eyes as explained in detail by the forensic expert. Had the accused not wanted either to kill her or to place her life in manifest jeopardy, he would have desisted immediately upon realising that she was struggling to breath."

Acts of omission

The act which destroys life **may be an act of commission or an act of omission**. For a long time, our Courts understood that for the *actus reus* to be perpetrated, there has to be a positive act of the will. The word 'positive' here has a negative connotation, insofar as it is an act which someone does **of his own initiative**. Distinguish this positive act of the will that someone does from an omission, that is, from the circumstances whereby someone doesn't do something.

The question is can someone commit the *actus reus*, be found guilty, of wilful homicide by an omission, as opposed to a positive act of the will? For a long time, the understanding was that the reply was 'no'. But even as a result of decisions of our Courts in relation to a particular case which was extraordinary, the Rachel Bolder murder, the position at law today has become clear that yes you can be convicted of wilful homicide by omission.
With respect to acts of omission, one has to speak of the **duty of care**. Count Ugolino who, in the Tower of Pisa, died because the person who had imprisoned him therein deliberately

failed to take food to him, clearly died at the hands of that person. But another man, witness of the fact, who had not duty to take food to the prisoner, even though he could, could not be punished for the death because his act was not the cause of death. So, if a person has the duty to do something, then if with the requisite intent he omits to do so and death ensues, he would be guilty of the homicide.

On this point, make reference to the judgment of ***Repubblika ta' Malta v. Concetta Decelis, et***, which is the first Maltese case to find persons guilty of wilful homicide by an act of omission.

In brief, the facts of the case were that Jason Decelis had met and had a sexual relation with Rachel Bolder, the victim. Jason had taken her to his mother's flat in Buġibba and on that night, they had made use of drugs. When Jason noticed that she was having difficulty breathing, '*bdiet tħarħar'*, he had called a friend who told him to inject salt. Jason's motive was not to call an ambulance since he would lose his bail, so far as he had a suspended sentence, and therefore, the police would get to know and that would place him in a position of trouble. His ultimate motive according to Courts was to ensure that he protects himself from any danger. Same with his mother who got to know when she got home in the evening, by that time the girl was progressively getting worse. The mother knew that the girl was getting worse since she had already treated her own son in similar situations. At a certain stage, the son called the father who left his residence and went to the flat.

No one called an ambulance, so prosecutor argued these people are all guilty of homicide simply because they did not call an ambulance. In the father's defence, by the time the father arrived in Buġibba, it was impossible to save the life of the girl because the drugs had made such a bad effect on the body. In a nutshell, the Courts had to determine what was the requisite *mens rea* here and whether a mere omission can lead to a conviction. The general rule which our courts have developed in this case, with special consideration in this case of English case law, is that there could be a duty of care. Although the law does not speak of a duty of care in a direct manner, there could be **a duty of care** which could be created by certain circumstances. So, if you have a legal obligation, that will trigger the duty of care. A passer-by who has no legal obligation, but merely a moral obligation, and does nothing about, he/she will not be found guilty of wilful homicide. The lawyers of the mother and the son argued how could there be a duty of care if there is no legal obligation vis-a-vis that person? The judges disagreed since the person brought her within his control in the flat of the mother and the flat was of the mother therefore, she has effective control of what happens in that flat.

The accused had driven the body to a place in Imġarr to hide the body which was eventually found by a farmer. The question was, by the time he drove and placed her body in the car – was she dead or alive? The prosecutor argued she was alive which is why they could not argue that the accused was guilty of concealment of a body. Here, we are speaking of timing, forensic examination, and circumstances.

There are various judgements because when the lawyers of the mother and son argued that duty of care was not established for Criminal Law purposes, they argued as a result of this, that a new crime was created by the Court and Courts cannot create crimes since

Parliament legislates and that *nulla crimen since lege* was violated. The Court, with Constitutional jurisdiction, had to determine whether effectively, because of the concept of the duty of care, a new crime was created or otherwise. In fact, this led to various judgements within these proceedings but also subsequent judgements where some form of allegation was such that there was an omission.

In *Repubblika ta' Malta v. Conċetta and Jason Decelis* (25/09/2008), the Court established that it was themselves who had created a duty of care. So, the Courts argued they vested themselves with a duty of care – duty of care does not necessarily arise and only by means of a legal or contractual obligation – a parent towards a child, a surgeon vis-à-vis his patient, an employer vis-à-vis his employee etc. The Court said they created a duty of care with the circumstances over which they had control. The element of **effective control** was crucial for them to vest upon themselves the duty of care. Keep in mind that for the crime of wilful homicide, the intent to kill or place one's life in manifest jeopardy is crucial for a conviction.

This was an extraordinary case firstly, since the whole family was accused, secondly, because we had wilful homicide by omission, a charge and a bill of inditement to that effect, and not to mention the way the perception which Courts have given to the duty of care in this regard.

In the cases *Il-Pulużija v. Dragana Mialcovic* (COCA 17/09/2019) and *Il-Pulużija v. Salvatore Chircop and Stanley Chircop* (COMA as a Court of Criminal judicature 06/03/2019) the Magistrate held, "*although Criminal Law does not explicitly cater for a duty of care, from the Concetta Decelis judgements, wherein many foreign jurists are cited, the First Court correctly understood and found that the voluntary failure of a person who has a duty of care to provide such care requested, which failure leads to the death of another person has penal consequences."*

With respect to homicide by omission, **Antolisei** says that the duty of care is *'un obbligo giuridico a contenuto positivo.'*

In the *Decelis* judgement, the Court of Criminal Appeal determined that the accused panicked and decided not to follow the advice which he was given that his omission led to the death of Rachel Bolder. The Court went on to cite Blackstone's 'Criminal Practice (2004)' and various British judgements. Also, it cited from Archbold's 'Criminal Practice (2006)' to the extent and to the effect that it is the judge who must exercise discretion to determine whether the duty of care subsisted or otherwise.

The First Hall Civil Court decision was dated 09/12/2010, *Concetta Decelis v. Ministeru tal-Gustizzja u tal-Intern* (3/2009/1) and that is the final decision by the Constitutional Court. The gist is that no new crime was created, and, in any case, the person determining guilt or otherwise had the discretion to determine whether a duty of care was triggered or otherwise and they also found that the position under Scott's law, 'recklessness', is very much akin to the second limb of the *mens rea* (place the life of another in manifest jeopardy). This is because in the **positive indirect intent**, you have still an element of foresight, so you can foresee that the person will die, you might not have the desire that the person will die, but the law treats that intent in the same manner. So, for the purpose of the

law, **someone who has the desire to kill should be treated equally to someone who knows that although he doesn't wish the death of the victim, he is indifferent to the consequences which he knows will probably ensue**, that is death. So, direct intent is foresight and desire in their perfection (when the foresight and the desire come together so you foresee that if you shoot at a person he will die, and you wish him to die (*animus necandi*)), but if you are perpetrating an act which is inherently and obviously likely to kill, but you don't really wish the death of the person, that is, you do not care whether he lives or dies, the law still considers that as wilful homicide. 'Recklessness' is very similar to the latter intent.

The link of causation
This refers to the 'but for' principle – 'li kieku ma kienx għall-att tal-akużat.' For example, if I am invited tonight to a dinner by a friend, and this friend lives close to me, and I decide not to use the car, and I walk towards my friend and I am run over by a car and killed. The prosecution might argue that my friend is guilty of wilful homicide because my friend invited me for dinner, and I would not have died had he not invited me. But there is no link of causation at all. The person responsible is the person who drove recklessly. You cannot argue and say it was the friend. There has to be the link. You cannot be found guilty if you dis-attached from a particular event.

Time limits
Under our law, **when the intention was homicidal**, no time limit is fixed after the injury within which death must ensue in order to sustain a charge of wilful homicide.

In terms of the *mens rea* per se, the motive is the underlying determination to commit a crime, the intent is the actual **foresight** and the **desire**. So, the motive is the underlying reason for you to commit the crime, your intent is really and truly your determination. Motive is only relevant for punishment and not for proving criminal intent. Ultimately, motive can be something good. Irrespective of the motive, *mens rea* and the *actus reus* need to be proven. These two have to merge together at a point in time. If they do not coincide, you will not have the crime. Here again, the importance of them coinciding see the *Alqadi judgement*, where the Court held, *"section 211 conveys that for wilful homicide to be proved, it is absolutely necessary that the actus reus must be accompanied by the intent to kill or to place the life of another in manifest jeopardy. Whosoever is tasked with determining thereupon, should consider all the facts of the case holistically, cumulatively, and deduce from all the facts and circumstances whether the person who committed the act possessed the requisite criminal intent or otherwise."*

3) **'Maliciously' (*doloso*)**
This word here means no more than that the killing must be unlawful. It merely means an evil design in general, the consciousness of doing a wrong thing, and serves to mark off wilful homicide from other forms of homicide, which – though the intention be the same, i.e., to kill – are yet not criminal, being ordered or permitted by the law or by lawful authority or otherwise justifiable.

The word 'maliciously' describes the **generic** criminal intent, i.e., the consciousness of doing something against the law. This means that the act is illegitimate, it is against the law, it is

unlawful. The act is unlawful. What distinguishes between one homicide, and another is the *mens rea*. It is the grand criteria. You can have different types of homicide. Essentially what distinguishes one from the other is the intent.

See vis-à-vis the act or omission is a case of a woman in a shaft for a number of days whereas the man in the same flat knew she was struggling in that shaft but didn't do anything about it – 03/12/2015 COCA superior *Repubblika ta' Malta v. Sergii Nykytiuk*. This was a case of persons in a matrimonial home who had argued, the woman for some reason had fallen in a shaft but apparently the man did not realise. However, he had admitted that he had heard certain sounds which were sounds of pain and so did neighbours. Essentially, the gist is that the element of foresight is important. Intent is foresight and desire because even if you may not desire that a person dies, if you foresee that a person will die as a result of a particular action, you are equally responsible for homicide.

4) **The killing must be committed with the specific intent to kill or to put life in manifest jeopardy**

This is the grand criterion which distinguishes wilful homicide from all other species of unlawful killings. So, while 'maliciously' describes the generic criminal intent, the **specific** intent of wilful homicide must be precisely **that of killing or at least exposing the life of another to manifest jeopardy**.

This is the distinctive attribute of this crime – without the specific intent there cannot be this crime, nor any attempt of it. This specific intent distinguishes the crime of wilful homicide from:

1) Bodily harm from which death ensues;
2) Homicide by misadventure or accident (casus);
3) Homicide by negligence (involuntary homicide)

Absence of any intention to cause harm (*animus nocendi*).

Also, it is the intent that distinguishes bodily harms which constitute **an attempted wilful homicide** from those which do not and are punished as the complete offence of bodily harm. So, if the person injured dies, following the infliction of the bodily harm, but it is established that the intention of the offender was not that of killing or of putting the life of the victim in manifest danger, the crime of wilful homicide does not arise, precisely on account of the **absence of that specific intention**.

So, the grand criterion, the most important element which distinguishes one type of homicide from another is the criminal intent. Essentially, whether the homicide is wilful or otherwise, involuntary, a GBH grievous bodily harm from which death ensues, the impact of the act is the same, the death of the person. But if there is homicidal intent, we have wilful homicide, if the intent is not homicidal, we can have the crime of GBH from which death ensues. This goes to show that **the act is the same**, and what is different is the criminal intent which accompanies the act and even the outcome of the act is the same because it leads to the death of the victim. Similarly, you have other circumstances where you can draw up certain distinctions between other types of homicide and bodily harm.

In a nutshell, when someone dies, and we may have a case of GBH from which death ensues (GBH followed by death), in these circumstances, you do not have homicidal intent. So,

when we do not have the homicidal intent, what is missing is either the intent to kill (direct) or the intent to place the life of another in manifest jeopardy (positive direct). In the absence either of the intent to kill or the positive direct intent, you will not have wilful homicide. If that intent is criminal lacking, we could have the other crime of GBH from which death ensues.

Direct & Positive Indirect Intent
According to our law, the intent in wilful homicide need not be positively that of "killing" (*animus necandi*). It is sufficient if the intent is to ***"put the life of such other person in manifest jeopardy"***. Where the intent is *"to kill",* the intent is **direct**. Where the intent is *"put the life of such other person in manifest jeopardy"*, the intention is **positive indirect**.

The law has considered that from the point of view of wickedness, having regard to the consequences ensuing, there is nothing to distinguish between a man who with the positive clear intent of killing proceeds to do an act which in fact causes death, and the man who, although without positively desiring to kill, yet does an act which is **inherently and obviously is likely to kill and in fact causes death**. The knowledge that the act is **likely** to kill, or the recklessness whether death, clearly foreseen as probable, shall ensue or not, is properly treated by the law on the same footing as the positive intention to kill.

Every man must be presumed to intent the obvious and natural consequences of his voluntary acts: "*Dolus indeterminatus determinatur ab exitu."* The circumstances and environment are important. Here we speak of element of probability and likelihood.

Premeditation
The specific intent as essential to constitute wilful homicide, must not be construed as recurring premeditation, that is, **the settled deliberate mind and design for some time before the commission of the act**. If there is evidence of premeditation, it makes it easier to prove the specific intent requisite, but even without any evidence of premeditation, such specific intent may well subsist.

So, there does not need to be premeditation for criminal intent to be proved. But if you have premeditation, it is much easier to prove the criminal intent. The intent is a subjective matter of the mind, that is, what he wanted at that time, but it is proved objectively. In other words, criminal intent is subjective but is proved objectively. So, from the facts, we decipher the intention of the accused.

When there is premeditation, also known as malice aforethought, where there is a preconceived plan or design to perpetrate an act, knowing that such act will lead to certain consequences you desire, it is easier to prove intention. If you have a case of, for example, road rage where the accused has never met the victim, there is certainly no premeditation, but that does not mean there isn't the crime. **Just because there isn't premeditation, does not mean there isn't criminal intent**. Obviously if there is premeditation, where there are objective facts of my pre-planned design to kill that person, it is easy for the prosecution to prove the criminal intent. The proof of premeditation facilitates the job of the prosecution in proving the criminal intent, at that point in time. It doesn't always mean that because intent is subjective and we need to determine the frame of mind of the preparator at a

point in time, doesn't necessarily always mean that it is more difficult to prove the mens rea than the actus reus. Sometimes, the latter is extremely difficult.

Particular person
The specific intent – and, indeed, responsibility for wilful homicide – is not negated by the fact that the person who was actually killed is different from the one whom it was intended to kill, or that the offender did not intend to kill any particular person.

Where the offender did not intent to cause the death of any person in particular, or where the offender kills a person other than the intended victim
Article 212

> **212.** The provisions contained in the last preceding article shall also apply even though the offender did not intend to cause the death of any particular person, or, by mistake or accident, shall have killed some person other than the person whom he intended to kill.

(i) Intention to kill a particular person, but not the one who actually was killed
Man shoots A with the intent and desire of killing A but accidentally hits and kills B instead. This killing of B is treated by the law not as an accident but as a murder. The *mens rea* is transferred from the injury contemplated to the injury actually committed, *'malitia egreditur personam.'*

When by mistake or accident, the person killed is other than the person intended, the agent shall nevertheless benefit of any excuse which would have decreased the punishment for the crime if it had been committed on the person against whom the act was intended.

(ii) Intention to kill, but without selecting any particular individual as the victim
This is known as **'universal malice'**. Even in Roman Law, the 'Lex Cornelia de Sicarlls' declared that it was not enacted for the protection of the life of this or that particular individual, but for the protection of all men, *'ipsam humanitatem tuetur.'*

But when by mistake or accident, the person killed is other than the person intended, the agent shall nevertheless benefit of any excuse which would have decreased the punishment for the crime if it had been committed on the person against whom the act was intended.

Similarly, under English law, according to **Archbold**, *"if a man fires at 'A' in such circumstances as would make the killing of 'A' manslaughter, and by accident hits and kills 'B' whom he never intended to kill at all, he is guilty of manslaughter."*

Death outside the jurisdiction, of a person stricken within the jurisdiction
Article 211(3)

(3) Where the offender gives cause to the death of a person within the limits of the territorial jurisdiction of Malta, the homicide shall be deemed to be wholly completed within the limits of the said jurisdiction, notwithstanding that the death of such person occurs outside such limits.

Punishment

211. (1) Whosoever shall be guilty of wilful homicide shall be punished with imprisonment for life.

The punishment reflects the gravity of the crime. Under Maltese law, the maximum punishment that can be inflicted on an individual is **life imprisonment** since we do not have the death penalty.

However, the penalty in relation to homicide is being questioned from a human rights perspective and in the past decade, individuals have claimed that **the penalty of life imprisonment without a periodic review of the sentence could be tantamount to a violation of a human right**. Predominantly, the human right which the convicts claim is inhuman and degrading treatment or punishment under **Article 3** of the ECHR which is found in the First Schedule to chapter 319 of the Laws of Malta (by Act XIV of 1987, we incorporated the European Convention on Human Rights into our law).

Various convicts at ECtHR level have argued that life imprisonment, as a punishment, divests punishment of its restorative and rehabilitative aspect. It is hence questionable. In other words, persons found guilty of homicide argue that the main objective of punishment should be the rehabilitation of the offender. Indeed, the main objectives of punishment can be summed up in rehabilitation, retribution and deterrents and the ECtHR has pronounced itself in this regard. It has examined the institute of life imprisonment within the state parties in order to determine its compatibility with the Convention itself.

The gist and the effects of these judgements
The ECtHR distinguished between three types of life sentence –

(1) One with eligibility for release after a minimum period has been served;
(2) A discretionary sentence of life imprisonment without the possibility of parole;
(3) A mandatory sentence of life imprisonment without the possibility of parole.

In a nutshell, the first raises no issues under Article 3. The second may be imposed after due consideration by the Court of all relevant mitigating and aggravating circumstances and in relation to the third type, the ECHR felt that it had to examine the compatibility of these types of life imprisonment with the Convention itself, reason being that the third system identified seems to remove the convict of any possibility to somehow plead and prove that mitigating factors or special circumstances may have subsisted when he/she committed the crime.

These judgements were referred to in a local judgement of our Constitutional Court: *Ben Hassine Ben Ali Wahhid v. Honourbale Prime Minister and Advocate* General (07/11/2016) (60/13AF).

Essentially, this judgement reproduced some particular sections of the following ECHR judgements –
(1) *Abdulah Oshalan v. Turkey;*
(2) *Trabelsi v. Belgium;*
(3) *Murray v. The Netherlands;*
(4) *Hutchinson v. the UK*
(5) *Babar Ahmad & others v. UK.*

The gist of these judgements is that States are obliged to ensure compatibility between their repressive system, which is the sanctioning regime (the punishment), and the Convention. States must introduce a juridical framework against which life sentences must be measured.

Basically, in a few words, this juridical framework has to cater for a system/mechanism by **means of which there could be periodic review of the sentence** and possibly also, a **prospect for release**. These judgements have tried to determine that a prisoner should have a right to hope that one fine day he/she may be released. These judgements go in the direction of emphasising the rehabilitative and restorative dimension. There is still an element of discretion of the competent authorities. This is similar to parole which is not an automatic right.

So, this leaves us at the fact that the punishment is still the gravest, and it mirrors the gravity of the crime. However, it doesn't mean that life imprisonment will be imposed in a mandatory fashion especially if the law, in some section or another impinges on the delivery of the judgement. Indeed, there are circumstances which can impinge on the delivery of the judgement, for example, if you have a unanimous verdict or a grade one verdict, in that case that gives less leeway to the judge. With a nearly unanimous verdict and a crime where you have premeditation, the judge has less flexibility. It doesn't mean that the judge has to impose life imprisonment, but **it would be much easier for him to justify such a punishment**. It would be completely different if a verdict is a 6-3 verdict which is less clear. In such a case, 3 jurors out of 9 do not share the view that the person is guilty as the other 6 have determined. Here, we have circumstances which need not necessarily belong to the accused, they may not necessarily be mitigating or aggravating, but the judges cannot ignore them.

We have an adversarial system during the trail and after the trial if there is an appeal. Our system allows and divides proceedings within trial. This is because our system allows a trial by jury and a verdict and the verdict of the jurors. If the verdict is an acquittal, it stops there, but if it is one of guilt, the jurors are excused and, in a way, different proceedings start to determine the sentence. The sentence itself is a separate and distinct phase of the trial itself. In continental jurisdictions, lawyers plead about guilt or innocence together with the sentence which should be delivered. Should the jurors or the judge find guilt, you have subsidiary arguments – that the punishment should be X and not Y.

INCITING OR HELPING OTHERS TO COMMIT SUICIDE
Section 213

> **213.** Whosoever shall prevail on any person to commit suicide or shall give him any assistance, shall, if the suicide takes place, be liable, on conviction, to imprisonment for a term not exceeding twelve years.

Essentially, when we examine this section of the law, we can summarise a few points insofar as, for many years but many decades ago, many jurists used to say and argue that if suicide is not a crime since death extinguishes the criminal action (the person committing it cannot be prosecuted), **how could the instigation for something which is not a crime be a crime**? This leads to a prohibition of this crime anyway because once we have a fully-fledged crime, distinct from wilful homicide, what is crucial is that you have a suicide. So, the perpetrator is not guilty of homicide because the person killed himself. Here, there is the impact of causation because if no act of mine led to the death, I can never be guilty of wilful homicide.

Legislative History
This law was imported in our Criminal Code as a result of the *Codice Penale* of 1889. It is interesting to note that the text used in the section of the law itself, even in the marginal provision, is also "incitement". Here, incitement and instigation are, to a certain extent, used interchangeably. What you need to know are the elements of this crime and how our Courts interpreted them.

The first condition in order that this section may apply is that ***there shall, in fact, have been a suicide***. Unless death, self-inflicted, has actually taken place, the instigation or assistance, whether or not there has been an unsuccessful attempt, will not be punishable.

Actus reus

The main element is the *actus reus*, which can be one of two, either/or –
1) Prevail upon another to commit suicide, or else
2) You can give assistance.

1) Prevail upon another to commit suicide
The words were taken from the Italian version, *'determina'*. The gist of all this means that for one to be found guilty under this section of the law, it isn't enough for someone to **pass a comment**, or a suggestion, as a result of which another person commits the fatal act. In other words, when a person simply **suggests** the idea of suicide to someone, or makes use of mere **indirect words of encouragement**, they are not found guilty of this crime. The legislator didn't want the person who suggested to be found guilty of this crime, simply by a mere suggestion. This is so, even if the person who receives the comment actually commits suicide.

In actual fact, what the legislator wanted was that a person who **literally impels another**, fostering the idea **constantly**, convincing that person **repeatedly** and **persistently** would be captured by this provision. So, what is required is the fostering and ramming in the original

idea in the suicide's mind, practically impelling the person to commit suicide to the extent that it can be said that **the suicide is a derivative of that conduct**.

'La parola determina circoscrive meglio il concetto della legge al suicidio in duce anche co lui che in altri rafforza l'idea del suicido.'
So, if someone has a pre-planned design to commit suicide, and another person reinforces that design, that person would not be guilty under this section. The law here isn't catering for a situation where the person has already shown suicidal thoughts whereby the instigation wasn't triggered another person. In other words, **if the idea was already formed, then it isn't encompassed under this article**.

'*Mentre al suicido determina co lui che nefanaxxera il proposito.'*
He who determines the suicide is he who triggers the idea in the first place. It is not a situation whereby someone already has the idea of committing suicide and someone else reinforces it or approves it. The law doesn't capture that circumstance; **you have to create the idea in the head of the victim**. To 'induce' means to reinforce the idea, while to 'determine' something is **to solicit it**, meaning that you form the basis of it; you trigger it.

2) Giving assistance
The giving of assistance may take various forms; but the crime will not arise except where the assistance given is recognised to have been really effectual.

The assistance has to be important for the purposes of the suicide, meaning that it has to actually **lead to it**. If giving assistance means that I provide a rifle for someone to commit suicide, but the person does not commit suicide with that gun, my giving of assistance did not lead to the crime so, the link of causation is missing. This is so despite me having the evilest intentions.

The assistance has to material and effective; it has to lead to the suicide. It has to be some form of **material aid**. You have to assist/aid.

It must have the same characteristics as are required in order that the assistance given in the other crimes may, according to the general principles, amount to complicity.

On this point in *Repubblika ta' Malta v. Erin Tanti* (COCA 09/04/2019), the Court held, *"the charges of wilful homicide and instigation to commit suicide may seem contradictory and/or mutually exclusive. They should be read and considered independently and separately from one another. It will hence be up to the jurors to establish which of those two criminal charges, if any, is proved beyond reasonable doubt after having been given the relative guidance and instructions by means of the summoning up of the presiding judge."* The jurors would determine the facts.

Sub-title V: OF EXCUSES FOR THE CRIMES REFERRED TO IN THE FOREGOING SUB-TITLES OF THIS TITLE

HOMICIDE OR BODILY HARM IN ACCIDENTAL AFFRAY
Article 237

> **237.** Where in an accidental affray a homicide or bodily harm is committed and it is not known who is the author thereof, each person who shall have taken an active part against the deceased or the person injured shall, on conviction, be liable -
>
> (*a*) in the case of homicide, to imprisonment for a term not exceeding three years;
>
> (*b*) in the case of a grievous bodily harm producing the effects mentioned in article 218, to imprisonment for a term not exceeding one year;
>
> (*c*) in the case of a grievous bodily harm without the effects mentioned in article 218, to imprisonment for a term not exceeding three months;
>
> (*d*) in the case of a slight bodily harm, to the punishments established for contraventions:
>
> Provided that, in the case of homicide, the person or persons who shall have inflicted on the party killed a bodily harm from which death might have ensued, shall, on conviction, be liable to imprisonment for a term from five to twelve years.

The gist is that where in an accidental affray, a homicide or bodily harm is committed and it is not known who the author is thereof, each person who shall have taken an **active part** against the deceased or the person injured shall, on conviction, be liable.

In *Pulużija v. James Farrugia, John Farrugia and Omar Caruana* (COCA 16/05/2014), the Court said, *"There is no evidence at all within the acts of the proceedings which could indicate that the appellant caused the above-mentioned offences. Since there were many persons who participated in the fight, he can only be found guilty of the accidental affray."*

The Court also held, *"…section 237 needs to be interpreted as follows: it cannot be applicable to the case of the appellant, this is because in the aggression, there was absolutely nothing which could be considered as accidental. On the contrary, it was premeditated, accompanied with the clear intent to attack the police and harm them in the process. The appellants arrived at the scene of the crime and were accompanied by other persons. They drove the car in an aggressive manner when they approached the police. They used excessive speed after which they pressed the car breaks instantly with a clear intent to intimidate. They opened the car doors and all of a sudden, they surrounded the police.* ***There is nothing accidental in this conduct****. The appellants and the people who accompanied them where there* ***specifically*** *to injure the police. John Farrugia's statement clearly manifests such intent, this being the premeditated plan to cause harm to the police because of the office they occupy. Therefore, the appellants cannot benefit from any mitigation in the punishment as contemplated in section 237(c)."*

In another two cases, *Il-Pulużija v. Brandon Callus* (COM as a COCJ 28/09/2015) and *Il-Pulużija v. Joseph Grech* (COCA CCA 16/02/2006), the Court held, "*for the purposes of article 237, **at least another two persons should have participated actively within the affray against the victim in such a manner that the perpetrator of the crime could not be known**. In a fight between only two persons, that is, the victim and the other person, this crime cannot subsist, and this legal provision would not be applicable. As was stated by Carrara, **the crime is based upon the uncertainty of its perpetrator**. Therefore, there can be no uncertainty when against the victim, only one person participated as is within this case."*

In *Il-Pulużija v. Stefan Lekov*, the Court, in interpreting this section of the law, rightly noted that **section 237 does not define an accidental affray**.

Legal certainty is crucial in Criminal Law. Legal certainty which reflected in the principle which is also a fundamental right within the right to a fair trial, becomes also very important. This doesn't mean that just because a crime is not defined with all the elements articulated, you do not have legal certainty. Having all the elements of a given crime articulated in the law is the ideal. Of course, there are other systems where the articulation of the crime is more detailed. Certainty is important because we need to know what is the *actus reus* and *mens rea*.

In the case of an accidental affray, we do not have a fully-fledged definition and therefore, Court judgements are more relevant. Jurisprudence clearly articulates the elements of the crime because the Courts interpret the section of the law, they dissect it, they define keywords, they analyse the context of the law, they analyse the spirit of the law and if it is difficult to literally interpret the law, Courts can indulge in a logical interpretation, an interpretation of the spirit of the law. Parliamentary debates are also important. Judges use sources, and when the law is ambiguous or unclear, they look and search elsewhere.

In *Il-Pulużija v. Abel Joseph Aquilina* (11/12/2017 COCA), the Court held, "*the concept of accidental affray incorporated in article 237 focuses on the fact that in the accidental affray, **more than two persons would have taken part against the victim** and **in the absence of planned aggression**, or premeditation of the persons involved, and in the **absence of a common design between them**. For the homicide or bodily harm to take place, when it is unknown who from those who actively participated (where involved) in the affray against the victim caused the homicide or bodily harm thus, each and every one who took an active part in the affray is criminally liable but of a crime which carries **a lesser punishment** of imprisonment form homicide or bodily harm itself. It is obvious that at least two persons must have taken part actively against the victim in such way that it **cannot be established who of them caused the homicide or bodily harm**. In a fight between two persons, the victim and the accused, this crime can never subsist because it is intrinsically based and dependent upon l-incertezza del'attore (the uncertainty of who the perpetrator is".*

This was confirmed in *Police v. Godwin Micallef* (COMA as a COCJA 04/11/2019) where the Court referred to other judgements of the Court and concluded that article 237 contemplates an accidental affray in which a victim is killed or suffers bodily harm, and the author/perpetrator is not found or identified.

Sub-title VI: OF THE CONCEALMENT OF HOMICIDE OR BODILY HARM, AND OF THE CONCEALMENT OF DEAD BODIES

CONCEALING THE BODY OF A PERSON KILLED
Article 239

> **239.** Whosoever shall knowingly conceal the body of a person whose death has been caused by a crime, shall, on conviction, be liable to imprisonment for a term from four to six months.

"Knowingly" is important. The person must have knowledge of it. Moreover, the death of that person whose body is concealed must have been caused by a crime.

In *Repubblika ta' Malta v. Piero di Bartolo* (CC 14/01/2015), the Court held, *"contrary to the interpretation submitted by the defence, in relation to this legal provision, what is certain is that* ***these must be considered within the title of the law****."*

Sometimes, for us to consider and interpret the law, we may need to see exactly where it is placed within the Criminal Code. Indeed, even the position within the Criminal Code can lead to consequences, even in terms of the understanding of that same section.

The Court went on to say that, *"…once the law terminates the consideration of the title between "Of Excuses for the Crimes Referred to in the Foregoing Sub-titles of this Title" it passes immediately onto article 239, therefore, article 239 must be dealt with in the context of the title of the crimes within which it is embedded, whereas the Italian counterpart version has been placed in a sub-title of the Italian law which does not relate with the crime of homicide. In his notes, Professor Mamo makes no reference to section 239 and passes to consider abortion after analysing the excuses to the crimes of homicide and bodily harm. Therefore, it is clear that the intention of the legislator was to ensure that the crime of concealing a body of a person killed should have been* ***a distinct and separate crime and not an alternative crime to wilful homicide itself****. The jurors, if circumstances so dictate, can find the accused guilty of wilful homicide but not guilty of the crime of concealing the body of the person killed or vice-versa. Everything depends on the evidence produced but both inditements reflect two different crimes which are altogether separate and distinct. This means that* ***the jurors can find guilt on both counts/inditements****."*

Sub-tile II: OF WILFUL OFFENCES AGAINST THE PERSON

BODILY HARM
Article 214

> **214.** Whosoever, without intent to kill or to put the life of any person in manifest jeopardy, shall cause harm to the body or health of another person, or shall cause to such other person a mental derangement, shall be guilty of bodily harm.

Elements –

1) Whosever;
2) **Without intent** to kill or to put the life of any person in manifest jeopardy;
3) Shall cause **harm to the body or health** of another person; or
   shall cause to such other person a **mental derangement**.

1) ***Mens Rea***

The ***animus nocendi***, which is the **intent to harm or injure** is what characterises bodily harm. So, while the *animus nocendi* is relevant for the purposes of bodily harm, the *animus necandi* is the direct intent to kill and therefore, is relevant for the crime of wilful homicide. Needless to say, there is a crucial difference between these two.

When we deal with bodily harm, and the law says this immediately, we are **excluding the homicidal intent**. In fact, the law specifically says, *"without intent to kill or to put the life of any person in manifest jeopardy."* The characteristic of bodily harm is **the lack of the homicidal intention**. Indeed, the law immediately presents us with this reality.

If, where an actual bodily harm is occassioned, the intent of the perpetrator was that of causing death, then – provided the means used or mode of perpetration might have caused death – the offence chargeable will not be that of bodily harm, having regrad to the injury actually inflicted, but that of attempted wilful homicide, having regard to the **more serious effect (death) which was intended**.

In *Il-Pulużija v. Kevin Galea (12/03/2019 COCA Inferior Jurisdiction)*, the Court made reference to another judgement, that of *Republic of Malta v. Antonio Falzon (22/09/2006)*, and held that, *"it does not make much sense that a person would be armed with a revolver simply to hurt or to injure someone else. A revolver is an adequate weapon for the purposes of killing such other person just as the appellant's revolver. More so, when the appellant had actually tried and tested such revolver and moreover, he threatened to kill Falzon on separate previous occasions."* Then Court considered the circumstances of the case in order to deduce the intention of the perpetrator.

Generic Intent
The fact that the law, in defining this crime, merely excludes the specific intent of wilful homicide, does not mean that an intent is not necessary. Bodily harm caused unintentionally may be either purely accidental (not criminally punishable) or merely negligent (punishable as involuntary). To constitute the crime of **wilful bodily harm**, the

injury must have been caused intentionally. But the intention required is merely the *'animus nocendi', the* **generic intent to cause harm**, without requiring necessarily an actual intention to do the particular kind of bodily harm which, in fact, ensues. In other words, **it is not essential that the intention was to produce the full degree of harm that has actually been inflicted**.

Answerable for the Damage Caused
Therefore, in the case of bodily harm, **if the intent of the doer is to injure**, he will **answer for the harm actually caused**, in application of the principle *"dolus indeterminatus determinator ab exitu".*

So, in bodily harm, **you are answerable under law for the degree of harm you produced** but provided that there was the intent to injure. In bodily harm, the reality of myself hurting a person voluntarily is that I am answerable for the extent of the damage I caused. I am responsible for the possible damage I have caused. In this regard, therefore, we are dealing here with an intent to injure which is a **generic intent**. This exists in stark contrast with the intent to kill which is a specific intent. So, the *animus nocendi* is generic whereby when I perform the act, **I do not know the degree of harm I will cause** and therefore, I am answerable for the harm which ensues.

In *Il-Pulużija v. Joseph Bugeja (COM as a COCJ 08/05/2017)*, the Court referred to Il-*Pulużija v. Emanuele Zammit (COCA 30/03/1998)*, and held that, *"in bodily harm* ***a generic intent to cause harm*** *is required. If the agent's intent is to cause harm, irrespective of its nature and extent, he has to answer for all the ensuing consequences, that is, he has to answer for all the consequences caused by his own actions."*

The Concept of Foresight in Intent
Intent is made up of **foresight** + **desire**. Foresight means that I foresee that if I do something, that act will lead to a given consequence. So, the intent can be, to a large extent, captured in these two words. Note that these two words together create a particular situation because if I do not foresee, although I may desire, that can lead to one particular crime but if I both foresee and desire, I am guilty of another crime.

This concept of foresight is better understood in the context of *culpa*. *Dolus* is a situation whereby you have power of volition, knowledge and foresight. In *culpa*, the desire is missing because it is of an involuntary nature. You can have culpa, criminal liability, if you did not foresee that you will kill the passer by, but you **should have foreseen it**. You do not have actual foresight, but you have **foreseeability**, therefore, an involuntary act. There, we are in *culpa*. If you have foresight, you are in the area of *dolus*. So, here we have a crucial difference.

In *Repubblika ta' Malta v. Pascalini Cefai* (08/10/2015) the Court held, *"according to doctrine, the intent is indirect when the event is simply a possible consequence of the actus reus, which event either was* ***not foreseen*** *or was* ***foreseen but not desired****. If such consequences where foreseen and notwithstanding that, the actus reus was desired and voluntary even when the consequences where not desired, the intent is positive indirect. If, however,* ***the consequences where not desired and not foreseen, the intent is negative***

***indirect**. Direct intent and positive indirect intent give rise to dolus which requires power of volition, knowledge and foresight. Negative indirect intent gives rise to **culpa** (culpable negligence) or to casus (accident)."*

In involuntary crimes, there wasn't actual foresight but **there was foreseeability**. If the consequences that ensued from the act were not foreseeable by a person with normal intelligence, by the reasonable prudent man who performs the due diligence/caution of the *bonus paterfamilias* (the diligence which the law expects), then you have *casus*. *Casus* eliminates criminal liability, despite the harmful event.

In *Repubblika ta' Malta v. Salvatore sive Salvu Gauci* (COCA 08/07/2004), the Court held, *"the crime of wilful homicide consists of the following elements: (1) either the accused foresaw death as a consequence of his acts and desired the death of the victim or else, (2) the accused saw death as a **probable** consequence of his acts and although not desiring the victim's death, he anyway performed the act or those acts which he knew would probably cause the victim's death. In the absence of either (1) or (2), the judge should conclude that the accused only wanted to hurt the victim who eventually died and because the accused should be liable for the consequences of his actions, then he should be found responsible for the crime of GBH from which death ensues.*

In order to determine the criminal intent, one must examine and analyse the facts of the case in detail, the material acts which were committed, and the prevailing circumstances surrounding such material acts. One must consider what type of weapon was used, how and in what manner it was used, where the blows with that weapon directed to, and what was said and done before, during and after the blows. The COCA refused to accept the principle accepted by the First Court, that wherever the blow is directed to within the human body, there always exists the possibility that a vein or artery is punctured, and that the victim loses blood and that consequentially, if a victim dies as a result of this, there would subsist the homicidal intent, possibly indirect. Here the First Court was practically excluding the crime of GBH from which death ensues when such an offence is such as to create a form of internal haemorrhage. Although it is true that the intention must be established form the material acts and the prevailing circumstances, the intent will ultimately be a subjective matter."

In *Republikka ta' Malta v. Brian Vella (28/07/2011)*, the COCA quoted from Gerald Gordan's 'The Criminal Law of Scotland' in order to explain the concept of 'recklessness' because it is advertant and involves foresight of the risk, so this concept is identical to our concept of positive indirect intent. Whereas, on the other hand, negligence is inadvertent and involves the absence of such foresight. Recklessness is dolus and negligence is culpa.

2) ***Actus reus***

Bodily harm may, as the law says, consist in harm to the **body or health** or **in mental derangement**. So, provided that the effect can be traced to the act of the accused, it makes no difference that the act operated on the mind or psyche of the victim causing, for example, a shock or some other mental unsettlement, rather than on the physique causing, for example, a wound or cut or stab.

Does there have to be physical violence?
It likewise makes no difference that no physical violence was directly exerted on the body of the victim, for even without this, it is possible to cause the effects contemplated by the law. For example, in the case where an infant is kept in a damp and cold place for a long time. In all such cases, the effect is always a hurt or an injury calculated to interfere with the health or comfort of the victim.

It is, moreover, commonly held that it is not necessary that the injury shall have been directly caused at the hand of the offender. Thus, a man will be guilty of the offence of bodily harm if he assaults another with a weapon and the latter gets hurt in trying to snatch the weapon from the aggressor's hand to ward off the assault and defend himself. The same applies to a man who pursues another with a weapon, if the latter in running away, grasps at something which injures him.

The accused may be convicted notwithstanding **he may not have intended to injure any one person in particular** or by mistake or accident, **he injured some person other than that whom he intended to injure**.

Attempted Bodily Harm

The principle that in the crime of bodily harm, a generic intention to injure is sufficient, the offender being answerable for the harm which has actually ensued, had given rise to a debate which went on for numerous decades as to **whether attempted bodily harm can subsist**. Indeed, on a charge of an attempted offence, an intention to commit that particular offence is a requisite.

Since bodily harm depends on the harm that one actually caused, the question which was being posed was: can a charge of an attempt subsist in the cases of bodily harm, particularly because the responsibility of the agent in bodily harm can only be assessed in relation to the effect, that is the harm, actually produced?

According to **Mamo,** looking at the classification of offences as made by the law, it is not difficult to imagine certain circumstances in which, having regard to the means used by the offender and his mode of action, one may be certain of his intention to produce one rather than another of the effects therein mentioned. Should there still remain a doubt as to the gravity of the result aimed at by the offender, the principle will naturally apply, *"in dubio pro reo."*

In *Republic of Malta v. Dominic Briffa* (COCA 16/10/2003) the Court held that, *"jurists have disagreed as to whether attempted GBH is possible or not. Maltese Courts have always accepted the theory which allows for the crime of attempted GBH, provided that it is proved that the accused has this specific intent to cause one of the consequences which characterise GBH. Therefore, there can be no doubt that if a person hits a pregnant woman with this specific intent to cause a miscarriage, if such miscarriage does not subsist, and all the elements of an attempted offence subsist, the accused would be guilty of attempted GBH…As has been shown by case law, circumstances might subsist which convince the judge to the required level of proof beyond reasonable doubt that where a slight injury results, the intention of the aggressor was not merely to cause such slight injury or a generic intent to cause some form of harm, but* ***a specific intent to cause a grievous injury****."* This is also confirmed in *il-Pulużija v. Saviour Xerri* (2012). In fact, the Court proceeds, *"this is where the charge of attempted GBH can subsist."*

Then the Court agrees with the appellant to the effect that, *"normally whosever uses a cutting or pointed instrument like a knife to hit another would have the intention to injure grievously not merely to cause a superficial scratch. It is true that in this case, the injury was caused in the inferior parts of the body, but it is a known fact that even in such parts there exist blood vessels like arteries and veins, nerves and muscular systems which, if perforated or ruptured, can easily lead to serious consequences. Therefore, the First Court was correct when it held* ***for attempted GBH to subsist, there must be a specific intent to cause a particular grievous injury and not merely a generic intent to harm or injure****. Such specific intent can be deduced from circumstances including the type of weapon used, and the type of injury sustained by the victim. It is one thing to consider a scratch caused by somebody who simply waives a knife to intimidate another or to keep another at a distance from him, but it is a completely different thing to cause a stab womb as resulted in this case."*

In some other cases, the Court reached this conclusion.

In *Il-Pulużija v. Aaron Schembri (COM COCJA 24/11/2014)*, *il-Pulużija v. Christian Cardona (24/03/2014)*, *Il-Pulużija v. Carlo Stivala* (10/07/2017*)*, and *Il-Pulużija v. Amanda Abela* (27/06/2017), the Court concluded that no crime has been attempted. There was no attempt to cause grievous bodily harm because the evidence showed that this case did not relate to an attempt but to a completed crime insofar as the accused effectively punched the victim in his face as a result of which, the victim suffered disfigurement in his face which disfigurement was of a permanent nature.

In *Il-Pulużija v. Daniel Victor* (10/03/2014), the Court referred to the *Emmanuel Zammit* judgement, saying that, "*if the intention of the perpetrator was to cause harm, no matter how slight such could be,* ***he must answer for the ensuing consequences which are directly caused by his own act****. The Court notes that for the crime under examination to subsist,* ***it is sufficient that the intention is a generic one****. There is disagreement between various authors as to whether there can be an attempt of a grievous injury.* The Court refers to Mamo, *the principle that in the crime of bodily harm a generic intention to injure is sufficient, the offender being answerable for the harm which has actually ensued gives rise to the doubt whether a charge of attempt is legally possible. Looking at the classification of offences under the law, it is not difficult to imagine certain circumstances in which,* ***having***

regard to the means used by the offender and to the mode of *action, one may be certain of his intention to produce one rather than the other of the effects therein mentioned."*

Il-Puluzija v. Doloris Cutajar (COCA 24/01/2013), yet again referred to the *Dominic Briffa* judgement, stressing that obviously *"the elements of an attempted offence must subsist. So, for attempted GBH to subsist, a circumstance which, independent of the will of the offender, must have* ***prevented the consummation of the criminal offence****. Besides the criminal intent, there must be the material act or omission. If the perpetrator desisted voluntarily, one may not conclude that the crime was not consummated as a result of a circumstance which is independent of the will of the offender."*

Il-Pulużija v. George Farrugia (COCA 17/10/2013) cites *Il-Pulużija v. Mariano sive Mario Camilleri* (08/02/2002), in which the Court held, *"the fact that the ensuing result was a slight bodily harm does not necessarily mean that there could not have been this specific intent to cause a GBH. Whether such intent subsisted or otherwise, is a matter of fact to be decided upon by the Court which, amongst other things,* ***must give significant weight to the nature of the instrument used*** *and of the part of the victim's body the blows were directed to."*

The criminal intent is subjective, that is, what the perpetrator had in his mind at that moment in time, but **it is proved objectively**. The Court must examine and determine what were the means used by the perpetrator and hence these can **indicate the intent of the perpetrator**. Depending on whether this instrument had the ability to cause a grievous injury or not, and therefore, even the mode of action, how he perpetrated the crime, in which circumstances, using what, at which point in time, because all these elements will lead the Court to conclude what the intention was at that particular point in time. The approach is therefore on a case-by-case basis. It will have to determine, on the facts before it, whether the intent was one and not the other.

In bodily harm, in general all you need is the intent to harm. However, where the law allows that the Court determines that **the crime is more serious than merely slight bodily harm**, and therefore one has attempted GBH, then **this specific intent to cause a particular harm needs to be proven**.

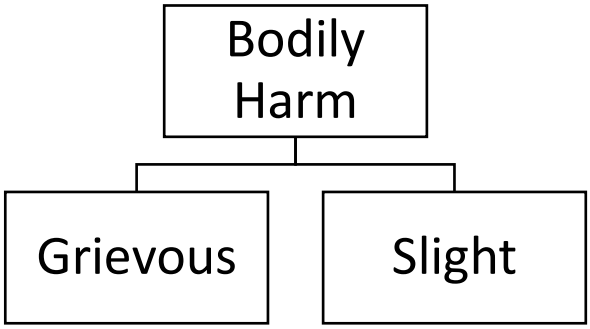
Two eminent jurists have been quoted. Manzini stated that, "*il dolo del delitto di lezione personale consiste della volontà e del consensoa libera e nel intenzione di colpire una persona.*"

This extract by Manzini was cited in the COCM as a COCJ judgement *Il-Pulużija v. Christopher Vella (2016)* which also made reference to *Republikka ta' Malta v. Stephen Pirotta (2015)*.

In *Republikka ta' Malta v. Salvatore sive Salvu Gauci (08/07/2004)*, the Court held that, *"although it is true that one must deduce the criminal intent of the agent, both from the material acts and from the circumstance's antecedent, simultaneous, and subsequent, to the same material act,* ***the criminal intent always remains a subjective matter****…x'kellu f'moħħu l-aġent fil-mument li għamel l-att?...and not simply an objective matter of what the agent should have anticipated or what a person with ordinary intelligence would have foreseen. Although it is true that sometimes the dividing line between animus necandi and animus*

nocendi is hazy, and although it is true that in this case, a weapon which was sufficient to kill was used, yet this fact on its own and of itself per se does not necessarily mean that there was the homicidal intent. In fact, our law contemplates as a GBH, hence with the generic intent to harm and not with the homicidal intent. The act, although caused with a pointed instrument, which penetrates into one of the cavities of the body."

Classifications of bodily harm (sections 216 & 218)



Landmark Judgements

Republic of Malta v. Mariano Girixti (03/10/2018) summarises some of the landmark judgements in the field, the main ones being COCA judgements especially those which distinguish the intent, such as *Republikka ta' Malta v. Francis Cassaletto* (08/11/1998) and *Repubblika ta' Malta v. Salvatore sive Gauci* (2004).

A. Grievous Bodily Harm

Article 216

> **216.** (1) A bodily harm is deemed to be grievous and is punishable with imprisonment for a term from one year to seven years -

Article 216 speaks of a bodily harm being considered as grievous under the law. Remember that what a medical might think is not necessarily what the law thinks. We need to consider the law from a legal point of view and not a medical point of view, despite the fact that medical's opinions are relevant.

Article 216(1)(a)

> (*a*) if it can give rise to danger of -
>
> (i) loss of life; or
>
> (ii) any permanent debility of the health or permanent functional debility of any organ of the body; or
>
> (iii) any permanent defect in any part of the physical structure of the body; or
>
> (iv) any permanent mental infirmity;

First of all, note the word *"danger"*. Where the person injured shall have recovered without ever having been, during his illness, in actual danger of life or of any of the said effects, it shall be deemed that the harm could have given rise to such danger **only when the danger was probable in view of the nature or the natural consequences of the harm**.

With respect to the danger of loss of life, even doctors cannot with scientific certainty, confirm certain facts insofar as whether a person was within a particular danger of losing

his/her life. Therefore, the clause of the law would still be applicable **if the danger was probable in view of the nature and the natural consequences of the harm inflicted**. So, if the danger is such that it is **probable**, not guaranteed, the section of the law would still apply in this regard.

With reference to the other parts of the law (permanent and functional debility) in *Pulużija v. Pierre Balzan and Jospeh sive Beppe Hilli* (09/04/2014), the Court held that, *"from the evidence produced, since there was a small amount of blood around the lungs, Vella was being considered to be in danger of losing his life but **the danger of losing one's life in end of itself does not transform the bodily harm into a GBH** unless together with that danger of loss of life, there is **a permanent debility or a permanent defect**."*

It, instead of the mere possibility of the danger above described, the bodily harm actually causes any permanent functional debility of the health or any permanent functional of an organ of the body and so on, then the GBH is considered as **aggravated and punished much more severally**. Such debility, defect or mental infirmity shall be deemed to be permanent even when this is only probably so.

Article 216(1)(b)

> (*b*) if it causes any deformity or disfigurement in the face, neck, or either of the hands of the person injured;

The word 'deformity' stands for the word *'mankament'* in Maltese and *'deformita'* in the old Italian text of our law. The word 'disfigurement' stands for the word *'sfregio'* therein and *'sfreġju'* in Maltese.

To 'deform' would imply something more serious and graver than to 'disfigure'. **Any external injury** which detracts from the appearance of the **face**, or of the **neck**, or of either of the **hands** (which are the most conspicuous parts of the human body), **provided it is not too trivial**, will be sufficient **'disfigurement'** to make the bodily harm grievous.

If the injury is more marked so as to give to any of these parts of the body affected an **unpleasant appearance**, as by causing a **considerable alteration of the tissues**, then this disfigurement becomes **deformity**.

In *Il-Pulużija v. Paul Spagnol (12/09/1996)*, the Court held that, *"disfigurement, as opposed to deformity, is constituted by **every harm to the features of the face, its linear harmony and also its aesthetics**. Jurisprudence establishes that such harm must be **visible from a normal distance**, generally used by people conversing with one another."*

In *Il-Pulużija v. William Mercieca* (COCA 20/06/2014), the Court distinguished between 'deformity' and 'disfigurement' by citing from the Macmillan English dictionary, *"deformity means a part of somebody's body that is not the normal shape. On the other hand, disfigurement means to spoil the appearance of someone or something."*

In *Il-Pulużija v. James Farrugia, John Farrugia & Omar Caruana*, the Court said, *"disfigurement in the face means **every deterioration of the facial features** which although*

it does not cause repulsion, it produces a 'peggioramento di spetto notevole o complessivo o per l'entità della alterazione stessa o per l'espressione d'assieme dell'voltò.'"

In the *Il-Pulużija v. Paul Spagnol (12/09/1996)* judgement, it was stated that the **teeth are not part of the face**, but the Court qualified this conclusion to the effect that **the loss of various teeth can lead to disfigurement and to deformity of the face** because of the effects such loss leaves on the face especially the mouth which is a part of the face.

Here, as well the Court further distinguished between 'deformity' and 'disfigurement' saying that, *"deformity leads to a **deterioration of the facial features**. Disfigurement can comprise every harm that diminishes the linear harmony in the face and its aesthetic beauty. The rapture of an incisor can be a grievous injury which causes deformity or disfigurement of the face. It is immaterial that with modern technological innovation, one can conceal the negative aspects of broken teeth. **What is important for legal purposes is that the injury caused would not heal in a natural way** in which case, the facial harmony would be permanently affected."*

In *Il-Pulużija v. Emily Zahra (COCA 15/02/1958)*, the Court held *"in relation to crimes against the person, there subsists disfigurement even when the scar is visible, meaning that if it may be noted from a normal distance. If the disfigurement is simple, grave or permanent, is a matter of extent or degree, but if there subsists a scar there will always be disfigurement."*

Does the harm have to be permanent?
It must be clearly noted that, in our law, in order that BH be considered grievous, it is not necessary that the deformity or disfigurement of the face, or of the neck or of either of the hands be serious and permanent. If it is serious and permanent, then this is a reason for a further aggravation of the offence and for increasing the punishment.

In *Pulużija v. Jonathan Farrugia* (15/02/2012), the Court clearly stated that, *"the disfigurement contemplated by article 216(1)(b), **may be merely temporary**. In other words, until the scar heals."*

In *Pulużija v. Keith Grech* (26/12/2017), the Court held, *"apparent demands that for the Court to determine whether disfigurement in the face subsists or otherwise, an amount of time must pass to enable the Court to consider the effects which the wound leaves on the face itself. This is wrong. Disfigurement, **even only for a few days**, for example, until stitches are in place, amounts to GBH although after stitches are removed and the mark fades, **no material disfigurement subsists**."*

In *Il-Pulużija v. Francis Dingli* (12/09/1996), the Court held that, *"for article 216(1)(b), **it is not necessary that the deformity or disfigurement be permanent** or that it subsists for a number of hours, days, weeks or months. If the disfigurement is **both serious and permanent**, the offence would become **very grievous** (gravissima) as contemplated by article 218(1)(b)."*

In *Il-Pulużija v. Fortunato Sultana* (05/02/1998), the Court held that, *"in terms of article 216(1)(b), the bodily harm is grievous if amongst other circumstances it leads to*

disfigurement in the face. The law does not require that such disfigurement subsists for a number of days. Disfigurement in the face, in the neck or in either of the hands, ***even if just for a few days****, remains disfigurement for all intents and purposes of law. The duration, the length of time and the permanence of such disfigurement is only relevant when in conjunction with the gravity of the bodily harm,* ***it leads to the so-called very grievous bodily harm as contemplated by article 218(1)(b)****."*

So, the responsibility of the offender will not be reduced. In other words, there will be no mitigating factor or possible defence, if for example, such disfigurement or deformity can be eliminated or reduced by some special treatment, or plastic surgery.

What if the harm might be eliminated or reduced?
Responsibility for the offence will not abate merely because the deformity or the disfigurement might have been eliminated or reduced by some special treatment such as plastic surgery, or in some other way, such as an artificial denture or a glass eye. Nor does the responsibility abate because the deformity or the disfigurement may be concealed by the hair, or the beard, or by a veil or in some other manner. In all these cases, the fact of the deformity or disfigurement is left and the nexus of the causality with the act of the offender remains unaffected. So, this will not benefit the offender in this regard.

How important are medical reports?
In *Pulużija v. Francis Muscat* (02/10/2018), the Court held that, *"the best evidence proving the effect which the punch had on Montanaro's face would have been a photo or photos taken a few hours after the incident. It is incorrect to conclude, as is usually concluded, that for GBH to be proved beyond reasonable doubt, either a medical certificate must be produced by way of documentary evidence or else, a doctor must testify in open Court. Such certificate or deposition* (testimony) *can be required if from the evidence given by other witnesses, including the complainant* (the alleged victim), *the Court still has a* ***reasonable doubt*** *whether there really subsisted a grievous injury on the alleged victim or otherwise."*

The *Il-Pulużija v. Paul Spagnol (12/09/1996) case* also clarified that, *"if there are scars, there is necessarily a disfigurement but there is no disfigurement if a change of colour of the skin subsists. Even a change in colour, however, or a fading of the skin, can produce disfigurement and deformity.* ***Everything depends on the extent and the degree of the harm caused****. It is not so important how the harm is classified or categorised from a medical point of view or in medical jargon. What is crucial under law is the effects such harm leaves on the face."*

Il-Pulużija v. Joseph Azzopardi (COCA 30/07/2014), *"whether a bodily harm is slight or very slight, grievous or very grievous, is a fact which has to be dealt with by means of an exercise of the Court's discretion. Thus, it is not an issue which necessarily and exclusively depends upon a medical opinion. Doctors and surgeons testify about what they came across from an empirical, factual and medical perspective. If the Court so allows them, they can express an opinion on various matters, including the cause and manner of how the harm was sustained, including the compatibility of symptoms which were clinically identified. However, it is up to the judge in the light of all evidence produced, including the testimony of medical experts, to determine the nature of the bodily harm."*

In *Il-Pulużija v. Srdan Simic* (2018), the Court held that, *"images of the victim constitute important evidence which can prove the gravity of the offence."*

Article 216(1)(c)

> (*c*) if it is caused by any wound which penetrates into one of the cavities of the body, without producing any of the effects mentioned in article 218;

The cavities of the body to which reference is here made are the cranial cavity, the thoracic cavity, and the abdominal cavity. The mere fact of penetration of the wound, without having produced any serious or permanent harm, is enough for the law to deem the injury grievous because the law wants to ensure that there is no such risk insofar as the dire consequences which can follow from the mere penetration. Therefore, even the **possibility of such serious effects** is punished by the law as grievous since it affects the vital parts of the body in this regard.

Article 216(1)(d)

> (*d*) if it causes any mental or physical infirmity lasting for a period of thirty days or more; or if the party injured is incapacitated, for a like period, from attending to his occupation;

The system of making the gravity of the injury depend on the duration of the infirmity was criticised by noted jurists on the basis that such criterion makes the matter of a day or a few hours of difference decisive and productive of an enormous difference in punishment. Legislatures which have included such provision in their codes justify it by its practicality and convenience. It provides an easily ascertainable standard which is better than mere conjectures or hypotheses. So, we are speaking of an objective assessment because there are a number of days stipulated by law.

According to our law, the infirmity and the incapacity to attend one's occupation are contemplated alternatively. When the law refers to occupation, keep in mind that various persons can have a part time job or possibly, 2 or 3 jobs. What the law is referring to is the **victim's ordinary occupation**, and not any other job which the victim performs.

The injury will be grievous if it produces the incapacity of the victim to attend to his ordinary calling or work for thirty days or more, **even though during the whole or some part of such time, the victim was not totally or absolutely disabled from all kinds of work**.

Article 216(1)(e)

> (*e*) if, being committed on a woman with child, it hastens delivery.

If instead of merely hastening delivery, the injury caused miscarriage, as contemplated in Article 218(1)(c), then the punishment is considerably increased; it is *gravissima.* While in the case of a miscarriage, there is the extrusion of a foetus at a stage when it is incapable of an independent life, in this case there is merely the acceleration of delivery or premature

delivery consisting in the extrusion of a child in such an advanced stage as to be capable of living. Miscarriage has irreversible consequences.

Did the perpetrator have to be aware of the pregnancy?
Italian text writers and commentators discuss the question whether knowledge of the pregnancy of the woman on the part of the offender is a requirement of the offence. We submit that in our law, such knowledge is not an ingredient of the offence.

In our law, **pre-existing causes which may contribute to make the injury serious, though unknown to the offender, will not diminish his responsibility.** It is only supervening accidental causes that induce a reduction of punishment.

Other cases of grievous bodily harm
Article 218

> **218.** (1) A grievous bodily harm is punishable with imprisonment for a term from five to ten years -
>
> (*a*) if it causes any permanent debility of the health or any permanent functional debility of any organ of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity;
>
> (*b*) if it causes any serious and permanent disfigurement of the face, neck, or either of the hands of the person injured;
>
> (*c*) if, being committed on a woman with child, it causes miscarriage.
>
> (2) Any debility of the health or any functional debility of any organ of the body, and any mental infirmity, serious disfigurement, or defect shall be deemed to be permanent even when it is probably so.
>
> (3) The punishment for the offences referred to in sub-article (1) shall be that established in article 312(2) if the bodily harm is committed by means of any explosive fluid or substance.

You have an **escalation of gravity** because you have an escalation of the consequences/effects of the act, and this is reflected in the escalation of the punishment which is triplicated.

In terms of sub-article (1)(a), in *Pulużija v. Alfred Caruana (COCA 27/02/2016),* the Court held that, *"the effects contemplated by article 218(1)(a) are deemed to be **permanent even if this is probably so**."*

Courts have reached conclusions on permanence when they have expert certification that the effects that an injury has led to are such that they are **probably permanent**, therefore on a balance of probability.

Objective of Punishment
In relation to bodily harm in a general way, there are references to **the objectives of punishment** in *Police v. Godwin Micallef* (04/11/2019) and in relation to what one may call maybe as an implicit sentencing policy. In our law, we do not have a fully-fledged sentencing policy.

But in an indirect manner, our Courts are developing some principles/rules and in this context, in *Pulużija v. Stefano Persiano* (10/01/2014), the Court held that, *"when violence against a person is used and inflicted upon a victim, the punishment should be an operative and effective sentence of imprisonment with immediate effect, not a suspended sentence of imprisonment. When permanent effects are caused to a victim, the perpetrator should not be condemned to a mere sentence of imprisonment which is suspended at law since this would not be proportionate with the crime committed and would hence be far too lenient."*

This line of thought has been established also by other superior courts especially after the dictum *Pulużija v. Joseph* Zahra (09/09/2002). Here the COCA held that, *"any form of violence against a person, as a general rule, should entail a punishment consisting in the deprivation of liberty with immediate effect."*

Of course, Courts do not have to necessarily follow what other judgements state. There is a trend to move in this direction but there are Courts which have not followed this implicit sentencing policy such as in the *Police v. Francesco Nanni* (07/03/2012) judgement where the judge upheld the following, "*It is true that there is a line of judgements which state that violence should lead to an effective prison sentence. But it also true that the Court must reach its decision on the basis of the circumstances in each and every particular case."*

Supervening Accidental Causes

Decrease of punishment in case of supervening accidental cause
Article 219

> **219.** The punishments laid down in articles 216 and 218 shall be decreased by one or two degrees if a supervening accidental cause has contributed to produce the effects mentioned in the said articles.

We have said that where a grievous bodily harm has in fact been caused, it is not necessary to prove that the doer had the specific intent to cause that particular degree of harm. With that being said, it is nevertheless considered that it would be contrary to the dictates of justice to hold the doer responsible **for effects which, perhaps, he did not intend and which, in any case, his act would not have produced but for the supervening accidental causes which contributed to make the effects of his act serious**. So, we are dealing with situations whereby the act of a person **would not have produced the effects where it not for these so-called supervening accidental causes**

There is not in such case a direct and complete causal connection between the act of the offender and the effects ensuing.

It is essential that the contributory causes are –

1) **Supervening** – arising after the infliction of the harm by the offender; AND
2) **Accidental** – altogether independent of the act of the offender.

So, if previously to the crime, the victim was inflicted by a particular disease or medical condition which could have contributed to make the crime grievous or more grievous, and therefore, this medical condition had an impact on the effect of the crime itself, the existence and the evidence of this previous medical disease or condition **will not avail or benefit the offender**. Nor will any circumstance which, though supervening, is connected to the act of the defendant as a consequence thereof.

The main judgement in this regard is *Repubblika ta' Malta v. Slavatore sive Savlu Gauci*, where the Court held that, *"cases of supervening accidental contributory causes would be, for instance, the negligence of the doctor attending the patient or the improper application to the wound or the non-observance by the patient of the doctor's prescriptions and instructions. In all such cases, we have a new fact, a positive fact,* ***independent of the act of the offender*** *which is super added to the injury* ***and produces effects which the injury by itself would not have produced.*** *The case would be otherwise if, for instance, the wound turns to gang green or septic poisoning or becomes grievous by its natural consequences or from an operation rendered advisable by the act of the accused. The rationale is that a person who brought the victim into some new hazard of serious personal injury may fairly be held responsible if any extraneous circumstances that were not intrinsically impossible should convert that hazard into a certainty. The doctrine of supervening accidental causes applies only to bodily harm and not to wilful homicide."*

In fact, the Court here refers to the *Francis Cassaletto judgement* and explains supervening accidental causes in this context, *"the appellant should know that the concept of supervening accidental causes can never apply to the crime of wilful homicide. The judge who did the summing up to the jury explained well that the defence council was incorrect when he argued that 'supervening' does not mean 'following'. On the contrary, 'supervening' means 'li tiġi wara', hence it does not precede but it follows something else. It is important to note that the section of the law was taken from the original Italian text which in fact uses the words 'causa accidentale sopra aggiunta.'"*

Therefore, It is to be clearly noted that the doctrine of super- vening accidental causes applies only in regard to bodily harm. It does not apply in regard to the crime of wilful homicide. In other words, if the intention of the agent was specifically that of killing or of exposing the life of the victim to manifest jeopardy and death in fact ensues, the agent is guilty of wilful homicide without any legal extenuation even if death had ensued partly as a result of supervening accidental causes.

Grievous Bodily Harm by Firearms, etc
Article 217

> **217.** A grievous bodily harm is punishable with imprisonment for a term from two to ten years if it is committed with arms proper, or with a cutting or pointed instrument, or by means of any explosive, or any burning or corrosive fluid or substance:
>
> Provided that where the offence is committed by means of any explosive fluid or substance the minimum punishment shall be imprisonment for four years and the provisions of the Probation Act shall not be applicable.

The means used to cause the harm are sufficiently serious in themselves to require more energetic repression. Apart from the fact that there means are calculated and likely to cause extensive harm, the use of them discloses a greater degree of malice, greater determination and a more dangerous character on the part of the offender.

Arms proper are those defined in Article 64, namely, all firearms, all other weapons, instruments and utensils mainly intended for defensive or offensive purposes.

Griveious bodily harm from which death ensues
Article 220

> **220.** (1) Whosoever shall be guilty of a grievous bodily harm from which death shall ensue solely as a result of the nature or the natural consequences of the harm and not of any supervening accidental cause, shall be liable -
>
> (*a*) to imprisonment for a term from six to twenty years, if death shall ensue within forty days to be reckoned from the midnight immediately preceding the crime;
>
> (*b*) to imprisonment for a term from six to twelve years, if death shall ensue after the said forty days, but within one year to be reckoned as above.
>
> (2) If death shall ensue as a result of a supervening accidental cause and not solely as a result of the nature or the natural consequences of the harm, the offender shall, on conviction, be liable to imprisonment for a term from five to ten years.
>
> (3) If the bodily harm is inflicted within the limits of the territorial jurisdiction of Malta, the crime shall be held to have been completed within those limits, even if the death of the person injured shall occur outside those limits.

'GBH from which death ensues' and 'GBH followed by death' are one and the same thing. As Carrara upholds, homicide can be "*po' essere doloso, colposo, or prete intenzionale*." This is a form of homicide *"praeter intentionem".*

1) ***Mens Rea***

If the intention of the doer was that of killing or of putting the life of the victim in manifest danger, and death ensues, he is guilty of wilful homicide. **Death being easily foreseeable as a probable consequence of the act, the grave result of which ensues is treated by the law as if it were intentional.** Therefore, the death as a likely consequence of the act, in this context, would eliminate the intention to harm. Because if the death was obviously foreseeable, it was clear that the outcome of one's act or omission is most likely to lead to the death itself, in that case, the objective facts would indicate that probably the intention was not merely to injure but to kill or to place the life of another in manifest jeopardy.

In a few words, for this crime to subsist, **the intention of the offender was merely to cause a bodily harm**; it was to injure/harm, even though possibly to seriously harm or injure. **It was not such as to expose the victim to manifest danger in the context of wilful homicide**. In other words, where the intention of the offender was merely to cause a bodily harm, even though serious, but not such as to expose the victim to manifest danger of life, and death ensues, then this result goes beyond this intention and the law cannot justly punish the act as one of wilful homicide.

The death which was **neither desired nor actually foreseen nor patently foreseeable as a likely consequence of the act**, cannot fairly be charged against the offender as wilful.

So, for this form of criminality to arise, it is essential that the intention of the agent was either (1) **not to kill**, so, no *animus necandi*, or (2) it was not that of exposing the life of the victim to manifest jeopardy, but it was **only that to cause a bodily harm**, whatever the degree, but the extent of that bodily harm cannot be such as makes the contemplation of death manifest.

In so far as his intention was directed to the wrongful injury of another, he must, though to a lesser extent than if he had intended, directly or indirectly, to kill, answer for the death which his act has in fact ensued.

2) ***Actus Reus***

In so far as regards the material element, this consists in any grievous bodily harm of those already described, from which death ensues. For the purposes of punishment, the law distinguishes between –

a. The case in which death follows solely as a result of the nature or the natural consequences of the injury; and
b. The case in which supervening accidental causes have contributed to bring about the fatal result.

In respect of (a), the law further distinguishes between the case in which death happens within 40 days and the case in which death occurs later than 40 days but within a year.

Beyond this time, if death occurs, it will not hold him especially liable for it. In principle, of course, the interval which may elapse between the commission of the criminal act whereby

the injury is inflicted and the death of the sufferer in consequence of that injury, might have no effect in our estimate of the offender's guilt.

Punishment
The punishment varies according as to whether the death ensues solely as a result of the nature of natural consequences of the harm or also as a result of the supervening accidental causes.

Ir-Repubblika ta' Malta v. Salvatore sive Salvu Gauci
In a nutshell, the accused felt that the victim, Anna Kok, caused various matrimonial problems between him and his wife, his wife being the victim's sister. The accused had admitted assuming possession of a knife, not to kill Anna Kok but to intimidate her in the street. A police officer, PS1404 Anthony Cutajar, had testified that the accused had told him that he didn't want to kill her, and **he aimed at her legs**. The accused pleaded before the Court of Appeal that the prevailing circumstances where such as to exclude homicidal intent and at worse, the resulting crime would be GBH from which death ensues.

The COCA upheld that, "*there is no doubt that the fileting knife is such as to be able to cause death and that his intentions where not noble when he met the victim in the street carrying the knife*. *But the blows on her body where* ***not directed at vital parts of the body*** *such as cavities containing delicate organs which are suspectable to haemorrhages and which control vital body functions such as the heart, lungs and the brain. The blows were directed and endured in the right leg above the knee as a result of which, Anna Kok bled profusely to death."*

The Court posed the following question: **would a reasonable man have foreseen Anna Kok's death as a probable consequence of the stab in the right leg?** The same Court answered this question, replying in the negative. Consequently, the verdict of guilt for wilful homicide was revoked into one of guilt for grievous bodily harm from which death ensues which of course, led to a reduction in the punishment. So, **the COCA determined that the intention of the agent was not homicidal**, therefore, eliminating the two types of criminal intent by means of which one can carry out wilful homicide. **The moment you eliminate the homicidal intent, the intent is that to harm**.

B. **Slight Bodily Harm**

Article 221

221. (1) A bodily harm which does not produce any of the effects referred to in the preceding articles of this Sub-title, shall be deemed to be slight, and shall be punishable with imprisonment for a term not exceeding two years, or with a fine (*multa*).

(2) Where the offence is committed by any of the means referred to in article 217, it shall be punishable with imprisonment for a term from two to seven years.

In effect, a bodily harm which is not grievous is slight. But, of course, the definition which article 214 gives of bodily harm generally, applies also to slight bodily harms.

In other words, a slight bodily harm –

1) Consists in a harm to the body or health or in a mental derangement which is not grievous within the meaning of the preceding articles of this Sub-title; and which

2) Is caused by a person acting without any intention to kill or to put the life of any person in manifest jeopardy but with the intention of causing a personal hurt.

Here a stab or a cut, or a bruise, or lacerated wound or mental shock or any other hurt or injury calculated to interfere with the health or comfort of a person, caused in the foresaid circumstances, would be of a slight nature.

The nature of the instrument or means with which it is caused, or the manner how it is caused is, generally, immaterial. **But if the offence is committed by an arm proper or any other of the means specified in section 217, the ordinary punishment is substantially increased.** Conversely, where the effect, considered both **physically** and **morally**, is of small consequence to the injured party, the ordinary punishment for slight bodily harm is reduced.

The Court has discretion in determining whether the harm caused is slight, grievous or otherwise.

Aggravations

> **222.** (1) The punishments established in articles 216, 217, 218 and 220, and in sub-articles (1) and (2) of the last preceding article shall be increased by one degree when the harm is committed -
>
> (*a*) on the person of any one of the parents or any other legitimate and natural ascendant, or on the person of a legitimate and natural brother or sister, or on the person of any one of the spouses, or on the person of any one of the natural parents, or on any person mentioned in article 202(*h*);
>
> (*b*) on the person of any witness or referee who shall have given evidence or an opinion in any suit, and on account of such evidence or opinion, or on the person of a child under nine years of age;
>
> (*c*) on the person of whosoever was a public officer or was lawfully charged with a public duty or is or was an officer or employee of a body corporate established by law and the offence was committed because of that person having exercised his functions;
>
> (*d*) on the person of whosoever was exercising his lawful duties as a private guard, a specialised private guard or community officer in accordance with the provisions of the Private Guards and Community Officers Act.
>
> (2) Nevertheless, no increase of punishment shall take place where the offender, without intent to cause harm to any particular person, or with intent to cause harm to some other person, shall, by mistake or accident, cause harm to any of the persons referred to in sub-article (1)(*a*) and (*b*).

The law seems to give the possibility to the judge to impose a heftier sentence if the judge determines that the crime was aggravated.

(a) In terms of bodily harm committed on a relative, the law wants to ensure that, as much as possible, the feeling of trust between relatives is protected. The offender not only injures the right of personal safety and the integrity which belongs to every individual, but it also offends against that special duty of love and good feeling arising out of the bonds of close family relationships.

(b) In terms of bodily harm committed on a witness or a referee, the law wants to ensure that it creates a disincentive for you not to intimate or try to change the decision-makers mind. Indeed, this person is in a vulnerable position because they can be further exposed of acts of third parties who might want to intimate him/her to change his/her judgement. In other words, a greater than the ordinary degree of protection is due to the persons giving evidence or an expert opinion in legal proceedings, thereby to ensure the freedom of such evidence or opinion in legal proceedings so essential to the proper administration of justice.

(c) The same applies with respect to persons in decision-making situations, such as public officers.

Proceedings upon complaint
In the case of slight bodily harm not committed by an arm proper or other means mentioned in article 217, and of slight bodily harm of small consequence, proceedings can be undertaken **only by means of a compliant of the injured party**. So, the police cannot institute proceedings *ex officio* but the injured party will have to complain. This insofar as the offence is not committed on a witness or referee.

Bodily harm is also an **extraditable offence** under our law and can be subject to the EAW by means of which a person can be surrendered from one EU State to the other.

Sub-title III: OF JUSTIFIABLE HOMICIDE OR BODILY HARM

JUSTIFIABLE HOMICIDE OR BODILY HARM
Article 223

> **223.** No offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority, or is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person.

It is not every homicide or bodily harm that is criminal. This section speaks of necessity, whereby we are dealing in self-defence and the defence of another person.

An important element of self-defence is that of proportionality. **Self-defence necessitates the element of proportionality**. With that being said, if one doesn't prove that the proportionate reaction of the accused was justified, that defence, although unsuccessful, can be used for the purposes of another defence (excess in self-defence).

The difference is that self-defence is a justification, it is a full defence, whereas the excuse is not a total defence but a partial one, merely serving to mitigate the punishment. In the latter case, guilt is nevertheless established. The person is guilty but guilty of an excusable crime because the law understands that a person can be placed either externally, with provocation, or internally with heat of blood and sudden passion and mental agitation, whereby at the moment in time when the crime is being committed, he/she is **incapable of reflecting**. But there is criminal intent anyway. So, the law is not excluding the *mens rea,* but it is granting certain extraordinary identifiable circumstances which the law itself acknowledges wherein the person is considered as less responsible than any other ordinary situation where there is no excuse.

In *Pulużija v. Carmenu Cutajar* (COCA 04/02/2003), the Court held that, *"in order to plead legitimate self-defence successfully in accordance with article 223, the following must result at least **on a balance of probabilities**: The accused must have caused harm or in the case of alleged wilful homicide, he must have killed to defend himself or to defend someone else from an evil which is **(1)** unjust, **(2)** grave and **(3)** inevitable. It is grave if it is directed against someone's personal safety, that is, if the accused who acted to defend himself or others perceives an evil directed against him or others from the aggressor. The evil threatened must also be inevitable, that is, actual of that moment in time not a threat relating to the future. It has to be spontaneous, not foreseen and one which may not be reasonably avoided by any other means except by the act of the accused who caused the harm or death of the aggressor. Moreover, the evil threatened must be unjust, that is, not ordered or authorised by law or by a lawful authority.*

*Finally, **there must be an element of proportionality between the danger perceived and the means used by the accused to defend himself from such danger**. In the absence of such proportionality, there will be **excess in self-defence** contemplated by article 227(d) of the Criminal Code, rendering the act from a justifiable one to an excusable one."*

Here we see how even when our Courts consider certain crimes, they conduct an exercise. They see whether the facts of the case fall within the remit of a particular section. If there

was no proportionality, then nevertheless the excuse can be considered. You can argue with relief that you proved the elements of self-defence in entirety, but should the jurors disagree, you invite them to consider that the actual act or omission of the accused in killing the victim, was such as to have been accompanied by the elements of self-defence but with the lack of proportionality, and hence, the actions are excusable.

When we speak of the requirements unjust, grave and inevitable, our Courts say that 'unjust' means 'unlawful.' On the other hand, grave is one which threatens life, limbs, body or chastity of an individual.

In *Pulużija v. Joseph Psaila* (COCA 28/01/1995), the Court held that, "*to plead self-defence successfully, the law imposes certain pre-requisites. The evil threatened by means of an aggression or damages must be unjust, grave and inevitable. The self-defence must be consummated to avoid consequences which, had they occurred, would cause irreparable harm and also, in order to avoid a danger that could not have been avoided in any other way. Hence,* ***the danger must be actual, spontaneous, absolute and unforeseen****. Otherwise, it could give rise to provocation not to legitimate self-defence. In self-defence, the evil threatened must be actual, not imminent."*

In *Pulużija v. Salvu Psaila* (09/11/1963), the Court held that, *"the justification of self-defence implies that* ***(1)*** *the evil repelled by the agent is unjust and that the aggressor's attack is both unjust and illegitimate. Hence, he who commits an act before finding himself in danger does not deserve impunity;* ***(2)*** *the evil must be actual and present throughout the reaction, in other words, it must subsist throughout the entire fight. If it ceases, self-defence cannot be pleaded successfully; and* ***(3)*** *the evil must be inevitable. The evil threatened and the danger must be grave and between on the one hand, the evil threatened and on the other hand, the danger perceived resulting in the reaction of the accused intended to avoid such danger there must be proportionality."*

In order for self-defence to subsist, there must have been no way out (actual, sudden, absolute), whereby the accused could not do otherwise.

In *Pulużija v. Augusto Auguliaro* (COCA 26/08/1998), the Court held that, *"not all those who act to defend themselves can invoke article 223 in their defence. The law clearly refers to the* ***actual necessity to defend oneself or others****. It is now a settled matter jurisprudentially that in order to plead self-defence successfully, the aggression one suffers must be unjust, grave and inevitable. The latter element (inevitability) lacks when one instead of avoiding a fight when this can reasonably be avoided, affronts and confronts the aggressor without any valid reason. Hence, directly participating in a physical confrontation."*

On inevitability, in *Repubblika ta' Malta v. Martina Galea* (COCA 14/01/1986), the Court held that, *"an essential requisite to successfully plead self-defence is inevitability. The accused cannot escape though he would, with the consequence that* ***self-defence cannot be pleaded if the accused would not escape though he could****. The Italian Cassassiano on the 26th of January 1948 upheld 'per la legittima difesa non occorre che sia in atto la violenza basta in pericolo e sufficiente il giustificato ti more di un offeso i niente.'"*

Here, in this context, we need to appreciate inevitability as a no way out. Moreover, if all the elements of self-defence are proved, but there lacks the proportionality, then one may benefit of the excuse under section 227. The law considers certain acts which lead to excusable crimes still as blame worthy. So, it attaches criminal liability to these acts anyway.

In *R. v. Manwel Mercieca* (27/10/1955), the Court held that, *"the verdict in a trial by jury wherein one stood accused of wilful homicide is such that one is found not guilty of wilful homicide but guilty of having exceeded the limits of self-defence means that the accused has been declared guilty of the crime as a result of having exceeded the limits of self-defence. Therefore, the accused may not plead that the jury's verdict excluded the bill of inditement and that consequentially, the crime which the convict was accused with was also excluded."*

So, guilt is established anyway.

Cases of lawful defence
Article 224

> **224.** Cases of actual necessity of lawful defence shall include the following:
>
> (*a*) where the homicide or bodily harm is committed in the act of repelling, during the night-time, the scaling or breaking of enclosures, walls, or the entrance doors of any house or inhabited apartment, or of the appurtenances thereof having a direct or an indirect communication with such house or apartment;
>
> (*b*) where the homicide or bodily harm is committed in the act of defence against any person committing theft or plunder, with violence, or attempting to commit such theft or plunder;
>
> (*c*) where the homicide or bodily harm is imposed by the actual necessity of the defence of one's own chastity or of the chastity of another person.

In *Pulużija v. Saviour* Sammut (15/09/2014), the Court determined that sections 223 and 224 originated from the *Codice delle Due Sicile* and from the French *Code Penale.* The Court reached this conclusion by referring to the report of Sir Andrew Jameson which was presented to the government with a commentary on these legal provisions. For the purpose of interpretation, the Court analysed works of jurists including Mamo, and the Italian and French counterpart provisions of the law in this regard. One of the points the Court raised and placed emphasis upon is Antolisei who upholds *"occorre in fine che l'aggressore abbia creato per il diretto preso di mira un pericolo attuale"* (it is speaking of actual and not immanent, as a result of which there is a distinction between self-defence and provocation).

Besides Italian law, the Court also analysed Scottish law which also portrays similar elements. In citing a few cases, it held, *"to reach the final result, that is to say, the result of complete acquittal, you must be satisfied of two things:* ***(1)*** *the first of these is that the accused was in an immediate danger of his own life. He must have had reasonable grounds*

for apprehension for his own safety and his alarm must have satisfied two things: (a) he must have had reasonable grounds for apprehension of his own safety and (b) the alarm must have been well-founded and there must have been no other means of escaping from the danger to which he was subjected. ***(2)*** *The second point you must be satisfied with is that the means which he took to overcome the assaults were necessary. Therefore, the aggression must be* ***unjust****,* ***grave*** *and* ***inevitable****.*

In relation to the first element, it is not necessary that there be violence. Antolisei upheld that 'l'oggetto del attacco deve essere un diritto.' In relation to gravity of the aggression, Manzini upheld, 'la giustificante non e condizionale alla irreparabilità del danno ma richiede soltanto che siavi un pericolo attuale.' Finally, in relation to the last element of inevitability, the danger must be sudden, meaning that the accused did not know of and did not know about such danger ***because if the accused was previously aware of such danger, there would not be legitimate self-defence but provocation****. The aggression must be absolute as Carrara upholds.*

Judge Harding stated that the requisite of gravity necessitates proportionality between the danger threatened and the reaction itself."

Sub-title IV: OF INVOLUNTARY HOMICIDE OR BODILY HARM

INVOLUNTARY HOMICIDE
Article 225

> **225.** (1) Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine (*multa*) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).
>
> (2) Where the offender has caused the death of more than one person or where in addition to causing the death of a person the offender has also caused bodily harm to another person or other persons the punishment shall be that of imprisonment of a term of up to ten years.

Here, we are dealing with *culpa*. There is a crucial difference between *dolus* and *culpa* being that ***dolus* presupposes that the harmful event was foreseen** whereas in *culpa*, we have **lack of foresight**. So, the person committing these crimes **lacked foresight**. With that being said, they are crimes nonetheless because although the offender lacked foresight, the law expected him to have such foresight. Indeed, we are in the realm of *culpa,* that is, in the sphere of negligence as opposed to 'recklessness' which is akin with positive indirect intent. The technical terminology is '**culpable negligence**.'

In *Il-Pulużija v. Joseph Piscopo* (COM 11/11/2019), the Court defines *culpa* in such way as to ensure that it possesses the following features:
"(1) A voluntary act,
(2) The lack of foresight, in connection with the harmful event caused by such voluntary act [link of causation] *and*
(3) The possibility to foresee such harmful event.

If the harmful event was not foreseeable except by means of extraordinary diligence which the law does not expect and which, at most, may lead to culpa levissima, it is not subjectable to criminal law. There shall hence not subsist any criminal responsibility."

A tripod of blame is used frequently by Courts when they try to summarise the concept of *culpa*.

In *Il-Pulużija v. Darren Borg* (19/05/2014), the Court held that, *"for culpa to be proved, there must subsist these three elements:*
"(1) La volontarietà dell'atto,
(2) La mancata previsione dell'effetto nocivo,
(3) La possibilità di prevedere."

Il-Pulużija v. Roderick Azzopardi, Aldo Siniana, Carmelo Camilleri (26/10/2017),
"(*1) Voluntary negligent conduct which is imprudent and careless,*
(2) The link between the act or omission and the harmful event,
(3) The element of foreseeability."

This is a section of the law which shows the humanity of the law. We see that the law does not expect miracles of human beings, it doesn't expect extraordinary diligence, but it does expect each and every one of us to have a **certain level/standard of due diligence which any ordinary and reasonable man would exercise**. Obviously, if there is lack of such diligence, it is only fair that the law punishes the outcome which is the harmful event which was caused by lack of such diligence. So, if there is a section of the law in our Criminal Code which shows the extent to which Criminal Law relies on fault, that is, immutability, it is this section. Here, the Court has already shown the extent to which no extraordinary diligence is expected of human beings but a certain amount and level of care/attention.

In *Il-Pulużija v. Troy Joseph Emanuel Caruana* (03/05/2019 COCA), the Court cites as follows, "*Mantovani and Podavani combined rules proclaimed by Antolisei with rules relating to foreseeability and inevitability in such way as to ensure that culpa is reflected in various elements."*

One mustn't confuse **foresight** and **foreseeability**. If there is actual foresight, one is in the wilful area and where there is foreseeability and no foresight, one is in the realm of *culpa*. In Maltese, foresight is referred to as *'event previst'* whereas something foreseeable which was not foreseen is referred to as *'kien previdibli.'*

In *Il-Pulużija v. Paul Buttigieg and Marcia Borg* (COM 20/07/2018), the Court held that, *"the essence of negligence is made to consist in the possibility of foreseeing the event which has not been foreseen. Hence, the essence of negligence is* ***foreseeability****."*

The diligence required of us is very similar to the Roman Law concept of the ***Bonus Paterfamilias***. Indeed, Criminal Law borrows some concepts which derive from Roman Law. The law expects us to exercise a certain level and standard of diligence. The concept is also cited in various judgements, including the aforementioned judgement.

In *Il-Pulużija v. Anthony Pace*, in citing Carrara, the Court held that, *"la colpa consiste nella prevedibilità dell' risultato non voluto."* Carrara captures in a few words the very essence of involuntary homicide and bodily harm.

In *Il-Pulużija v. Joseph Zammit* (12/04/2017), the COM, rather than quoting from Carrara, quoted from Crivellari's commentary on the *Codice Penale*, *"la colpa e la volontaria mancanza di previsione delle conseguenze prevedibili dell' proprio atto."*

Meaning of 'imprudence'

We have an explanation by our Court as to terms used in our law, one of which is imprudence.

In *Il-Pulużija v. Aaron Camilleri, Joseph Camilleri and Mary Camilleri* (25/04/2014), the Court held that, *"imprudence is equivalent to 'un atto inconsiderato e riscuso'* committed with *'leggerezza or sconsideratezza'."*

In *Pulużija v. Tarciso Fenech (26/03/1998),* the Court explains the distinct categorisation of the law and the distinction the law portrays between on the one hand, the limb of the law

which speaks of imprudence, carefulness, unskilfulness, and on the other hand, the limb which speaks of non-observance of statutory regulations.

The Court held, *"in order to fully understand the essence of negligence, one must keep in mind that in our daily lives, frequently situations are created and arise wherein the activity we undertake can give rise to harmful effects to the detriment of others. Experience teaches us that in such cases,* ***the necessary precautions must be taken with an eye to avoid that the right and interests of others be jeopardises****. Article 225 refers to* ***rules emanating from general past experiences in life*** *by virtue of the use of the words "imprudence, carelessness and unskillfulness in one's art or profession".*

Whereas, on the other hand, those rules of a statutory nature are indicated by means of the words "non-observance of regulations". It should be pointed out that by means of the latter phrase, the legislator is not merely referring to subsidiary legislation which comes into effect by virtue of the promulgation of legal notices, government notifications and orders but also, to ***every form of conduct statutorily prescribed*** *which hence includes internal regulations enacted by private companies, organs, units and bodies. For example, regulations issued by owners of a factory to prevent harm to their employees and other visitors and even the highway code."*

In *Il-Pulużija v. Richard Grech* (COCA 21/03/1996*),* the Court held that, "*the crime entails a voluntary negligent act or omission which was followed and led to the harmful event.* Here the Court describes the concept of the ordinary, reasonable, prudent man as that of the ***bonus pater familias****…who has to exercise the diligence which needs to be used depending on the particular circumstances. In fact, for an involuntary crime to be said to have occurred, there should subsist voluntary negligent conduct* ***generically consisting in*** *imprudence, carelessness or unskillfulness in one's art or profession or consisting specifically in the non-observance of regulations* ***which conduct is followed by means of the link of causation with an involuntary harmful event****. In order to establish guilt upon the consummation of a negligent act, a comparison has to be drawn with the concept of the Bonus Paterfamilias as derived from Roman Law. Reflecting the conduct which would have been adopted by a man of normal intelligence, normal diligence and normal sensitivity. This is a criterion which, whilst serving as a guiding model, leaves the judge with enough discretion to evaluate it within the context of the particular facts of the case. In fact, both in the Codice Zanardelli and in the Codice Rocco, the phrase used is 'inosservanza di leggi regolamenti ordini o discipline.'*

The Court concluded by underlying that in the case of non-observance of regulations, the essence of negligence is the same as that flowing from imprudence, carelessness, or unskilfulness. The non-observance of regulations established by an authority for the protection of third parties is tantamount to negligence or imprudence because ***it is obviously and manifestly negligent and imprudent not only to fail to take the necessary precautions indicated by one's past experiences in life, but also to fail to obverse and respect the precautionary measures explicitly, expressly and specifically stipulated by an authority****.*

The Court hence finds that the appellant was negligent in his conduct for two main reasons: first of all, when he shot at the bird which was not flying high, he did not ensure before he

shot that his friends were behind him. This is after all, a very basic and elementary precautionary measure. Moreover, he was also negligent because having known Agius for long, and having been bird hunting with Agius, even in previous seasons, he could have foreseen that Agius, although he was squatting in front of him and just a few feet away from the barrel of the gun, would have moved to shoot at the bird in such a way as to come in the direction of the shot of the agent, as in fact happened. The harmful event was foreseeable and hence, avoidable by means of sub caution and thought on the appellant's part. It is true that Agius ordered the shots and ***that he (the victim) contributed to his own death****, but* ***this does not mean that the appellant was not negligent*** *and that such negligence did not cause the death of Agius."*

Most judgements on involuntary homicide refer to these instances:

1) **The lack of a proper look out when people are driving**. This has led to circumstances of pedestrians being killed or grievously injured. In their legal considerations, Courts have a tendency to divide the actual content of the judgement insofar as they analyse the very content of the incident;

- *Il-Pulużija v. Joseph Grech* (06/06/2003) – *"in relation to the matter on the foreseeability of the event, when this is caused by imprudence, or carelessness, the criterion of foreseeability is very important. There is no doubt that should one drive without keeping a proper lookout, owing to fatigue, other thoughts, lack of concentration, or for any other reason, it is foreseeable that such person would not possess the necessary reflex action in order to be able to react when, for example, a pedestrian crosses the road or gets closer to the driver's car. The fact that one keeps a proper lookout whilst driving i.e., that one does not simply look in front of him but becomes aware of the surrounding circumstances together with anyone who might be walking or running in the side of the road, is* ***a social norm intended to avoid harm****. Hence, if a person does not keep a proper lookout, and, as a result thereof* [causation] *harm ensues,* ***the driver is liable for the harm involuntarily caused****."*

- *Police v. Charlot Mifsud* (30/11/2011) – *"****keeping a proper lookout*** *means more than looking ahead. It includes* ***awareness of what is happening in one's immediate vicinity****. A motorist shall have a view of the* ***whole road*** *from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the roads as well. Foreseeability is not enough.* ***The harm or the event must have been avoidable****, i.e., such that it could have been avoided in the particular case. In other words, for the lack of a proper lookout to lead to criminal liability, the Court must be satisfied* ***that had it not been for the lack of such proper lookout, either the harmful event would probably not have occurred, or else, it would not have occurred to the extent and gravity that actually ensued****. If the harm in any case could not have been avoided, the link of causation between the lack of a proper lookout and the harm caused would be missing. Hence, it would not be possible to determine that the lack of a proper lookout was the efficient cause at least in part of the harmful event."*

- *Il-Pulużija v. Ruth Grech* (COM 12/012017) – with reference to obligation of drivers, the Court held, *"he who does not see that which is reasonably visible means he didn't keep a proper lookout."*

- *Il-Pulużija v. Conrad Caruana Montalto* (26/11/2012) – *"it seems that the incident occurred exclusively as a result of the negligence on the part of the complainant consisting in the way she crossed the road and all this, without any negligence on the part of the accused."*

- *The Police v. Corporeal Ramaint Thomas Hoare* (15/12/1956) – *"the Court examined the role of the victim's contributory negligence and it concluded that* ***the contributory negligence does not benefit the accused****. Therefore, it does not constitute a defence at all, especially if the driver used excessive speed which would of its own nature anyway endanger the lives of pedestrians or passers-by."*

2) **The harm ensuing from the making of fireworks** for the purposes of the local village feast;

   The following judgment goes to show how when the act of the victim contributes to the harmful event, this can be **considered for the purposes of punishment** but **will not avail the accused** insofar as it does not constitute a proper defence.

- *Il-Pulużija v. Manwel Xerri* (COCA 28/02/1953) – *"in Criminal Law, the establishment of criminal liability as a result of a negligent act is a difficult task. However, some basic principles can be safely acknowledged when a person, without taking the necessary precautions, voluntarily performs an act which of its own nature creates a danger to the life of others and as a result of such act, another person is killed. Hence, the person who performed such act is guilty of involuntary homicide.*

  It is true that mere inadvertence is not sufficient in order to eliminate criminal liability. It is equally true that the mere violation of the law diminishes and is enough for such purpose just as it is true that the extent or degree of diligence which is sufficient for the purposes of Civil Law is not sufficient for the purposes of Criminal Law. However, these considerations do not avail the accused if in the particular case he was negligent.

  Contributory negligence does not avail the accused *unless it results that there subsisted an act of the victim which, independently of the negligence of the accused, caused the victim's death. A distinction should be drawn between he who performs the dangerous act by means of which another person is killed when such other person (the victim) never and at no stage, contributed towards placing himself in danger and/or the harmful event and, on the other hand, the case wherein by means of a dangerous act, a person causes the death of another who voluntarily and fully aware freely placed himself in such danger, such as a mature adult who was not obliged as a result of his employment, to place himself in such a dangerous situation. The same principle regulates Criminal Liability relating to damages. If and when the dangerous act which caused the victims death had also caused damages, the act of the accused consisting in the manufacturing fireworks is intrinsically dangerous and that in those surrounding circumstances and conditions which aggravate the danger such act was negligent. Therefore, criminal liability subsists.*

One must note that the farm was leased to the accused. Hence, he should have regularised his position at law by applying for a license to enable police authorities to monitor that the necessary precautions are being adopted. It was thus the accused who, without adopting the necessary precautions, negligently created needlessly and incautiously a dangerous state of affairs, irrespective of the fact that the fire allegedly deriving from the cigarette might have stopped found the prepared fireworks nearby and caused the fatal explosion.

The defence argued that the victim was very negligent. This is true because he was imprudent when he participated in the manufacturing of the fireworks without anyone's involvement and without any obligation deriving from an engagement or employment or contract of service, but merely as a hobby and fully aware of the danger. In this case, the victim's negligence was merely contributory since the victim contributed materially to the event because he manufactured fireworks without taking any precaution but there was not from his side, any act which of itself caused his own death. It does not result that there subsisted an act of the victim which was independent of the agent's negligence. If the fire resulted from the spontaneous combustion of substances which were significantly humid, the fact that it was not stored as it should have been stored, coupled with the fact that nearby there were prepared fireworks, rather than placed elsewhere, is a part of the whole picture manifesting the negligence of the accused. If the fire was caused by the cigarette, a fact which is not excluded by fire experts, it does not result that the cigarette and matches where left on the windowsill by the victim, always keeping in mind that the incident subsisted because the prepared fireworks were placed nearby in close proximity and in the vicinity without protection or precaution, given that they are, by their very own nature, easily flammable.

Whereas had the accused abided by the law, such flammable materials would have been stored elsewhere or rather, placed into fireproof receptacles. It may be shown that it wasn't the accused who left the cigarette on the box of matches which was found on the windowsill and in fact, this seems to be the case. But irrespective as to who placed the cigarette on the windowsill, the juridical situation establishing negligence persists because the accused was negligent and such negligence is imputable to him. This immutability/blame is not according to legal principles and established doctrine negated by the victim's contributory negligence. Therefore, although contributory negligence does not constitute a defence, it may mitigate the sentence."

- *Il-Pulużija v. Baskal Saliba* (COCA 28/07/2017) – *"the negligence of others does not exclude the negligence of the accused unless it is decisive, that is, the guilt of the accused can only be excluded in the case where the responsibility of the victim was the only and exclusive cause of the incident. Otherwise, if the victim's responsibility is only of a contributory nature, the criminal liability of the accused remains the same. Although it can be considered for the purposes of the punishment inflicted."*

3) **Property and construction**;

- *Il-Pulużija v. Joseph Busuttil, Ludovico Vella, Carmelo sive Charles Camilleri et* (COCA 26/11/1992) – *"Article 30 of Chapter X of the Laws of Mala stipulate that when a building is being repaired or road repairs are conducted, or a ditch or trench is being*

used, or any other works in a public road are conducted, the responsible official should ensure that every tragedy should be avoided by ensuring that every ditch or trench be adequately lit at night-time to prevent tragedies. ***The danger that during night time a passer-by does not see the trench and falls therein is obvious and easily foreseeable****. The person responsible for the works being undertaken is expected and obliged to take the necessary precautions dictated by basic and logical reasoning to prevent any tragedy and this irrespective of any order he may receive. The fact that at the end of the road there was a no entry sign, does not avail the accused.* ***The contributory negligence of the victim does not avail the appellants from their criminal liability****. It is only considered for the purposes of punishment.*

The failure to take obvious precautions to prevent such an obvious and clear danger indicates that a sentence of imprisonment should be inflicted rather than a mere fine. All three appellants were responsible for the incident, for the death of Joseph Carabott as a result of their ***negligent failure and carelessness****. In the case of Busuttil, as a result of his non-observance of regulations.* ***Appellants Vella and Camilleri are responsible anyway, although Bustill was their immediate superior****. There is no doubt that the victim contributed by means of his own negligence and non-observance of regulations to his own death. In fact, he didn't even have a light on the bicycle he was riding in pitch darkness. This fact, however,* ***does not avail appellants from criminal liability****. It will be* ***considered for the purposes of punishment****. The Court feels that the obvious lack of any preauction leading to the clear danger should entail and deserves a sentence of imprisonment, not a mere fine. Busuttil's liability is even greater than that of the other appellants. He was their superior and had the duty to verify whether lights were properly affixed and installed and if not, he had the duty to order that such lights be in fact affixed and installed."*

4) **Drug-related**; **insofar as the administration of drugs is concerned**.

- *Il-Pulużija v. Saverina sive Rini Borg* (31/07/1998 COCA) – here the accused obtained, offered, and provided heroine to the dead person who is Kevin Calleja, the victim. The Court considered all the evidence but also the evidence of the deposition of the toxicologist which showed and proved that the deceased had materially contributed to his own death by mixing alcohol, pills, and heroine. The Court exercised its discretion in evaluating the facts of the case in order to determine the intention of the perpetrator.

  However, the Court went further by establishing the following principles: *"according to article 225 of the Criminal Code, for involuntary homicide to subsist, there needs to be proof that the voluntarily negligent conduct, generically consisting in imprudence, carelessness, or unskillfulness in once art or profession or consisting specifically in the non-observance of regulations, is* ***followed by means of the link of causation with an involuntary, harmful event****. This means that in the field of negligence, there exists activity with a particular purpose which, as a result of the failure to adopt certain precautions, may violate or damage the rights and interests of third parties.* ***The essential feature of negligence is the foreseeability of the harmful event which may be caused by one's voluntary conduct****.*

There are various forms of negligent conduct resulting from imprudence, carelessness, or unskillfulness in one's art or profession or else, from the non-observance of regulation.

*Imprudence arises from someone's **behaviour** when such person does not apply and exercise the **appropriate caution**.*
*Carelessness arises from the **lack of attention** and **concentration of the agent**.*
*Unskillfulness is the specific form of **professional negligence**.*

Negligence can also arise from the failure to obey and adhere to laws regulations and orders as those many regulations stipulated by public authorities in relation to an identifiable activity with the purpose of avoiding harmful effects and damages to third parties, that is, those which prevent harmful effects. For example, the Dangerous Drugs Ordinance.

*Under these forms of negligent conduct, be it imprudence, carelessness or unskillfulness, in one's art or profession, or the non-observance of regulations, there exists an essential difference, that of **foreseeability**. This indispensable element remains essential under every form of negligent conduct, however, to a different extent/degree. Foreseeability is always the salient feature in every form of negligence, but **it partakes of different degrees** in all cases of imprudence, carelessness, or unskillfulness in one's art or profession. Whereas foreseeability is presumed in relation to the non-observance of laws, regulations and similar orders statutorily established, in such cases, any evidence to the contrary is not possible, it is inadmissible. This is, therefore, an absolute presumption. The agent cannot say that the harmful event which was caused as a result of his non-observance of regulations, was not foreseeable to him. As acknowledged by various jurists, in such cases, the legislator's foreseeability substitutes the foreseeability of the agent. This is exactly why voluntary negligent conduct is defined as voluntary conduct which causes a harmful event not desired, but foreseeable. That is, an event which could have been avoided with the caution and attention exercised by the reasonable ordinary man.*

As is known by everyone, the mental and physical harm, and in some cases death, caused by the abusive taking of heroine is a foreseeable contingency. In such case, the harm is obviously foreseeable, although not desired and although not foreseen. Had it been foreseen, or desired, such conduct would have been wilful, not negligent. We would have dolus rather than culpa. Contributory negligence does not give rise to any compensation in Criminal Law but may only be considered by the Court for the purposes of inflicting punishment."

- *Pulużija v. Carmel Micallef, Raymond Calleja and Philip Azzopardi* (19/04/2012) – *"**such need for the existence of a chain of causation between the negligent act and the ensuing harm is a requisite for responsibility to exist**. The principle that for culpa to exist there must be the nexus between the act and the event applies not only with regards to negligence, imprudence, carelessness and unskilfulness in one's art or profession, but it is equally requisite in the cases of the non-observance of regulations.*

- *Pulużija v. Kevin Borg* (09/10/2012), *"the nexus required to prove involuntary homicide consists in Maujeri having taken drugs from the accused and Maujeri having died as a consequence thereof."*

- *Il-Pulużija v. Fatih Pancar* (31/10/2017), *"for culpa to subsist, the Court must find that there exists a link between an act committed by and imputable to the accused and its outcome, i.e., between the act causing damages and the ensuing damages."*

Sub-title V: OF EXCUSES FOR THE CRIMES REFERRED TO IN THE FOREGOING SUB-TITLES OF THIS TITLE

CASES OF EXCUSABLE WILFUL HOMICIDE
Article 227

227. Wilful homicide shall be excusable -

(*a*) where it is provoked by a grievous bodily harm, or by any crime whatsoever against the person, punishable with more than one year's imprisonment;

(*b*) where it is committed in repelling, during the day-time, the scaling or breaking of enclosures, walls, or the entrance of any house or inhabited apartment, or the appurtenances thereof having a direct or an indirect communication with such house or apartment;

(*c*) where it is committed by any person acting under the first transport of a sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting;

the offender shall be deemed to be incapable of reflecting whenever the homicide be in fact attributable to heat of blood and not to a deliberate intention to kill or to cause a serious injury to the person, and the cause be such as would, in persons of ordinary temperament, commonly produce the effect of rendering them incapable of reflecting on the consequences of the crime;

(*d*) where it is committed by any person who, acting under the circumstances mentioned in article 223, shall have exceeded the limits imposed by law, by the authority, or by necessity:

Provided, moreover, that any such excess shall not be liable to punishment if it is due to the person being taken unawares, or to fear or fright.

As we already saw, a justifiable homicide or bodily harm is one that is not criminal at all and does not involve any legal penalty whatsoever. An excusable homicide or bodily harm, on the other hand, is one which is criminal and involves legal penalties, but is less blameworthy than wilful homicide or bodily harm in ordinary cases, and, therefore, less severely punished. How less severely depends on the nature of the excuse and, of course, the kind of bodily harm caused.

Sub-article (a)
Such provocation does not benefit the accused unless it has taken place at the time of the act in excuse of which it is pleaded.

Puliżija v. Julian Mercieca (COCA 06/01/2003), *"a retaliation may fall within the parameters of the excuses contemplated by law, for example, as per 227(a) or (c) which are paragraphs applicable to offences against the person by virtue of article 230 but can never constitute*

and amount to justifiable (legitimate) self-defence under article 223. ***One reacts in self-defence to avoid an evil which is about to be directed against him not to retaliate for an evil which he has already suffered****."*

The law tells us, *"Where is it provoked"* so here, you have an element of provocation insofar as it consists in GBH itself.

Republikka ta' Malta v. Nazareno sive Reno Mercieca and Gaetano Scerri (COCA 15/05/1995), *"from an analysis of 224(a) and 227(b) of our Criminal Code, it is obvious that the law is not contemplating the case where an aggressor has already made his way into the house or flat of someone else but* ***only the case where there subsists the actual threat of forced entry****. If the aggressor is already inside the house, to plead a self-defence successfully, all the elements of self-defence must subsist, i.e., the evil threatened was grave, unjust, inevitable and the reaction was proportionate to the threat/aggression. Provocation and self-defence are distinct and different, both conceptually and empirically. In legitimate self-defence, there is a threat of actual danger of death or a sexual offence. Provocation is completely different in that not each and every act which provokes another person can lead such other person to plead self-defence."*

In *Pulużija v. Saviour* Sammut (15/09/2014), it was held that, *"The Court, whilst rejecting the plea of legitimate self-defence notes that* ***self-defence on one hand, and provocation on the other hand, are two distinct defences****. Either one of these does not lead to the other. For legitimate self-defence, the reaction of the accused had to be such as to repel an immediate danger whereas in provocation,* ***the reaction is caused by anger which is more characterised by a sense of revenge rather than defence****. As Professor Mamo upholds,* ***everything depends on the state of mind of the agent****. Those who have to judge must not let themselves be guided by calm wisdom after the event based on a two-minute assessment of the record of the evidence but* ***should judge according to the psychological condition of the agent at the time of the fact and according to what the impression caused on him by the imminent danger permitted to discern and to do****. Hart in his book 'Punishment and Responsibility' upheld "provocation is therefore considered as a good enough reason for a diminutive of punishment because the agent's ability to control his action is thought to have been impaired or weakened, otherwise by his own actions, so that conformity to the law which he had broken was a matter of special difficulty for him as compared with normal persons normally placed.""*

Sub-article (b)

If the homicide is committed in the same circumstances but during the night time, then according to section 223(a), it is included amongst the cases of lawful defence and is, therefore, not merely excusable but justifiable.

The reason for the distinction is clear. The fright and alarm and especially the immediate apprehension of personal danger due also to the greater difficulty of obtaining assistance, caused by an assault on one's house at night time are greater than during the day time.

Sub-article (c)
This is by far the most complex not only because of its wording, but because of its very innate wording, particularly especially in the context of the proviso to the article itself.

Jurists of all countries have admitted the plain distinction which exists between homicide committed under the immediate influence of a sudden violence of resentment excited by some injuries, and homicide committed in cold blood and deliberately. **But all cases of ungovernable passion are not to be excused**.

Pulużija v. Phillip Muscat (COCA 12/03/1960), "***the excuse of provocation may not be granted simply because the accused was agitated whilst committing the crime***. *It is necessary that such excitement or agitation was produced from such circumstances which, according to law, entitled the accused to certain benefits. This is why our law, whilst contemplating provocation on the one hand, acknowledges that this mitigation should be limited to the extent that it should not run counter to* ***the principle that each and every person must control his passions and impulses***. *This is a general rule. Amongst such limitations and restrictions, we find the fact that he who claims this benefit would not be the provoker, the one who initially provoked, and therefore, he who causes an injury in a fight cannot request such benefit if he provoked the fight. When self-defence is part of the defence of the accused, it is important that such defence be pleaded formally and substantively, not casually and incidentally.* ***Since one of its prerequisites is inevitability, it obviously can never be pleaded when a person, not only didn't escape and avoided the fight, but actually searched for and created the fight***. *Therefore, the same reasons to exclude the benefit of provocation subsist to exclude even more strongly self-defence itself."*

Objective Test: Ordinary Temperament
So that a person may be deemed to be incapable of reflecting and benefit of this excuse, it is necessary, in cases of provocation, that the homicide be in fact attributable to the heat of blood and not to a deliberate intention to kill or to cause a serious injury to the person and that the cause be such as would, **on persons of ordinary temperament**, **commonly produce the effect of rendering them incapable of reflecting to the consequences of the crime**.

So, the test to be applied is **whether the provocation was sufficient to deprive a reasonable man, a man of ordinary temperament, of his self-control**, not whether it was sufficient to deprive of his self-control the particular person charged (objective not subjective test).

The operative part creates a situation whereby the test is subjective while the proviso which deals with provocation is the objective test.

Pulużija v. Mariano sive Mario Camilleri (COCA 08/02/2002), *"227(c) grants an excuse only when the provocation or rather the provocative act, was such that* ***in persons of ordinary temperament commonly produces the effect of rendering them incapable of reflecting upon the consequences of their actions***. *The law itself, by means of 227(c), contemplates the co-existence of mental excitement with all the constitutive elements of wilful homicide including the required mens rea, being the specific intent.*

While in sub-article (a) the law itself specifies what the provocation must consist in, here, on the contrary, the law leaves it to those who have to judge to exercise their independent judgement. It **does not limit or specify the causes of provocation**. So, any fact, whatever it may be, which has induced a sudden passion or mental excitement in consequence of which the agent is, in the act of killing, incapable of reflecting, will be sufficient, provided the conditions are satisfied.

Pulużija v. Mario Manicaro (06/03/2014), *"the accused claimed that his conduct was caused by the fact that his wife bit him on the lips. The Court notes that this should not have caused such reaction. If appellant has a serious problem of anger management, he must address this and ask for help rather than pursuing aggressive behaviour in such way as to harm himself and others.* ***It is true that provocation is recognised as a defence by our law, but clearly this has various limitations****…*

The Court also makes reference to the fact that 227(c) per se makes no reference to the word 'provocation' and explains the extent to which the objective test, which it must undertake, involves an assessment of the following factors*:*

*"…**(1)** whether the accused committed a voluntary act against the victim, **(2)** whether such act was undertaken by way of a reaction to the aggression by the victim, in other words, whether there is a causal and immediate link between the cause and the effect, **(3)** whether there subsisted an injury to the accused and in the case for fulfilment in 227(a), or another crime against which the person is subject to the term of imprisonment exceeding one year. if a provocative act of somebody else does satisfy the requisites under 227(c), it could possibly satisfy the requisites under 227(a) itself."*

In *Il-Pulużija v. Christopher Sant* (27/03/2019), *"the Court has to determine whether **a person with ordinary temperament** would have acted in such manner when so provoked as recounted by the accused in this case."*

In *Il-Pulużija v. Mario Muscat* (11/01/2019), the Court acknowledged that we not are considering a cold-blooded person, but a person with normal/ordinary temperament. This judgement makes reference to English text writers such as Andrew Jameson, concepts such as outbreaks of brutal violence and temper and other English jurisprudence in this sense and regard.

In the above case, the term 'provocation' is described as *"**provocation is some act, or some series of acts done by the dead man to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of his mind**."*

Cases of inadmissibility of excuse
Article 229

> **229.** The excuse referred to in article 227(*c*), shall not be admissible -
>
> (*a*) where the passion is provoked by the lawful correction of the person accused;
>
> (*b*) where the passion is provoked by the lawful performance of duty by a public officer;
>
> (*c*) where the offender has either sought provocation as a pretext to kill or to cause a serious injury to the person,
>
> or endeavoured to kill or to cause such serious injury before any provocation shall have taken place.

These are some obvious qualifications to this generalisation which the law defines.

He who provokes cannot be the provoker
Furthermore, there are certain other limitations which in the practice of our Courts are also usually applied. As a general rule, no words or gestures, however opprobrious or provoking, will be considered to be provocation sufficient to excuse homicide by reason of instantaneous passion, if the killing is effected with a deadly weapon. But if the words of provocation are coupled, for instance, with such an act as spitting upon the defendant or with a blow, they might have the effect of excusing the homicide. **Also, the excuse of provocation is generally excluded if it was the defendant who first gave provocation.**

In an old case, *Police v. S. Lia* (1948), the COCA said, *"the excuse of provocation is excluded by the fact that it was the defendant who, together with his brother first went up to N.N. and in this way began the fight; it is thus the case which English jurists indicate by the words **'provocation provoked by the provoker'**. Provocation to he admitted as an excuse requires also that the reaction shall be proportionate, whereas the defendant used a weapon."*

Pulużija v. Alana Gauci case (COCA 04/07/2013), *"he who invokes provocation cannot be the provoker."*

You cannot provoke an incident as a pretext to a crime you intended committing and then pleading provocation.

Time interval – direct & immediate influence
In regard to all cases of provocation, it is expressly laid down that they shall not avail the offender unless they shall have taken place at the time of the act in excuse whereof, they are pleaded. In other words, it is essential that the wounding, etc, should have been inflicted **immediately upon the provocation being given**: for if there is a sufficient cooling time for the passion to subside and reason to interpose and gain dominion over the mind, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood.

Republikka ta' Malta v. Martina Galea (COCA 14/01/1986), *"the mental state contemplated by section 227(c) can come into effect* ***both as a result of provocation or other reasons****. From an analysis of this legal provision, this Court concludes that for a wilful homicide to be excusable, the person who commits it ("in the act of committing the crime")* ***was not in a state wherein he was capable of reflecting owing to the immediate influence*** *("first transport of a sudden passion or mental agitation").*

Both in the case of a sudden passion and mental excitement, it is always necessary that the person who kills was ***under the direct and immediate influence of either the sudden passion or mental excitement****, i.e., under the immediate influence of such mental state of affairs. This mental state of affairs of the accused could have been caused, though not necessarily, by provocation.*

The Court uses the words 'could have been caused' since such mental state of affairs could also not have been caused by provocation as is the case with infanticide. Even before the introduction of infanticide, there were cases wherein mothers were convicted of the homicide of their babies but with the mitigation that such mothers acted under the direct and immediate influence of mental excitement as a result of which the mother was at the moment of the act incapable of reflecting upon the consequences of her actions. Here the Court is making reference to Regina v, Madalena Camilleri (1890). *To constitute a mitigating factor for the purposes of wilful homicide, both sudden passion and mental excitement upon which a person acts under their influence,* ***must be such that the sudden passion or mental excitement rendered the person incapable of reflecting upon the consequences of his actions****. In this context, section 227(c) stipulates that in cases of provocation, i.e., in cases where the mitigation of provocation is pleaded and has allegedly caused the sudden passion or mental excitement, for an accused to be considered as incapable of reflecting on the consequences of his actions,* ***the homicide should have been consummated owing to heat of blood and not because there existed the deliberate intent to kill and that the reason/ground of provocation was such as would in persons of ordinary temperament commonly produce the effect of rendering them incapable of reflecting on the consequences of their actions****."*

Pulużija v. Nikolai Borg Oliver (COCA 10/03/1999), *"one of the most essential ingredients for the defence of self-defence to subsist is that the danger, or rather the evil which one is trying to avoid must be actual, there and then of that same moment in time.* ***If, however, the danger has passed, one cannot plead that whatever he has done was done by him to defend himself****.* ***The most one can plead is that he reacted to a provocative act****. This requirement emerges unequivocally from a reading of article 223 namely, the actual necessity of the lawful self-defence."*

This next judgement refers to an English judgement, to the effect that **the interval between the provocative conduct and the defendant's reaction might wholly undermine the defence of provocation**. So, here again, in terms of the proviso, the Courts stress on the objective test.

Pulużija v. Alan Gauci (COCA 04/07/2013), *"here the Court refers to an interval of time between words in a bar and the incident on the road* ***and this interval of time was such as to***

indicate that a person of ordinary temperament would have considered the consequences of what he had in mind, of his actions*.*

Pulużija v. Toni Micallef (16/10/1937), *"self-defence is not a mere excuse like provocation but a complete justification which avails the accused from any and all criminal liability and punishment. But for it to be successful, one must act to combat an evil which was going to be committed upon himself as a result of an immediate danger of an aggression which aggression must be unjust, grave and inevitable.* ***The requisite of gravity necessitates a certain proportionality between the aggression and the reaction****. Whereas the requisite of inevitability requires that the evil to the person could not have been avoided by any other means but for the reaction of the accused.* ***Hence, if there were any other means available for the accused to avert such violence, self-defence would not subsist****. Such means could include the possibility of escaping. If the accused could have avoided the evil by escaping, and instead he reacted and caused harm to the aggressor, he does not deserve the justification of self-defence but could only merit the excuse of provocation. When one considers the excuse of provocation, one must follow the rule provided for in article 235 which entails that provocation cannot benefit the accused if it did not occur at the point in time of the act which constitutes such excuse. This is why the law speaks of and uses the words 'in excuse whereof they are pleaded'".*

{{The next judgement is the most important judgment, particularly for the distinction between the operative part and the proviso.

Republikka ta' Malta v. Aymen Said Jailai el Baden (28/09/2004), *"it is a settled matter that 227(c) postulates two situations: the first being the mental excitement or sudden passion caused by something internal and not necessarily resulting from an external act of provocation caused by someone else. The second situation for which another paragraph within 227(c) is applicable is that wherein the mental excitement or sudden passion is caused by the provocation of another person, it seems that the First Court, in its summing up to the jury, interpreted 227(c) as one to be subjected to an objective test when such a test was only and solely required in cases of provocation. Notwithstanding this, the Court declares that the jurors could have reasonably reached such a verdict and hence concludes that the appellant was not wrongly convicted.*

For self-defence to be proved, and thus lead to justification and lack of blameworthiness, contrary to the excuses in 227(d), all the constitutive elements which are considered as requisites must be cumulatively fulfilled/satisfied, i.e., the evil threatened by grave, unjust and inevitable and the reaction be proportionate to the threat or aggression. This is a test how to determine inevitability or otherwise. One must ask whether the accused, the person attacked, could have, taking into account all the circumstances of the case, reasonably avoided that threat or danger. If common sense and logic leads one to conclude that the accused could have avoided such danger or threat by changing direction or fleeing away or simply by not moving at all, then in such case, the element of inevitability of the threat or danger, is lacking. If, however, on the other hand, taking into account all the circumstances of the case, common sense and logic dictate that the accused did not have to do any of all this, but instead, proceed to get closer to the threat or danger, the constitutive element of inevitability of the threat or danger would be fulfilled."

The distinction between the operative part of the law and the proviso is crucially important.

Sub-article (d)
Under article 223, a homicide is justifiable if it is ordered or permitted by law or by a lawful authority or is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person. But so that the justification which excludes entirely any criminality in the act, may apply, it is necessary that the limits imposed by law or by the authority or by the necessity of the defence are not exceeded. **If there is an excess beyond such limits, then complete justification cannot be claimed, but only an excuse**: in other words, the act will constitute an offence and will be liable to punishment, through reduced, unless the excess is due to the person concerned being taken unaware, or to fear and fright.

So, here we have the excusable circumstance which is called **excess in self-defence**. In the bill introduced to the Council of Government in 1889, the Crown Advocate explained, *"A person, while engaged in self-defence or in carrying out an act which the law enjoins or permits, may exceed the bounds of moderation and an injury to life or limb may ensue. This, according to the general principles of law, is an offence. It constituted what in Italian law is styled **"un eccesso di difesa"**. As a rule, when any similar excess is committed, the persons convicted of such an excess **are dealt with as a person who commits an excusable homicide or an excusable bodily harm**…"*

However, such excess of defence shall not be punishable if it was occasioned by the person concerned **being taken by surprise or through fear or fright**. When in a given case there is such a degree of surprise or fright or fear that the person assaulted would not calculate the limits within which his action would be legitimate, the excess, if any, should not be deemed unreasonable and the person should be acquitted of all blame.

So, although this sub-article refers to when one exceeds the limits imposed by law, one must keep in mind the proviso which, while it acknowledges that there was excess, states that such excess it is not punishable in the case that it is due to the person being taken unaware or to fear or fright; 'tinħasad, tibża u titwere'. So, the law acknowledges that you have exceeded the limits of self-defence, which is normally punishable, but it caters for a situation whereby because the excess was caused by being taken unaware, the law understands those particular circumstances and guarantees impunity.

On this, Sir Arturo Mercieca said, *"In general, all admit that the right of self-defence is sacred. And such right, at first sight, would appear to be unlimited, inasmuch as it is difficult to know up to when the exercise of it may be necessary in consequence of an unjust and violent aggression on the part of another who has only himself to blame if any injury is caused to him by the person lawfully defending himself. **The right of self-defence is inherent in the individual; it is derived from the law of nature which imposes the duty of self-preservation**. Therefore, it is only in exceptional cases – and only where there is culpa, indeed where, more than culpa, there is a certain degree of dolus – that a departure can be made from the said principle. Now if the person exercising the right of self-defence was in such **a state of mind as to be incapable of calmly judging up to where his resistance should go and of fixing the precise point beyond which his defence would cease to be permissible,***

in any such case there is clearly neither 'dolus' nor 'culpa'*: and where there is neither one nor the other, there cannot be any criminal responsibility and liability to punishment."*

Also, Maino, in respect of article 50 of the Italian Code writes,
"Article 50 requires that the limits imposed by the law, by the authority or by necessity, shall have been exceeded. But not every time that there is disproportion between the act committed and that which has given occasion to it, the justification disappears to make way for the mere excuse of excess. ***Everything depends on the state of mind of the agent****. If this was such, in spite of the peril, as to permit to him the free movement of his body and the free exercise of his mental powers, then it will be a case of mere excuse or extenuation: otherwise the material disproportion of the act does not exclude the justification. And let it be repeated: those who have to judge must not let themselves be guided by the calm wisdom after the event, based on a too minute assessment of the record of evidence - but should* ***judge according to the psychological condition of the agent at the time of the fact and according to what the impression caused on him by the imminent danger permitted him to discern and to do.*** *Otherwise, by requiring an exact and mathematical proportionbetween the causative fact of the psychological co-ation and the material consequence of the defensive reaction, a crime is artificially created where a criminal does not exist, and a punishment is applied where there is no reason, either juridical or moral, which shows it to be necessary"*

For us to understand how one can exceed the limits of self-defence, we need to understand what constitutes self-defence *per se*. The burden of proof lies on the person pleading self-defence, but **that person does not need to reach the same standard or proof which the prosecution needs to reach**. That person will be successful in his defence if he reaches the **standard of balance of probabilities** in his pleas of self-defence.

The moment the accused fulfils this, the prosecution would not be able to prove its case beyond reasonable doubt. Conversely, if the prosecution has reached proof beyond reasonable doubt, the accused cannot reach proof on the balance of probabilities. Technically speaking, the accused can stay silent and say nothing. The *onus probabndi* is on the prosecution but then if the accused is going to plead certain defences, it is up to him to prove it. If the accused decides to testify, he is subjecting himself to cross-examination by the prosecutor.

The law doesn't punish he who exceeds in self-defence due to fear, fright or being taken unaware. When you have excess in something, you need to have that something. In other words, **excess in legitimate defence necessarily presupposes that the elements of self-defence subsist**. So, the elements under article 223 are proved.

Il-Pulużija v. Mallia Agius (COCA 22/10/1960), *"****excess in self-defence necessarily presupposes the existence of self-defence*** *and hence, for this defence to be pleaded,* ***the accused cannot be the one who acted first****. He cannot be the first aggressor. In such case, the aggressor cannot plead self-defence and consequentially, he cannot plead excess in self-defence which requires first and foremost, ab initio, a situation of self-defence. It is up to the judge to determine whether there subsists circumstances of fear or fright which lead to impunity."*

Pulużija v. Fortunato Sultano (COCA 05/02/199), *"excess in self-defence owed to lack of proportionality necessarily presupposes the elements of self-defence. What we have in such situation, however, is that the accused did more than whatever was required to defend himself."*

La Pulużija v. Gratio Mallia (COCA 22/02/1930), *"e necessario che visi a stato in concorso di questi elementi per l'eccesso di legittima difesa: (1) che imputata abbia volute respingere una violenza contro di se, (2) che tale violenza si a stata attuale, (3) che si a stato ingiusta (4) che vi si a stata la necessità della difesa, (5) a che egli mosso dal spavento al timore abbia accedettero nei limiti di tale difesa."*

Police v. Peter Roy Seed (06/04/2011), *"not everyone acting in self-defence may invoke article 223. The wording of the law is clear, 'actual necessity of one's legitimate self-defence or the defence of another person'. According to doctrine and jurisprudence, it is a well-established concept that* ***in order to successfully invoke the plea of legitimate self-defence, the sustained aggression must be unjust, grave and inevitable****. The element of inevitability is missing where instead of avoiding a fight, when this can reasonably be avoided, one actually confronts another without a valid reason thereby precipitating the actual, physical confrontation.*

Indeed, it was held by Lord Widgery that "it is not the law that a person threatened must take to his heals and run in the dramatic way suggested by Mr McHale but what is necessary is that he should demonstrate by his actions that he does not want a fight, he must demonstrate that he is prepared to temporise and to disengage and perhaps, to make some physical withdrawal; and that this is necessary as a feature of the justification of self-defence is true in our opinion whether the charge is a homicide charge or otherwise."
The Court hence concluded that the device shows however that the actions of the accused consisting of instinctively protecting his face by raising his arms clutching onto his glass, rather than throwing it away tends to show that ***he exceeded the limits of self-defence but that this was due to the person being taken unaware or to fear or fright*** *and this in terms of the proviso of article 227(d) made applicable to the case of wilful bodily harm by virtue of article 230. The Court therefore finds that the accused has indeed caused GBH on James Hanan that the accused acted in self-defence when so doing, that he exceeded the limits of self-defence but that the said excess was as a result of the accused being taken unaware or through fear or fright and this in terms of 218(1)(b), 223, 227(d) and 230. Therefore, the Court acquits the accused."*

Excusable bodily harm
Article 230

230. The crime of wilful bodily harm shall be excusable -

(*a*) in the cases mentioned as excuses for wilful homicide in article 227(*a*) and (*b*);

(*b*) in the cases mentioned as excuses for wilful homicide in article 227(*c*);

(*c*) if it is provoked by any crime whatsoever against the person;

(*d*) in the cases mentioned as excuses for wilful homicide in article 227(*d*).

So, all grounds of excuse which we have considered in relation to wilful homicide are applied also to bodily harm. In addition, a bodily harm is excusable if it is **provoked by any crime whatsoever against the person** (Sub-article (c)).

SUB-TITLE VI: OF ABORTION, OF THE ADMINISTRATION OR SUPPLYING OF SUBSTANCES POISONOUS OR INJURIOUS TO HEALTH, AND OF THE SPREADING OF DISEASE

PROCURING MISCARRIAGE
Article 241

> **241.** (1) Whosoever, by any food, drink, medicine, or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a term from eighteen months to three years.

Here again, you have exhaustive section of the law. First of all, although we speak of 'abortion', the law *per se* in its same wording does not use this word. It uses the word 'miscarriage'. So, really and truly, the law doesn't use the word 'abort' *per se*, **but the way it explains the miscarriage conveys that the law is punishing abortion**.

Our Code does not define the word "abortion" or, rather "miscarriage". In general, this word refers to **the malicious interruption of the process of pregnancy by the expulsion of the foetus**.

One will also note that our law comprises the crime of abortion in the class of crimes "against the person", as opposed to crimes affecting the "good order of families". The reasoning behind this is that in the crime of abortion, the violated right must be attributed to the foetus, and it is the right it has to a *"spes vitae".* Moreover, the intention of the offender is directed to the destruction, if not of a new life, at least of an expectation of life: and **the right violated is consequently that of life**.

In this hypothesis the crime can be committed by **any person**, other than the woman herself. The consent of the woman to the criminal practice on herself is, for our law, immaterial. So, unlike in other systems of law, in the Maltese system, the consent of the woman is not taken into account, not even for a mitigation in punishment. Our law has taken what appears to be the more acceptable view that the life of the foetus is not something which is disposable by the woman and that, therefore, her consent to the abortion should not carry with it any mitigating effect.

Elements –
1) **Pregnancy** (Criminal interruption of a pregnancy)
2) **The accused must know of the existence of the pregnancy** (the accused can be either the woman or one of the practitioners). The accused must be aware of the existence of the pregnancy in this regard.
3) The actus reus – there is not exhaustive list as to how you can perpetrate this offence. there is no list of means in the law. **The law is indifferent towards the method/means of how you procure an abortion**.
4) When the crime is committed by **another person** who is not the woman, **the consent of the woman is immaterial**, it will not provide a defence. So, if a medical expert is producing an abortion, because the woman who is pregnant has asked for this, the consent therefore, will not constitute a defence.

1)
A pregnancy, the normal period of which goes from conception to the natural ejection of the foetus. In our law, abortion can be perpetrated at any stage of the pregnancy whatsoever.

And the pregnancy must exist in fact. If it does not exist in fact, whatever may be the belief or the intention of the agent, nothing he can do can constitute the crime of abortion or any attempt of it.

In most systems of law, the crime of abortion can arise only if there is a criminal interruption of actual pregnancy.

2)
The accused, whether the woman herself or a third party, must know of the existence of pregnancy. Without this knowledge there cannot be the specific malice of this crime. Such malice consists in the intention to cause the expulsion of the foetus.

Most writers take the view that the intention of the offender need not be specifically directed to the death of the foetus, in as much as such death being the almost necessary consequence of the expulsion, such consequence even if not positively desired must nevertheless have been foreseen as probable. In any event, the intention of the agent must not have gone beyond the death of the foetus (such that when the person performing the abortion intends the death of the mother). This provision applies where the 'dolus' of the agent was directed to the mere abortion.

The intention of the agent should be directed to causing the miscarriage. If there is no such intention, the means used against the woman which should cause abortion, would constitute the crime of GBH.

if the agent deliberately intended to cause abortion and actually causes it, his punishment would be up to a maximum of three years (section 241) whereas if he did not intend such consequence but acted merely out of hostility to the woman and caused the same effect, the maximum punishment would be up to ten years (section 218 (c)).

The question is sometimes discussed by theoretical writers whether there can be a "negligent" or "involuntary" crime of abortion and the answer generally given is in the negative. The same is undoubtedly the position under our law. Only, of course, if the miscarriage has caused the death of the woman or a bodily harm on her, there may be a charge of involuntary homicide or bodily harm, if the necessary requirement of “culpa” is satisfied.

3)
The material element of the crime consists in causing the miscarriage of a woman with a child. There must, therefore, be an actual emptying of the uterus of the product of conception, and it appears that such product must be a live foetus at whatever stage of development. **The crime requires for its completion the death of the foetus: consequently, the crime is not committed if, at the material time, the foetus was already dead.**

According to this view, if the foetus, after extrusion, survives, there would be merely an attempt of the crime. It must, however, be pointed out that other writers opine that even in such case there would be the completed crime inasmuch as the law makes the crime consist in the miscarriage of a pregnant woman and the term miscarriage in the context means the discharge of a gravid uterus of the result of conception unlawfully caused by any means, independently of the ultimate effect on the life of the foetus.

Moreover, abortion is **by any means whatsoever**. In fact, the law after specifying certain more frequent modes of perpetration (food, drink, medicines, violence) then uses the comprehensive words, *"any other means whatsoever"* to embrace every other possible wilful cause.

Suffice it to mention that from the medico-legal point of view, the principal methods may be divided into two main classes –
1) Employment of drugs;
2) Employment of instruments.

Drugs: there is no drug and no combination of drugs which will, when taken by the mouth, cause a healthy uterus to empty itself without endangering the life of the woman who takes it.

Instrumental interference: this is brought about by the employment of a wide variety of instruments. These may be used in the first instance or be resorted to when drugs have failed to procure abortion.

But apart from instruments other 'mechanical' means may be used to induce miscarriage. Blows or violent pressure on the abdomen are sometimes resorted to. Also **severe** exercise at certain kinds of physical exertion causing violent agitation of the body.

There has been discussion for many years as to whether you can procure an abortion by some form of **psychological** or **mental** means, but this would be practically impossible to prove the link of causation in this regard.

Sub-article (2)

> (2) The same punishment shall be awarded against any woman who shall procure her own miscarriage, or who shall have consented to the use of the means by which the miscarriage is procured.

Almost all civilized laws reject the inhuman doctrine which considers that a pregnant woman can dispose of the foetus within her womb as of a part of her own body.

A new existence, from the very first moment of germination is considered by the law as the subject of rights, first among which is the right to full physiological development and no one, not even the mother, can deprive it of it.

Our law has likewise rejected the doctrine that the woman who consents to or herself procures her own abortion should be treated more leniently than any other offonder. That doctrine is based on the specious assumption that the woman in such circumstances always acts under the stress of strong dictions which extenuate her guilt. But this is a gratuitous generalization: and in any event the Court can always give effect to any genuine grounds of mitigation in a particular case within the latitude of punishment which tie law provides.

In regard to the woman, the material element of the crime may consist alternatively either –

a) In consenting to the use by others of the means by which the miscarriage is procured;
b) In herself procuring her own miscarriage.

It needs hardly to be said that the consent by the woman to induce her guilt must be free and voluntary and given in the awareness of the criminal purpose for which the means are used.

Death or grievous bodily harm caused by means used for miscarriage
Article 242

> **242.** If the means used shall cause the death of the woman, or shall cause a serious injury to her person, whether the miscarriage has taken place or not, the offender shall, on conviction, be liable to the punishment applicable to wilful homicide or wilful bodily harm, diminished by one to three degrees.

This is not a mere aggravation of the crime of abortion but a **distinct form of criminality** in so far as liability is contracted, in the appropriate circumstances, whether the miscarriage has taken place or not.

It is not uncommon that means used to procure miscarriage occasion the death of the woman or serious injury to her health without succeeding in the principal intent. **Such death or serious injury may occur without the onset of miscarriage**.

When death or serious injury happens to the woman in consequence of the action of the abortionist or would-be abortionist, it is clear that the punishment must be more severe. But, on the other hand, our law does not make such punishment equal to that provided for wilful homicide or wilful bodily harm because in the case of article 242, **the more serious consequence was not intended**; it was caused, merely through want of skill or negligence. In other words, it was 'involuntary'. If the actual purpose of the offender was the death of the woman or her injury, the charge that would arise would be that of wilful homicide or bodily harm.

However, for the application of the provision in question, it must be established that **the death of the woman or her serious injury arose in consequence of the means used.** There must be some nexus of causation between them.

It is not, nevertheless, material to inquire whether or how far those consequences were foreseeable. **If they happen as the effect of the means used they are always imputable because the agent was, in any event, in the pursuit of a criminal transaction** and the

possibility of such consequences is such common occurrence that the prosecution ought not to be required to prove that the offender could have foreseen them.

Where physician, etc., prescribes or administers means for causing miscarriage
Article 243

> **243.** Any physician, surgeon, obstetrician, or apothecary, who shall have knowingly prescribed or administered the means whereby the miscarriage is procured, shall, on conviction, be liable to imprisonment for a term from eighteen months to four years, and to perpetual interdiction from the exercise of his profession.

In this context as well, you have another sub-section of the law insofar as the material elements we are speaking of consenting to the use by others of the means by which the miscarriage is procured. The other option is when the woman herself perpetrates the crime, in such case, the material element would consist in the woman herself procuring her own miscarriage. In this other section of the law, the law refers to surgeons, amongst others, who have knowingly prescribed or administered the means. The content of the prohibition is that the physician or surgeon must have **knowingly prescribed or administered the means by which the abortion is procured**. We refer to employment of drugs and employment of instruments.

Elements –
1) A miscarriage has actually taken place;
2) It shall have taken place by the means indicated or supplied by the physician, surgeon, etc.
3) The physician, surgeon, etc., shall have prescribed or supplied such means knowingly, i.e., knowing they were intended to be used for that purpose (clearly no guilt would attach to a medical practitioner, etc., who prescribes or supplies a drug or instrument for a proper or innocent purpose, but of which, unknown to himself, use is made by the woman or others to produce the miscarriage). **But a strong presumption of guilty knowledge would no doubt arise if the drugs or instruments prescribed or supplied are commonly indicated or used as abortifacients**.

In connection with this provision, would a doctor be guilty of a crime if he induces miscarriage and destroys the foetus to save the life of the mother? This question has long formed the subject of discussion among jurists.

What about indirect abortion?
Indirect abortion is that which follows as a secondary result of an action the purpose and primary effect of which is other than abortion. In such a case, if there is a justifiable reason sufficiently grave for the course action proposed (whether it is a question of medical treatment or something else), then the abortion which follows may be permitted once it is neither intended nor directly caused.

Attempted abortion
The question is often asked by text-writers and commentators whether the crime of abortion admits of a punishable attempt. Naturally **the question arises where the endeavour is made by adequate and sufficient means**, for if the means used were absolutely inadequate or insufficient for the purpose, the hypothesis of a criminal attempt would be excluded on the grounds of impossibility. The law may punish the use of the means **as such**, **if certain consequences, independently of the onset of miscarriage, ensue** (as our law in Section 242, where the woman dies or suffers severe injury), **but not as an attempt**.

But suppose the means used or supplied or administered **could** have induced abortion? The more commonly accepted jurists recognise the possibility of attempt where the act is done by any person other than the woman herself. The general rules of criminal attempt find no difficulty of application in such cases. Doubt is entertained by certain writers in the case of attempt committed by the woman on herself.

If the law itself does not by an express provision exclude the attempt in this crime, it is not seen why there should be impunity when unambiguous acts of execution leave no doubt as to the determined intent of the woman to attempt miscarriage. As Crivellari says: *"The difficulty of proof in the concrete case is not an obstacle, because such difficulty does not exclude the possibility."*

SUB-TITLE VIII: OF INFANTICIDE AND OF THE ABANDONMENT, EXPOSURE AND ILL-TREATMENT OF CHILDREN

INFANTICIDE
Article 245

> **245.** Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth to the child or by reason of the effects of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this article the offence would have amounted to wilful homicide, she shall be guilty of infanticide and shall be liable to the punishment of imprisonment for a term not exceeding twenty years.

Here, keep in mind that **infanticide is separate from wilful homicide** – *"notwithstanding that the circumstances were such that but for this article the offence would have amounted to wilful homicide, she shall be guilty of infanticide…"*. It is treated as a separate substantive crime altogether.

With that being said, for a long time, infanticide was conceived as an aggravated form of homicide. The doctrine then current was that the killing of so young an infant, in its first coming into the world and when it is absolutely incapable of offering any resistance, was particularly heinous.

As time went on, rather than an aggravation, jurists started considering infanticide to be an excusable form of homicide for a number of reasons, one of them being the effects of childbirth and lactation upon the woman.

It is interesting to note that for many decades, statistics showed that infanticide was mostly committed by illegitimate mothers to hide their shame. So, was more commonplace than not, being committed to illegitimate children (out of wedlock) when at the time there was still a distinction between a legitimate and an illegitimate child, even in the law. Eventually, this distinction was declared unconstitutional.

The basis of this act being considered as separate from wilful homicide is that the operation of Criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman just after child birth is so upset, and is in such a hysterical state altogether, that the law cannot deal with her in the same manner as if she was in a regular and proper state of health.

So, the characteristic of this crime is the acknowledgment of the law that **the woman in that situation lacks a certain amount of reflective power**. Whereas our Criminal Law is intended to encourage compliance with the law, this is another section which tries to understand the psychological state of a woman in a particular circumstance.

It is important to note that this crime can **only be committed by a woman on HER child**. The law understands that a woman's state of mind might be so upset or rather, in a hysterical situation, that it also has been deemed to be a miserable condition. Obviously, you need to understand that in this realm, probably, even the evidence of certain medical experts will be important.

The fulcrum of this crime is what has been considered as **a deranged state of mind of the mother arising from partition which reduces the moral responsibility of the act**.

Elements –

1) The child must be **the child of that mother**;
2) The child must be **under an age of 12 months**;
3) At the time of the act or omission, she must
   a. **not have fully recovered from the effects of giving birth to that child** and by reason thereof, the balance of her mind must have been disturbed or
   b. the balance of her mind must have disturbed by reason of **the effects of lactation consequent upon the birth of the child**.

By act or omission

Infanticide by omission means the neglecting to do such things connected with the continuance of the life of the child as may cause its death; as, for example, neglecting to tie the umbilical cord after severance, since by omitting to do this, the infant may bleed to death; or by omitting to remove such obstacles as would prevent it from breathing; or omitting to feed it. On the other hand, **infanticide by commission** is the performance of any act against a live-born child which prevents it from living or which destroys its life.

The state of mind of the woman

Of course, if the woman, at the time of the act or omission was definitely insane within the strict legal meaning of the word, then the provisions regarding insanity will apply: but if her state of mind is disturbed through what is called "perpetual insanity" or other physical effects of child-birth or exhaustion from breast-feeding consequent, then subject to the concurrence of the other requisite conditions, this section will apply.

The child must be the child of that mother

The basis of the extenuation of homicide being the disturbed state of mind of the mother, i.e., a purely personal circumstance, it does not seem that it can extend to any co-offender, co-principal or accomplice.

Repubblika ta' Malta v. Nathalie Pisani (COCA 1982), *"article 245 which was introduced by virtue of Ordinance VI of 1947, is based upon the first article of the English Infanticide Act of 1938. There is here a special offence based on the concept of diminished responsibility for the purpose of avoiding a conviction of murder or manslaughter in contrast to the continental doctrine wherein this crime is founded upon considerations pertaining to the honour of families. From a reading of section 245, it is clear that guilt emerges in relation to infanticide not in relation to wilful homicide in the case where at the time of the act or omission, the mother would have a disturbed balance of mind as a consequence of the circumstances referred to therein. There is no absolute presumption. The disturbed balance*

of mind is just one of the considerations contemplated by law. In order to ensure that guilt is related to infanticide, not homicide, it is not correct to conclude that the law presumes that a mother who kills her baby who is less than of a year of age would not be fully composmentis, within the control of her mental faculties, as a result of the effects of pregnancy and giving birth. The correct position at law is that the law itself caters for this possibility, this contingency and therefore, in cases where a disturbed state of mind results as in section 245 which is obviously different from the insanity plea contemplated in article 33. The offence the mother has rendered herself guilty of would-be infanticide not wilful homicide." Here we understand the difference even in the actual punishment meted out by law.

What is the difference between Infanticide and Crime of Sudden Passion?
Before, opinions in Malta differed as to whether any such special provision was necessary. It was not questioned that the killing by a mother of her child at a time when her mind was deranged following and on account of parturition, deserved to be treated less severely than ordinary wilful homicide.

But one school of thought had it that sufficient provision for the purpose existed already in section 227(c) of the Criminal Code which excused wilful homicide committed by any person under the stress of instantaneous passion owing to which the agent was, at the time, incapable of reflecting. In substance, **this theory put the effects of child-birth on the same footing as other violent excitements like anger or fear**: women were entitled to that indulgence to human weakness generally shown by the law relating to provocation.

In a 1944 case, *Rex v. Vittoria*, the Court stated that article 227(c) applies only when the passion or mental agitation pleaded by the accused has been induced by provocation, i.e., by a cause from within and does not apply when it is merely the effect of the physiological fact of having given birth to the child.

Punishment
Finally, it may be observed that the law prescribes a maximum punishment but no minimum. This was done precisely in order to enable the Court to assess the appropriate punishment within that maximum, having regard to the particular circumstances of the case. It may well be that, in the particular case, the disturbance of the balance of the mind of the mother was but very slightly removed from insanity.

ABANDONMENT AND EXPOSURE AND ILL TREATMENT OF CHILDREN
Article 246

> **246.** Whosoever shall be guilty of abandoning or exposing any child under the age of seven years shall be liable to imprisonment for a term from seven months to one year.

How can you abandon a child?
There are many ways that can give rise to this criminality because the law does not tell us how and in what circumstances does abandonment subsist. However, if we were to simply try to coin a definition, abonnement refers to voluntary and permanent relinquishing of control over children by natal parents or guardians, whether by leaving them somewhere, selling them, or legally consigning care and control to some other person. It arises when the child's health and safety and welfare stops being a priority to those who have a duty of care. can abandonment be of a merely emotional nature? That would form under neglect and other forms of ill-treatment. The abonnement has to jeopardise the child's safety and therefore, it has to be to the determined of the child.

In this context, see the *Police v. Sabrina Albrecht* (30/09/2014), *"this Court is not satisfied that the accused had any intentional element whatsoever to abandon her child or in any way expose him as required by article 247 of Chapter 9. It results that when the police arrived on site, they found the child on the steps outside leading to the flats and that he was not roaming around in the streets. Apart from this, it has not been proven that the child in question was at some stage in some sort of danger. hence, there is no doubt whatsoever that the charge brought against the accused has not been proven and for the reasons stipulated here above, the Court acquits the accused from the charge brought against her."*

The law also speaks of "exposure." So, the Criminal Code does not give us a definition of "exposure", it just condemns exposure just as it does with abandonment. Exposure is a form of abandonment with the difference that it usually **tends to happen within the first weeks of a child's life in such a manner that it generally occurs before the child has had a chance of being integrated within its family**. So, exposure refers to the act of removal, offering, or separation and to this extent, it has some similarities with abandonment *per se*.

The advantage of not having a definition is the discretion of the judge but more so, the extent to which someone can be accused of this crime where the act or omission might not clearly initially be defined in a clear manner and be articulated as neglect. So, it gives room for manoeuvre even for prosecutors who might tender a charge in this regard, fully knowing that the act might not necessarily constitute a particular crime and see what the Court will determine.

The terms 'in the best interests of the child' can mean a lot and it is used consistently. What might be in the best interests of the child might be a subject of disagreement. Here, we are dealing with wellbeing and safety. The concept of exposure and abandonment can also be tricky, because you can have parents arguing that it is their way of making the child independent. Therefore, it is important for the Court to analyse the intention of the perpetrator, whether he/she intended to jeopardise the wellbeing of the child or not.

IF CHILD DIES OR SUSTAINS INJURY
Article 247

> **247.** (1) Saving the provisions of article 245, where, in consequence of the abandonment or exposure of the child, such child dies or sustains a bodily injury, the offender shall be deemed, in the first case, to be guilty of wilful homicide, and, in the second case, to be guilty of wilful bodily harm, and shall be subject to the provisions relating to homicide and bodily harm respectively; but the punishment shall be diminished by one degree.
>
> (2) Where the abandonment or the exposure of a child as provided in this article shall not have taken place under circumstances of manifest danger either to the life or to the person of the child so abandoned or exposed, the punishment shall be diminished by two degrees:
>
> Provided that where the punishment prescribed in sub-articles (1) and (2), be not heavier than the punishment prescribed in the last preceding article, the offender shall, on conviction, be liable to the punishment prescribed in the latter article, increased by one degree.

This leads to death or sustaining a bodily injury.

ILL-TREATMENT OR NEGLECT OF CHILD UNDER SIXTEEN YEARS
Article 247A

> **247A.** (1) Whosoever, having the responsibility of any child under sixteen years of age, by means of persistent acts of commission or omission ill-treats the child or causes or allows the ill-treatment by similar means of the child shall, unless the fact constitutes a more serious offence under any other provision of this Code, be liable on conviction to imprisonment for a term not exceeding two years.
>
> (2) For the purposes of sub-article (1), ill-treatment includes neglecting the child's need for adequate nutrition, clothing, shelter, and protection from harm, persistently offending the child's dignity and self-esteem in a serious manner and persistently imposing upon the child age-inappropriate tasks or hard physical labour.
>
> (3) The provisions of article 197(4) shall also apply in the case of an offence under this article, when the offence is committed by any ascendant or tutor.

This provision refers to **persistent acts of commission or omission**. It is a systematic illegal pattern of behaviour. In sub-article (2), it also speaks of ill-treatment. Here we have circumstances whereby we have had an addition in the law in this regard.

In *il-Pulużija v. Yohan Galea* (06/07/2015), there was an admission.

ADMINISTERING OR CAUSING OTHERS TO TAKE SUBSTANCES INJURIOUS TO HEALTH
Article 244

> **244.** Whosoever shall, in any manner, maliciously administer to, or cause to be taken by another person any poisonous or noxious substance capable of causing any harm or injury to health, shall, on conviction, be liable to imprisonment for a term from thirteen months to two years, provided the offence does not in itself constitute the offence of homicide, completed or attempted, or a serious injury to the person.

Elements –
1) The malicious administration to or the causing to be taken by another person;
2) In any manner;
3) Of a poisonous or noxious substance;
4) Capable of causing any harm or injury to health.

1)
The formal element of this crime is indicated by the word *"maliciously"* which in context seems to mean **an intent to harm/to injure**. Obviously, we are speaking of *animus nocendi* which is the intention required even for bodily harm, as opposed to *animus necandi*.

So, the wilfulness of the act of administering the substance or causing it to be taken is not enough without the knowledge of its poisonous or noxious character and of its capacity to cause harm, and without a wrongful intent.

There has to be the wilfulness of the act and also, **the knowledge of the perpetrator of the poisonous or noxious character of the substance**. And not only the harmful character of the substance but its ability to cause harm.

So, the crime would subsist if the offender acted with dolus. So, both **foresight** and **desire**. You need the mental element, the malicious element.

2)
This element is self-explanatory

3)
The substances to which the provision relates are poisonous or noxious substances capable of causing harm or injury to health.

Taylor has described a poison as a substance which when taken into the mouth or stomach, or when absorbed into the blood, is capable of affecting seriously the health or of destroying life by means of its action on tissues with which it immediately or after absorption comes into contact.

For the purpose of this provision of the law, however, it is not necessary that the words "poisonous substance" be defined further than as a substance which, when administered or caused to be taken, is capable of being harmful or injurious to health.

Professor Mamo says that although the actual substance can be poisonous or noxious, the crime will not arise if the quantity administered or caused to be taken is in fact innocuous, meaning negligible (so small).

4)
The crime under discussion is completed notwithstanding that the victim has not, in fact, suffered any harm, if **the substance is maliciously administered or caused to be taken** was **capable of causing harm or injury to health**.

Also, it is not necessary that there should be actual delivery by the hand of the defendant.

By express terms of this article, the punishment therein prescribed applies, unless the offence committed constitutes in itself the crime of homicide, whether completed or attempted, or a grievous bodily harm – in which cases the punishments applicable would be those appropriate thereto.

The offence will only subsist provided the acts committed by the offender do not actually amount to homicide because in that case, if you have the *dolus*, you will not be punished for this crime but for the crime of homicide. Homicide can be committed by means of any act, provided that the elements of the crime are proved. So, the law itself says this is the crime which applies, provided it does not lead to death. This crime will lead to consequences short of the death of the person.

Finally, it may be mentioned that the sale and supply of poisons and dangerous drugs are regulated by other laws. We have various laws which address issues relating to substances *per se*. Keep in mind that although the prohibition arises directly from the Criminal Code, there are other laws which of their own very nature, although they are not purely criminal laws, they also have criminal consequences.

TRANSMISSION, COMMUNICATION ETC, OF DISEASE
Article 244A

> **244A.** (1) Any person who, knowing that he suffers from, or is afflicted by, any disease or condition as may be specified in accordance with sub-article (3), in any manner knowingly transmits, communicates or passes on such disease or condition to any other person not otherwise suffering from it or afflicted by it, shall, on conviction, be liable to imprisonment for a term from four year to nine years:
>
> Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishment established in article 211(1).
>
> (2) Where any such disease or condition as is referred to in sub-article (1) is transmitted, communicated or passed on through imprudence, carelessness or through non-observance of any regulation by the person who knew or should have known that he suffers there from or is afflicted thereby that person shall on conviction be liable to imprisonment for a term not exceeding six months or to a fine (*multa*) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37):
>
> Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishments established in article 225.
>
> (3) The Minister responsible for justice shall, by notice in the Gazette, specify diseases or conditions to which this article applies.

This deals with the transmission of diseases. This crime is the type whereby even if an accused admits to the contents of the crime, the Court will still have to consider certain aspects to see whether it has been admitted.

What are the communicable diseases? These are listed in the Communicable Diseases and Conditions Regulations being subsidiary legislation 9.10, namely regulation 2 thereof. This is HIV, Aids, hepatitis C, hepatitis B and tuberculosis. So, article 244A does not apply to diseases which do not fall under this legal notice. It is an exhaustive list of diseases. Keep in mind that a particular disease can lead to another insofar as HIV itself could lead to aids.

The law demands various element insofar as the way it has to be proved.

Police v. Stephan Maurice George Saurin (03/10/2018), the Court cited legal notice 137 of 2005 which enlists the five communicable diseases and stated the following, *"there is hardly any Maltese case law on the matter. This is the crime of transmission, communication (passing) of a disease or of a condition specified under law whatever the means used to transmit such disease or condition and not necessarily deriving from sexual encounters. In this case, the evidence brought by the prosecution relates to alleged homosexual acts between the accused and third parties. Hence, the Court's assessment shall focus on this modality of transmission. The transmission of the disease or condition can be extenuated by the characteristics of such disease or condition and by the way it is transmitted. A disease or*

condition can be transmitted either by means of the awareness of both consenting sexual partners or of either one of them or else even when both sexual partners have no such awareness. The infection can be transmitted even if there would not be full penetration. To prove guilt, the prosecution has to prove beyond reasonable doubt and with clarity both the means and the way in which a disease or condition was transmitted from one subject to the other. The Court must consider all the evidence both of ordinary witnesses and of medical and scientific experts. These two types of witnesses must be consistent.

Therefore, the elements of this crime are the following – (1) ***the subsistence of a disease or condition in the agent****, (2)* ***contagious activity which can be of a sexual nature between the agent and the victim*** [link of causation]*, (3)* ***the transmission of the specific disease or condition from the agent to the victim*** [link of causation]*, (4)* ***insofar as the mens rea is concerned, the knowledge that before the contagious activity, the victim was not afflicted by (was not suffering from) that specific disease or condition****, (5)* ***the other intentional element being i. the knowledge of the agent to the effect that at the time of the contagious activity, he was suffering from such specific disease or condition and deliberately and voluntarily transmitted such disease or condition to the victim who was not suffering from such disease or condition at the time of the contagious activity OR ii. That he should have known that he was afflicted by that disease or condition that he should have known that he could transmit it to the victim because he acted negligently.***

In order to prove guilt, the prosecution must prove in a scientific and medical manner the subsistence of the disease or condition in the agent and the transmission of the same to the victim provided such disease or condition is one of those enlisted in legal notice 137 of 2005. The prosecution is required to prove beyond reasonable doubt that the victim was infected with <u>the very same disease or condition</u> of which the agent suffered from at the time of the contagious activity. This is because the agent may be suffering from other diseases or conditions which were not transmitted to the victim during the contagious activity or else the victim was already afflicted by a disease or condition even without his knowledge which is different to the one which was transmitted to him by the agent, and which was not transmitted to him by the agent.

It is hence important that the Courts consider all the scientific evidence together with the factual contextual circumstances in order to determine guilt or otherwise. The Court has to be convinced at the required standard of proof that the disease or condition was actually transmitted from the agent to the victim and from nobody else. [administration of poisonous substance they have to be capable of *causing harm, but here the disease has to necessarily be transmitted]. Moreover, that the victim was infected with the same disease of condition and not any other disease or condition.*

The fact that the agent admits unprotected sexual intercourse with the victim and that he had such intercourse with the requisite intent or negligently, is not enough to prove this crime. Hence, for the purposes of this crime, the admission of the agent does not suffice to prove his guilt neither is it sufficient to prove that the victim was a virgin and was afflicted by the disease after the homosexual act. This is because if there is no medical and scientific evidence which related directly to the nature and type of this specific disease or condition which was allegedly transmitted by the agent to the victim, a miscarriage of justice might

ensue, and the agent would be found guilty erroneously. For example, Titius has a sexual encounter with Caius, Caius claims he was infected with HIV further to his homosexual activity with Titius who, in turn, admits to the unprotected homosexual act. it results that Titius was infected by HIV. No medical tests are undertaken to determine whether Caius was infected with the same type, species and strain of the virus which afflicts Titius although there is evidence that both of them have HIV. If it results that the type, species and strain of the virus which Caius has is different to that of Titius, guilt should not subsist. Both English and Italian case law place a higher burden on the agent who is aware that he suffers from a specific disease or condition. Both jurisdictions cater for the possibility of transmission by means of a negligent act.

Under English law, the agent who foresees that the victim can be infected with the disease or condition and has unprotected sex with the victim, notwithstanding such risk, is considered to be reckless. Once this foresight is proved, the Court must evaluate the extent and degree of the risk taken by the agent.

The reasonableness or otherwise of the agent's act depends on some factors: (1) the frequency of unprotected sex between the agent and the victim. A small number of sexual encounters leads to a different situation because the imprudence of the agent is much higher when frequent sexual encounters are undertaken; (2) the risk of transmission. This could also depend on the frequency of unprotected sex in the case of certain types of diseases or conditions which are very easily contagious, just one unprotected sexual intercourse may be sufficient to be considered negligent by the agent. On the other hand, in less contagious diseases, just one sexual intercourse may not necessarily be classified as negligent. However, if sex is undertaken without protection, notwithstanding the low incidence of the extent to which the disease or condition is contagious, it can still amount to negligence by the agent because the degree of negligence increases as a result of the unprotected nature of the sexual activity.

Yet the determining factor is whether the agent knew that he was afflicted by this specific disease or condition before undertaking sexual activity with third parties. Or else whether he should have known that he suffered from this specific disease of condition at the time of sexual intercourse. Therefore, the prosecution must prove: (1) the transmission happened with the knowledge of the agent, (2) the transmission happened when the agent should have known that he was suffering from such disease or condition. It suffices that the agent knows that he has been diagnosed with HIV although it is not expected of him to know the type, species and strain of the virus or its degree and extent. The knowledge of the agent in the case of transmission by negligence is more difficult to prove for the prosecution because the prosecution must prove that the agent should have known that he suffered from the disease or condition.

The Court asks itself, who should know that he suffers from a disease or condition. One could say that this should be expected of everybody before they engage in sexual activity, yet the agent should have at least an indication, a symptom that he is afflicted by such disease or condition or else, that he is particularly promiscuous or else, that he is aware that he has undertaken unprotected sex with persons who the agent knew suffered from such disease or condition. However, if a person undertakes sexual activity with many people although this

exposes such person to the risk of transmission, this fact alone per se does not automatically and necessarily mean that he has been infected with a disease or condition simply as a result of such sexual activity. The fact that he placed himself in a high risk of being infected by a disease or condition does not necessarily mean that he should have known that he is suffering from a disease or condition. On the other hand, if the agent knew that the persons with whom he had sex where already afflicted by the disease or condition, in such case, the risk that such disease or condition be transmitted to him would be exponentially higher and it would hence be reasonably expected of him to know that he could have been infected with a disease or condition but if he did not have the knowledge that the other persons with whom he had sex where afflicted already by the disease or condition when they had sex with him it is very difficult for the prosecution without compelling and objective evidence to prove that the agent should have known that he was afflicted by the specific disease or condition.

Maltese law does not refer to the knowledge of the victim in relation to the disease or condition of the agent. In the crime of knowingly transmitting, communicating or passing a disease or condition, one of the main elements is that the victim was not afflicted by the disease or condition before the voluntary sexual encounter with the agent. However, the element of this crime does not need to be proved in the case of negligent transmission in terms of 244A(2) where the law does not refer to the victim having been infected with a disease or condition which he did not suffer from before the contagious activity. It seems that the legislator is here postulating a scenario where a person could have been infected before but not necessarily with this specific disease or condition attributable to the agent of the crime. In any case, the prosecution would still have to prove beyond reasonable doubt that the victim was infected with a specific disease or condition in a manner imputable to the agent although such transmission occurred by negligence of the agent who should have known that he was afflicted with the specific disease or condition."

SUB-TITLE IX: OF THREATS, PRIVATE VIOLENCE AND HARASSMENT

THREATS BY MEANS OF WRITING
Section 249

> **249.** (1) Whosoever by means of any writing, whether anonymous or signed in his own or in a fictitious name, shall threaten the commission of any crime whatsoever, shall, on conviction, be liable to imprisonment for a term from six to twelve months or to a fine (*multa*) not exceeding five thousand euro (€5,000), or to both such imprisonment and fine:
>
> Provided that where the threat concerns the use of nuclear material to cause death or serious injury to any person or substantial damage to property or the commission of an offence of theft of nuclear material in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act the punishment for the offence shall be increased by three degrees; the expression "nuclear material" shall have the same meaning assigned to it by article 314B(4).
>
> (2) Where the threat, be it even verbal, contains an order, or imposes a condition, the offender shall, on conviction, be liable to the punishment prescribed in sub-article (1), provided that such fine (*multa*) shall not exceed ten thousand euro (€10,000).
>
> (3) Moreover the offender shall be required to find a surety, or to enter into a recognizance as provided in articles 383, 384 and 385.

The objective element of the offence consists in making threats. In sub-article (1) these have to be in writing, and they have to be to the effect that the offender will commit a crime against the victim, so, it cannot be a threat of a contravention. It has to be against the victim. So, not any crime. Verbal threats will only fall within the remit of this provision when they contain an order or else impose a condition.

There has to be a generic intent of wilfully and knowingly writing or saying something, in the case of (1) it is writing and (2) it is saying, in the awareness that it is a threat. The Courts have held that threats which the offender promises to carry out on the verification of a condition which is within the control of the would-be victim are anyway threats contrary to law, this was decided in *Stella Bugeja v. Rosina Bugeja* (COCA 31/01/1949). In another case, *Caterina Galea v. Carmelo Carabott* (COCA 23/05/1949), the Court stated that a person who wishes some horrible consequence against another which is outside his/her control would not be committing the offence of threats.

PRIVATE VIOLENCE

Article 251

> **251.** (1) Whosoever shall use violence, including moral and, or, psychological violence, and, or coercion, in order to compel another person to do, suffer or omit anything or to diminish such other person's abilities or to isolate that person, or to restrict access to money, education or employment shall, on conviction, be liable to the punishment laid down in sub-article (1) of the last preceding article.
>
> (2) Where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) of the last preceding article.
>
> (3) Whosoever shall cause another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be liable to the punishments prescribed in sub-article (1) decreased by one to two degrees:
>
> Provided that where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) decreased by one to two degrees.

He use of violence to compel the passive subject to act in a certain manner. Violence comprises any form of conduct suitable to compel the passive subject to act in a certain manner and therefore, it comprises both physical and moral forms of violence, including threats, this was decided in Puliżija v. Jean Claude Cassar (COCA 16/03/2001).

The mens rea in private violence is that the offence requires the specific intent of obtaining the desired result by the mentioned illicit means.

BLACKMAIL

Article 250

> **250.** (1) Whosoever, with intent to extort money or any other thing, or to make any gain, or with intent to induce another person to execute, destroy, alter, or change any will, or written obligation, title or security, or to do or omit from doing any thing, shall threaten to accuse or to make a complaint against, or to defame, that or another person, shall, on conviction, be liable to imprisonment for a term from one to four years.

This is a specific form of private violence because the violence is used to coerce the victim into doing something specific and we are considering here specifically in the threat of accusing, defaming or making a complaint against a passive subject.

In *Pulużija v. Ruth Frau* (04/07/2017), *"the crime contemplated in 250(2) is instantaneous not continuing or continuous but since its effects being the fear of the complaint can and generally protrude at length, it is susceptible to be repeated and can partake of a continuing*

or continuous nature since the extortion would not need to be consummated each and every time by means of an explicit and formal threat. This is because the victim of the crime, once influenced, i.e., once intimated, would be willing to concede to any request which would again be made by the agent provided that such subsequent requests be made with the same criminal intent."

The Court referred *to* *R. v. Geraldu Cassar* (02/07/1985) to explain the phrase *'or to make any gain', ""or to make any gain" derives from the concept of "o di fare altro lucro". 'Lucro' is defined as 'guadanio' which means gain. The word connotes material aspects and material matters. It does not connote personal or moral satisfaction.*

The Court also makes reference to *Pulużija v. Edgar Apap* (COCA 13/04/1957), the contents of which were also confirmed in *Angelo Vella* (COCA 28/07/1988), *"the word "gain" refers to something which has patrimonial value and not to any gain or pleasure or satisfaction which has no pecuniary value. If the intent of the agent was mere personal satisfaction, the constitutive element of the crime would be lacking, yet the legal provision was amended by virtue of Act III of 2002 by means of which blackmail can be committed for any objective, scope or end not only patrimonial, pecuniary gain. Thus, the criminal intent behind the blackmail or the threat is that the agent compels the victim to do something which he would otherwise not have done by means of threats to the effect that something will happen to the victim.*

The Court quotes *Pulużija v. Ashraf el Bakri* (09/01/2014), *"for the crime to subsist, it is not necessary to prove that the agent wanted to make pecuniary (patrimonial) gain because the crime subsist irrespective of the end, scope and objective which the agent wanted to achieve by means of his conduct. This is so, provided all the other elements of the crime be proved. To achieve such end or scope or objective, the agent must have threatened the victim and the threat must be a threat to accuse or to make a complaint against or to defame such person or another person."*

See also *Pulużija v. Edgar Publius Bonnici Cachia* (26/03/2015) and *Pulużija v. Aronne Gravina* (14/06/2017).

SUB-TITLE VIII BIS: OF THE TRAFFIC OF PERSONS

TRAFFIC OF A PERSON OF AGE FOR THE PURPOSE OF EXPLOITATION IN THE PRODUCTION OF GOODS OR PROVISION OF SERVICES

Article 248A

248A. (1) Whosoever, by any means mentioned in sub-article (2), traffics a person of age for the purpose of exploiting that person in:

(*a*) the production of goods or provision of services; or

(*b*) slavery or practices similar to slavery; or

(*c*) servitude or forced labour; or

(*d*) activities associated with begging; or

(*e*) any other unlawful activities not specifically provided for elsewhere under this Sub-title,

shall, on conviction, be liable to the punishment of imprisonment from six to twelve years.

For the purposes of this sub-article exploitation includes requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety.

(2) The means referred to in sub-article (1) are the following:

(*a*) violence or threats, including abduction;

(*b*) deceit or fraud;

(*c*) misuse of authority, influence or pressure;

(*d*) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;

(*e*) abuse of power or of a position of vulnerability:

Provided that in this paragraph "position of vulnerability" means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

(3) The consent of a victim of trafficking to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in sub-article (2) has been used.

This is a fully fledged national crime, but it can have a transnational dimension because it can be planned elsewhere, perpetrated elsewhere or else its effects are felt elsewhere insofar as in fact, the prohibition of trafficking of persons which is usually and colloquiality termed modern day slavery.

The UN convention against transnational organised crime was signed in the year 2000 and is intended to oblige States to create a legal framework by means of which such states would be able to punish the act of human trafficking and migrant smuggling. It can have a transnational element because human trafficking could also be perpetrated by a criminal organisation. The prohibition of trafficking although it emerges from the UNCATOC really

and truly emerges from the Palermo Protocols. What was punished was effectively the act by means of which a person is trafficked.

Our law is largely modelled on recommendations by Council of Europe and UN organs, especially the UNODC and the protocols to the UNCATOC themselves which are additional legal instruments.

The law focuses on the element of **control**, control to the extent that the passive subject is dependent upon the agent. the control is such that the passive subject (the victim) has no choice but to abide by the conditions/instructions of the agent.

General provisions applicable to this sub-title
Article 248E

> **248E.** (1) In this Sub-title, the phrase "trafficks a person" or "trafficks a minor" means the recruitment, transportation, sale or transfer of a person, or of a minor, as the case may be, including harbouring and subsequent reception and exchange or transfer of control over that person, or minor, and includes any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of any country for any of the purposes mentioned in the preceding articles of this Sub-title, as the case may be.

This defines trafficking of a person. The law speaks of all the means which can be used for the crime of trafficking. The law is broad and wide. Effectively, there are various methods by means of which the crime can be perpetrated.

Act XVIII of 2003 introduced this crime. This basically amended the Criminal Code which had transposed the Directive no, 2011/36 on Preventing and Combatting trafficking in Human Being (THB) and Protecting its Victims. So, these are the amendments to the transposition of the directive. These were seeking to discourage both the commission of THB and the use of the service of a trafficked person. You can discourage the commission of the crime, and you provide a disincentive if you also effectively curb the surface of a trafficked person. most importantly, these amendments establish the irrelevance of the consent of the victim. Even if the victim consent to being trafficked, the crime would still subsist. this is a very powerful legislative tool. It becomes no defence of any person accused of THB that the victim consented in any form whatsoever.

Essentially, it also introduced the crime of aiding, abetting (characteristics of complicity) and instigation of the crime of THB which is a crime that does not depend on a result, and therefore, is not a result crime. Also, most importantly, the crime per se of THB was categorised as a violent international crime, this time for the purposes of a particular subsidiary legislation: Criminal injuries compensation scheme regulation.

Human trafficking is largely considered as a crime which definitely violates a fundamental HR. for example, article 5 of the ECHR, right to liberty and security because of the element of control and coercing; article 3 of the ECHR which prohibits inhuman and degrading

treatment and punishment and torture. The message our governments, including international organisation, want to send is the gravity of this crime.

Pulużija v. Paul and Elena Ellul (COCA 19/09/2006), *"for trafficking to subsist, it is necessary that at least just one act, one mode of conduct listed within the abovementioned legal provision is present. From the evidence given by Tatiana Parisheva, this Court has not doubt that these two persons were recruited and that their residence in Malta was deliberately facilitated with the scope of exploiting such persons in prostitution. In all this, the appellant was directly complicit and participated therein. Konak Bayeva testified that Elena Ellul, the appellant's wife, had helped her to obtain the required documentation in order to enter Malta and had also told her that she would be able to find employment for her, although she had not specified the type and kind of employment. Parisheva testified that she had come to Malta to work as a waitress. These two women effectively found themselves* ***within the control*** *of the appellants and of the other two co-accused constrained to prostitute themselves. Additionally, their air ticket and passport were confiscated hence creating a state of affairs wherein they were not free to choose and act voluntarily. In relation to the appellant, thus, the means contemplated by sub-paragraphs (b) and (c) of sub-article (2) of article 248A subsist. Thus, the second grievance is hereby rejected. As stated by the First Court, the crimes which the appellant stood accused of are very serious indeed. Thus, society needs the Court's protection also because these crimes are causing the breakdown of families and thus require that he who is found guilty of having committed such crimes should be duly punished on the basis of the harm he has inflicted.*

Pulużija v. Dunkin Hall, Daren Bonnici and Ingrid Bonnici (22/07/2004), *"the crime contemplated within the bill of inditement is in the Court's opinion one of the most grave crimes within the Criminal Code. The crime of THB for the purposes of prostitution is a form of cowardice of the most reprehensible levels one can ever contemplate. The fact that a human being exercises total control over another human being who is divested of all liberty and dignity and all this for financial gain is very condemnable and extremely degrading. This is why the legislator catered for a maximum penalty of 9 years imprisonment."*

The scope of the THB – Pulużija v. James Grima, *"in the Courts opinion, the case of Marina Marosova does not fall within the parameters of article 248A but may potentially fall within the remit of article 248B. The reason for this is that because we are dealing with trafficking of persons with the purpose of prostitution, it is not the case that Morosova was required to provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries, and health and safety. There is no wage regulation order or wages counsel order for prostitutes or any prescribed working standards for such activity. Besides this, here we are confronted with a case wherein a person came to Malta voluntarily and deliberately to provide sexual services. Thus, the constitutive elements i.e., the ingredients of the crime of THB at least as defined in article 248A are missing."*

It makes reference to Il-Pulużija v. Raymond Mifsud (01/03/2012), *"in relation to the charge contemplated by articles 248A(2)(a) and (b), these are crimes which fall within the parameters of sub-title (8 bis) of Chapter 9 of the Laws of Malta entitled 'Of the Traffic of Persons'. It is evident that 248A sub-articles (1) and (2) are not applicable. In the current case since they deal with cases of trafficking of persons for the purposes of exploitation in*

the production of goods or in the provision of services and do not include expresis verbis (explicitly) sexual services but relate solely and exclusively to cheap labour. Article 248B deals with trafficking of persons for the purposes of prostitution. This being sexual exploitation…The accused is also charged with a violation of 248B which falls within the parameters of the same legal provision. The first ingredient of the crime consists in the trafficking of minors, which crime must be consummated by means of any act [alternative not cumulative] *emanating from 248A(2), i.e., with **either one** of the following: violence or threats including abduction; deceit or fraud; misuse of authority, influence or pressure, the giving or receiving of payments or benefits to achieve the consent of the person having control of another person."*

With respect to deceit and fraud, the typical case is that of telling persons that they would come to Malta to work and deceiving such person. There is the deceit because there is already the malice aforethought, there is a pre-planned strategically designed mode of conduct which is intended to secure the physical transfer of a woman or a man from one place to another, and the law mentions a number of manners, but with the pre-planned design and intention that this person will be controlled by you within this criminal enterprise, because generally here we are speaking of an entire enterprise, for the purposes of profit, *lucrum.* In such a manner that a person loses their personal belongings (passport, means of identification etc), so hence, detachment form the outside world, is placed within the control of the perpetrator in such a manner that the person cannot easily leave, so you have an element of coercion. This is the result of a deceitful or fraudulent intent and act. This is proved by initial emails, initial contracts of employment and so on. It is often accompanied by an element of intimidation.

The Courts continued to say *"these means are specifically catered for to distinguish this crime from the crime of migrant smuggling penalised by means of Chapter 217. It is a crime whereby a person voluntarily submits himself to another in order to cross frontiers into another state irregularly. In the case under scrutiny, the law requires that the person is trafficked against his or her will with the use of any of the above-mentioned means. In the facts emerging throughout the proceedings, the girls were brought to Malta on false pretences, i.e., they were made to believe that they would be working in a restaurant in Malta and hence, accepted the offer which was made deceitfully and fraudulently. Hence, satisfying paragraphs (a) and (b) of sub-article (2) of article 248A. The second ingredient of the crime is the intentional one, the intention to traffic for purposes of prostitution and as proved without any shadow of a doubt, the girls were trafficked for such purposes. In fact, the accused immediately upon their arrival made them available for clients. Besides deceiving them on the reason why they shall be coming to Malta, he also deceived them in relation to the hotel they would be staying in which turned out to be his own farmhouse wherein they were immediately asked to offer sexual services."* The Court went on the define trafficking as per law, in article 248E and concluded as follows, *"the behaviour of the accused fits like a glove within this definition, i.e., within 248E. Since the constitutive elements of the crime have been proved, the accused is being found guilty of having committed the crime."*

SUB-TITLE IX: OF THREATS, PRIVATE VIOLENCE AND HARASSMENT

HARASSMENT
Article 251A

251A. (1) A person who:

(*a*) pursues a course of conduct which amounts to harassment of another person; or

(*b*) pursues a course of conduct which he knows or ought to know amounts to harassment of such other person; or

(*c*) subjects another person to an act of physical intimacy; or

(*d*) requests sexual favours from another person; or

(*e*) subjects another person to any act and, or conduct with sexual connotations, including spoken words, gestures and, or the production, display or circulation of any written words, pictures, and, or any other material, where such act, words, and, or conduct is unwelcome to the victim, and could be reasonably be regarded as offensive, humiliating, degrading, and, or intimidating towards that person,

shall be guilty of an offence under this article.

(2) For the purpose of this article, the person whose course of conduct is in question ought to know that it amounts to harassment of another person if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person.

(3) It is a defence for a person charged with an offence under this article to show that:

(*a*) his course of conduct was pursued for the purpose of preventing or detecting crime; or

(*b*) his course of conduct was pursued under any enactment, regulation or rule, or to comply with any condition or requirement imposed by any person under any enactment; or

(*c*) in the particular circumstances the pursuit of the course of conduct was reasonable.

(4) A person guilty of an offence under this article shall be liable to the punishment of imprisonment for a term from six months to two years or to a fine (*multa*) of not less than five thousand euro (€5,000) and not more than ten thousand euro (€10,000), or to both such fine and imprisonment:

Provided that the punishment shall be increased by one degree where the offence is committed against any person mentioned in article 222(1).

This article contemplates within itself circumstances whereby one can plead any of these 3 as a defence.

Pulużija v. Giuseppe Axiaq (16/01/2014), *"harassing someone goes beyond merely placing someone under stress. Harassment implies an action or conduct which is interpreted by the receiving party as emotionally unfavourable and hence, negatively being or feeling stressed out is a unilateral and personal feeling. Merely stopping a car and seeing your wife cross the road when she was accompanied by another person cannot be tantamount to harassment. There is nothing illegal in doing so.*

Pulużija v. Joseph Micallef (13/03/2013 COCA), *"the accused pleaded that he took photos of the complainant Maria Manicolo in his capacity, as provisional administrator of the condominium and to obtain evidence proving that the complainant was placing garbage bags in a prohibited area. As a result of these photos, the complainant felt harassed. The Court concluded that the complainant objected to the local council's instructions to the effect that garbage bags should be placed next to the stairwell which leads to the flats and this owing to the excessive smells which entered into her own flat. Unlike other condomini, Maria Manicolo continued to place the garbage bags not in front of her residence but next to the drive in, in defiance of written notices and orders by the provisional administrator and in defiance of Marsaskala local council orders. All the accused wanted to do is obtain evidence to be used in a meeting of the condomini or in a court of justice rather than to harass the complainant, his behaviour hence cannot be considered as unreasonable. Article 251A(3)(c) is therefore applicable. The judgement of the First Court is hence being revoked. The appeal is being accepted and the accused is being acquitted of the Criminal charge."*

Pulużija v. Massimo Tivisini (COCA 27/02/2009), *"the Court considered that when one takes into account the general conduct of the appellant, and the crimes he has committed, including grievous bodily harm and aggravated theft, Elenora Camilleri had ample reasons to be worried about his obsessive behaviour, given that at all costs he insisted to speak to her when she feared that violence would be inflicted upon her.*

Although as submitted by the appellant, the term harassment was defined by Black's Law Dictionary 7th Edition as follows "words, conduct or action (repeated or persistent) that being directed at a specific person annoy, alarm or cause substantial emotional distress in that person and serve no legitimate purpose;" ***the repetition and persistence must not be considered in isolation and with reference only to the facts of this case but must be considered in the light of the previous behaviour of the appellant****. In fact, as stated by the COCA in* Pulużija v. Allan Carabez (21/06/2007), *"in such cases the background to every incident is vital for the Court to be able to pick out and extract the isolated incident from the habitual and repeated behaviour over a period of time." Within this context, the criterion of persistence and repetition is amply proved, not as a result of the incidents which occurred after 1st September 2008 and as a result of the prior background.*

The Court considered that the crime of harassment was introduced for the first time within our Criminal Code by means of Act XX of 2005 and incorporated in our Criminal Code by means of articles 251A-215D. 215A creates the crime by means of which a person pursues a mode of conduct which amounts to harassment of another person ***which he knows or ought***

to know that such conduct amounts to harassment of another person*. This crime is reflected within the fourth charge.*

In sub-section (2) the law adds that for the purpose of this article, the person whose course of conduct is in question ought to know that it amounts to harassment of another person ***if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person****. It is a defence for a person charged with an offence under this article to show that his course of conduct was pursued for the purpose of preventing or detecting crime or his course of conduct was pursued under any enactment, regulation or rule or to comply with any condition or requirement imposed by any person under any enactment, or else in the particular circumstances, the pursuit of the course of conduct was reasonable.*

Article 251C provides that references to harassing a person include alarming the person or causing the person distress. Besides article 251C's reference to alarming the person, or causing the person distress, our law does not define the generic term 'harassment'. Whereas the lack of a specific detailed and exhaustive definition permits the exercise of the judge's discretion, as to what constituted harassment, it could on the other hand, create doubts on the application of Criminal Law in relation to such crimes which emanate directly from complex and delicate interpersonal relations. In foreign jurisdictions, it was established that one of the forms amounting to harassment is following or rather stalking [in our law, stalking is more associated with committing harassment without disclosing your identity]. *A common case is that of the rejected stalker where the agent follows the victim with the aim of changing her mind. Correcting her rejection or paying the victim pack for having rejected the agent, there are the resentful stalkers who do their outmost to pay the victim back by intimidating the victim. There are also intimacy seekers who attempt to create an intimate and passion relationship with the victims. Erotomaniac stalker believe that the victim loves them and interprets the victim's actions, words and behaviour as conducive to that love. Another type of stalker is the incompetent suitor who is unable to approach the victim socially, possibly as a result of being too shy or for fear of rejection but who anyway expects to have an intimate relationship with the victims. Finally, there are predatory stalkers who observe the victim's incessantly and plan a sexual attack.*

Each and every case is calculated and intended to create fear to the effect that the victim would feel followed and placed under pressure unjustly. This is exactly what the law wants to prohibit. The appellant submitted that it is only logical and natural that he requests and explanation from his ex-lover to know the reasons why she left him, but the Court cannot endorse this or approve such behaviour simply because he felt aggrieved, disappointed or hurt. The appellant is a mature 40-year-old married man with a wife requesting maintenance which facts result from his Criminal records. He is not a young man with illusions about love. Thus, his acts and conduct constitute harassment in the eyes of the law."

In *Pulużija v. Simon Azzopardi* (04/05/2011), the Court refers to *Pulużija v. Raymond Parnis* (COCA 24/04/2019) wherein the Court gave an exhaustive definition of whatever constituted harassment, within the parameters of the law. The Court stressed that the word 'imgiba' in the English text, a course of conduct, implies not merely one isolated incident.

The Court added that all the things which happened in the context of one incident can never amount to the crime contemplated by 251B. The crime was modelled upon article 4(1) from the UK Protection from Harassment Act (1997). The words "on each of those occasions" are indicative that the material act (the *actus reus*) cannot be consummated in just one incident but there must subsist at least two occasions exactly as stated in English law with the words "on at least two occasions." For some reason, in the Court's opinion without planning common sense and logic, the words "on at least two occasions" where omitted from the Maltese text.

Blackstone's Criminal Practice (2008) states as follows, "*how separate the two occasions must be remains to be seen. The nature of stalking the activity which primarily created the need for the new offences might mean that the occasions are likely to be on separate days. Although it may be possible to differentiate activities on one day where they can be viewed as not being continuous. The further apart the incidents, the less likely it is that they will be regarded as a course of conduct. It is recognised however, that circumstances can be conceived where incidents as far apart as one year could constitute a course of conduct. These types of incidents would be those intended to occur on an annual event such as a religious festival, a birthday or an anniversary."*

Pulużija v. Julian Cesare (01/03/2012 COCA), *"according to the second sub-article of the legal provision which introduced the crime of harassment, the Maltese legislator applied an objective test of the reasonable man whereby a person acting in a dubious manner should know whether his or her conduct amounts to harassment or otherwise* [objective test]*. If a reasonable man who possesses the same information considers such conduct as harassment, the crime would subsist. The objective test of the reasonable man is confirmed jurisprudentially."*

CAUSING OTHERS TO FEAR THAT VIOLENCE WILL BE USED AGAINST THEM
Article 251B

> **251B.** (1) A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions, and shall be liable to the punishment of imprisonment for a term from one to two years or to a fine (*multa*) of not less than six thousand and five hundred euro (€6,500) and not more than fifteen thousand euro (€15,000), or to both such fine and imprisonment.
>
> (2) For the purpose of this article, the person whose course of conduct is in question ought to know that it will cause another person to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.
>
> (3) It is a defence for a person charged with an offence under this article to show that:
>
> (*a*) his course of conduct was pursued in the circumstances mentioned in article 251A(3)(*a*) or (*b*); or
>
> (*b*) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

Initially, when looking at the crime, one will not the absence of the words 'on at least two occasions.' Initially, that may seem to suggest that the legislator did not want to include the presence of a course of conduct to prove the offence but as pointed out in *Pulużija v. Brian Micallef* (COCA 14/10/2011), the fact that the law requires the causation of fear on each of those occasions, contradicts this initial belief and **leads to the conclusion that this offence also requires a course of conduct like in article 251A**.

The said course of conduct must cause the passive subject to **fear that violence will be used against him or his property or the person or property of one of the persons mentioned in 222(1)**. The causation of fear must be actual and not merely probable. So, for article 251B to be proved this cannot subsist unless the passive subject actually fears that violence will be used. This is also confirmed in *Pulużija v. Horass Caruana* (COCA 20/09/2012).

Keep in mind that article 251B refers to fear of violence which may be perpetrated in the future. Therefore, **the crime in article 251B cannot subsist if the threatened violence has already been committed**. This was stated in *Pulużija v. Usef Imbarrek* (COCA 04/06/2010).

The ***means rea*** is similar to that of harassment with the difference that the offender knows or ought to know that his conduct will cause the fear envisaged by the law and **the test**

employed by the Courts is that of the reasonable man. It is the objective test. This was confirmed in *Horass Caruana* and *Raymond Parnis*.

Needless to say, there has to be a causal nexus. So, the fear felt by the victim has to be due to the acts of the offender. This is also confirmed in *Pulużija v. David Caruana Smith* (19/05/2014).

The attempted form of this offence is possible if the active subject pursues a course of conduct which is aimed at causing the passive subject to fear that violence will be used and is suitable to attain such purpose but does not succeed in instilling such fear, the attempted form of the offence will subsist. This was decided in *Pulużija v. Nikola Farrugia* (COCA 13/11/2013).

Sexual Offences

What happens legally if these are carried out without consent. The title of sexual offences incorporates articles 198-209 of the Criminal Code. These articles have seen major changes in these last years and the force behind these major changes, one might say, are pressures or amendments imposed by international instruments to which Malta is a party. The original provisions were contained in the original Criminal Code. There are amendments which overhauled these offences.

Amending Acts in the Criminal Code on Sexual Offences

1. **Act XXXIII of 2007** – This act has added three new articles, article 204A, 204B and 204C, and these amendments introduced **provisions that primarily protect minor children from sexual abuses**. It, therefore, introduced into our law **Council Framework Decision 2004/64/JHA** (22/12/2003) On Combating the Sexual Exploitation of Children and Child Pornography). It also implemented the **Optional Protocol to the United Nations Convention on the Rights of the Child**, on the sale of children, child prostitution and child pornography. So, articles 204A-204C implement into our law the provisions of these two conventions.

2. **Act IV of 2014** – This act has dramatically increased the punishments for those offences where the victims are minors. So, seven years later, the punishment for the aforementioned offences were dramatically increased. This Act also rendered the **aiding and abetting** (if your friend is looking for a child for illicit purposes, you might provide the child or the place, you might contact someone to provide that child – you are not committing that offence however you are aiding and abetting) as criminal conduct in relation to some of the crimes against minors contained in the title. This Act implemented the **EU Directive 2011/92/EU** of the European Parliament and of the **Council of 13/12/2011** on Combating the Sexual Abuse and Sexual Exploitation of Children and Child pornography. Essentially, this directive is the European version of the UN Convention.

3. **Act XIII of 2018** – This Act has primarily repealed the Domestic Violence Act, Chapter 481 of the Laws of Malta and replaced it with the current Gender Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta. Essentially, **Act XIII of 2018 repealed the limited Domestic Violence Act and replaced it** with a wider Act that includes domestic violence as it was before, but also includes gender-based violence. Since it is gender based, it also includes those people whose sexuality is on the spectrum. It is not just male or female.

   The second important change that Act XIII of 2018 made is that **it completely re-defined the offence of rape**. The offence of rape (Art. 198) has existed in our Criminal Code since its promulgation, however in 2018 that offence was completely overhauled. It also re-defined other offences such as abduction (Art. 199), the offence of participation in sexual activities with persons under the age of 16 (Art. 204C). It also introduced a new offence, amongst others, which is that of sexual harassment (Art. 251A). It also increased penalties for certain sexual offence.

Moreover, it **implemented the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence**, commonly referred to as the Istanbul Convention CETS210.

4. **Act LXIV of 2021** – This Act amended the offence of rape, amongst other things, to extend particular activities that before were not included. It re-tuned the offence of rape primarily by introducing the concept of rape carried out with **inanimate objects**.

The Istanbul Convention

As previously mentioned, Act XIII of 2018 implemented the **Istanbul Convention** into domestic legislation.

This Convention is a Council of Europe convention. The Council of Europe is the organisation whose aim is to uphold human rights, democracy and the rule of law. It was established in 1949 after the atrocities carried out during WWII. It has its seat in Strasbourg and it is the oldest European institution. The Council of Europe has numerous legal instruments, perhaps the most famous one being the European Convention on Human Rights. It has also numerous other conventions such as that on Criminal Law, the Convention against Corruption, and amongst others, the Istanbul Convention.

This Convention was signed in Istanbul on the 11th of May 2011, and **it seeks to protect women against all forms of violence**, **prosecute and eliminate violence against women**, and to **combat domestic violence**.

In addition, it also –

- Designed a comprehensive framework, policies, and measures for the protection of and **assistance to all victims** of violence against women and domestic violence and
- It established a **specific monitoring mechanism for the proper implementation and adoption of the standards and requisites found in the Convention**.

The Istanbul Convention has 3 purposes –

1) It creates or contains those behaviours that are considered as being unwanted/criminal, but it does not only provide these offences but
2) It established a framework mechanism so that once these are carried out, there is a support system.
3) Also, in a typical Council of Europe manner, it established the third pillar which is the monitoring pillar.

Although the main focus of this Convention is the protection of women from violence and domestic violence, **it also recognises that there might be other vulnerable groups of people**. This Convention chooses to focus mainly and solely on women. However, the Maltese legislator agreed with the argument that other people need protection also. So, Government also saw the limitation of this Convention and when implementing it into our laws, **Government used gender neutral wording**, thus **extending the protection of this Convention to any person**, whatever the sexuality, race, age, background etc.

Therefore, **although this Convention focuses mainly on the protection of women, Act XIII of 2018 implemented it and opened it up to protect any type of person**.

The Convention does not just implement offences, but it also **aims at creating a framework of protection for the victims**. It tries to create a holistic approach towards the treatment of these victims primarily by focusing on preventive measures because it is better to prevent than to cure and the Convention sees this benefit. For instance, it urges governments to train professionals (social workers, psychologists etc) who are in close contact with victims. It also imposes on Government the need to raise, on a regular basis, awareness campaigns and it also imposes on Government the obligation to set up treatment programmes for the perpetrators. So, the Convention also tries to prevent having more victims by imposing on Government the obligation to treat the particular offender.

Malta signed this Convention on the 21st of May 2012 and ratified it on the 29th of July 2014. Moreover, it was brought into force on the 14th of May 2018.

SUB-TITLE III: OF SEXUAL OFFENCE

RAPE
The offence of rape is found in **article 198** of the Criminal Code and this article was considerably amended through Act LXIV of 2001.

The Traditional Concept of Rape
Traditionally, the offence of rape was composed of two elements –
1) Violence; and
2) Carnal knowledge.

These two elements had been interpreted and examined by our Courts for over 150 years until the promulgation of Act XIII of 2018.

Act XIII of 2018 completely redefined the offence of rape, substituting the previous manifestations of this offence, i.e., the (1) violence and (2) carnal knowledge with the elements of (1) consent and (2) carnal connection (effectively it retained the element of carnal knowledge but fine-tuned it and it substituted the element of violence with the element of consent).

The element of violence
By way of background, 'violence' was not defined by our Code. Owing to this, its development was affected through case law and numerous judgements which started developing the concept of violence in the direction **to include non-consensual activities**. Indeed, traditionally, our Courts adopted Maino's rule of thumb when interpreting the circumstances of a case, wherein he holds that,

"l'indagine caratteristico del delitto si riduce a questo, di determinare se la congiunzione carnale sia avvenuto contro la volontà della vittima, e nonostante quella che secondo le sue si riduce ad un apprezzamento delle circostanze del fatto che rientra nelle nozioni più ovvie della vita."

So, the use of violence by the agent **presumed** that the victim was not giving a free and wilful consent to the act. Our Courts established that violence could take different forms – physical, moral, real or presumed.

Physical violence implied the use of **force**, up to any degree, **on** the **victim's body**.
Moral violence implied the victim's **psychological manipulation** by the agent (which would include threats, false pretences, and/or coercion, amongst others).
Real violence implied the use of an **outside action** which was essential at bringing about the carnal connection.
Presumed violence referred to those instances where the law creates a ***juris et de jure*** **presumption** of violence.

The element of violence would be established by the Courts on a case-by-case basis. Of course, when in the law you have a definition, then life is easier since if there are elements that satisfy the standards, then you have the crime. But at the time, our law did not define

violence so in each case the Court had to establish whether there was violence or not. In order to do so, the Courts had to determine the circumstances behind each case, including the age of the victim and of the perpetrator, any past history between these two persons, any form of intoxication used, and the particular circumstances of each and every case, that is, the background to the particular case.

Moreover, **the element of 'violence' had to be present at the commencement of the execution of the offence**. So, not only did the Court have to establish whether there was violence or not, but also that such violence was present at the commencement of the execution. The European Court of Human Rights also made its fair comments on the element of 'violence'.

In fact, in *M C v. Bulgaria* (04/12/2003), the applicant claimed that Bulgarian law did not afford sufficient protection against rape, with one of the reasons being that it required proof of the passive subject's physical resistance. The court held that when prosecuting sexual offences, **a too-rigid approach in the mandatory requirement of proof of physical resistance is detrimental** and risks leaving certain types of rape unaccounted for, whilst jeopardising the victim's sexual autonomy.

The Court held that *"it was persuaded that any rigid approach to the prosecution of sexual offences such as requiring proof of physical resistance, in all circumstances,* ***risks leaving certain types of rape unpunished*** *and thus,* ***jeopardising the effective protection of the individual's sexual autonomy****. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Article 3 and Article 8 of the European Convention of Human Rights must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act including in the absence of physical resistance by the victim"* (Paragraph 166).

Effectively what the Court is saying is that **having a system of rape based on violence risks not prosecuting certain delicate situations where violence is not present**. It said that in order to be totally in line with article 3 and 8 of the Convention, the element of violence should be changed with the element of consent.

Owing to the fact that behavioural responses vary from individual to individual, a 'one size fits all' approach on how victims usually react or how they are expected to react, is completely avoided. In fact, a lot of rape victims suffer from what is known as 'rape-induced paralysis' and 'tonic immobility' whereby the rape victim freezes during the assault. This freeze response is the body's natural reaction to dealing with the imminent threat and fear during the rape, alongside the shock and dismay of being degraded, disregarded, dehumanised, objectified and treated as less than a human being.

Practical difficulties with the requirement of 'violence'

The requirement of 'violence' brought about numerous practical difficulties. Indeed, there could be cases where a sexual encounter was willed by both parties, and eventually, it turned violent due to some fetish or whatever things that come to their mind. So, we have this situation where what could have started or what could have been a consented/willed sexual encounter, would have a violent twist. In such case, you have violence and sexual

activity but how are we going to determine **whether that violence was the result of rape** or **the result of the party's volition**, that is, what they wanted? If the parties wanted to have violence in their sexual encounter, would that amount to rape?

Although the element of violence served its purpose and although it was extended to include as many situations as possible, it also had a side that confused certain situations such as this where a **consensual sexual encounter ended up with violence**.

This also gave rise to a second problem, what about we start having a sexual encounter, the victim is enjoying it, but then realises **that he/she doesn't want to continue anymore, and the aggressor keeps on wanting the action**? What happens then? So, the sexual activity started willingly but then something changes, and the victim wants to stop, but the perpetrator does not. With the traditional element of violence, can we speak of rape?

2 unanswered questions prior to Act XIII:
1) Is consensual sexual activity with violence tantamount to the offence of rape?
2) What if one of the parties withdraws his/her consent mis-sexual encounter?

These questions were dragging on throughout the years as implementing the element of violence as a requisite of rape. Naturally, to reply to the question where you have a consensual sexual activity which ends up with a violent fetish, that situation would not result into rape but would result into bodily harm. So, if both parties want to be violent and during the activity one of them is injured, in that case we cannot speak of rape, but bodily harm, slight or grievous.

Act XIII of 2018 changed this legal position and brought Malta in line with the Istanbul Convention by replacing the element of 'violence' with the clearer notion of 'lack of consent'.

Indeed, the Istanbul Convention is based on the element of consent. Therefore, with the implementation of the Istanbul Convention into our Criminal Code, our legislator had to replace the element of 'violence' with that of 'consent', as seen in article 198 *"whosever shall engage in non-consensual…"*

The Istanbul Convention completely discards the constituent element of violence, but rather, it condemns all forms of non-consensual sexual acts, irrespective of the current or previous relationship between the aggressor and the victim. This serves as an umbrella provision, aiming to fully safeguard all victims of sexual violence, especially rape.

The Current Position on the Offence of Rape
Article 198
Article 198 of the Criminal Code is based on Article 36 of the Istanbul Convention which criminalises the engagement of *"non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object"*.

The Istanbul Convention obliges States to upgrade their national definition of the offence of rape to move away from the element of violence or use of physical force. Under this Convention, **lack of consent automatically amounts to rape**.

The offence of rape encompasses 3 forms of carnal knowledge, but there are elements which are common in all 3 –

1) "*Whosever*" – any person may commit this offence, whatever sexual orientation, age background or circumstance.

2) "*…shall engage…*" – implies **a voluntary action**. A person engages because he wants to engage in whatever it is and therefore, these words hold the key to the whole theory of the *mens* rea. The person must have the capacity to understand and will those particular acts.

3) *"…in non-consensual carnal connection…"* – As we know, *actus non facet reum nisi mens sit rea*. It is useless having the will without giving effect to it. While 'non-consensual' means **any situation where the victim is not consenting**, carnal connection means **any kind of physical touch**.

1) **The Element of Consent**

Consent occurs when a person authorises or permits another to act, do, or take something from the consenter.

In *Pulużija v. Omissis* (376/2007 COM 24/02/2012), the Court held that there is a difference between **consent** and **submission**. Every consent involves a submission, but it by no means follows that a mere submission involves consent. The Court must also be aware to the fact that a person may submit to an act but submitting does not necessarily mean that there is consent. **Not every submission implies a consent.**

This is the key change to the offence of rape. The element of consent has answered the question about what starts off as a consensual activity and changed into a non-consensual activity. In the case that mid-way through one party withdraws their consent, now the moment one of the parties changes his/her consent, **any act past that moment may be construed as rape**. It might amount to rape; it depends on the particular activity carried forward.

There is no need for the element of violence in rape. What is essential is the lack of consent. This change has also simplified the judiciary's job who no longer has to establish whether there was violence or not since now there is the benchmark of consent. If there is no consent, then the accused is guilty, and if there is consent, he/she is not. In determining whether the consent was withdrawn or not, the circumstances of the case are taken into account.

Under our Criminal Code, the element of 'lack of consent' is defined by **Article 198(3)** which stipulates that,

> (3) The acts referred to in sub-articles (1) and (1A) shall be deemed to be non-consensual unless consent was given voluntarily, as the result of the person's free will, assessed in the context of the surrounding circumstances and the state of that person at the time, taking into account that person's emotional and psychological state, amongst other considerations.

Indirectly, this provision gives a definition of consent as being something *"voluntary, as the result of the person's free will."* But how does the Court come to the conclusion that consent was or was not given?

This article is based on article 35(2) of the Istanbul Convention and it provides benchmarks and guidelines on which the Courts may determine whether a sexual encounter was consensual or not. **This article guides the Court on what elements to look out for on a case-by-case basis to determine whether a particular encounter was consensual or not**.

The Court will take into account –
1) The context of the surrounding circumstances;
2) The context of the state of that person at the time;
3) Taking into account that person's emotional and psychological state, amongst other considerations.

The elements in this sub-article are cumulative and not alternative, and if any of these elements is not satisfied, then the act is deemed to have been done without consent. The Court is being asked to investigate whether the victim's consent was purely free or whether it was vitiated by some circumstances.

This sub-article proposes a hybrid test approach by which on the one hand, the Court is to apply the **subjective test** on part of the victim to establish whether the victim was free and capable of giving consent, whilst on the other hand, it must also apply the objective test to determine whether the circumstances surrounding the case militate in favour of consent or lack of it.

So, in this investigation, the Court needs to zoom into the **subjective perception** of the victim meaning did the victim consent. It also must examine the **objective surrounding** circumstances. For example, two people met at a bar and the perpetrator started giving drinks to the victim, took her in his car, to his house etc. These are all the circumstances that the Court will take into account in determining whether the person consented or not. Conversely, it might be that the following morning, this same girl went to report the case to the police notwithstanding that she wanted to have the encounter. In that case, you have a *prima facie* case of rape but the Court, in examining the subjective point of the person reporting, will determine that this was a case of consensual sexual activity.

Consent may be expressed by being explicitly stated or demonstrated, but it may also exist in its tacit form. Factors like intoxication, incapacitation, age, deception, unconsciousness and coercion **disrupt a person's ability to give a valid consent**, which is why the active agent must **responsively evaluate the passive subject's physical or mental state**.

Moreover, contrary to the English position, **this sub-article does not place any form of attention onto the perpetrator's belief**. Under English law, for the crime of rape to subsist, there must be a lack of consent and the perpetrator must not 'reasonably' assume that the person is consenting. Under Maltese law, **the law is not bothered with what the perpetrator believes**.

In conclusion, all the acts tantamount to rape listed in article 198 will automatically constitute the offence of rape if it is proven that any one of the participating parties did not freely consent to the act, **when taken in line with the individual circumstances of the case**.

In addition to the above, **Article 201** of the Criminal Code creates a presumption of lack of consent based on objective criteria,

> **201.** Unlawful carnal knowledge and any other indecent assault, shall be presumed to be non-consensual:
>
> (*a*) when it is committed on any person under twelve years of age;
>
> (*b*) when the person abused was unable to offer resistance owing to physical or mental infirmity, or for any other cause independent of the act of the offender, or in consequence of any fraudulent device used by the offender.

(a) This is a *juris et de jure* presumption whereby no one can say that a person under 12 years of age gave his consent. It is also very easily proven because in Court all that is necessary is the birth certificate of the victim. If the victim is less than 12 years old, then automatically, there is no consent. Once the victim turns 12 years or more, then this sub-article falls.

(b) This second scenario requests a deeper examination of the circumstances of the case and the character of the victim.

"…unable to offer resistance owing to physical or mental infirmity…"
In the Maltese version of this article, the words used are *'marda tal-ġisem'* (disease of the body), *'jew tal-moħħ'* (of the mind) which therefore implies a medical condition of the body or of the mind and therefore, it must be a **biological condition** rather than a temporary condition (such as intoxication or drugs). There is **no age** tied to this sub-article.

"…or for any other case independent of the act of the offender…"
Therefore, in this second limb, the presumption of lack of consent should be there if the infirmity is mental or physical or any other cause independent from the actions or devices used by the offender. So, there is a distinction between the state of the victim

and the actions of the aggressor. Here, an example of any other cause would be that you are in Paceville, and someone is drunk and that person, due to intoxication, may not offer resistance, **even if you did not contribute to her inability**. The aggressor should not have contributed in any way to the position where the victim may not offer resistance.

"…or in consequence of any fraudulent device used by the offender."
This third limb ties up the actions of the offender with the state of the victim. So, we have seen that in the second limb there is a separation but, in this limb, there is a direct link that the person is unable to offer resistance due to a fraudulent device used by the offender. 'Fraudulent device' is wide. It can be anything as long as the sexual activity is a direct consequence of that fraudulent activity/action. It could be presenting yourself as being rich, for example.

This second paragraph, however, as opposed to paragraph (a), is a *juris tantum* presumption, meaning that the presumption is there but is open for discussion and examination before the Courts. The adjudicator has to determine whether the elements of this paragraph are satisfied or not.

The English Position on Consent

Unlike in Malta, the element of consent has been a long-standing element in the offence of rape in English law. In fact, the UK Sexual Offences Act (1956), had already introduced offences whose elements necessitate a lack of consent on the part of the victim. So, from much before the coming into force of the Istanbul Convention (2011). This means that under English law, this concept had ample time to develop, and to be tried and tested.

The UK Sexual Offences Act went even a step further by introducing a statutory definition of 'Consent'. This is 'brave', considering that not even the Istanbul Convention has provided such a definition.

74*. "A person consents if he agrees by choice and has the freedom and capacity to make that choice."*

This definition is essentially built on three concepts/pillars –

1) The person ***"agrees by choice"*** – This essentially implies that the agreement should be initiated from within that person (internally/mentally);

2) The person has **"the freedom"** to make that choice – Freedom implies freedom from any pressures, any fears, any consequences. That choice that is initiated internally should be made in an environment where it is okay to decide one way or the other way, without fearing any consequences. If there is no freedom, say for example, a situation were saying no to a sexual advancement would result in being hit physically or financial consequences, then there is no freedom in that choice since it is made in a threatening environment;

3) That person has **"the capacity"** to make that choice – The capacity being the mental capacity. In our legal tradition, it would translate into have the *capacita di intendere*

(understanding) and the *capacita di volere* (will). The capacity to consent may be affected by various conditions, such as mental conditions, intoxication and so on.

The question of 'capacity' to consent became particularly relevant in an English case when the complainant was intoxicated at the time of the act. In *R v. Benjamin Bree* (English Court of Appeal in its Criminal Division on the 13/03/2007 [2007] EWCA crim 804), the England and Wales Court of Appeal explored the issue of capacity and consent, stating that,

"If, through drink, or for any other reason, a complainant had temporarily lost her capacity to choose whether to have sexual intercourse, she was not consenting, and subject to the defendant's state of mind, if intercourse took place, that would be rape. However, where a complainant had voluntarily consumed substantial quantities of alcohol, but nevertheless remained capable of choosing whether to have intercourse, and agreed to do so, that would not be rape."

In *B (MA) [2013]* (English Court of Appeal in its Criminal Division on the 10/05/2012 [2013] EWCA crim 3), the English court explored some basic principles with regard to mental disorders.

Under English law, the perpetrator must **reasonably** believe that the penetration is non-consensual, and to determine whether such belief is reasonable, all the circumstances of the case must be analysed, especially to determine **whether the active subject has taken any steps to ascertain such consent or not**.

Article 1 of the English Sexual Offences Act (2003) stipulates that,
"a person (a) commits an offence if:
(a) He intentionally penetrates the vagina, anus or mouth of another person;
(b) With his penis;
*(c) (b) does not consent to the penetration and **(a) does not reasonably believe that (b) consents**."*

Having regard to this article, under English law, a person may be found guilty of a sexual offence if the victim does not consent to the penetration and **the agent does not reasonably believe that the victim consents**. So, it is not only an objective test whereby the victim is not consenting, but the English definition also introduces a **subjective test** in the sense that the perpetrator/agent should *"not reasonably believe"* that the victim consents.

Blackstone argues that although this provision focuses on the belief of the accused, **the English Act falls short of defining what a reasonable man could assume**. So, on the one hand we have this subjective element that the perpetrator should not reasonably believe that the victim has given consent, but then the law does not define what 'reasonably' is. The English law does not give this objective criterion which essentially means that **it is up to the Court to decide on a case-by-case basis**. Blackstone has a very interesting discussion on this point.

We can draw two main conclusions –

1) Capacity is an integral part of consent. Without the ability to form a decision, you cannot have consent;

2) A consent can only be valid if the person not only has the capacity, but also is giving the consent in a free environment where that person has enough knowledge and understanding to form a positive agreement to the act being proposed;

2) **The Element of Carnal Connection (penetration)**

The carnal connection refers to **the physical touch** between the agent and the victim. One must keep in mind that **penetration is a prerequisite for the offence of rape**, and slight penetration suffices for the consummation of the offence.

With the amendments of 2018, the Criminal Code bluntly encapsulates all forms of possible penetration – be it with bodily parts or objects – and labels them as rape, provided that such penetrations are done intentionally. Indeed, nowadays penetration needn't even be one by a genital organ, since the law recognises the possibility of penetration by foreign objects, or other body parts.

So, **the penetration of the vagina, anus or mouth with a sexual organ of the other person** dealt with in article 198(1), **penetration of a sexual organ, vagina, mouth or anus, not with the sexual organ of the agent but with some other bodily part** dealt with in the proviso to article 198(1) and **the use of foreign objects** in article 198(1A) all amount to carnal connection.

These focus on the orifices of the human body which may be abused for sexual activities. It is a gender-neutral Article which does not provide any limit to the number of participants, the gender or sexual orientation.

This element has 3 alternative modes of the *actus reus* –

Scenario 1 – **The penetration of a person's genital organ into another's genital organ**.

> **198.** (1) Whosoever shall engage in non-consensual carnal connection, that is to say, vaginal, anal or oral penetration with any sexual organ of the body of another person, shall, on conviction, be liable to imprisonment for a term from six (6) to twelve (12) years:

The 'sexual nature' in this regard is strongly presumed.

Scenario 2 – **The penetration of a person's genital organ into another's body part that isn't a sexual organ**.

> Provided that whosoever shall engage in non-consensual vaginal, anal, or oral penetration with any other part of the body not mentioned in sub-article (1) on the body of another person, shall, on conviction, be liable to imprisonment for a term from three (3) to nine (9) years:
>
> Provided further that penetration with any bodily part shall be deemed to be complete by its commencement, and it shall not be necessary to prove any further acts.

It is the victim's sexual organ that is being used in the commission of the crime. Again, the 'sexual nature' is presumed.

Scenario 3 – **the use of an object**

> (1A) Whosoever shall engage in non-consensual vaginal, anal or oral penetration of a sexual nature with an object, whether the object is intended for activities of a sexual nature or otherwise, shall, on conviction, be liable to imprisonment for a term from three (3) to twelve (12) years:
>
> Provided that penetration with an object shall be deemed to be complete by the commencement of the penetration with that object, and it shall not be necessary to prove any further acts.

Article 198(1A) relates with the penetration of an anus, vagina or mouth with an object. It would appear that where there is a penetration of an object, there must be a sexual nature/wish in the use of the object. So, **the reason behind it should have a sexual element**. With that being said, the object need not be a sexual object.

This type of penetration is done with an object. The essential element here is that such penetration is of a *"sexual nature"*. Therefore, not any type of penetration done with an object would satisfy this element of the offence, but one which has a sexual nature. The Code does not provide any definition or grade of what constitutes this sexual element, thus leaving the interpretation and existence of this element on a case-by-case basis.

It is important for the Courts to determine the existence of the sexual nature of an act since this first limb of the *actus reus* focuses on the sexual organ of the victim, rather than the agent, and therefore it is necessary to determine the *animus* of the agent. Certainly, there are situations where although there might be vaginal or anal penetration, the sexual element is missing and therefore, there is no criminal offence. Such would be the case, for instance, where on has certain tests carried out by a gynaecologist which require, to some degree, penetration of the patient's vagina with medical instruments.

Firstly, in such cases, there is consent (although this isn't necessarily either if a person is found unconscious, and the doctor needs to penetrate) and secondly, the penetration should be for a sexual nature. When there is a medical reason, this second element is not

satisfised. If the medical penetration is a pretext for sexual arousal, in this same situation where you are in a medical atmosphere, there is that sexual element. Element of sexuality cannot be excluded *a priori*. The Court cannot say this person was in hospital and therefore, it was necessarily for medical reasons. **The Court has to analyse every situation on a case-by-case basis to determine whether there is this sexual element**.

Moreover, the law stipulates that in order to exist, the carnal connection **need not be complete**. The **mere commencement of the carnal connection is enough to complete this element**. So, the law does not require that you go the whole way, but just the mere beginning is enough, whereby it is deemed that you have gone the whole way. In fact, the second proviso to article 198(1) states that "*Provided further that penetration with any bodily part **shall be deemed to be complete by its commencement**, and it shall not be necessary to prove any further acts."*

Article 206

> **206.** The crimes referred to in this Title to constitute which there must be a carnal connection shall be deemed to be complete by the commencement of the connection, and it shall not be necessary to prove any further acts.

In essence, this article is repeating or emphasising the second proviso to article 198. The difference is that whereas the proviso to article 198 refers to the offence of rape, article 206 is referring to the crimes under this sub-title. So, this carnal connection is not limited to the offence of rape but is extended to those offences under the title of sexual offences that necessitate a carnal connection. Carnal connection **requires flesh on flesh**, and therefore, touching through clothing is not tantamount to the offence of rape.

In *Il-Pulużija v. Omissis* (COCA 04/09/2003), the Court held*, "biex ikun hemm ir-reat ta' stupru, mhux mehtieġ li jkun hemm penetrazzjoni sħiħa w l-iċken bidu ta' konessjoni karnali hija suffiċjenti biex jissussisti r-reat."*

So, the slightest connection is enough for the offence to exist.

Marital rape

There is also the issue of martial rape. In the past, the question was whether this could exist. The previous position was in the negative, that once you consent to marriage, you are consenting to whatever it brings with it. In 2006, the position changed with *Pulużija v. Stephen Bonsfield* (COCA 27/04/2006).

Remember that rape, in itself, **necessitates some kinds of penetration**. When it comes to these specific areas, vagina, anus or mouth, there must be some kind of penetration, even though NOT FULL penetration. The crime subsists even by the mere touching of organs.

Facilitating rape

Article 198(2) creates this offence whereby a victim is coerced to engage in non-consensual activities either with the agent or with third parties,

> (2) Whosoever by force, bribery, deceit, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct, causes another person to engage in any of the non-consensual acts described in the preceding sub-articles with any person shall, on conviction, be liable to the punishment mentioned in the same sub-articles.

The elements of this offence are that the agent, through the acts listed in the sub-article causes the victim to engage in non-consensual acts with any person, be it the agent himself or any third-party. It is not necessary that the agent engages in carnal connection with the victim for this offence to subsist. If there exists a triangulation of the parties: i.e., the agent, the victim and the person raping the victim, this sub-article will apply to the agent whilst the person raping would be liable for the offence of article 198(1).

Until now, we have seen rape in itself, where the agent commits it. Article 198(2), however, considers the offence of **facilitating the commission of the offence of rape**. This sub-article is considering the situation where a victim is subjected to the *actus reus* mentioned in this article, (force, bribery, deceit etc), and it causes the victim to expose herself non-consensual sexual intercourse with any person.

So, it is not only a one-to-one relation in the sense that I am the agent using one of these modes to coerce the victim to have a sexual encounter with me, but there also can be the situation where I am forcing a victim to have a sexual relation with a third party. In doing so, and just for doing so, I will be liable to the same punishment as imposed on rape. So, **by facilitating the offence of rape, even though I have no carnal connection, I become liable to the same punishment**.

Aggravating circumstances

Article 202 provides an exhaustive list of aggravations to this offence. In fact, if the offence of rape is accompanied with any of the aggravations mentioned in that article, the punishment for the offence is increased by one or two degrees. This can mean that the punishment can increase to a maximum of 20- or 30-years imprisonment, respectively.

Also, article 209A of the Code states that any person who is found guilty of an offence under this title of the Code, including the offence of Rape, shall not be eligible to the benefits of Article 21 of the Criminal Code. Article 21 empowers the Court, where there are special and exceptional reasons which are to be expressly and explicitly stated in detail in the judgement to apply a lesser punishment than that stipulated by law for specific crimes.

Damages

Article 198(4)

> (4) In addition to any punishment to which the person convicted of an offence under this article may be sentenced, the Court may order the offender to make restitution to the injured party of any property or proceeds stolen or knowingly received or obtained by fraud or other unlawful gain to the detriment of such party by or through the offence, or to pay to such party such sum of money as may be determined by the Court as compensation for any such loss as aforesaid or for any damages or other injury or harm, including moral and, or, psychological harm caused to such party by or through the offence, and any such order may include both a direction to make restitution and, in default, to pay as aforesaid. The order shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

Article 198(4) considers the situation where the Court may order damages or compensation to the victim. Through this article, the Court is empowered to, in addition to any punishment for the offence of rape, order the payment of damages, the payment of compensation, including moral damages to the victim.

The compensation of victims of crime is a novel concept on our criminal law tradition. More often than not, the victims of any crime would have to resort to the Civil Court in order to obtain a monetary remedy for the damages resulting from the committed crime.

Act XIII of 2018 changed this tradition by introducing Article 15A as a general provision empowering the Court to order the convicted person to **return any proceeds or gain yielded by the crime** or even to **pay any compensation** which is determined by the Court. This order would be given **in addition to the punishment for the specific offence**.

Specific to the offence of Rape, article 198(4) empowers the Court to impose an order on the offender to **return back to the victim any property or proceeds gained through the commission of the offence** and even to pay **damages**, including **moral** damages and **psychological** damages to the victim.

Note the distinction between damages and compensation which are two separate concepts. Damages refers to the 'refund' of the actual damages caused. For instance, during the commission of the offence of rape, I had an expensive pair of sunglasses, and the agent broke them for me. The payment for that action are damages. On the other hand, compensation is a sum of money fixed arbitrarily in order to alleviate/lighten the impact of the offence on the victim. For example, a victim has been raped and she is suffering from depression. So much so that she doesn't feel comfortable coming to university. What is the price of being depressed? There is no price and therefore, the Court will award a sum of money which it thinks will lighten the burden or will help assist the victim in dealing with this particular effect. So, damages are quantifiable while compensation is not. Depression has no price. Therefore, the Court will fix a sum after considering numerous factors. Compensation includes moral damages.

Withdrawal of proceedings

With regard to the offence of Rape, the position was that notwithstanding that criminal proceedings would have been instituted against an alleged perpetrator, the victim could have withdrawn the complaint made, thus leading to the premature termination of the criminal proceedings.

The position has been changed by Act XIII of 2018, wherein the proviso of Article 543(f) now gives the Court the discretion to order the continuation of the proceedings notwithstanding that the victim would have expressed the intention to withdraw the complaint. In exercising the discretion, however, the Court must give particular consideration to the best interests of the complainant, any minors involved and any other relevant third parties. After carrying out this exercise, the court will then direct whether to order the cessation or the continuation of the proceedings.

In conclusion, **given the novel nature of the recent amendments to Article 198 *et seq*. the legislation has not yet been thoroughly challenged and weathered in Court. It is therefore interesting to see how the Maltese courts will embrace and interpret these amendments with a view of further expounding the correct and proper interpretation of these offences.**

ABDUCTION

Our law distinguishes two forms of the crime of abduction. The first is committed by any person who abducts with the intent to harm such person, whilst the second is committed by any person who, by fraud or seduction, abducts any person under the age of 18 years.

For the existence of the crime, it is, therefore, necessary that the victim has been abducted, that is to say, taken or removed from one place to another. The element is common to both forms of the crime. But the other elements differ.

1) **Abduction with an intention to harm**

Article 199(1)

> **199.** (1) Whosoever shall, abduct any person with the intent to harm such person, shall, on conviction, be liable to imprisonment for a term from six to twelve years.

History
A few words on the previous version of this offence, which was similar to the offence of rape, historically also requiring a degree of violence. Previous to Act XIII of 2018, this offence required a degree of violence, and that the victim was abducted either to be **abused** or for the purpose of **marrying the person**. Furthermore, if the agent restored the person within 24 hours, there would be a reduction of punishment. Similarly, if the agent married the victim, the proceedings would be halted. So, if I abducted a person and subsequently, marry her, the fact that I have married her will exonerate me from liability.

This has been substantially amended by Act XIII of 2018.

Elements –
1) Whosoever
2) Shall abduct a person
3) With the intent to harm such person.

1)
First of all, whosever can commit this offence. It is anyone.

2)
Actus Reus
The material aspect of this offence is satisfied with **the mere taking of the person**. This variety of the crime can be committed against any person, whether male or female, whether of age or a minor, whether married or unmarried.

If you have taken, then at that moment, the *actus reus* is satisfied. The law uses the word 'abduct', implying the forceful taking of the person. In fact, the Maltese version of the offence uses the words *'jisraq persuna'* which **denotes the action of taking the person against his/her will**. What is essential is that **the theft of the person is done without the person's consent**.

The *actus reus* of this offence is satisfied upon the moment of taking which means that the victim **need not be detained for a period of time** for this offence to be satisfied. In fact, the detention of a person is an offence in itself (art. 86). The moment I take a person against his/her will, the offence is satisfied. If, in addition, the person is detained, then that is an additional offence.

3)
Mens Rea
However, there is a condition for the *mens rea* being that the taking of that person, therefore the abduction, must be carried out **with the intent to harm that person**. It is not a generic intent to abduct. It is a **specific intent** to cause harm.

With respect to what kind of harm, the law is silent. It can be **physical** harm, **mental** harm, harm of a **sexual nature**, harm of a **verbal nature** and so on. The law is silent, giving enough discretion to the Court to determine, on a case-by-case basis, whether harm was the reason behind the abduction.

So, it implies the mere taking of the person with the intention to cause harm and the detention does not fall under this article. In fact, the detention of the person is considered in article 86 of the Criminal Code which deals with illegal arrest. It is where a person is detained or confined without having a lawful authority. In this case, unlike in the case of the offence of abduction, the intention is a generic one. The abduction may develop into the illegal arrest, but it is not an essential element.

So, putting these two elements together, the offence is completed the moment the person is taken away with the said intention. **The completion of such purpose is not necessary to constitute this offence**.

2) **Abduction by fraud or seduction**
Article 199(2)

> (2) The punishment laid down in sub-article (1) shall be increased by one or two degrees where any person abducts, by fraud or seduction, any person under the age of eighteen years.

In article 199 you have to have the actual abduction meaning that you have the involuntary movement of the victim from one place to another. It does not necessarily imply the confinement of such person and the mens rea is to cause harm to the victim.

Sub-article (2) considers the offence of **fraudulent abduction**. This builds up on sub-article (1) by giving us more parameters. This offence of abduction is increased by one or two degrees, so, the perpetrator is punished more severally.

Where the means used to take away the victim are “fraud and seduction”, the crime arises only if the victim is a person under 18 years of age, whether male or female.

The *modus operandi* should be through fraud or seduction. The fraud may consist in **any device which places the victim into the hands of the offender**, against, or at any rate **without the concurrence of the victim's will**.

Therefore, it includes any means whereby the victim is induced in error and is decoyed to a place where **he/she would not have consented to go without such fraud.** It also includes any other fraudulent means, such as sleep, drunkenness, insensibility induced upon the victim so as to place him or her in the impossibility of opposing the taking away.

Seduction consists in any persuasion, inducement or blandishment held out by the agent unlawfully to induce the victim to go away with him/her.

Whilst the *actus reus* (the actual abduction) is fairly easy to prove in Court, the element of seduction is not as easy. Carrara argues that *"for a proper understanding of the juridical meaning of this word, it is not enough to look at the means used but one must also examine **the state of mind of the agent behind the use of those means**."* So, whereas conduct such as flattering and the use of words, may *prima facie* appear to satisfy the threshold of seduction, Carrara argues that one should not just stop at a *prima facie* level but should see the **state of mind of the agent in the use of these seductive devices**.

Moreover, although article 199 is found under sexual offences, it by no means limits the understanding of the word 'seduction' to a sexual element. The word 'seduction', when used by the law, should not be limited to sexual seduction and therefore, the aggravation in sub-article (2) is not limited to a sexual environment but is extended to any other type of seduction.

In *Pulużija v. Michael Bugeja* (COCA 13/09/2013), the Court was quoting from a previous case, *Pulużija v. Raymond McKay* (14/03/1985), holding that,

*"The fact that this offence may be satisfied with the use of fraud or seduction **necessarily implies a certain degree of cooperation from the victim** for it is through this cooperation that the minor accompanies the agent wherever he wants…there must be a **causal link and effect between the fraud or seduction used and the fact that the minor accompanied the agent**. If the minor was still going to the same place independently from the means of the agent, then it cannot be said that the offence has been satisfied."*

So, the Court had concluded that the fraud or seduction adopted by the agent leading to the cooperation by the victim was the d**irect result of the betrayal of the faith that the victim had in the agent**. The fact that the agent adopted his fraudulent devices and the victim cooperated, necessarily implies the betrayal of faith.

Aggravating Circumstances

Articles 201 and 202 of the Criminal Code stipulate the aggravating circumstances for the offence of abduction. Article 201 was covered under the sub-topic of consent. Whilst article 202 provides a list of circumstances which if any of these situations is satisfied, then the punishment is increased by one or two degrees.

Where offender marries person abducted. Non-consent in case of carnal knowledge and indecent assault

Article 201

> **201.** Unlawful carnal knowledge and any other indecent assault, shall be presumed to be non-consensual:
>
> (*a*) when it is committed on any person under twelve years of age;
>
> (*b*) when the person abused was unable to offer resistance owing to physical or mental infirmity, or for any other cause independent of the act of the offender, or in consequence of any fraudulent device used by the offender.

Aggravating circumstances

Article 202 provides an exhaustive list of aggravations, meaning that if it is not included within this list, it is not an aggravation. Moreover, it is an **alternate list** meaning that if any one of those conditions is met, then the aggravation subsists. This is the opposite of a cumulative list which is when all circumstances have to be satisfied.

The main gist of these aggravations is the protection of the victim from potential abuse that the agent may create from his dominant position. So, in the **majority** of these aggravations you have a breach of trust where the victim is trusting the perpetrator. For that breach of trust, there is the aggravation.

SEXUAL OFFENCES AND MINORS

United Nations Convention on the Rights of the Child

On an international level, perhaps the most prominent piece of legislation is the United Nations Convention on the Rights of the Child. This Convention is the most widely ratified convention on the protection of minors. It entered into force on the 2nd of September 1990 and Malta ratified this Convention a few months later. So, it is perhaps the most notable convention, being one of the most ratified conventions globally.

This Convention creates a framework for the protection of numerous rights of minors. The scope of this Convention stems from the assumption that *"the child, by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection before as well as after birth."*

The driving force behind this Convention is the fact that minors, due to their physical and mental immaturity, need special legal protection, that is, a special framework directed towards them.

The Convention defines 'child' under Art. 1 as *"every human being below the age of 18 years unless the national provisions applicable to the child stipulate a lower age."* So, the general principle under the Convention is that the child is any human being under the age of 18 unless the law applicable to the child prescribes a lower age. So, Art. 1 creates a general principle.

<u>The Convention establishes 4 core principles –</u>

1) **Non-discrimination** – where every child should enjoy his/her rights and should never be subjected to any discrimination. This principle is enshrined in Art. 2 of the Convention, *"State parties shall respect and ensure the rights set forth in the present convention to each child…"* So, Art. 2 essentially states that all Member States shall ensure that their legislative framework does not create or permit or allow any form of discrimination on any grounds.

2) **The best interests of the child** – this principle addresses the need to provide protection to the child at all stages of the legal process. This principle is found in Art. 3(1) of the Convention, *"in all actions concerning children whether undertaken by public or private social welfare institutions…"* So, this second core principle focuses or addresses those situations where children for any reason are going through a **legal process**. It could be any legal process such as care and custody of the parents, care orders where the Government steps in to request the Court to give special orders for the benefit of the child, adoption proceedings, and so on. So, any legislative process which somehow involves or relates to the child must ensure in its very self that the best interests of the child and not of the parents, the State or of the institutions, are maintained and ensured.

3) **The right for survival and development** – this principle is mostly directed towards ensuring the child's economic and social rights. It is found in Art.6(2) of the Convention which states that, *"State parties shall ensure to the maximum extent possible the*

survival and development of the child." So, now this article has empowered the State, has shifted the responsibility on the State, to ensure the child's benefit, be it social, economic, health and so on. The word used by the Convention is the 'survival' of the child. This word translates into anything that is related to the child's wellbeing, such as food, medicine, clothing, and education. Naturally, survival is in the context of today's society and not that of the jungle. The Convention isn't referring to the survival of the fittest, but it must be seen in the context of society; that the child is giving a fighting chance within society.

4) **The views of the child** – with this principle, it is now the child's turn to tell us what his/her interests are. In fact, the Convention is based on the principle that in order to know what the best interests of the child are, one must listen to the child. In fact, Art. 12(1) states that *"State parties shall assure to the child who is capable of forming his or her own views…"* So, the views of the child must be heard, must be understood, however, must also be weighed in the context of the maturity of the child. In other words, when a State is listening to the child, it must give weight to the viability and the mental aspect and capability of the child.

When it comes to sexual offence with minors, the Convention obliges State parties to legislate against the sexual exploitation and sexual abuse of minors, in particular, where a minor is induced or coerced to take part in an illegal sexual activity. So, the Convention imposes this obligation on state parties that within their Criminal Law framework there are provisions prohibiting sexual abuse with minors.

In fact, **Art. 34** of the Convention states that,

"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials."

Note that Art. 34 of the Convention doesn't simply oblige the State to look internally within its jurisdiction to make sure that these aren't allowed, but it also imposes on States the obligation to take all appropriate national, bilateral, and multilateral measures. One of the reasons behind this is **child trafficking**. Unless we have bilateral and multilateral agreement, it is very difficult to bring perpetrators to justice. Mostly because it is not just a matter of having extended jurisdiction. We might have jurisdiction to cover any offence that happens worldwide, but if we do not have to tools to cooperate with other States, the perpetrator will not be brought to the State to be tried. So, the Convention imposes on the State to have these agreements ensuring that a perpetrator is brough to justice and ensuring that an offence is triable by the Courts of that particular nation.

Obviously, after imposing this complex legal framework, the Convention imposes the **obligation on the State to ensure that minors aren't exploited or abused within its own**

territory, by, for example, care givers, parents, guardians, or other persons who are responsible even temporarily for the child. So, the Convention doesn't just look at the larger picture that you have instruments allowing the prosecution of perpetrators internationally and cooperation between States. Of course, these are important, but the Convention also ensures that a State ensures that children aren't also exploited in the privacy of their home, school class and so on by their care givers.

This extensive protection is not limited just to sexual offences but also extends to the physical and mental protection of the minor: protection from excessive mental abuse, violence, exposing the child constantly and so on. These are abuses that the Convention seeks to deter.

The Convention states that the measures adopted by the States should include programmes providing support to the child and their care givers and **programmes aimed at recognising or detecting instances of abuse and following up such instances of child abuse**. By the very nature of the offence, it is very likely that children tend to suppress being abused. In the majority of cases, if an adult is abusing a minor, the adult will terrify the minor that in the case he/she speaks up, something bad will happen. Therefore, that creates a certain omerta in these offences. The Convention is aware of this difficulty and therefore imposes an obligation on the State to create programmes that detect these situations. Not only detect but treat these situations, through psychological and social support for instance. It also imposes on States the obligation to follow up the case. Indeed, the effects of a period of abuse might come up later in life. This is why following up the development of that particular child is so important.

The Optional Protocol to the Convention on the Rights of the Child

This is a separate legal instrument to the Convention that builds up on the effectivity of the Convention. It does not replace the Convention but builds on it. The Convention, of course, remains the core document; the basis.

<u>There are two optional protocols –</u>

1) The Optional Protocol on the Involvement of Children in Armed Conflict (OPAC);
2) The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC).

Focusing on the OPSC, Malta ratified this Protocol through Act XXXI of 2007. The OPSC came into force in January of 2002. Moreover, the OPSC is the result of the United Nations' increasing concern with the international trade of children and their sexual abuse. It kind of builds up a framework to ensure the maximum cooperation between States in the detection, prosecution, and punishment for these offences.

The Lanzarote Convention

The official name of the Convention is the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. It is a Convention that has been promoted by the Council of Europe. Its purpose is to supplement the UN Convention on the Rights of the Child. So, the purpose of this Convention is not to have something parallel to it, but to

supplement it. Malta singed this Convention in 2010 and it entered into force in January of 2012.

This Convention goes a step further than the UN Convention by giving a definition of what is to be understood with the term 'sexual abuse'. In this way, it doesn't replace or run parallel to the UN Convention but builds around it. This definition is found in Art. 3(b) of the Lanzarote Convention which states that, *"sexual exploitation and sexual abuse of children shall include all forms of behaviour which are dealt with in articles 18 to 23 of the Convention."* Then it lists a series of different actions from article 18 to article 23.

<u>The Lanzarote Convention, imposes on state parties the obligation to take all measure to criminalise the following actions –</u>

1) Engaging in sexual activities with a person who has not yet attained the age to consent to such acts;
2) The engagement of sexual activities with a child when this is done through the use of force, coercion, or threats;
3) The abuse by the agent of his position of trust, authority or influence on the minor for sexual purposes;
4) The abuse of vulnerable children through mental or physical infirmity by the agent for the sake of sexual activities.

These are aimed to protect the children under different circumstances: children who are vulnerable; children who trust in the authority of another person; children who are not capable of giving their consent; and the use of force, threats or other fears by the agent of the child so that the agent can abuse from this child.

The wording of the Convention establishes the principles, and not the details because each MS has different legal provisions and realities. For example, the Convention doesn't define what the age of consent is because different countries have different ages, but all it says is that it has to be the age of legal consent.

The Lanzarote Convention establishes that the basis for these prohibited acts must be a sexual purpose. For instance, abusing a child through violence would fall under a different offence and not under this Convention. For an act to fall under this particular Convention, there must necessarily be a sexual element.

<u>Apart from the obligation on Member States to criminalise the aforementioned principles, the Convention also imposes on States the obligation to –</u>

1) Take steps to prevent the commission of these offences (monitoring persons in close contact with minors, training such persons and so on);
2) States must provide support and rehabilitation to children who have been victims of this abuse (once a child has been abused, there must be an infrastructure by Government aimed at supporting and rehabilitating that minor from that trauma);
3) The criminalisation of any activities of a sexual character with minors;
4) The implementation of child-friendly measures in the investigative and judicial process (for example, the child doesn't testify in front of everyone. As much as possible, the minor talks in an informal manner. The idea is that the child is having what resembles a

conversation with the judge or magistrate and in this way, the child will be more comfortable to speak, and it will be less traumatising overall).

The EU Directive on Combatting the Sexual Exploitation of Children and Child Pornography
This is Directive 2011/93/EU of the European Parliament and of the Council of 13th December 2011. It replaces a previous Council framework decision No. 2004/68 JHA. Since it is an EU Directive, each Member State of the EU is legally obliged to transpose it into its national legislation. This Directive is based on the Lanzarote Convention with the difference that in this Convention, there are actual penalty brackets imposed on the Member States.

The Lanzarote convention establishes the general principles. How each Member State imposes the principles in their national legislation is up to them. On the other hand, the EU Directive builds on the Convention and builds on the Directive by creating penalty brackets which each Member State has to impose in their national legislation, the aim is harmonisation of the effects of child abuse throughout the EU.

Malta transposed the original 2004 Framework Decision through act XXXI of 2007 which introduced new offences in our Criminal Code such as articles 204A-204C.

THE OFFENCE OF DEFILEMENT OF MINORS
Article 203

> **203.** (1) Whosoever, by lewd acts, defiles a person who has not completed the age of sixteen years, shall, on conviction, be liable to imprisonment for a term from four to eight years:

This article has been established for a long time but was amended in 2018.

The offence of defilement of minors requires the existence of 3 elements –

1) Whosever
2) Defiles a person
3) By lewd acts;

Material element

4) Who has not completed the age of 16 years;
5) The **formal** element

1)
'Whosoever' indicates that any person of any age, orientation, race, religion may commit this offence. Therefore, even minors between themselves can commit this offence. In the case of a minor, the provisions of articles 35 and 37 would kick in.

2) & 3)
Actus reus

Def'n of 'defile' = *"damage the purity or appearance of; mar or spoil."*

This crime consists in the effective defilement of a minor, by lewd acts. It deals with those lustful acts **not consisting in carnal connection** or **attempted carnal connection**, whether actual or constructive, committed **on the person** or **in the presence of an individual**, whether male or female, and capable of defiling such individual.

Lewd acts
Professor Mamo refers to the parliamentary debates behind this article where it was made clear that the use of mere words, or any picture, books or representation, obscene as they may be, would not constitute this particular crime since the legislator required the **actual use of lewd acts**. So, indecent facts which affect only the moral sense, do not constitute the crime in question.

So, the original legislator wanted more than simply showing books, pictures, words etc to the minor; it required that **the defilement is done by the use of lewd acts**.

The lewd act constituting this crime must be committed either on the person of the minor, or even simply in his presence. To take a different view would be to ignore the obvious spirit of the law in creating the crime, that is the desire to protect youth from the pernicious effects of moral defilement and, therefore, also from all those acts which, **though they take place without physical contacts**, are nevertheless inherently intended to defile. Apart from this, the letter itself of the law speaks of lewd acts, without any distinction.

Professor Mamo argues that the lewd acts need not completely satisfy the sexual appetite of the agent but **should at least be directed towards his/her sexual appetite**. In other words, in order for there to be a lewd act, it is not necessary that the agent is fully satisfied from the act, but **it is enough that those acts excite him and feed his appetite**. What is important is that **these acts offend the decency of the victim**.

So, a lewd act on the person or in the presence of a minor would constitute the crime, provided they are calculated to defile the minor by exciting sexual passion or desire.

It need hardly be said that although the law speaks of lewd acts (plural), it must not be imagined that one single act, if calculated to defile, will not be sufficient. The plural is used by the law merely to denote the species and not the number of acts. It would be absurd to hold that the defilement should be unpunished only because it has been caused by one single act (presumably grave) rather than by more acts.

The Court of Criminal Appeal in the case *Pulużija v. John Gera* (14/11/2008) held that *"l-att libidinuz mhemmx għalfejn jissoddisfa lil min jagħmlu. Huwa biżżejjed li jissoddisfa l-ġibda sesswali ta' min jagħmlu."* The Court had arrived at this conclusion basing itself on Manzini who held that lewd acts include all those acts made through contact and gestures which may excite the senses even if such acts do not fully satisfy one's libidinous intents.

Defilement

There must be effectual defilement of the minor. Hence, the question arises whether the crime can take place where the lewd acts are committed on a person or in the presence of a person – being, of course, in either case, underage – who is already defiled. Concerning this question, there has been considerable controversy amongst text-writers and divergence in judicial practice.

It was more than once held by Continental Courts that, if the minor is already defiled, he cannot be the object of the crime under reference. But as against this view, other judgements and authorities point out that there can be degrees of defilement and that it would be an improvident law that which left unpunished the act of a person *"che si adoperasse a sospingere sulla via della corruzione, fino al piu sconfinato libertinaggio, un impubere che gia vi fosse iniziato."*

Between the two extreme doctrines, the one that excludes the crime whenever the minor is already defiled, and the other that admits such crime irrespective of the previous defilement, Maino himself suggests a middle course – "*It is an inquiry"*, he says, *"which has to be made in each case by those who have to judge; and, notwithstanding the difficulties and uncertainties inseparable from such an inquiry, we hold that this is the most correct solution, having regard to the spirit and the letter of the law,* ***thereby avoiding the two extreme views****, the one which makes the crime subsist whatever the previous defilement of the minor, and the other which excludes the crime whenever the victim is not new to sexual practices, without caring to ascertain whether his defilement is yet capable of being aggravated by fresh acts, thus leaving exposed easy prey to the lust of others mere children fallen, often without fault of their own, on the road of vice, but who might yet be reclaimed*

if others did not take the advantage of their inexperience or foolishness to complete their ruin."

This reasoning is, no doubt, appealing. But our Courts, probably considering the extreme difficulty, if not absolute impossibility, of deciding in any case that a minor is so utterly lost as to be beyond hope, have consistently inclined to the doctrine that previous defilement, whatever its degree, does not exclude the crime.

For the subsistence of the crime it is not necessary that the defilement shall be immediate. The very young age of the person with whom the lewd acts have been committed does not rule out the crime, if the remembrance of such acts is calculated to cause the defilement. Indeed according to our law, if the victim is under twelve years of age, that is a reason for aggravating the crime.

In conclusion, in *Pulużija v. Thomas Wiffen* (COCA 08/01/1996), the Court held that for the completed offence, there must be the lewd act and the actual defilement. **The lewd act may be committed either on the minor himself or else, in his presence**. All acts which either of their very nature or circumstances which are **performed for the sexual arousal or appetite of the agent or victim and are capable of arousing the victim's interests are to be considered as lewd acts for the purposes of this offence**. So, the Court extended the sexual arousal not only for the agent but for the victim. The Court held that the duration of the encounter is immaterial.

Repubblika ta' Malta v. Jason Mamo (COCA 15/07/2013) concerns the crime of the defilement of minors.

4)
The age of the minor
Under article 203, the law uses the words *"a person who has not completed the age of sixteen years."* This is the age of the victim. Therefore, the commission of this offence extinguishes itself the moment the victim attains 16 years. Once a minor attains the age of 16 years, this offence with regard to that minor will not subsist. There are other offences that will, but not this specific offence. This age was reduced from 18 years, but Act XIII of 2018 has lowered the age from 18 to 16.

5)
The will of the agent to commit acts which are considered as lewd, and which have sexual gratification for the agent. So, it is not merely the commission of these acts that will give rise to this crime, but they must be for the sexual gratification for the agent.

As to the intentional elment of the crime, **no specific intent to defile is necessary**. The defilement, whether intended or not, must be considered as **a necessary consequence of the lewd acts themselves**, leaving it in every case to those who are to judge to determine whether they were calculated to defile. **If the acts are inherently capable of this effect it is impossible to maintain that the agent who willed the acts did not also will and intend the consequences inherent in their nature**.

Aggravations

Proviso to Sub-article (1) provides a list of aggravations to this offence. Essentially, it provides us with four situations which if satisfied, considerably increase the punishment for this offence.

The main gist of these aggravations is the breach of trust which the victim has in the perpetrator. These are cumulative.

The offence is punishable with imprisonment from a term from 6-12 years –

(a) if the offence is committed on a person who has not completed the age of twelve years or with violence (physical or psychological);

(b) if the offence is committed on a person who has not completed the age of 16 years by means of threats or deceit;

(c) if the offence is committed by any ascendant by consanguinity or affinity, or by the adoptive parents, or by the tutor of the minor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the minor who has not completed the age of 16 years.

(d) when the offender abuses of a recognised position of trust, authority, influence or during his duties as a professional in the possession of an official qualification and, or warrant to practice as counsellor, educator, family therapist, medical practitioner, nurse, pathologist, psychiatrist, psychologist, psychotherapist, social worker and, or youth worker over the person who has not completed the age of sixteen years and one of the circumstance referred to below occurs:

i. the offender wilfully or recklessly endangered the life of the person who has not completed the age of sixteen years;
ii. the offence involves violence or grievous bodily harm to such person;
iii. the offence is committed with the involvement of a criminal organisation within the meaning of article 83A(1).

As regards (a), the wording of the law does not require the violence to be committed on the victim. It could be committed in the presence of the victim, on another person, or on an object. What the law requires, however, is that there is a link between the use of violence and the sexual activity/the defilement. So, it is not necessary that the violence is perpetrated on the actual child, what is important is that as a result of that violence, the child is scared and is made to participate in the defilement.

Now as regards the aggravations at (b) above, the word 'deceit' includes all devices or contrivances calculated to induce the minor into error in order to make him submit to the lewd acts of another. It would appear that a false promise of marriage would constitute such deceit. There must also be the use of threats or deceits meaning that the defilement is the direct result of the threats or deceit used by the perpetrator.

Note that in sub-article (a) there is the 12-year ceiling, while in paragraph (b) there is the ceiling of 16 years, however it is not an automatic aggravation.

With regard to the aggravations at (c), Maino is of the view that the words “any other person charged ... with the care or control of the minor” include a master vis-a-vis his servant. The word “charged” (in the Italian text “affidata") must not be construed in a formal sense but rather in the sense implied in the natural order of the relationship existing between master and servant or employer and employee. It would be inconsistent to exclude the aggravation in the permanent relationship which derives from a “locatio operis" and admit it – as there is no doubt it must be admitted – in the case of a person who has, even casually, the temporary custody of a minor.

Paragraph (c) and (d) are fairly straightforward. Essentially, they are directed towards persons who benefit from the trust of the victim.

Sub-article (1A)

> (1A) When the act is consensual between peers who are close in age and in the level of development and provided that the acts do not involve physical and, or psychological abuse, the punishment shall be decreased by one or two degrees.

Act LXIV of 2021 introduced a new sub-article to this offence, sub-article (1A) which addresses those situations where minors have sexual relations between themselves. These types of activities, when done between minors themselves, are still an offence but if the ingredients in sub-article (1A) are satisfied, the punishment is decreased.

Elements –

1) They must be close in age;
2) They have to be within the same level of development (similar intellectual capacity). They should be similar in the way they can process their consent and form their opinion;
3) These acts should not involve any physical or psychological abuse.

In this sub-article, the law uses “peers”. It doesn’t limit the number of participants. Obviously, this sub-article has not yet been tested in Court, however, the use of the word ‘peers’ would suggest that more than two persons might be participating in that particular activity.

Applicability of article 197(5)

Sub-article (2)

> (2) The provisions of article 197(5) shall also apply in the case of an offence under this article, when the offence is committed by any ascendant or tutor.

This makes article 1975 applicable which is directed towards the consequences of a conviction on the perpetrator. If one of these persons are found guilty of this offence, the Court may suspend or even withdraw their parental authority.

Complaint of injured party
Sub-article (3)

> (3) Provided that where the injured party withdraws his complaint, the Court may decide and direct the continuation of proceedings against the alleged perpetrator, giving particular consideration to the best interests of the complainant, any person under the age of sixteen (16) involved, and any other relevant third parties, and shall cause such request and decision to be registered in the records of the case:
>
> Provided further that proceedings shall be instituted *ex officio* when the act is committed with abuse of parental authority or of tutorship.

This focuses on the **complaint** of the injured party. In order for the Criminal Court to process an offence, the police must bring the culprit to Court and charge him with the offences whilst gathering evidence. How do the police get to know about an offence? There are numerous ways, they can investigate, they can see the person but one of the ways in which the police are made aware of offences is through the complaint of the injured party.

In the majority of cases, nearly the absolute majority, once the police obtain a complaint, they can proceed on their own steam (*ex officio*) but in a few minor cases, the police would require the existence of the complaint throughout the whole criminal procedure. Essentially, in the vast majority of cases, once the police receive a complaint or information, they find the perpetrator and arraign him in Court and the case continues whether the victim wants it to continue or not. The police are bound to continue with the case.

There are a few minor cases where the police not only require the complaint at the beginning of the proceedings but at all stage of the proceedings, the complaint must exist meaning that the victim must not withdraw the complaint. There are a few cases where if the victim withdraws the complaint, the moment this happens, the case falls. The majority keep on going whether the victim withdraws the complaint or not, *ex officio*.

Sub-article (3) creates a hybrid approach which is quite a recent creation. It has retained the possibility for the victim to withdraw the complaint, but it is **not an automatic termination of the criminal process**, meaning that if the Court is not convinced that the withdrawal of the complaint is done voluntarily, then the Court may still order the continuation of the proceedings notwithstanding the withdrawal of the complaint. This hybrid system has been devised in order to protect victims from potential threats or other potential situations where they are coerced into withdrawing the complaint.

For example, I defile a minor, the parents of the minor file a complaint against me and I am facing charges. My temptation is to coerce the minor or threaten him that unless he withdraws the complaint, I will do something bad to him. The child might believe me and go to Court and claim he has no interest to continue this case. He isn't withdrawing because he wants to but because he is scared. So, this approach burdens the Court with ensuring as much as possible that the withdrawal, of the complaint is done voluntarily. So, it ensures that there are no background influences on the withdrawal of the complaint. However, the

law still allows the withdrawal of the complaint since it is more likely that these offences are committed within a family context and perhaps, the child does not want to further the consequences of his relatives. However, it is still trying to prohibit the abuse that exists within the context of withdrawing a complaint. Remember that complaints can be summitted by a tutor on behalf of that minor.

When the Criminal Code speaks of 'complaint' it doesn't understand the generic term of 'complaint'. The type of complaint that the Criminal Code is looking at is a very specific document; it is a formal letter normally written by a lawyer on behalf of the victim or the person complaining, such as the parents of the minor, which guides the police on the facts of the case and must be present throughout the proceedings.

Complaints are very limited in our Criminal Code because the majority of cases, the information is given to the police through a report and not through a complaint. The former is when a person goes to a police station and says what happened. These are *ex officio*. With regards to the report, the general public can submit it even if not connected to the case. But generally, the victim files a report. On the other hand, when it comes to complaints, it is the victim or the person who have authority over the victim who may complain.

To recapitulate, the Court is empowered to refuse the withdrawal of the complaint by the victim and order the continuation of the case.

INSTIGATION, ETC., OF DEFILEMENT OF MINORS
Article 203A

> **203A.** Whosoever, by any means other than those mentioned in article 203(1), instigates, encourages or facilitates the defilement of a minor of either sex, shall, on conviction be liable to imprisonment for a term from three to six years and the provisions of article 203(2) and (3) shall, *mutatis mutandis*, apply to an offence under this article:
>
> Provided that the offence shall be punishable with imprisonment for a term from four to eight years in any of the cases referred to in the proviso to article 203(1):
>
> Provided further that when the act is consensual between peers who are close in age and in the level of development and provided that the acts do not involve physical and, or psychological abuse, the punishment shall be decreased by one or two degrees.

Essentially, this offence focuses on those agents who instigate, encourage, facilitate the defilement of minors without necessarily engaging in the actual defilement.

Most of what is contained in this article, has already been discussed in article 203. However, as results from the first paragraph, this article covers those situations where a minor is defiled but not in the way that is prohibited in article 203. So, this article includes all that is

not found in article 203; the element of lewd acts. Since article 203A does not require the existence of lewd acts, **there is no need to have the specific intent** which is required in article 203. This article, however, focuses on the instigation, the encouragement or the facilitation of the defilement of minors.

So, there is a triangulation being created – the victim, the perpetrator who must satisfy the elements of article 203, but then you have the instigator. A third party who would be covered under this article. Essentially, article 203 is not punishing the perpetrator who is actually defiling the minor but that person who is encouraging, facilitation, perhaps providing a place for the crime to happen and so on. This third person does not need to have, therefore, the specific intent for the minor to be defiled. **It is not even necessary that the defilement occurs**. As long as this person encourages, facilitates, instigates the defilement, then this offence is satisfied, **irrespective of whether the defilement occurs or not**. So, if I am aware that my property is going to be used for the defilement of a minor, but I do nothing to stop it, I will not be held guilty under this offence.

In *Pulużija v. Carmelo Sant* (COCA 12/02/2009), the Court held that it is clear that the purpose of the legislator was to cover those acts which although not carried on the physical person of the minor, led to the defilement of the minor. In this case, the accused had masturbated in front of the minor and the defence counsel argued that this article applies only to those situations where a person instigates, encourages, or facilitates the defilement of a minor by third parties and not by the agent. At first glance, the Court held, this argument could *prima facie* appear to be valid. However, by making reference to parliamentary debates, the Court ruled out this argument.

In *Pulużija v. Omar M Ammar Jolgham* (COCA 15/02/2008 Appeal No. 372/2007), the accused had tried to seduce a young boy and also touched him in various areas of his body. The Court ruled that these actions did not amount to defilement as there was no proof of the '*atti di libidine'* (libidinous acts). The Court, however, found him guilty of an attempted article 203A since there was no evidence of corruption.

Note that article 203 and 203A are alternative to each other. So, a person cannot be found guilty of both articles. However, in the majority of cases, the police would accuse a person with both articles. The Police would charge under both articles so that if the evidence is not strong enough to convict a person under the more serious article under article 203, the police hopes that the evidence will be strong enough to convict under article 203A.

In the proviso, there is an aggravation to the offence of article 203A where it is carried out in the circumstances referred to in the proviso of article 203(1). Essentially, the same aggravations, therefore the breach of a personal trust, apply to both article 203 and article 203A.

PROSTITUTION

Our Criminal Code tackles 3 different scenarios of prostitution, addressed under 3 different articles –

1) **Article 204** – prostitution of persons underage.
2) **Article 197** – prostitution of persons underage by an ascendant.
3) **Article 205** – prostitution of persons of age.

Inducing, etc., persons underage to prostitution
Article 204

> **204.** (1) Whosoever in order to gratify the lust of any other person induces a person under age to practise prostitution, or instigates the defilement of such person, or encourages or facilitates the prostitution or defilement of such person, shall, on conviction, be liable to imprisonment for a term from three to six years:

1)
The first question is who may carry out this offence? "Whosoever". So, it is any person, irrespective of the age, sex, relation etc.

2)
Formal element – *"…in order to gratify the lust of another person"* – this is a specific intent to gratify another person's lust. Again, there is no qualification of such other person. The important point is that **there is another person**. To gratify one's own lust would not fall under this element because this necessitates the existence of a third party. It is this element that distinguishes this offence from the offence of defilement of minors. In the latter, the agent is gratifying his own lust. In this article, the gratification is of another person's lust. In fact, in *Pulużija v. Mark Azzopardi* (COCA 23/01/2004), the Court held that *"mill-kliem tal-liġi huwa evidenti li l-element formali hawn huwa l-intenzjoni tal-ħati li jiddisodisfa z-zina ta' ħaddieħor u mhux mela tiegħu innifsu. Fliema każ allura, wieħed jista' jitkellem dawr ir-reat ta' koruzzjoni ta' minorenni."* So, from the wording of the law, it is evident that the formal element for this offence is the accused's intention to gratify the lust of another person **and not therefore, his own lust**. In which case, one would speak of the offence of the defilement of minors.

3)
This offence contains 3 possible ('or') **material elements** –

a. **Where such person induces a person underage to practice prostitution** – the law uses the word *"induces"* (*"iħajjar"*). This implies the action whereby the agent tries to persuade or lead the minor to engage in the sexual act. The law does not specify any mechanism by which the agent may induce. So, it could be through words, gestures, promises, and so on. What is important is that **the child engages in the sexual encounter as a direct result of the agent's actions**. If the agent uses threats, violence, coercion or force, then the **aggravation found in article 204A (1)** kicks in. What this article requires is the active participation of the agent in inducing or encouraging or

empowering the minor to practice such activity. Mere passivity or knowledge of these facts **does not** constitute this offence.

In fact, in *Pulużija v. DC* (COM 11/01/2013) the mother was the accused, and her daughter was a minor of 16 years who had engaged in prostitution. The police apprehended the minor in a car with an adult who claimed that when he went to pick up the minor, she was in the presence of her mother. The Court held that although the minor was picked up in the presence of her mother, it does mean that the mother induced her into prostitution, although the mother was well aware of her daughter's activities. In fact, from the case it resulted that the minor was introduced in the circle of prostitution by third parties.

b. **Instigates the defilement of such prostitution** – this is the second form of this offence. Whereas the first form uses the word 'induces', this second form uses the word 'instigates' (*'jeċita'*). The use of this word denotes the action whereby the agent brings about or causes the act to happen. Therefore, it is more than merely encouraging or inducing the minor. In this form, there is a more active part, it is not just encouraging or inducing the minor, but it is bringing about. It is a sort of organisation. It is a step further than simply inducing the minor. Naturally, the instigation should be aimed at defiling the minor, but this time, through third parties. Therefore, this specific form complements the offence under **article 203** because it closes a triangulation of this offence. In **article 203**, the offence is one-on-one whereas in this part, you have a triangulation. You have a person organising the defilement of a minor by a third party.

c. **Encourages or facilitates the prostitution or defilement of such person** – this particular element catches those situations where a person does not instigate or induce a minor for prostitution but facilitates it. Under this third limb, the agent need not necessarily instigate the minor, or induce the minor. He doesn't even need to meet the minor. As long as that person either encourages or facilitates the prostitution. Note that the words 'encourages' or 'facilitates' are not linked to the minor. Indeed, the agent could potentially encourage another adult to induce or instigate the prostitution. It could be that two adult friends are discussing and one of them would like to prostitute his second cousin. The friend encourages him. The person encouraging him would still fall under this offence. Contrary to the other two limbs, the agent under this form should not exercise any form of influence or control over the minor. Obviously, because if he exercises control or influence, that person would fall under the pervious forms.

Article 204 does not require the repetition of these offences and it does not require any gain or benefit by the agent. So, monetary gain or benefit by the actions do not form part of this offence. Article 204 would still subsist if the prostitution of the minor is carried out once and just for the fun of it. when the law speaks of prostitution of minors, it does not require a certain regularity, it does not require that someone derives some sort of gain or benefit. If it happens, then article 204 is satisfied.

Second limb versus third limb

The second limb denotes an active role with the agent towards the minor, meaning that for example, I meet up with a minor and I encourage her. In the third limb, there is no contact

between and the minor. A friend of mine comes up to me telling me he wants to prostitute a child and I tell him I can provide the place.

Aggravations

> Provided that the offence shall be punishable with imprisonment for a term from six to nine years, if any one or more of the following circumstances results:
>
> (*a*) if the offence is committed to the prejudice of a person who has not completed the age of twelve years;
>
> (*b*) if the offence is committed by deceit;
>
> (*c*) if the offence is committed by any ascendant by consanguinity or affinity, by any one of the adoptive parents, by the spouse or tutor of the minor, or by any other person charged, even though temporarily, with the care, eduction, instruction, control or custody of the minor;
>
> (*d*) if the offence is committed habitually or for gain.
>
> (2) The provisions of article 197(5) shall also apply in the case of any offence under this article, when the offence is committed by the spouse, by an ascendant or by the tutor.

The proviso to article 204 gives us a list of aggravations which are considerably straightforward.

Prostitution of persons underage by an ascendant

Article 197

> **197.** (1) Any ascendant by consanguinity or affinity who, by the use of violence or by threats, compels, or, by deceit, induces any descendant under age to prostitution, shall, on conviction, be liable to imprisonment for a term from six to twelve years.

Who may carry out this offence? It is targeted to a very closed set of persons – any ascendant of the minor. Contrary to the other usual articles, this doesn't start with "whosoever", it is limited to a particular set of people.

The ascendants must be related to the minor either by consanguinity (through the blood line) or by affinity (through marriage). Consanguinity, for instance, would be the brother of my father, whilst affinity would be the wife of the brother of my father. "marriage" also includes civil partnerships and so on.

Similar to article 204, the agent must induce the minor to carry out prostitution, however, through the use of violence, threats or deceit. If none of these ingredients is found, yet the minor is still being prostituted, then that action would be covered by article 204. Article 204 is not excluded by article 197, article 197 exists only if there is a blood line or affinity, and the use of threats, violence, or deceit. Article 204 also includes ascendants if any of the elements of article 197 come missing.

Due to the increased sense of trust, the punishment under this article is graver than that contemplated by article 204.

Article 197 relates to the prostitution of the minor and therefore, if there is another offence such as defilement of the same minor, then that would be covered by article 203. If there is a defilement of minors by an ascendant, it would fall under the general articles of 203 and 203A. The point being that article 197 is very specific article with very specific elements.

Prostituting of spouse under age or of minor by husband or wife or tutor
Article 197(2)

> (2) The same punishment shall be applied to anyone of the spouses or tutor who, by the use of violence or by threats, compels, or, by deceit, induces to prostitution his or her spouse under age or the minor under his or her tutorship.

This is looking at two classes of persons – in between spouses where a spouse prostitutes his spouse who is also a minor or else, prostitutes the minor who is under his/her care. Sub-article (2) is not very commonly applied, in particular the minor part of the spouses, however, refer to article 3 of the Marriage Act. This stipulates that any marriage contracted between children under 16 years is null and void and between 16-18 it can be so with the authority of the parents and the courts. so, this article is necessarily targeting the age gap between 16 and 18. So, the marriage is between those age gap and one of the spouses is threatening, and so on to prostitution.

Prostituting of descendant or spouse of age, by ascendant or husband or wife
Article 197(3)

> (3) If the ascendant or any one of the spouses, by the use of violence or by threats, compels, or, by deceit, induces the descendant or his or her spouse, of age, to prostitution, he or she shall, on conviction, be liable to imprisonment of a term from three to six years.

Sub-article (4)

> (4) The punishment prescribed for the crimes referred to in the preceding sub-articles shall be increased by one to two degrees in the cases referred to in article 202, as applicable.

This cross-references to other articles.

Inducing persons under age to prostitution or to participating in a pornographic performance

Article 204B

> **204B.** (1) Whosoever in order to gratify the lust of any other person engages, recruits or causes a person under age to practice prostitution, or to participate in pornographic performances, or profits from or otherwise exploits a person under age for such purposes, shall, on conviction, be liable to imprisonment for a term from five to ten years.

This tackles the offence of inducing persons underage either to prostitution or participation in a pornographic performance. The first two elements are identical to article 204 (lust, gratification and so on). However, the difference between article 204B and article 204 is that in article 204 the law speaks of 'inducing a person underage' while article 204B speaks of 'engages', 'recruits' or 'causes' a person underage to practice prostitution. Not only prostitution but also participation in a pornographic performance. The law does not define what it understands by 'participation'. It is not necessary that the minor is actively involved in the act but what is important is that the minor is somehow involved. It could be the child is part of the storyline that leads up to the act, and when the actors are acting, the child is somehow in the scene. What is important is some kind of participation in the pornographic performance, **to any level**.

Furthermore, the law goes a step further by also **punishing any person who exploits such a situation**. The exploitation can be for any reason such as profit, gain and so on.

The punishment under this article is also graver than that of article 204 because the level of damage is potentially worse on the victim.

<u>The concept of 'gain' under these articles</u>

This concept has been emerging under numerous provisions and is also found in article 204A where the law states that *"whosoever with violence, threats, coercion or force…"*

With the element of gain, first of all, the law does not require *ad validitatem* (necessarily) monetary gain. The law does not, therefore, imply that necessarily there must be a monetary gain. Gain can be interpreted as any form of benefit for which the agent or a third party under article 204A may derive. The purpose behind article 204A is also there to punish persons who although not directly instigating or causing the prostitution, perhaps not directly in contact with the minor, they somehow derive a benefit, so, indirectly.

The law is drafted in vague terms and therefore, it is up to the courts in a given case to determine whether there was gain, the kind of gain, and whether the gain was derived from this particular activity. For example, I have rooms for rent, a person comes to me, and I rent him a room upon telling me he needs it to study. Instead, he is practicing these offences. In that case, the person renting is deriving a benefit, but it is not linked to the particular activity because he is unaware of what is happening. On the other hand, a third party comes and says his friend needs the room to prostitute a minor. In that case, the person renting

doesn't even know who the parties in the prostitution are, but he is still deriving a gain and therefore, falls under this article.

Aggravations

> (2) The offence shall be punishable with imprisonment for a term from six to twelve years, if any one or more of the following circumstances results:
>
> (*a*) when the offender wilfully or recklessly endangered the life of the person under age;
>
> (*b*) when the offence involves violence or grievous bodily harm on such person;
>
> (*c*) when the offence is committed with the involvement of a criminal organisation within the meaning of article 83A(1);
>
> (*d*) when the offender abuses of a recognised position of trust, authority or influence over the person under age.

Back to article 204B(2), it provides us with a list of aggravations.

Article 83A creates the offence of merely participating in the criminal organisation and therefore, the reference made in article 204B(2)(c) is satisfied even with the simple participation in the criminal organisation that is committing these offences. even a person who is participating in the organisation without perhaps knowing who the victims are or knowing where the activity is being carried out, but he is participating. It could be simply standing guard outside. So, it needn't be direct participation.

Compelling or inducing persons of age to prostitution
Article 205

> **205.** Whosoever in order to gratify the lust of any other person, by the use of violence, compels or, by deceit, induces a person of age, to practise prostitution, shall, where the act committed does not constitute a more serious offence, be liable, on conviction, to imprisonment for a term from three to seven years:
>
> Provided that the offence shall be punishable with imprisonment for a term of four to nine years, if it is committed -
>
> (*a*) with abuse of authority, of trust or of domestic relations; or
>
> (*b*) habitually or for gain.

Article 205 is a residual offence. A residual offence is one that applies where no other graver offence applies. In fact, the wording of this article states *"where the act committed does not constitute a more serious offence"*. That phrase renders this article a residual offence, being that if there is a graver offence, that will be applicable. If the circumstances are such that no other graver offence is committed, then you can fall back on this article.

The elements of this offence are very similar to the other articles, in particular to articles 204 and 204A.

The major exception is that now we are talking about persons who are over the age of 18 and not minors. But again, you have the gratification of the lust of another person, the use of violence, threats or coercion, the inducement of a person **of age**, and the practice of prostitution by the victim.

The White Slave Traffic (Suppression) Ordinance, Chapter 63 of the Laws of Malta

This Ordinance was brought into effect on the 01/08/1930 and it ratified the UN International Convention for the Suppression of the White Slave Traffic, signed in Paris on the 04/05/1910. It was subsequently amended in 1949. Essentially, this Ordinance ratified the previous 1910 UN Convention on the same topic.

The Ordinance aims at suppressing the traffic or abuse of persons for sexual purposes. This Ordinance is very specific to preventing the abuse and trafficking of persons for sexual purposes. Trafficking and abusing of persons for other purposes, such as forced employment, would fall under different sections of the Criminal Code. Therefore, this Ordinance focuses specifically for sexual activities.

Inducing a person who has attained the age of twenty-one years to leave Malta or to come to Malta from elsewhere for purposes of prostitution

Article 2

2. (1) Whoever, in order to gratify the lust of any other person, compels by means of violence or threats, or induces by deceit, a person who has attained the age of twenty-one years to leave Malta for purposes of prostitution elsewhere or to come to Malta from elsewhere for the purposes of prostitution in these islands, shall be liable, on conviction, to imprisonment for a term not exceeding two years, with or without solitary confinement:

Provided that the punishment shall be imprisonment for a term from two to ten years, with or without solitary confinement, if the offence is committed -

(*a*) by an ascendant by consanguinity or affinity, by the adoptive father or mother, by the husband or the wife, or by a brother or sister; or

(*b*) by means of abuse of authority, of trust or of domestic relations; or

(*c*) habitually or for gain.

(2) A conviction under this article shall entail the forfeiture of every authority and right granted to the offender over the person or property of the person to whose prejudice the offence shall have been committed.

Inducing a person under the age of twenty-one years to leave Malta for purposes of prostitution

Article 3

> **3.** (1) Whoever, in order to gratify the lust of any other person, induces a person under the age of twenty-one years to leave Malta or to come to Maltafor purposes of prostitution elsewhere, or encourages or facilitates his departure from Malta or arrival in Malta for the same purpose, shall be liable, on conviction, to imprisonment for a term from two to five years, with or without solitary confinement:
>
> Provided that the punishment shall be imprisonment for a term from three to ten years, with or without solitary confinement, if the offence is committed -
>
> (*a*) to the prejudice of a person who has not completed the age of twelve years; or
>
> (*b*) by means of violence or threats, or by deceit; or
>
> (*c*) by an ascendant by consanguinity or affinity, by the adoptive father or mother, by the husband or wife or tutor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the person under the age of twenty-one years; or
>
> (*d*) habitually or for gain.
>
> (2) A conviction under this article shall entail the forfeiture of every authority and right granted to the offender over the person or property of the person to whose prejudice the offence shall have been committed, and, in the case of the tutor, his removal from the tutorship and his perpetual disability from holding the office of tutor.

Both articles consider the situation where a person is either (a) taken from Malta elsewhere, or (b) is brought to Malta from another country, both for the purposes of prostitution. These articles do not require any citizenship, residence or any link to the Maltese islands. What is important is that the person is either physically in Malta or physically brought into Malta. So, this Ordinance isn't only directed to Maltese persons. It could be someone who came here on holiday and is somehow taken away from Malta for the purposes of prostitution.

Article 2 considers the victim as being above the age of 21 and the travel mentioned in the article is a direct result of the violence used, the threats or deceit. Therefore, if the person voluntarily travels for such purposes, then this offence would not result. Since the travel, although for sexual purposes, has been done voluntarily by the victim, this offence does not subsist. The person **has to be made** to travel for these purposes.

One of the major differences between these two is the age of the victim. Under the Ordinance, the age is elevated, being 21 years. This is because prostitution lies more than

having a sexual encounter and therefore, with this age the law wants to ensure that the person under the age of 21 is offered the necessary protection.

A person who voluntarily travels for the purpose of prostitution does not fall within the ambit of article 2 or article 3.

The age of 21 is a historical remanent of the age of consent/maturity when the Criminal Code was promulgated. In the late 19th century, the age of majority in Malta was 21, now it has been reduced to 18 and in some instances 16. It is likely that the legislator did not amend this age in order to ensure additional protection for those persons aged between 18 and 21.

Detention, etc, of a person against his will in a brothel etc.
Article 5(1)

> **5.** (1) Whoever detains, or is wilfully a party to the detention of a person, against his will, in any brothel, or in or upon any premises used for purposes of habitual prostitution, even if such person may have resorted to such place of his own free will, and may have remained there to practice prostitution, and notwithstanding any obligation or debt which such person may have contracted with any person whomsoever, shall be liable, on conviction, to imprisonment for a term not exceeding two years, unless a higher punishment is applicable under any other provision of the Criminal Code or of any other law.

The elements of this article are three-fold –
1) The detention or the wilful participation in the detention of a person;
2) Against the person's will;
3) In any brothel or premises used for the purposes of prostitution.

What's being in focus under this article is the forceful retention of a person in a brothel. Therefore, if a person voluntarily resorted to the brothel, and remained there out of his/her own will, until that stage, this offence would not kick in. The moment, however, such person is not free to leave from the brothel, is the moment where this offence kicks in. The offence is not going to a brothel for the purposes of work, but it is keeping the person of whatever gender in that brothel against that person's will. So, you can have a situation where a person voluntarily works at a brothel and is able to leave and come whenever he/she wants. But the moment that a person says that person that he/she cannot leave is the moment upon which this article kicks in.

This article kicks in even though there could be an agreement or some form of obligation between the manager/pimp and the prostitute. Historically, it was common to have arrangements where a person/pimp would offer a residence, clothes, food and drink to a prostitute who, in turn, would give him a major cut from the proceeds. Although this model isn't particularly common anymore, you might still have situations where people or agents import women/men in Malta **under false pretences** and once they are here, they make

them sign an agreement and understand that they cannot leave the new work (prostitution) until an amount of money has been returned back.

For example, a lady from a foreign country is looking for work as a nurse, is contacted by a Maltese agency and comes here believing that she is going to work as a nurse, and when she comes here, she finds herself in a job of prostitution and the agent says that she has to work until a sum of money is paid. This would fall within the ambit of article 5.

Article 5(2)

> (2) A person shall be deemed to detain another person, for the purposes of this article, if, with intent to compel such other person to remain in a brothel or in or upon any premises used for purposes of habitual prostitution, he withholds from such other person any wearing apparel or other property belonging to the latter, or, where wearing apparel has been lent or otherwise supplied to such other person, he threatens such other person with legal proceedings if the latter takes away with him the wearing apparel so lent or supplied.

This creates a **presumption of detention**. This envisages the scenario, in addition to sub-article (1), where the agent either **(1) withholds some property of the victim** (e.g., getting people from outside under false pretences and subsequently taking away their passport) in this case the mere fact that the agent is holding that person's property creates an automatic presumption that there is an illegal detention of the person. Not only, but it could be that the agent **(2) provides materials such as clothes, or underwear, to the prostitute in order to give her services**. If the owner/agent threatens the prostitute with legal action should they run away with this property then that threat is also deemed as illegal detention under this article.

Article 5(3)

> (3) No legal proceedings, whether civil or criminal, shall be taken against such other person for taking away or being found in possession of any such wearing apparel as was necessary to enable such other person to leave such premises or brothel.

Technically, running away with other people's property is theft but sub-article (3) of article 5 states that no legal proceedings whether civil or criminal shall be taken against such other person…

Article 5(3) is creating an exemption with a view to protecting the victims, with a view to helping out victims who want to leave the brothel. It is creating an exemption that even though running away with other people's property is technically an offence, no criminal or civil action may be taken. The agent may not open a lawsuit stating that a group of prostitutes property costing a certain amount. Most of the times, the prostitutes have very limited resources to clothes when working, and therefore, a good chance of them escaping is for them to escape with whatever they are wearing. With this sub-article the prostitutes have an additional security of mind that they can leave with what they are wearing and not be faced with nay consequences.

Power of Commissioner of Police in case of unlawful detention of person
Article 6

> **6.** (1) It shall be lawful for the Commissioner of Police, when, in his opinion, there is reasonable cause to suspect that a person is detained against his will for immoral purposes by any other person in any place, to issue a warrant to any police officer not below the rank of inspector, authorising him to search for the person so detained and to take him out of such place; and the Commissioner of Police may cause the person who was being so detained to be delivered up to his parents or other relatives, or otherwise dealt with, as circumstances may permit or require.

This gives special powers to the Commissioner of Police in relation to the investigation and prosecution of offences under the Ordinance. In fact, article 6(1) states that the Commissioner may, wherever he suspects that a person is detained against his/her will, for immoral purposes, issue a warrant served on a Police Inspector to enter the premises and search for evidence relating to these offences. This is one of the few occasions where the Commissioner of Police **personally** may issue a warrant under his signature served upon the Police Inspector, empowering him to enter premises and search for evidence relating to prostitution.

Punishment for living on the earnings of prostitution etc
Article 7(1)

> **7.** (1) Any person who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person, shall be liable, on conviction, to imprisonment for a term not exceeding two years:
>
> Provided that where that other person has not attained the age of eighteen years, the offence shall be punishable with imprisonment for a term from eighteen months to four years.

This focuses on the offence of living off the proceeds of prostitution. The purpose is to discourage living off the proceeds of prostitution. The major element in this article is the knowledge that those earnings are from prostitution. Let's say a married couple and the husband has a secret business of prostitution and the wife doesn't know, and the wife thinks that the husband is something else. The money he makes from prostitution is used by the wife, but she believes it is coming from elsewhere. In that scenario, the husband will be liable to this article but the wife, since she is in belief that the money comes from elsewhere, that belief would exonerate her from liability. If, however, the wife is aware that that money is coming from prostitution, even though she may not have any form of involvement, the fact that she has knowledge of the source of that money is enough to satisfy this offence.

Article 7(2)

> (2) Any person who in any street or other public place or in any place exposed to the public loiters or solicits for the purpose of prostitution or for other immoral purposes, shall be liable, on conviction, to imprisonment for a term of not more than six months.

Prostitution per se

Under our law, what is punished is not the actual act of prostituting yourself. So, a prostitute in abstract is not committing an offence. What is punished is **the solicitation for the purposes of prostitution** – **article 7(2)** of the Ordinance.

Elements –

1) **Any person may commit this offence**
2) **The solicitation must be in a public place or street** – if the solicitation is made in a private context, such as a party and the organiser thinks of getting prostitutes, then that would not be a place exposed to the public and therefore, that solicitation would not fall under this article.
3) **The action must be of loitering or soliciting** – the law does not specify what would constitute loitering or soliciting, so **any method** may be used as long as there is the solicitation; as long as you are trying to attract customers.
4) **The purpose should be that of prostitution and other immoral services**.

Il-*Pulużija v. Joseph Vella* (COCA 30/05/1994)

Article 7(3)

> (3) A person shall be deemed, until the contrary is proved, to be knowingly living, wholly or in part, on the earnings of prostitution, if it is shown that he lives with, or is habitually in the company of, a person practising prostitution or that he has exercised control, direction or influence over the movements of that person in a manner as to show that he is aiding, abetting or compelling the prostitution of that person with any other person or generally.

This creates a presumption, *"until the contrary is proved."* This presumption focuses on the people who live closely to the prostitute. It is a rebuttable presumption. It might be that the wife of the pimp might bring enough evidence in Court to show that she truly believes that he has a different profession. The presumption with regard to the wife is that she is knowingly living off of the proceeds of prostitution. But the wife might bring evidence to rebut such presumption. In that case, this presumption would fall, and she would not be liable under this article.

In *Il-Pulużija v. Anthony Curmi* (COCA 29/07/1961), the Court held that *"ir-reat ta' għajxien f'kollox jew in parti mill-qliegħ tal-prostituzzjoni jippressuponi mhux okkazzioni waħda ta' qliegħ baxx imma sistema ta' sfruttament ta' turbitudni ta' ħadd ieħor allovolja din il-*

persuna l-oħra takkonsenti. Għaldasqtant il-fatt izolat li wieħed jirċievi flus talli jressaq persuna għal skop ta' prostituzzjoni, ma jikkostitwixxix dan ir-reat."

Therefore, the Court in this case is stating that a single occasion where a person derives profits from the prostitution does not imply this offence. There should be a system of repeat exploitation of the person's character for the purposes of profit notwithstanding that the victim might have consented to this arrangement. So, this article is not satisfied with a one-time payment. What would subject me under this article is a **repeat income** (there is no minimum or maximum). So, more than one time where the profits are picked up by the agent, **even though the prostitute might be well aware and consent to other people living off of the proceeds she is generating**.

Articles 8, 9 and 10 focus on the keeping or **managing of premises used for prostitution**.

Punishment for keeping, etc, brothels
Article 8

8. (1) Whoever shall keep or manage or share with others in the management of a brothel or of any house, shop or other premises or any part thereof which is or are, or is or are reputed to be resorted to for the purpose of prostitution or other immoral purposes shall be liable, on conviction, to imprisonment for a term not exceeding two years and to a fine (*multa*) not exceeding four hundred and sixty-five euro and eighty-seven cents (465.87).

(2) Whoever knowingly lets for hire or permits the use or shares in the profits of any vehicle used for the purpose of prostitution or other immoral purposes shall be liable, on conviction, to imprisonment for a term not exceeding six months and to a fine (*multa*) not exceeding one hundred and sixteen euro and forty-seven cents (116.47).

(3) A person shall be deemed to share in the management of a brothel or of any house, shop or other premises or any part thereof for the purpose of prostitution or other immoral purposes, if he partakes directly or indirectly of any of the profits of such management, or takes an active part in the management of such brothel, house, shop, premises or part thereof.

Punishment for use of shop, etc, for the purpose of prostitution
Article 9

9. Whoever keeps any shop, lodging-house or hotel or any private apartment and suffers or permits such shop, lodging-house, hotel or apartment or any part thereof to be used as a place of assignation for the purpose of prostitution or any other immoral purpose shall be liable, on conviction, to imprisonment for a term from one to six months.

Punishment for letting houses, etc, for the purpose of prostitution
Article 10

> **10.** Whoever owns or has under his administration any house or other premises and knowingly lets or permits the use of the same for the purpose of prostitution or other immoral purposes, shall be liable, on conviction, to imprisonment for a term from one to six months.

Punishment in case of failure to take steps to eject person from premises used for immoral purposes
Article 12

> **12.** (1) Whoever, after due notice in writing has been given to him by the Commissioner of Police that a house or other premises owned or administered by him, is or are used for the purpose of prostitution or other immoral purposes, fails, within six working days, to take the necessary steps before the competent court for the ejection therefrom of the person or persons occupying the same and to prosecute the proceedings with due diligence shall be liable to a fine (*multa*) in terms of the Criminal Code.
>
> (2) In the case of a conviction for an offence against the provisions of this article, the court shall allow the offender a period of time within which to take the said steps under a penalty of four euro and sixty-six cents (4.66) for each day during which the default in carrying out the order of the court continues.

This empowers the Commissioner of Police to order the owner of a property to take legal action and eject persons using his property for prostitution within 6 days from the notice. Under article 12, if the Commissioner suspects or knows that property is being used for the purposes of prostitution and perhaps the owner leased out this property to another person who is using it for prostitution, whether the owner knows or not of the purposes of his lease, the Commissioner of Police may order the owner to initiate proceedings to evict the person.

Under article 13, the Commissioner may also order the closure of the house/property used for prostitution and under article 14 the Court may also order the suspension of any license on the property. Let's say someone has a hotel which is being licensed by the Malta Tourism Authority and part of it or all of it are being used for prostitution. The police under article 13 may immediately order the closure of the hotel until final judgement. Once it is given, if the Court finds guilt under this Ordinance, the Court may also order the withdrawal or cancellation of the license of the hotel.

Sub-title III: OF CALUMNIOUS ACCUSATIONS, OF PERJURY AND OF FALSE SWEARING

Interpretation
Article 100

> **100.** In this Sub-title "criminal proceedings" includes the inquiry referred to in Sub-title II of Title II of Part I of Book Second of this Code and any proceedings under the Malta Armed Forces Act.

This article provides us with the interpretation which his to be given to the term 'criminal proceedings'. This term also encompasses the compilation of evidence, meaning il-*kumpilazzjoni tal-evidenza*. It also covers any criminal proceedings heard before the Court of Magistrates, Malta or Gozo, as a court of criminal inquiry.

CALUMNIOUS ACCUSATIONS
Article 101

> **101.** (1) Whosoever, with intent to harm any person, shall accuse such person before a competent authority with an offence of which he knows such person to be innocent, shall, for the mere fact of having made the accusation, on conviction, be liable -

The aim of this article is to punish calumny because through it, **the administration of justice may be misled into sentencing an innocent person**. That is the raison d'etre behind this article of the law.

Elements –
1) An accusation of an offence made to a competent authority;
2) The intent to harm the other person;
3) The knowledge on the part of the accuser of the innocence of the other person.

1)
When the law speaks of accusation, it refers to all or any of the ways and modes in which a notice of an offence (*noticia criminis*) is made to a competent authority. The notice of an offence refers to the **report**, **information** or **complaint** (*rapport, denunzji, kwelela*).

The nature of the accusation
Article 101 of the Criminal Code speaks about **verbal** or **direct** calumnious accusation. This is so because the false accusation to the competent authority is made in writing or aurally by means of a report or an information or else of a complaint. This is as opposed to the crime contemplated and prescribed by means of article 110(1) of the Criminal Code. When it comes to the latter article, we are referring to real or indirect calumnious accusation. Whilst, on the other hand, article 101 refers to verbal or direct calumnious accusation.

Two important things to keep in mind – (1) the accusation can be made in **any form**, emanating an information, report or complaint and (2) there is **no need to follow the formalities laid down in the Criminal Code** for the lodging of a formal complaint. This was also confirmed in the judgement *Il-Pulużija v. Joseph Seychell* (17/10/1997 COCA). The Court held, *"l-akkuza jew denunzja ghall-finijiet tal-kunulja ma tirrekjedi ebda formalita*

partikolari. L-unika ħaġa li hi rikjesta hi li dik l-akkuza jew denunzja jsir quddiem awtorita kompetenti…"

The identity of the accuser

Keep in mind that **the identity of the accuser must be made known to the police** because our Criminal Code rejects any anonymous report or information. Action upon any anonymous report or information is only taken by the police in certain specific circumstances.

In fact, on this point, make reference to **article 535(2)** of the Criminal Code,

> (2) Nevertheless, no action shall be taken by the Police upon any anonymous report or information, except in the case of a flagrant offence or where the report or information refers to some fact of a permanent nature. In any such case, it shall be lawful for the Police to proceed on such report or information, after ascertaining the flagrancy of the offence or the permanent fact.

An example of *"a flagrant offence or where the report or information refers to some fact of a permanent nature"* is the case where the police receive an anonymous call and are informed that there is a fight or hold up in a certain place. The police will go because it is urgent and it is a flagrant offence, meaning that it is happening at that time. Moreover, it has to be of a **permanent nature**.

The notion of self-calumny

Also keep in mind that the notion of '*auto calumia*' (self-calumny) is not contemplated by our Criminal Code. This situation arises when, for example, the accuser informs the authority that he is guilty of an offence and **either the offence was not committed** or else if it was committed, **it was not committed by himself**. When it comes to article 101 of the Criminal Code, the accuser shall accuse a third party before the competent authority. **He cannot accuse himself but a third party**. In fact, the wording of the law states whosoever *'with intent to harm any person.'* It uses the word 'any person' not with intent to harm himself.

The fact that the accusation must be an offence

The false accusation must be made to the competent authority and must be of an offence, meaning a **crime** or a **contravention**. It is only when a fact is attributed to a person which the law characterises as a criminal offence that the competent authority may be moved to institute criminal proceedings against such a person. And it is only in these circumstances that such a person/third person may be exposed to injury. This was stated in *Il-Pulużija v. Vincenzo Attard* (07/11/1949 COCA), *"biex ikun hemm ir-reat ta' falza denunzja hemm bżonn li d-denunzja falza tkun dwar…"*

Time bar
The offence of calumnious accusation does not arise when the fact falsely is imputed is –
1) Time barred or
2) No longer punishable at law.

So, for example, what happens if the police receive a report, whereby someone alleges that Mr X stole his laptop. If in actual fact Mr X stole his laptop, then it would not amount to this offence. But if for example, the accuser states that Mr X stole a laptop, a mobile, a handbag and the theft is aggravated by amount in terms of article 261(c) and 267 and 279(a) or (b) would that constitute this offence? If from the investigation the police establish that Mr X stole the laptop, but that the theft isn't aggravated by amount, you have to see **whether that aggravation constitutes an offence in its own right**. So, in this example, theft is an offence under our Criminal Code, but the 'amount' in theft aggravated by amount is not an offence in its own right.

Conversely, let's say that the accuser accuses Mr X of committing theft accompanied by GBH and from the investigation it transpires that theft was committed but it wasn't accompanied by GBH. Then that would amount to calumnious accusation because the term GBH **constitutes an offence in its own right**. So, **the test is whether the aggravation constitutes an offence in its own right**.

What constitutes a competent authority?
A competent authority is an authority who has the power to investigate a particular individual and then subsequently, to take Court action against that particular individual. Competent authorities include the Executive Police, the AG, Appoġġ, The Controller of Customs and so on. In fact, this was even stated in *Il-Pulużija v. Joseph Seychell* (17/10/1997 COCA), *"L-akkuza jew denunzja ghal-finnijiet tal-kulunija ma jirrekjedi ebda formalita partikolari. L-unika ħaġa li hi rikjesta hi li dik l-akkuza jew denunzja jsir quddiem awtorita kompetenti…"*

2)
This is the **generic intent** required for this part of the offence. The harm or else injury may consist merely in exposing the victim to the possibility of criminal proceedings being taken, leading to the possibility of a punishment awarded against that particular person.

Consequently, **the possibility of such proceedings is essential**, therefore, (1) the criminal proceedings **need not be instituted**, (2) what is required is the **possibility** that criminal proceedings could have been instituted. What is necessary is the malicious intention on the part of the accuser and this was reteriated in *Il-Pulizija v. Dolores Camilleri* (COCA 26/03/2009), *"il-hsara li tirrekjedi l-liġi fit-tieni element hija dik li persuna akkużata tiġi assogettata għal-possibilita li jittieħdu proċeduri kriminali kontra tagħha..."*

It does not mean that it is absolutely necessary that the accusation should indicate the person of the accused by name. It is sufficient if the information, report, or complaint contains the particulars necessary to identify said person. Therefore, **the person accused must be reasonably identifiable**, meaning that when a person goes to the police station and accuses Mr X of having committed a particular crime, there is no need to say all the

information of Mr X. The importance is that the person is identifiable. Sometimes not even the name of the person is required. The person must be reasonably identifiable whereby there is no need to give the full details of that particular person. Moreover, nor is it necessary that the false accusation should contain minute details of facts or in actions of the articles of the law. It is enough that it contains **sufficient information to give rise to criminal proceedings**.

3)
The **specific intention** required for this offence is **the knowledge on the part of the accuser of the innocence of the other person against whom an accusation is made** must be certain so that it can be said that the said accusation was made **deliberately** and **maliciously**. Moreover, the knowledge on the part of the accuser of the innocence of the third party **must exist at the time the information is laid or the compliant is made**. So, it must be certain, and it must exist at the time the information is laid, or the complaint is made. In fact, in *Il-Puliżija v. Dolores Camilleri* (COCA 26/03/2009), the Court held that, *"l-element formali jew speċifiku tar-reat in dežamina hu propju…"*

In *Pulużija v. Doreen Zammit* (15/06/2001 COCA), the Court held

Dak hu li ghamlet l-ewwel Qorti, u hu evidenti li meta din waslet sabiex tkun moralment konvinta mill-htija ta' l- appellanti, dan kien ifisser li dik il-Qorti kienet certa, bla dubju dettat mir- raguni, li apparti l-att materjali tar-rapport mwettaq mill-appellanti, hi, cioe' l-appellanti, fil-hin li ghamlet dak ir-rapport fuq Martin Gaffarena, kienet taf li huwa innocenti u b'dan kollu xorta rrapportatu. Dan hu kull ma jirrikjedi l- Artikolu 101 li tahtu l-appellanti instabet hatja, cioe' l-att materjali tar-rapport lill-awtoritajiet kompetenti, u l-element formali fis-sens li min ghamel dak ir- rapport kontra persuna fejn akkuzata b'reat, kien jaf li dik il-persuna fil-fatt ma kienetx ghamlet dak ir-reat, bil-konsegwenza naturali li tali agir effettivament iwassal sabiex tigi kagunata hsara lill-persuna rapportata. Kif dejjem gie ritenut, wiehed huwa tenut dejjem responsabbli ghall-konsegwenzi naturali ta' dak li intenzjonalment u volontarjament jghamel. Minn dawn il-fatti jemergi l- element formali ta-dan ir-reat addebitat lill-appellanti. Dan ukoll kien parti mill- apprezzament tal-provi fl-assjem taghhom li sar mill-ewwel Qorti w li din il- Qorti ma ssib ebda skorrettezza fih.

Can there be attempted calumnious accusation?
No because calumnious accusation is a formal offence and it is generally held, that such offences do not admit of an attempt. You either have it or you don't. This offence is completed as soon as the complainant lodges the complaint, report or information with the competent authority.

Judgements
1) *The Police v. John Cameron* (21/04/2009 COM Gozo);
2) *Il-Pulużija v. Juanita Fenech* (17/03/2017);
3) *Il-Pulużija v. Daniel Mizzi* (17/06/2019 COCA);

The Difference between Defamation and Calumnious Accusation
The difference between the two was highlighted in *Il-Pulużija v. Christine Abramovic et* (COM Malta, 07/11/1979).

Previously, defamation was punishable under our Criminal Code by means of article 252. By means of Act XI of 2018, the section of the law was repealed from our Criminal Code. Nowadays, it falls under the Media and Defamation Act, Chapter 579 of the Laws of Malta. Therefore, it is no longer a Criminal offence.

Punishment

(*a*) to imprisonment for a term from thirteen to eighteen months, if the false accusation be in respect of a crime liable to a punishment higher than the punishment of imprisonment for a term of two years;

(*b*) to imprisonment for a term from six to nine months, if the false accusation be in respect of a crime liable to a punishment not higher than the punishment of imprisonment for a term of two years, but not liable to the punishments established for contraventions;

(*c*) to imprisonment for a term from three days to three months, if the false accusation be in respect of any other offence.

(2) Where the crime is committed with intent to extort money or other effects, the punishment shall be increased by one degree.

Article 101(1)(a), (b) and (c) prescribe the punishment. The punishment for calumnious accusation is determined by the means of the punishment which could be awarded by means of the alleged fact and it **depends on the gravity of the accusation**.

Sub-article (2) also provides for the **aggravating circumstances** to sub-article (1).

SUBORNATION OR ATTEMPTED SUBORNATION OF WITNESS, REFEREE OR INTERPRETER
Article 102

102. Whosoever, in any civil or criminal proceedings, suborns a witness, a referee, or an interpreter, to give false evidence or to make a false report or a false interpretation, shall, on conviction, be liable -

(*a*) where the false evidence, report or interpretation has been given or made, to the punishment to which a person giving false evidence would be liable;

(*b*) where there has only been an attempt of subornation of a witness, a referee, or an interpreter, to the same punishment decreased by one or two degrees;

(*c*) where the subornation has been committed by the use of force, threats, intimidation or by promising, offering or giving of an undue advantage to induce false testimony, to the punishment mentioned in paragraph (*a*) increased by one or two degrees.

Our law punishes subornation in the following instances –

1) Where the false evidence, report or interpretation has been given or made

If the witness, referee or interpreter is arraigned in court and subsequently acquitted of the charged proffered against them by reason of some personal ground of defence, the person who has suborned him will not be exempted from criminal responsibility if the falsity of the testimony, or reference or interpretation has been objectively established.

When our law speaks of the false evidence, reference or interpretation, has been given or made, **it does not mean that is necessary to prove that it has objectively influenced the event of the proceedings**. What is necessary to prove is that the false evidence, interpretation or reference has been given in the cause **to the possible prejudice of justice**.

2) Where there has only been an attempt of subornation

The Criminal Code also punishes where there has only been **an attempt**. This is when a witness, reference or interpreter sought to be suborned have not in fact given false evidence, false interpretation or false reference.

3) Subornation committed by the use of force, threats, intimidation, etc

Our Criminal Code also punishes the instances whereby subornation has been committed by the use of threats, intimidation or by promising, offering or giving of an undue advantage to induce false testimony.

Punishment

Our law makes a distinction of whether the false evidence report of information has actually been give or made, where there has only been an attempt or where the subornation is committed by the use of force, threats, intimidation and so on.

PREPARATION OR PRODUCTION OF FALSE DOCUMENTS

Article 103

> **103.** Whosoever, in any civil or criminal proceedings, shall cause a false document to be prepared or shall knowingly produce a false document, shall be liable to the same punishment as the forger thereof.

In both cases, the person shall be awarded the same punishment as the forger.

PERJURY IN CERTAIN CRIMINAL TRIALS

Article 104

> **104.** (1) Whosoever shall give false evidence in any criminal proceedings for a crime liable to a punishment higher than the punishment of imprisonment for a term of two years, either against or in favour of the person charged or accused, shall, on conviction, be liable to imprisonment for a term from two to five years.
>
> (2) Where, however, the person accused shall have been sentenced to a punishment higher than that of imprisonment for a term of five years, the witness who shall have given false evidence against such person in the trial, or of whose evidence use shall have been made against such person in the trial, shall be liable to such higher punishment.

Our law does not define what constitutes **"false evidence"** or as it is called in some other legal systems, legal or judicial perjury. Keep in mind that when it comes to article 108, we are speaking of extra-judicial perjury. There is a difference.

Elements –

1) A testimony given in a cause, whether civil (Art. 106) or criminal;
2) An oath lawfully administered by a competent authority;
3) Falsity of such testimony;
4) The wilfulness of such falsity (the Criminal intent).

1)

By the word 'testimony' it is means any **statement** or **deposition**, or **declaration** made before a Court of Justice in judicial proceedings, according to law. Therefore, the word 'testimony' includes all kinds of statements which have **a probative value**.

It must be given in a cause, meaning in contentious proceedings which call for a decision. When it comes to article 104, we are speaking of *A v. B*. This differs from article 108.

Who can give false evidence?

Any person appearing before a Court of law to give evidence. For example, either as a witness, a lay person or the complainant who filed the criminal complaint.

Article 629 of the Criminal Code

> **629.** (1) Every person of sound mind is admissible as witness, unless there are objections to his competency.
>
> (2) The court shall explain to the witness the obligation of the oath if, on account of his age or for other reasons, it appears doubtful whether he understands such obligation; and if, notwithstanding such explanation, the court shall deem it necessary that the witness, before giving evidence, be further instructed as to the consequences of false testimony, the court may, if it considers the deposition of such witness to be important for the ends of justice, adjourn the trial to another day, and, should the case be before the Criminal Court, discharge the jury.

The Court will see that the person who testifies understands the import of the jury. When it comes to minors, this also happens but it will be explained in simple words. Keep in mind that there is nothing wrong with a person underage testifying. The important thing is that the child says the truth. There have been cases where a person has testified at as young as 3 years old. The same applies to persons who have certain conditions who aren't excluded from testifying, so long as the person is of a sound mind and understands the implications of lying.

Article 563 of the COCP

> **563.** All persons of sound mind, unless there are objections against their competency, shall be admissible as witnesses.

Article 630 of the Criminal Code

> **630.** No person shall be excluded from giving testimony for want of any particular age; it shall be sufficient that the court be satisfied that the witness, though not of age, understands that it is wrong to give false testimony.

Article 564 of the COCP

> **564.** Whatever may be the age of a witness whom it is intended to produce, he is admissible as such, provided he understands that it is wrong to give false testimony.

Both the witness as well as the accused, if he/she decides to testify, may give false evidence. Keep in mind that the latter is a **competent but not a compellable witness** meaning that he/she has the right to remain silent and such silence cannot be used against him. If he testifies, it must be out of his own free will. In fact, **article 634** of the Criminal Code.

> **634.** (1) The party charged or accused shall, at his own request, be admitted to give evidence on oath immediately after the close of the prosecution, saving the case where the necessity of his evidence shall arise also at a subsequent stage, or the court sees fit to vary the order of the evidence; and such party may be cross-examined by the prosecution, notwithstanding that such cross-examination would tend to incriminate him as to the offence charged:
>
> Provided that the failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecution.

Once the accused testifies, he is treated as a normal witness whereby he cannot say that he won't answer not to incriminate himself. So, the rules that apply to witnesses would apply to him whereby **he will have to say the truth**, and nothing but the truth.

2)
The false testimony should have been **given on oath** lawfully administered by a competent authority, therefore, if the testimony is not given on oath, no statement or affirmation, however false will constitute the offence.

Article 632 of the Criminal Code

> **632.** The form of oath to be administered to witnesses shall be the following:
>
> *You* A. B. *do swear (or do solemnly affirm) that the evidence which you shall give, shall be the truth, the whole truth, and nothing but the truth. So help you God.*

This prescribes the form of the oath to be administered to any witness.

Who is the competent authority?
When it comes to perjury, we speak of a Court, Tribunal or Disciplinary Baard.

The oath must be taken personally by the person to be sworn in. In fact, article **577(3)** COCP.

> (3) Witnesses shall be sworn previously to their examination, and the oath shall, unless the law provides otherwise, be administered to them by the registrar.

3)
This is the "*perċezzjoni tax-xhud.*"

Our law does not provide us with a definition of what constitutes a "false testimony". Essentially, this is when a **person affirms what is false** or else **denies what is true**. In fact, in *Il-Pulużija v. Rose Borg et* (10/10/2016 COM Malta), *"ili għall kull bon fini…"*

Keep in mind that the person under oath must testify. If, for example, he **refuses to answer** certain questions or he is **evasive**, that doesn't constitute perjury. When this happens, the Court has the right to tell him he has to respond and to put him in the basement of the Court and he will be kept there until he speaks.

What happens if a witness fails to disclose something which he knows or says he knows nothing about a particular matter?
The witness has to speak the truth and nothing but the truth. This is the duty of the witness to say the truth as far as he knows it. So, if he fails to disclose what he knows or says he doesn't know where he knows, and he does it in **bad faith** or with criminal intent, then he is guilty of this crime.

What happens when a witness denies having seen or heard the facts on which evidence is required?
In such cases, bad faith on the part of the particular witness may be difficult to prove because it may happen that although the witness was in a position to have seen or heard, he may have in actual fact not noticed.

For this offence to subsist, it is necessary that **the falsity must be material in the cause**. If therefore, the falsity falls upon circumstances which are irrelevant to that particular cause, to that particular case, then the crime could not arise because no possibility of injury will arise.

For example, if in a court case the defendant is being accused of theft, if the witness who takes to the witness stand and testifies gives a false testimony, for this crime to subsist, such false testimony must be with regard and in relation to the offence the accused is being accused of, in this case, theft.

Therefore, if the falsity falls upon circumstances which are entirely irrelevant to those criminal proceedings which, whether true or false, **could in no way influence the outcome of those criminal proceedings**, then the crime of perjury would not arise. So, keep in mind that our law requires that all the evidence tendered by a particular witness or all the witnesses, **must be relevant to the matter in dispute**.

For example, John Borg is being accused of stealing a car, when the witnesses which are summoned by the police tender evidence, it must be connected to that accusation, in this case, stealing a car. So, keep in mind that **the Court may always refuse to admit any evidence which it considers as irrelevant or superfluous**. In this way, **what constitutes material evidence and necessary evidence depends upon the circumstances of the case**. If the falsity is material to the cause, it means that it could affect the decision of the judge/magistrate in one way or another.

Article 522 COCP

> **522.** It shall be lawful for the court to cause the person whose interdiction or incapacitation is demanded to appear before it, to question such person and cause him to be examined by one or more experts; and the court may, in all cases, appoint a temporary curator to take charge of his person and property.

With regards to the third element of perjury, no actual injury resulting from an erroneous judgement pronounced in consequence of such false deposition is required. **There is no need to prove the actual injury**. Indeed, the mere possibility of injury to the administration of justice alone characterises this crime. Moreover, generally speaking, the event is not considered except in certain cases, for the purposes of the assessment of punishment.

4)
The intentional element of this offence is **the consciousness of uttering a falsehood or of concealing the truth**. Therefore, any mistake or forgetfulness on the part of the witness or on the part of the accused excludes the criminal intent in this offence. Consequentially, the falsity must be **deliberate** and **intentional**.

If it is incurred from inadvertence or mistake, then it cannot constitute this crime. This also means that this crime is not committed by a witness or by the accused who testifies a falsehood honestly believing it to be the truth.

Keep in mind that **the criminal intent need not consist in the wish to harm any particular person**. In fact, in the case of criminal proceedings, as per article 104(1), **the offence subsists whether the false testimony is given against or in favour of the accused**. The motive of the offender, as in other cases, is entirely irrelevant.

Finally, the question whether there was the necessary criminal intent is one which needs to be **determined on a case-by-case basis** and must be established form the particular circumstances of the case.

Is a person liable to the punishment of perjury when he takes a false deposition to save himself?
With regard to the person charged or accused, if this particular person chooses to testify, so he takes the witness stand and testifies in his criminal proceedings, then he may be cross-examined notwithstanding that such cross examination may tend to incriminate him of the offences with which he is charged. Once the accused chooses to testify, **he/she is treated as a normal witness**.

If, for example, John Borg makes a false deposition, he becomes guilty of this crime. With regards to all the other witnesses, including the parties to a civil action, the general rule is that no person may be compelled to answer any question which may incriminate him/her. Therefore, a witness to whom an incriminating question is put, may prevail him/herself of the right to remain silent but if said witness answers the questions being put forward, either by the prosecution or by the accused through his lawyer, and he/she replies on oath, then **said witness cannot alter the truth**. If he does, then he would be found guilty in terms of article 104.

Article 633 of the Criminal Code

> **633.** (1) No objection to the competency of any witness shall be admitted on the ground that he was the party who laid the information or made the complaint, or that he was the party who made the report or the application in consequence of which proceedings were instituted, or that he is, by consanguinity or affinity, or by reason of any contract, employment or otherwise, in any manner related to or connected with the party above referred to, or with the person charged or accused; but in every such case, the witness shall be heard, and those who have to judge of the facts, being fully persuaded and convinced of the veracity of the testimony, shall act upon such testimony in the same full and ample manner, as if such facts had been proved by an extraneous person not related or connected as aforesaid.
>
> (2) Nevertheless, it shall lie in the discretion of the court, regard being had to the degree of consanguinity, the reluctance to give evidence against the husband or wife, his civil union partner or against his cohabitant, against an ascendant or a descendant, or against a brother, sister, uncle, or nephew, and to other particular circumstances of the case, not to compel a witness to give evidence if he be unwilling to depose against a person related to him in any of the said degrees.

So, in a nutshell, article 633(2) gives the discretion to the Court to excuse a witness from giving evidence. For example, against his close relatives or the person's mentioned in this sub-article, or because of the particular circumstances of the case. But **if the Court does not excuse said witness from testifying, then the witness is bound to testify** and if he gives false evidence, and obviously all the other elements of this offence conquer, then that witness will be guilty of the offence of false testimony.

A domestic violence case is a practical example. Say the wife of an abusive husband files a report, making a domestic violence claim. There are certain cases whereby when this case is appointed before the magistrate, the accused, through her lawyer, will inform the magistrate that she does not wish to testify against her husband for reasons such as that they have children. The Court can agree to the submissions, or it may not.

The Notion of Retraction

Our Criminal Code does not contain any express provision on retraction. But the concept of retraction has been accepted in Maltese jurisprudence. This was even stated in the judgement *Il-Pulużija v. Karl Carmel Azzopardi* (COCA 01/11/2013). In fact, the Court held that, "*Illi huwa pacifiku li d-duttrina ta' "retraction" ghalkemm ma tirrizultax daqstant cara mill-Kodici Kriminali, tapplika minghajr ebda dubju u giet accettata mill-Qrati taghna f'kazijiet ta' spergur."*

Essentially, retraction is **when a witness or the accused retracts any untruthful deposition**. As previously mentioned, the law creates the offence of false testimony (perjury) only inasmuch as this may wrongly influence the decision in a particular cause. Therefore, when a person who has given false testimony **prevents its affects in time**, and retracts any untruthful deposition, then one of the elements of this offence seizes to exist. This principle of retraction may be also inferred to from article 602 of the COCP.

> **602.** (1) If the witness or interpreter, at any time before the hearing of the cause is concluded, wishes to make any addition or correction, the court shall allow such addition or correction and shall give weight thereto according to circumstances.
>
> (2) Any such addition or correction shall be noted down and certified in accordance with the provisions of articles 594 and 595.

In the judgement *Il-Puliżija v. Marzouki Hachemi Beya Bent Abdellatif* (COCA 22/10/2001), the Court held that *"retraction is an incentive and an opportunity given to a witness to correct his version or deposition so that his/her untruthful deposition does not lead to and cause damage to the person accused or to any other person. The aim of retraction is to uncover and establish the truth which after all, is the aim of each and every criminal case. The effect of retraction is that the possibility of creating an injustice is eliminated and that no irreversible harm is caused to others."*

Retraction of any untruthful deposition or incorrect deposition has to be made –

1) During ongoing proceedings as per article 602 COCP **AND**

2) Before criminal proceedings have been concluded and decided.

It cannot be made afterwards. If retraction is made subsequently to the final decision, that is, when the case is considered as *res judicata*, then the witness will still be found guilty under this article.

The offence of perjury as per article 104 is **completed and consummated as soon as the criminal proceedings in which that particular witness testified are decided**. So, keep in mind that the consummation of the offence of perjury is not completed or consummated as soon as the witness testifies a falsehood, but it is completed and consummated as soon as those criminal proceedings are decided because during the ongoing criminal proceedings, that witness may retract any untruthful deposition.

This is because at the moment in time, that particular witness cannot once again take the witness stand and retract any untruthful deposition. This was stated in *Il-Puliżija v. Marzouki Hachemi Beya Bent Abdellatif* (COCA 22/10/2001).

Retraction **need not be absolutely spontaneous**. It is sufficient if it is voluntary. So, 'spontaneous' refers to when a person is testifying, and at a certain point he/she admits to having testified a falsehood. In practice, what normally happens is that either the defence lawyer or the prosecution and many a time the judge or magistrate, will call upon the witness and will tell him/her if you testify on oath a falsehood, you are committing a criminal offence. Then the judge will inform that particular witness that when it comes to article 4, that person may even go to prison and will inform him/her that if they want, they can retract any untruthful deposition. Obviously, if that person retracts any untruthful deposition, he/she cannot be found guilty of perjury. **Retraction must be explicit, unconditional and complete**.

Retraction of any untruthful depositions is applicable only with regards to **articles 104**, **105** and **106** of the Criminal Code. It is not applicable with regards to article 108 of the Criminal Code. This is because only articles 104, 105 and 106 of the Criminal Code speak about a person giving false evidence in criminal or civil proceedings and **retraction may be made whilst criminal or civil proceedings are still ongoing** with the aim of avoiding damage, or harm to a particular person. conversely, article 108 does not speak about proceedings. Therefore, since one of the essential elements for retraction to subsist is missing, meaning that retraction has to be made during ongoing proceedings and before proceedings have been concluded and decided, then retraction is not applicable to proceedings in terms of article 108 of the Criminal Code.

Case law on retraction

- *Il-Pulużija v. Romeo Bone and Sabrina Bone* (COM 30/09/2011);
- *Il-Pulużija v. Patrick Filletti u Enrico sive Henry Filletti* (COCA 24/11/1992);
- *Il-Pulużija v. Arnold Farrugia* (COCA 17/01/2019)

Punishment

When it comes to criminal proceedings, the punishment for perjury varies according to the gravity of the offence. The accused is being charged with during those particular criminal proceedings in which the false testimony is given.

PERJURY IN OTHER CRIMINAL TRIALS

Article 105

> **105.** Whosoever shall give false evidence in any criminal proceedings for an offence not referred to in the last preceding article, either against or in favour of the person charged or accused, shall, on conviction, be liable to imprisonment for a term from nine months to two years.

When it comes to article 105, we are speaking about a person who gives false evidence in any criminal proceedings for any offence liable to a punishment which is less than 2 years imprisonment. Therefore, it also includes contraventions.

PERJURY IN CIVIL PROCEEDINGS

Article 106

> **106.** (1) Whosoever shall give false evidence in civil matters, shall, on conviction, be liable to imprisonment for a term from seven months to two years.
>
> (2) The provisions of sub-article (1) shall apply to any person who, being a party to a civil action, shall make a false oath.
>
> (3) Whosoever shall make a false affidavit, whether in Malta or outside Malta, knowing that such affidavit is required or intended for any civil proceedings in Malta, shall, on conviction, be liable to the punishment mentioned in sub-article (1).

Remember that in all these articles, the constituent elements of perjury in criminal proceedings are present.

The only thing which varies is the punishment. Although it is true that in both cases there is an offence against the administration of justice, the affects with regards to society at large as well with regards to the individual are not injurious in the same degree. So, when it comes to civil proceedings, the interests involved are most of the time pecuniary in nature. So, when the false testimony gives rise to a wrongful judgement, then the prejudice suffered by the aggrieved party is most of the time remediable. On the other hand, when it comes to criminal proceedings here the false testimony is calculated to provoke a more gracious injury which is almost redressable both when it favours the impunity of a guilty person or else when an innocent person ends up in prison. Hence, the difference which the law makes when it comes to punishment purposes. In criminal proceedings, a person can end up in prison, hence the difference in gravity.

Il-Pulizija v. Ruth Mary Baldacchino (COCA 26/05/2016) – the Court held that, "*Illi l-azzjoni penali ghar-reat ta'l-ispergur a tenur ta'l-artikolu 106 tal-Kodici Kriminali u cioe' r-reat hekk ismejjah judicial jew legal perjury, jipotizza t-tehid ta' gurament falz fil-kors ta' kawza pendenti quddiem Qorti. Illi l-artikolu 106 jitkellem dwar l-ispergur fil-kawzi civili li jipotizza tlett istanzi ta' spergur fi proceduri civili u cioe' l-ispergur mix-xhud, l-ispergur minn persuna li hija parti fil-kawza civili u l-affidavit falz.*"

PERJURY BY A REFEREE OR INTERPRETER
Article 107

> **107.** (1) Any referee who, in any civil or criminal proceedings, shall knowingly certify false facts, or maliciously give a false opinion, shall, on conviction, be liable to the punishment to which a false witness is liable under the preceding articles of this Sub-title.
>
> (2) The same punishment shall apply to any person who, when acting as interpreter in any judicial proceedings and upon oath, shall knowingly make a false interpretation.

The constitutive elements are the same as those of articles 104, 105 and 106. Keep in mind that retraction does not apply to this article of the law. When it comes to article 107, it is not a mistake or an erroneous expression of opinion or inadvertence or carelessness or unskilfulness that the law punishes by means of this offence, but the law punishes the deliberate and intentional perversion of the truth by a referee or interpreter.

The punishment
In criminal proceedings, art. 104(1) holds that the punishment is of imprisonment for 2 – 5 years, whereas in art. 105 it is imprisonment of 9 months – 2 years.

In civil cases, the punishment applied is that prescribed by means of article 106(1) meaning from 7 months – 2 years imprisonment.

FALSE SWEARING
Article 108

> **108.** (1) Whosoever, in any other case not referred to in the preceding articles of this Sub-title, shall make a false oath before a judge, magistrate or any other officer authorized by law to administer oaths, shall, on conviction, be liable -
>
> (*a*) to imprisonment for a term from four months to one year, if the oath be required by law, or ordered by a judgment or decree of any court in Malta;
>
> (*b*) to imprisonment for a term not exceeding three months, if the oath be not so required or ordered.
>
> (2) The provisions of this article shall not apply to promissory oaths.

In other systems of law, this is called **extra-judicial perjury**. The person does not give false testimony during court proceedings. So, when it comes to perjury it is referred to as judicial perjury. When it comes to article 108, we are speaking about extra-judicial proceedings. So, when it comes to article 108 there are **no court proceedings**. Article 108 deals with false statements made on oath by individuals **not** during court proceedings.

Elements –
1) A false statement;
2) Wilfully made (intentional element);
3) On oath;

4) Before a person authorised by law to administer oaths.

1)
Here the person must have made a false statement. Keep in mind that the word 'statement' includes both **verbal** statements and also **oral** statements. So, the person must have made verbal or written statements.

2)
A person must have made a statement **knowing to be false**. So, the false statement must have been made willingly. Therefore, it is necessary that the person making the statement should have the full consciousness of perverting the truth. If due to ignorance, forgetfulness or any other cause exclusive of malice, a statement has been made which is objectively false, then no criminal responsibility under this article of the law would arise.

3)
The material element of this offence is that the false statement, whether verbal or written must have been **made on oath**. **The form in which the oath is taken is completely irrelevant and immaterial** meaning that one may take the oath in the Roman Catholic form by kissing the cross, or else a person may take the oath on the Qur'an or else by means of a solemn regulation as regulated by law. **The most important thing is that the person taking the oath says the truth**.

Article 111 of the COCP

> **111.** A witness professing the Roman Catholic faith shall be sworn according to the custom of those who belong to that faith; and a witness not professing that faith shall be sworn in the manner which he considers most binding on his conscience.

Article 112(1) of the COCP

> **112.** (1) Witnesses or other persons required to take the oath shall swear to tell the truth, the whole truth and nothing but the truth.

Remember that in the case of article 108 of the Criminal Code, the oath is not taken during the course of criminal proceedings.

4)
The oath must be lawfully administered by a person who is authorised by law to administer oaths. Such person would be a judge, a magistrate, any other commissioner for oaths and other public officers exercising that role in terms of law.

So, here reference is being made to the Commissioners for Oaths Ordinance, Chapter 79 of the Laws of Malta. Article 3(1) of this chapter says, *"the minister responsible for justice may from time to time, by warrant under his hand, appoint persons, being public officers, public employees, advocates, or legal procurators, to be Commissioners for Oaths, and may at any time revoke any such appointment."* Furthermore, article 6(1) stipulates that *"The Attorney General, the Deputy Attorney General and such of the other Officers of the Attorney General*

as the said Attorney General may from time to time designate by notice in the Gazette, as well as the magistrates and the notaries, shall ex-officio be Commissioners for Oaths…" So, once these persons are appointed as Commissioner for Oaths, their name will be published in the Government Gazette.

Article 108(2) makes it clear that this article applies only to an **assertory oath and not to a promissory note**. An assertory oath is one in which a present or past fact is affirmed or denied. On the other hand, a promissory oath is that by virtue of which a person binds himself towards others to a future positive or negative obligation.

Punishment

> (*a*) to imprisonment for a term from four months to one year, if the oath be required by law, or ordered by a judgment or decree of any court in Malta;
>
> (*b*) to imprisonment for a term not exceeding three months, if the oath be not so required or ordered.

Sub-article 1(a) and (b) prescribe the punishment to this offence. A distinction has to be made between oaths required by law, ordered by a judgement or decree of any Court or else oaths not required or so ordered. The former is, for example, the oath which is necessary to obtain the issue of a precautionary warrant, or the oath taken to file a civil case, or when a person testifies during a magisterial inquiry. When it comes to the latter, there you do not have ongoing criminal proceedings; it is just an inquiry ("*inkjesta"*).

An example of oaths ordered by decree or judgement, is when someone requests bail and the Court orders that his ID card be exhibited in the acts of the proceedings and the person takes a false oath whereby he states that he lost his ID card or it was stolen, when in actual fact, it is in his possession.

An example of oaths not required or ordered is when a person fills in a form requiring confirmation under oath. The punishment is higher when the oath is required by law or ordered by a judgement or decree of any court in Malta.

The distinction between Article 104 and Article 108

This was delineated in *Il-Puliżija v. Marzouki Hachemi Beya Bent Abdellatif* (COCA 22/10/2001). The Court held that there exists a distinction between perjury and false swearing.

So, when a person tenders false evidence during a Court case, meaning a cause, then that would amount to perjury. On the other hand, when it comes to article 108, the person would not have tendered evidence during Court proceedings and consequently, he would not have committed the more heinous crime in terms of article 104 of the Criminal Code.

In the case of perjury, the false testimony must have been given during a cause whereby the Court has to determine whether the person charged or accused is criminally responsible for having committed that particular crime or otherwise (he may be acquitted). Therefore, when it comes to perjury, there must necessarily be a criminal charge to be answered.

When it comes to article 108, for example, the oath would have been ordered by law such as when a person testifies during a magisterial inquiry. The aim of the inquiry is there to preserve evidence so that is why you do not have any criminal proceedings in a magisterial inquiry.

And you can have persons being called as witnesses who may testify on oath. For example, a passer-by who witnessed the crime. Likewise, for example, if the person fills in a transport Malta application or an ID application which has to be confirmed on oath, and that particular person takes a false oath, then we have article 108 because we do not have any ongoing criminal proceedings. Likewise, for example, the Court gives bail to a particular person, and he has to sign the conditions which he has to observe during bail. But then the person takes a false oath. Once again, there we do not have ongoing criminal proceedings, but we have a judgement or decree of any Court ordering that person to take an oath.

In the judgment *Il-Pulużija v. Joseph Zammit* (COCA 26/03/2015), the court held that article 108 of the Criminal Code excludes perjury in criminal trials. Perjury in civil proceedings or perjury by a referee or interpreter. It also held that article 108 speaks about 'in any other case not referred to in the preceding articles of this sub-title.' This refers to any other case whereby a person takes a false oath before a judge, magistrate or any other officer authorised by law to administer oaths.

- *Il-Puliżija v. Johan Micallef* (25/02/2020).
- *Il-Puliżija vs Duane Carabott* (COCA, 17/10/2011).
- *Il-Puliżija vs Maryhese Schembri* (COM, 02/02/2011)

Single witness sufficient
Article 638(2)

> (2) Nevertheless, in all cases, the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses.

Criminal offences contemplated in the Criminal Code, with the exclusion of calumnious accusation, perjury and false swearing, the testimony of one witness, if believed by those who have to judge of the fact, is enough proof. Thus, in the case of murder, one witness if believed by persons have to judge is enough. This article is not applicable to determine whether a person committed offence prescribed by means of article 101 (calumnious accusation), 104 (perjury) and 108 (false swearing).

When a single witness is not sufficient
Article 639 (1)

> **639.** (1) Notwithstanding the provisions of the last preceding article, a person may not be convicted of calumnious accusation, perjury or false swearing, solely upon the evidence of one witness contradicting the fact previously stated on oath by the person charged or accused; but such person charged or accused may be convicted on the evidence of a single witness, when such evidence is corroborated in some circumstance which is material to establish the alleged crime by any other proof duly adduced.

For articles 101, 104 and 108 a person may be convicted on the strength of a single witness, provided that the evidence of this witness is corroborated in some circumstance which is material to establish the alleged crime. E.g., There would be Mary Borg and her version of events is corroborated by means of a CCTV footage. Thus, for these articles, there needs to be **corroboration**.

Jurisprudence on Article 639
When it comes to articles 101, 104 and 108, the testimony of a particular witness is not sufficient.

- *Il-Pulizija v. Antonio Zammit* (02/03/1957);
- *Il-Pulizija v. Franġisk Galea* (19/03/1952).

INTERDICTION IN SENTENCES FOR CALUMNIOUS ACCUSATIONS, PERJURY AND FALSE SWEARING
Article 109

> **109.** (1) The court shall, in passing sentence against the offender for any crime referred to in this Sub-title, expressly award the punishment of general interdiction, as well as interdiction from acting as witness, except in a court of law, or from acting as referee in any case whatsoever.
>
> (2) Such interdiction shall be for a term from five to ten years in the cases referred to in the last preceding article, and for a term from ten to twenty years in any other case referred to in the other preceding articles of this Sub-title.

In addition to the punishment prescribed by means of article 101, 104, 105 and 106, and 108, if the accused is found guilty of the crime proffered against him then he/she will also be interdicted, in terms of article 109.

Sub-article (2)
With regards to article 108, in addition with the punishment prescribe by means of article 108, when it comes to general interdiction, the term shall be from 5-10 years. on the other hand, when it comes to 101, 104, 105, 106 the general interdiction shall be for a term from 10-20 years. keep in mind that if although the person is interdicted, he may still be called as a witness to testify during court proceedings; he may still tender his evidence notwithstanding having been interdicted by a court of law.

General interdiction is dealt with in article 10 of the Criminal Code.

Interdiction
10(1)

10. (1) Interdiction is either general or special.

(2) General interdiction disqualifies the person sentenced for any public office or employment, generally.

(3) Special interdiction disqualifies the person sentenced from holding some particular public office or employment, or from the exercise of a particular profession, art, trade, or right, according to the law in each particular case.

(4) Either kind of interdiction may be for life or for a stated time.

(5) Temporary interdiction shall be for a time not exceeding five years, except where the law especially prescribes a longer time.

(6) Interdiction, whether for life or for a stated time, may, upon the application of the person sentenced to such punishment and on good grounds being shown to the satisfaction of the court by which the sentence was awarded, be discontinued at any time by order of the said court.

(7) The court shall order a sentence awarding general or special interdiction or a decree ordering the discontinuance thereof to be published in the Gazette, but, in respect of a decree ordering discontinuance as aforesaid, at the expense of the person concerned.

(8) If any person sentenced to interdiction, shall infringe any of the obligations arising from that punishment, he shall, on conviction, be liable to imprisonment for a term not exceeding three months and to a fine (*multa*).

The person is only disqualified from **holding a public office or employment**. This type of interdiction is different to that contemplated in the Civil Code. If a person is found guilty of perjury, for example, he may still enter into contracts, vote and so on. So, when it comes to general interdiction in criminal law, the interdicted person is **only** precluded from holding a public office or employment.

Moreover, although said person is interdicted, he may still be called as a witness and testify in pending court cases, be them civil or criminal.

In the case of general interdiction, the Court will order in passing judgement that the said judgement will be published in the Government Gazette. The purpose behind this is that entities such as Government departments and the community at large would be able to know that that particular person has been interdicted by that particular judgement. In fact, article 10(7) of the Criminal Code states that "*The Court shall order a sentence awarding general or special or a decree ordering the discontinuance thereof to be published in the*

Gazette, but, in respect of a decree ordering discontinuance as aforesaid, at the expense of the person concerned." And then, sub-article (8).

So, for example, if that particular person holds a public office, then he will be liable to imprisonment for a term not exceeding 3 months and to a fine (multa).

This is why in the case of calumnious accusations, perjury, and false swearing, a person may be convicted on the strength of a single witness, provided that that particular testimony is corroborated by some evidence which is material to the cause (art. 639). This is because the accused, if found guilty of one of the crimes mentioned, will be awarded a very hefty punishment (imprisonment + general interdiction).

FABRICATION OF FALSE EVIDENCE
Article 110(1)

> **110.** (1) Whosoever shall fraudulently cause any fact or circumstance to exist, or to appear to exist, in order that such fact or circumstance may afterwards be proved in evidence against another person, with intent to procure such other person to be unjustly charged with, or convicted of, any offence, shall, on conviction, be liable to the punishment established for a false witness, in terms of the preceding articles of this Sub-title.

Article 110(1) of the Criminal Code is another form of calumnious accusation. This article speaks about **real** or **indirect** calumnious accusation. Basically, it consists of in the false fabrication of evidence of an offence against an innocent person with the intention to procure to such person to be unjustly charged in Court or convicted of that particular offence so fabricated.

On the other hand, when it comes to article 101, this speaks about **verbal** or **direct** calumnious accusation. Because when it comes to article 101 the false accusation is made either in **writing** or **orally** by any information, report or compliant. But when it comes to article 110(1) you have real or indirect calumnious accusation.

In fact, **Antolisei** delineated the differences between the two, so, calumnious accusation contemplated by means of article 101 and the fabrication of false evidence as contemplated by article 110(1),

"Le modalita dell'incolpazione possono concretare la cosidetta calunnia diretta o formale e la calunnia indiretta o materiale (detta anche reale). Si ha la prima quando l'attribuzione dell'illecito penale si attua mediante denuncia ....; la seconda quando l'incolpazione si pone in essere simulando a carico di taluno le tracce di un reato.13 .... tracce costituite da tutti i fatti o circostanze che servono a designare un determinato individuo come certo o probabbile autore o compartecipe di un fatto criminoso. I modi piu comuni concui si commette questa forma di calunia sono la simulazione di violenza sulle persone o sulle cose, oppure il collocaamento di oggetti indizianti presso il caalunniato..."

Material element
When it comes to this offence, the material element consists in fabricating, that is, falsely or fraudulently causing any fact or circumstance to exist or to appear to exist which may be used as evidence of a criminal offence against an innocent person.

Formal element
On the other hand, the intentional element of this offence consists in **the intent on the part of the agent to procure that that person be unjustly charged with or unjustly convicted of any offence**.

Therefore, in the case of verbal or calumnious accusation as contemplated by means of article 101 of the Criminal Code, the crime is completed by the mere presentation of the information, report, or complaint to the competent authority such as the Executive Police. On the other hand, in the case of real or indirect calumnious accusation as contemplated in article 110(1), the crime cannot be said to be completed until the fact or circumstance of fact falsely or fraudulently caused to exist or to appear to exist becomes known to the competent authority.

In *Il-Pulużija v. David Mizzi* (16/01/1998), the COCA held,

"The crime contemplated for in sub-article (1) of article 110 is that of real or indirect calumnious accusation which is distinct from verbal and direct calumnious accusation as contemplated by means of article 101 of the Criminal Code. The offence contemplated by means of article 110(1) necessitates that the agent by fraudulent means, materially creates or materially causes any fact or circumstance to appear to exist which then afterwards may be used and may be proved in evidence against another person. Both indirect calumnious accusation and also indirect calumnious accusation, the intentional element of the offence consists in the intention on the part of the agent to cause harm to another person. When it comes to article 110(1), the uttering of words is not enough to constitute this offence. But what is required is that creation of material traces of an offence with the intention, the ultimate aim, of using said traces against the other person."

In *Il-Pulużija v. Jackson Micallef* (COCA 27/11/2020), the Court held that *"without any doubt it was the accused who committed the material act which led to the filing of the report in respect of the parte civile (the aggrieved party). This material act was committed by the accused fully conscious of the fabrication of evidence on his part."*

Other case law
- *Il-Pulużija v. Christian Demanuele* (COM Malta 10/08/2017);
- *Il-Pulużija v. Loreto Buġeja* (COM Gozo 23/09/2010);
- *Il-Pulużija v. Luigi Duca* (COM Malta 05/10/2018);
- *Il-Pulużija v. Annabelle Grech et* (COM Malta 12/11/2020) – both accused were acquitted then the *parte civile* appealed to the COCA and by a judgement of the COCA dated 06/12/2021, the Court ruled that the *parte civile* has no right of appeal when it comes to these cases. The appeal had to be filed by the AG and not by the *parte civile*. The *parte civile* can only appeal through the AG and not file it him/herself. The COCA did not take

cognisance of the appeal application field by the pate civile and therefore, the judgement of the 12th.

SIMULATION OF OFFENCE

Article 110 (2)

> (2) Whosoever shall lay before the Executive Police an information regarding an offence knowing that such offence has not been committed, or shall falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence, shall, on conviction, be liable to imprisonment for a term not exceeding one year.

In article 110(1), the subject matter is the **fabrication of evidence**, whereby the focus is the evidence which has been falsely or fraudulently created. But when to comes to sub-article (2) the focus is on **the offence which has been simulated**.

The simulation of an offence is considered as a crime because of the injury it causes to the administration of justice by actually misleading it. This offence as contemplated by means of article 110(2), differs from the offence of calumnious accusation as contemplated by article 101. When it comes to this particular offence, **simulation of an offence**, keep in mind that **there is no specific accusation against any determinate person**. But when it comes to article 101, we have specific accusation against a particular person.

Also, when it comes to article 110(2), there is not therefore the intent to cause an innocent person to be unjustly convicted or charged.

When it comes to article 110(2) the *actus reus* is two-fold. It consists of either –

1) Laying before the Executive Police an information regarding an offence knowing that such offence has not been committed. This is known as **verbal or direct simulation**.

2) By falsely devising the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of that offence. This is known as **real or indirect simulation**.

1) **Verbal or direct simulation**

4 important things to keep in mind –

a. This must consist of a **denunciation**, meaning a report, information, or complaint regarding an offence to the Executive Police knowing that such offence has not been committed. For example, a person denounces to the police that a robbery has taken place when in actual fact, said person actually knows that such offence has not been committed.

   That is the difference between this article and article 101 – **you do not specify the person**. Once you specify the person, you have article 101, and not article 110(2). Therefore, when it comes to verbal or direct simulation, we have the creation of a

fictitious offence which is being reported by a particular person to the police. The crime is completed by the presentation of such information, report, or complaint to the police.

The subsequent confession on the part of the agent that he was untruthful when lodging the information, report or complaint, does not exculpate said agent. Once you file that report or you give that particular information to the police, then if there is some sort of retraction, that won't exculpate the agent from this article.

b. As in the case of culuminous accusation, as per article 101, **it is not absolutely essential and necessary that the denunciation of the particular offence to the executive police should comply with all the requirements or the forms prescribed and laid down in the Criminal Code**, meaning that there is no need for the agent to comply with the requirements as stipulated in articles 537 exequitur of the Criminal Code which lay down the mode in which the information may be given to the police, or a complaint may be drafted and so on. When it comes to article 110(2), even when it comes to calumnious accusation as per article 101, the agent, the person filing that particular report or filing the information need not comply with the formalities laid down by means of article 537 exequitur of the Criminal Code.

   In *Pulużija v, Anthony Farrugia* (02/04/2004), the COCA held that in the case of verbal or direct simulation, there is no need to observe the formalities prescribed by means of article 537 exequitur of the Criminal Code. It stated that the simulation of an offence may even be done verbally to the competent authority. In the case of article 110(2), the words *"lay before"* must be construed in the general sense and it means to bring to the attention of the executive police. So, this judgement defined the words *"lay before"*. It also held that article 110(2) is intended to avoid the competent authority from investigating a crime which in actual fact did not occur.

c. The denunciation must be made **without specifying the supposed offender**. Otherwise, the crime degenerates into calumnious agent as per article 101. In fact, this was stated in *Il-Pulużija v. Joseph Zahra* (COCA 22/09/2010), whereby the Court held that the accused specified the identity of the persons of whom he reported. Consequently, the offence in terms of article 110(2) did not subsist. When it comes to this offence, the person filing the report, information, or complaint must not specify the identity of the supposed offender. The report or information or complaint must only be in relation to an offence and not to a particular person.

   Moreover, in *Il-Pulużija v. Eugen Galea* (COM Malta 22/02/2021), the Court reiterated that the accused had filed a report with the Executive Police whereby he reported two persons, JJ Vela and Godrick Marsdin. Consequently, since the accused specified the identity of these persons, then the crime in terms of article 110(2) did not subsist.

   In *Il-Pulużija v. Joseph Borg* (COM Malta 11/03/2019), the Court stated that once the agent specifies the names or the name of a particular person, then the crime degenerates into calumnious accusation and that particular person may not be found guilty in terms of article 110(2).

d. The denunciation, meaning by means of a report, information, or complaint to the Executive Police, may be of a **crime or a contravention**.

2) **The real or indirect simulation**

When does this happen? For example, a person who in order to make believe that he has suffered some sort of theft, breaks the locks, leaves a ladder against the wall and devises other traces to give an appearance of reality to the simulated crime in such a manner as to cause the Executive Police to proceed to the magisterial inquiry and to the discovery of the authority to the said crime. For example, insurance fraud.

In fact, article 110(2) states that the person *"shall falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence..."*

Even in real or indirect simulation, the simulation may be of any offence, be it a **crime or a contravention**. Moreover, it **must be made in a manner as to make possible the initiation of criminal proceedings for the ascertainment of the supposed offence**. It is not necessary for criminal proceedings to be initiated. There has to be the possibility of criminal proceedings, not that they be in actual fact initiated. So, the possibility of initiation of criminal proceedings.

Criminal intent

You need the specific intent to **deceive or mislead the course of justice** by denouncing or making appear an offence which is known not to have been committed. That is the specific intent required for this in offence, keeping in mind that these are offences against the administration of justice. When the simulation of the offence is directly intended to harm or injure another person, then the crime that arises is that of calumnious accusation and not simulation of an offence. It will degenerate in the crime of calumnious accusation.

Il-Pulużija v. Mel Spiteri (COM Malta 10/09/2020) is about real or indirect simulation. The accused, Mr Spiteri, was involved in a traffic accident, as a result of which the victim died. At the time of the accident, the accused was driving a car bearing vehicle registration number FTO050. Subsequently, the accused came up with the idea to tell his father that his car was stolen at the time of the traffic accident. The came up with this idea that he would not be identified as the driver of the car at the time of the traffic accident and at the time he ran over the victim. The accused devised traces of an offence whereby he broke the driver's door window to give the impression that his vehicle was stolen at the time of the traffic accident. The Court found the accused guilty, amongst others, of article 110(2),

"Mill-provi jirrizulta illi sussegwentement ghall-incident, l-imputat u siehbu Ryan Micallef ftiehmu li jipparkjaw il-vettura FTO-050 x'imkien l-Iklin u jghidu lil missier l-imputat li l-vettura insterqet. Dan bil-hsieb evidenti li b'hekk, l-imputat ma jigix identifikat bhala s-sewwieq tal-vettura fil-hin li din investiet lil Elizabeth Tucknutt Whilems. Jirrizulta wkoll li l-imputat, sabiex iwettaq dan il- hsieb, holoq tracci ta' reat ta' serq billi kisser il-hgiega tal-bieba tax-xufier tal- vettura FTO-050 halli l-vettura tidher li giet misruqa...

Dan kollu jfisser illi l-elementi kollha tar-reat tas-simulazzjoni formali jew indiretta, jinsabu sodisfatti ghaliex huwa ppruvat illi l-imputat, meta kisser il- hgiega tal-vettura u rrapporta lil missieru li l-vettura in kwistjoni kienet insterqitlu, b'qerq holoq tracci ta' reat b'mod li setghu jinbdew proceduri kriminali."

In *il-Pulużija v. David Mizzi* (16/02/1998), the Court delineated the differences between real and indirect simulation and verbal and direct simulation. It held that in the case of real and indirect simulation, the agent falsely devises the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence. Whilst, on the other hand, in the case of verbal or direct simulation, the agent lays before the Executive Police information regarding an offence knowing that such particular offence has not been committed. It also held that the constitutive element of this offence is the **consciousness on the part of the agent that the offence that he is laying before the Executive Police in actual fact did not occur**.

Similarly to the previous judgement, in *Il-Pulużija v. Francine Cini* (20/09/2019), the COCA delineated the differences between real and indirect simulation and verbal and direct simulation,

"Iz-zewg reati huma differenti. L-ewwel subartikolu jikkontempla r-reat tal-kalunja reali jew indiretta konsistenti fil- holqien bil-qerq ta' reat bil-ghan li dan jiswa bhala prova kontra persuna ohra. It-tieni reat jirreferi ghal-denunzja ta' reat minn agent li jkun jaf li dak ir-reat ma sehhx u dan minghajr ma jindika espressament l-persuna responsabbli ghal dak ir-reat inezistenti"

In *il-Pulużija v. Vincenzo Attard* (COCA 07/11/1984), the Court held that for the crime of simulation of an offence to subsist, the false report must be about a crime or a contravention which give rise to criminal proceedings before the courts of criminal jurisdiction. In fact, it held that,

"f'sentenza mgħotija mill-qorti tal-appeall kriminali, ġie sostnut li biex ikun hemm ir-reat ta' 'falza denunzja', hemm bżonn li id-denunzja falza tkun dwar delitt jew kontravnezjoni li jagħti lok għall azzjoni kriminali perseguibli quddiem il-qorti tal-ġustizzja kriminali."

For both verbal or direct simulation, and real or indirect simulation to subsist, a number of actors need to exist. These are common. In fact, Antolisei lists them down as –

The possibility of criminal proceedings.

Other jurisprudence –

- *Il-Pulużija v. Loretto Bugeja*
- *Il-Pulużija v. Maximillian Ciantar* (COM Malta 24/06/2019)

HINDERING PERSON FROM GIVING THE NECESSARY INFORMATION OR EVIDENCE
Article 111(1)

> **111.** (1) Whosoever shall hinder any person from giving the necessary information or evidence in any civil or criminal proceedings, or to or before any competent authority, shall, on conviction, be liable to imprisonment for a term from four months to one year or to a fine (*multa*).

Elements –

1) **An act or omission on the part of the agent** – for example, by means of his demeanour, his attitude, his words uttered verbally or else by writing something;
2) **The causal link** – this person does not allow the other person from giving the necessary evidence or information.

These were listed down il *Il-Pulużija v. Alfred Attard* (COM Gozo 27/02/2020),

"L-element materjali ta' dan ir-reat jikkonsisti (i) f'att ta' persuna (ta' kummissjoni jew ommissjoni), komportament, attitudini, gesti, kliem bil-fomm jew bil-kitba, li (2) ma jhalliex persuna ohra (u ghalhekk jinhtieg in-ness kawzali) (3) tagħti t-tagħrif jew provi meħtieġa."

On this article, the jurist Falzon states, *"che tra i principali requisiti di questo reato sia la coazione fisica o morale di una persona a non dare la neccesaria prova in una causa, dimodoche` risultando non esservi stato un atto bastevole ad impedire la prova o non essendo necessaria la prova che si volesse impedire per la giusta definizione della causa sia civile che criminale, non ci sara` luogo a precedimento per tale reato".*

Consequently, according to him, there must be what is referred to as "*coazione fisica o morale"* – physical or moral violence with the aim of hindering that particular person from giving evidence/tendering his testimony in civil or criminal proceedings or before a competent authority.

This offence is completed as soon as the other person is hindered, even if temporarily or for a short period of time. Or else he is hindered on a particular occasion from giving information or evidence to the competent authority.

If on the other hand, the agent resorts to an act or omission, on the part of the other person, with the aim of hindering the other person from giving the necessary information or evidence, and notwithstanding this, the person at the receiving end still gives the necessary information or his testimony, then this would lead to an attempt on the part of the agent.

In fact, in the same judgement, the court held that, "*Mid-dicitura ta' din id-disposizzjoni, ir-reat ikkunsmat javvera ruhu* ***hekk kif il-persuna l-ohra effettivament tkun giet mxekkla jew ma thallietx*** *– imqarr jekk b'mod temporanju, ghal qasir zmien jew f'okkazzjoni wahda partikolari (fejn din setghet eventwalment xehdet jew taghat l-informazzjoni) -* ***tagħti t-tagħrif jew provi meħtieġa."***

In this case, the court concluded that although the actions of the accused could be construed as "*coazione fisica o morale"*, on the other hand, his actions do not show that a certain Victor Borg ended up not testifying against the accused as a result of the latter's actions. The court also stated that it was not proven that on the day Borg did not testify against Attard, due to Attard's threats. The court only found the accused guilty of an attempt.

In *Il-Pulużija v. Annabelle Grech et,* the Court held that in her cross-examination, Adriana stated that none of the accused influenced her to change the conclusion reached by herself in the report which was to be presented in court. the court concluded that both accused could not be found guilty in terms of article 111,

"Ghal darba ohra l-atti huma ghal kollox sajma mill-provi li jissostanzjaw din l-imputazzjoni. Mhux talli hekk, talli kif gia sottolineat l-istess Andreana Gellel in kontro-ezami taghmilha cara li l-imputati fl-ebda hin ma influwenzawha biex tvarja, tbiddel jew taqleb xi konkluzjoni milli hi kienet waslet ghaliha. Mir-rapport ma biddlet xejn u lanqas ma hasset li kellha tibdel. Tkompli tghid li hija fl-ebda hin ma hassitha mhedda minkejja li l-imputati qalulha b'mod car li ma qablux mal-konkluzjonijiet fir-rapport taghha ghax ma kienx fl-interess tat-tfal. Apparti minn hekk meta l-Appogg rceviet it-telefonata fis-sistema on call taghha u din ingabet ghall-konjizzjoni tal-istess Gellel, hija mill-ewwel infurmat lill-Imhallef bil-kontenut ta' din it-telefonata u anke talbet direzzjonijiet minghandu dwa rkif kellha timxi. Din il-Qorti ghalhekk ma tarax kif dan ir-reat jista' jirrizulta fic-cirkostanzi."

SUPPRESSION, DESTRUCTION OR ALTERATION OF TRACES OF A CRIME
Article 111(2)

> (2) Whosoever, in any case not otherwise provided for in this Code, shall knowingly suppress, or in any other manner destroy or alter the traces of, or any circumstantial evidence relating to an offence, shall, on conviction, be liable -
>
> (*a*) if the offence is a crime liable to a punishment not less than that of imprisonment for a term of one year, to the punishment laid down in sub-article (1);
>
> (*b*) in the case of any other offence, to imprisonment for a term not exceeding three months or to detention or to a fine (*ammenda*) of not less than two euro and thirty- three cents (2.33).

This offence arises when the fact, the subject matter, does not constitute any other offence other the provisions of the Criminal Code, so it is an umbrella clause.

Must the suppression, destruction or alteration be of something tangible, or some form of verbal declaration?
This offence consists in knowingly, so the *mens rea*, suppressing, destroying or altering the traces of an offence or any circumstantial evidence. Obviously always relating to an offence. The alteration must be in respect of circumstantial evidence relating to an offence. We are

referring to material evidence, meaning something tangible such as the *corpus delicti*, the clothes used in the commission of an offence, the arms used in the commission of an offence, and so on. We are not speaking about any declaration or any false declaration. The suppression, destruction or alteration must be in relation to something **tangible**.

This was event stated in *Il-Pulużija v. Gordon Picard* (COCA 30/11/2016). The Court held

"...bl-ahhar parti allura tirreferi ghal provi materjali u mhux ghal xi dikjarazzjoni jew stqarrija inveritjiera. Illi il-codice penale taljan illum qasam dawn ir-reati f'zewg disposizzjonijiet distinti, bl-artikolu 378 jitkellem dwar "il favvoreggiamento personale" u l-artiklu 379, fuq dik "reale", li madanakollu jeskludi l-ahhar parti tad-disposizzjoni ta'l-artiklu 225 u cioe' dak tar-reat in dizamina. Illi allura meta l-artiklu 378 jitkellem fuq il-favvoreggiamento personale irid ifisser lli:
"È configurabile il reato di favoreggiamento personale nel caso di aiuto consapevolmente fornito al colpevole di un delitto a sottrarsi a investigazioni ancora non in atto, purché esse siano chiaramente immaginabili dall'agente sulla base degli elementi concreti a sua conoscenza."

According to Professor Mamo, although the subject of this offence may be 'whosever', that is, any person, this in actual fact does not include the parties to the offence, meaning the accused. If the accused after having committed the crime proceeds to supress, alter or destruct any circumstantial evidence, then his action would constitute and would be considered as a continuation of the principal offence. so, according to Prof Mamo, if a person is accused of supressing circumstantial evidence and then he proceeds to alter the traces of the crime, this constitutes the same crime, and it is a continuation of the principal offence. This will be taken into account for punishment.

Il-Pulużija v. Justin Borg makes a distinction in certain situations when this article is applicable and when it is not.

Keep in mind that the suppression, alteration or destruction must be done knowingly. It is not something recklessly but knowingly. The offence is complete without requiring that the police should have in actual fact been deceived. So, it is not necessary that the police be in actual fact deceived and start the investigation about the particular case. It is not a requisite of this offence. this is because the mere possibility of such injury to the administration of justice is sufficient.

In the *Gordon Pickard* case, the court held that the act of suppressing, destroying or else altering the traces of circumstantial evidence, relating to an offence is sufficient and there need not be any agreement whatsoever with the accused for the suppression of this evidence. The suppression of evidence may be committed by a party which is extraneous to the accused, not necessarily involved in the crime. The court also held that the intention must be as such so as to derail the course of justice. The material act committed by the agent must consist of the direct and positive act on his part to suppress, alter, or destroy the traces of circumstantial evidence relating to a particular offence.

In *Il-Pulużija v. Justin Borg* (26/11/2020), the COCA discussed the issue as to whether this offence may be committed by the party to the principal offence, meaning by the accused, or by any other party, meaning a third party not involved in the commission of the offence. the COCA held that (1) if the suppression, alteration, or destruction of circumstantial evidence has been committed as soon as the principal offence has been committed, then it is considered as a continuation of the principal offence but on the other hand, if the suppression, alteration or destruction is committed afterwards, then it must be considered as a separate offence. the test is and it all depends on the amount of time between the original offence and the suppression, alteration or destruction of circumstantial evidence. In fact, the Court stated,

"Jiġifieri wara li l-appellant wettaq ir-reati prinċipali ta' sewqan b'manjiera bla kont, traskurat, u perikoluż, nonche l-offiżi gravi involontarji, ***u wara li kien għadda ammont ta' ħin*** *huwa, anke jekk forsi fuq suġġeriment ta' ħaddieħor, għażel minn jeddu li kemm iċaqlaq il-vettura tiegħu minn fuq il-post tal-inċident, kif ukoll żewġ xiehda oħra rawh iniżżel tyre minnhom. Din il-Qorti tqis li din l-azzjoni qajla tista' tiġi meqjusa bħala xi forma ta' kontinwazzjoni mar-reati prinċipali li jaqgħu fl-isfera tan-negliġenti jew l-involontarju."*

This judgement goes a step forward than Prof Mamo, making a distinction according to the lapse of time.

- *Il-Pulużija v. Edwin Vassallo* (COM Malta 12/08/2019)

- *Il-Pulużija v. Justin Chetcuti* (COCA 30/10/2021)

"81.Għal dak li jirrigwarda l-ħames imputazzjoni, din il-Qorti tippremetti li dak li jrid jiġi ppruvat huwa li CHETCUTI, meta rema' dawn l- iskratać, kien qiegħed jagħmel hekk sabiex jissoprimi, jew jeqred jew ibiddel it-traċċi ta' reat. Din il-Qorti tqis li tara kemmxejn stramba li CHETCUTI rema' dawn l-iskratać f'perjodu ta' żmien li kien miftuħ għall-kaċċa. Jekk l-appellant kien qiegħed bis-sew, u kien jaf li kien qiegħed bis-sew, ma kellux għaliex jarmihom fl-għalqa hekk kif jidher fil-filmat. Din il-Qorti diffiċilment temmen li CHETCUTI bħala kaċċatur ma kienx jaf li kien fil-pussess ta' skratać li l-liġi tipprojbixxi minħabba li kienu ta' dimensjoni ikbar minn dawk permessi.

82.Din il-Qorti tosserva wkoll kif skont il-Membri tal-Birdlife li kienu qiegħdin jiġbdulu l-filmat, huwa rema' dawn l-iskratać fil-mument li induna bil-preżenza tagħhom. Dan il-fatt ikompli jsaħħaħ il-fehma ta' din il-Qorti li CHETCUTI kien konsapevoli tal-fatt li kien qiegħed jagħmel xi ħaġa vjetata mill-Liġi u li għalhekk kien ikun aħjar jekk jarmi dawk l-iskratać u jiddissoċja ruħu minnhom. Altrimenti ma kellux għalfejn jarmihom.

83.Għaldaqstant, din il-Qorti tqis li l-Qorti tal-Maġistrati (Malta) setgħet legalment u raġonevolment issib ħtija fl-appellant anki għal ħames imputazzjoni miġjuba fil-konfront tiegħu."

- Il-Pulużija v. Deborah Farrugia (COCA 26/06/201&) Para 8-11

"8. It-tieni aggravju tal-appellanti jirrigwarda s-sejbien ta' htija dwar il-hames imputazzjoni, dik ravvizata fl-artikolu 111(2) tal- Kodici Kriminali dwar kull min jissoprimi, jew b'xi mod

iehor jeqred jew ibiddel it-tracci jew l-indizzji ta' reat. L-appellanti targumenta illi qatt ma setghet tkun imputata b'dan il-fatt la darba hija imputata bir-reat principali u in sostenn ta' dan ccitat l- insenjament tal-Professur Mamo;

9. F'Notes on Criminal Law – Revised Edition 1954-1955, pp 78- 80, il-Professur Mamo jirritjeni illi : "The subject of this offence can, according to the said Sec. 110 of our Code, [illum 111 tal-Kap 9] be "Whosoever", that is any person but according to the best accepted authorities this generalisation does not include the parties themselves to the principal offence. In other words, if a person who has himself committed an offence, suppresses or destroys the traces or evidence thereof he would not be guilty of this further offence: his action in any such case would but be a continuation of his principal offence (v. Carrara "Opuscoli di Diritto Penale" Vol. VIII, p.48 & 49; Impallomeni op. Cit Vol II 283);

10. Fis-sentenza ricenti ta' din il-Qorti, diversament preseduta per Onor Imhallef Edwina Grima fl-ismijiet Il-Pulizija vs Gordon Pickard tat-30 ta' Novembru, 2016, l-Qorti trattat fid-dettall l-origini tal-artikolu 111(2) tal-Kodici Kriminali liema artikolu kien mudellat fuq il-Codice Zanardelli tal-1889. F'dik il- kawza, izda, l-appellant kien rinfaccjat bl-imputazzjoni singolari ipotizzata f'dan l-artikolu u dan ghad-differenza tal-kwistjoni odjerna fejn l-appellant kien imputat b'xejn anqas minn hdax-il imputazzjoni. Il-kwistjoni li dwarha hi mehtiega rizoluzzjoni f'dan il-kaz hi ghalhekk jekk dan ir-reat setax ikun migjub kontra l-appellant la darba gia kien imputat bir-reat principali;

11. Kif jemergi mill-provi, meta l-appellanta kienet intercettata fil-kamra tas-sodda taghha kienet offriet rezistenza ghall-arrest u waqt id-diverbju u r-rezistenza hija tat daqqa ta' sieq lis-saqqu peress illi kien hemm xi trab fuq il-lizar li l-Pulizija ssuspettaw li kien droga. Dak it-trab spicca infirex u qatt ma kien rekuperat. Issa l-appellanti tressqet sabiex twiegeb, fost ohrajn, ghall-imputazzjoni ta' traffikar u pussess ta' droga. Kwantu il- pussess, dan kien jirrigwarda l-ammonti misjuba u ghalhekk il-prosekuzzjoni ma akkludietx imputazzjonijiet dwar it-trab li infirex bid-daqqa li tat l-appellanti, ghaliex it-tracci ta' dak il-potenzjali reat kienu inqerdu. Dan seta kien ammont tal-istess droga u seta kien droga ta' tip differenti izda dan jibqa mhux mgharuf la darba l-prosekuzzjoni ma inkludietx imputazzjoni dwarha. Isegwi ghalhekk illi meta kontra l-appellanti inharget il-hames imputazzjoni, dik ravvizata fl-artikolu 111(2), ma kienitx fl-istess waqt imputata bir-reat li ipotetikament nehhiet jew qerdet it-tracci dwaru. Li kieku l-hames imputazzjoni kienet tirreferi ghall- imputazzjonijiet 1 sa 4, traffikar u pussess ta' droga, kienet allura tkun meritata d-diskussjoni kif imqanqla fir-rikors tal-appell, li izda ma huwiex il-kaz."

<u>Sub-articles (a) & (b)</u>

This prescribes the punishment. (a) refers to imprisonment from 4 months to 1 year or a fine (multa). (b) refers to imprisonment not exceeding 3 months, detention or a fine (AMENDA).

CONTRAVENTIONS
Articles 338, 339, 340

Jurisdiction

Keep in mind that not all contraventions contemplated by means of articles 338, 339 and 340 are heard and tried by the COM Malta or Gozo as a court of criminal judicature. There has been an amendment. In fact, legal notice 82 of 2022 entitled the Commissioners for Justice Act (schedule amendment III regulations of 2022). This legal notice amended the commissioners for justice act, Chapter 291. As a result of which, some of the contraventions contemplated in articles 338-340 of the Criminal Code now fall under the remit and jurisdiction of the Commissioners for Justice. Certain contraventions are no longer tried by the COM. The Schedule found in Chapter 291 of the Laws of Malta stipulates that the contraventions laid down in Article 338(a), (b), (c), (d), (i), (j), (l), (m), (n), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), AA, CC DD, FF, GG, HH, II, JJ, KK and MM; Article 339 (1)(a), (b), (c), (d), (f), (l), (k), (l), (m) and 340 (a), (b).

These sub-articles are heard and tried before the Commissioners for Justice and no longer tried by the COM. These contraventions are called Scheduled Offences as per article 2 of chapter 291. The Commissioners for Justice hear other offences, such as those under the litter act, education act, and the other offences listed down in the schedule.

The CFJ schedule amendment No III regulations of 2020 entered into force of on the 15/02/2022. Regulation 3 of Legal Notice 82 of 2020, states that *"all offences committed after the entry into force of these regulations on the 15/02/2022, in breach…"* By elimination, the contraventions not listed down in this schedule, fall within the remit and jurisdiction of the COM Malta or Gozo as a court of criminal judicature.

For example, the contravention regulating maintenance on access is still heard by the COM Malta or Gozo. Maintenance and access issues are not heard by the CFJ.

The *raison d'etre* behind this amendment is to ease the workload of the COM. Keep in mind that contraventions are **minor offences**. there is a particular tribunal, and this hears these contraventions as listed down in the schedule annexed to Chapter 291.

Punishment

The punishment awarded for the contraventions tried by the COM Malta or Gozo as a court of criminal judicature and the punishment awarded for those contraventions tried by the Commissioner for Justice differ.

Article 7(2) of the Criminal Code is applicable for those contraventions tries by the COM Malta or Gozo as a court of criminal judicature. On the other hand, **article 10(2)** of Chapter 291 lays down the punishment for the scheduled offences, heard and tried by the Commissioner for Justice. A Commissioner for Justice may not condemn a person for a period of detention. Therefore, it may not award a punishment which is restrictive of personal liberty. The Commissioner for Justice may award a fine (MULTA) or (AMENDA) and

a penalty of €11.65 if the person does not pay the fine (MULTA) or (AMENDA) within one month from when the case is finally decided.

Prescription

Article 12(1) of Chapter 291 of the Laws of Malta

Both the contraventions heard and tried by the Commissioners for Justice and also those contraventions heard and tried by the COM, have a prescriptive period of 3 months, as per article 688(1)(f) of the Criminal Code. This article imposes a 3-month prescriptive period for contraventions. As we shall see, the only exception to the 3-month prescriptive period is the contravention contemplated by means of article 338(z) of the Criminal Code. This is the contravention dealing with maintenance or alimony. When it comes to this article, the Criminal action is barred by the lapse of 6 months.

The forfeiture of the *corpus delicti*

As per article 23(2) of the Criminal Code, in the case of contraventions, the forfeiture of the *corpus delicti* shall only take place in the cases expressly stated by law. article 10(2), on the other hand, of Chapter 291of the Laws of Malta gives the power to the Commissioner to order the forfeiture of any object used in the commission of the offence. As per article 10(3) of chapter 291 the Registrar of the Tribunal shall immediately inform the authorities in writing of any forfeiture of any object used in the commission of the offence or of the revocation or suspension of any license ordered by a Commissioner of Justice and shall send the authority a certified copy of the judgement. In the cases of contraventions, both those tries under Chapter 291 and also those tried by the COM, the forfeiture of the corpus delicti could only be ordered in the cases expressly provided for by law. For example, if there is an armed robbery and a shotgun is used, the court in its judgement may order the forfeiture of that firearm. Or for example, in the case of drugs. But when it comes to contraventions, the forfeiture of the *corpus delicti* is not automatic. It is only in the cases prescribes and the cases laid down in the law that the court may order the forfeiture. For example, I a person is found guilty of overseeing, it isn't going to order the forfeiture of that person's car. That is why when it comes to contraventions, **being minor offences**, article 23(2) may only be applied when the law expressly provides for the forfeiture.

Concurrent offences and punishments

Article 17 of the Criminal Code lays down how punishment is to be awarded in the case of concurrent offences. In the case of contraventions, the pertinent articles are article 17(c), and (d). These state the manner in which the punishment may be worked out. It is a technicality.

SUB-TITLE I: OF CONTRAVENTIONS AFFECTING PUBLIC ORDER

ARTICLE 338

Some of these contraventions date back to many years. Some of them since the date of the promulgation of the Criminal Code. In fact, certain contraventions are barely used, such as article 338(a). So, they are still there but are barely used. Moreover, many of the contraventions are self-explanatory. Sub-article (b) is a clear example.

These contraventions may also be given in conjunction with other offences such as in the case of sub-article (f) where there is the ad hoc law which deals with school licensing.

Sub-article (g) for example, if a warden who is entrusted with a public service, he requests your ID card or your particulars, you cannot simply refuse because that would amount to a contravention.

Article 338(z)

> (*z*) when so ordered by a court or so bound by contract fails to give to a person the sum fixed by that court or laid down in the contract as maintenance for that person, within fifteen days from the day on which, according to such order or contract, such sum should be paid:
>
> Provided that, notwithstanding any other provision of this Code, the criminal action for an offence under this paragraph is barred by the lapse of six months:
>
> Provided further that where the offender is a recidivist in a contravention under this paragraph the offender shall be liable to the punishment of detention not exceeding three months or a fine (*multa*) not exceeding two hundred euro or imprisonment for a term not exceeding two months;

Sub-article (z) speaks about an instantaneous offence. This offence is committed as soon as the accused fails to pay the sum fixed by the Court or so ordered by a contract, within 15 days from the day on which according to such order or contract, such sum should have been paid. Let's say a Court judgement or a contract agreed by the parties and Mr X is to pay his wife or dependants maintenance €200/month on the 30th of every month. Let's say the 30th of April has come and Mr X hasn't paid. This particular contravention gives a 15-day grace period for Mr X, in this case, to pay maintenance. If on the 16th day, Mr X does not pay the maintenance due by him, then his wife may go to the police station and file a report that Mr X did not pay maintenance for the month of April. When it comes to maintenance cases, there is a particular Magistrate who hears them all.

What does an order of the Court consist of in article 338(z)?

It may consist of a decree given by the Court *pendente lite* (during the course of the proceedings) or else a judgement. When it comes to a contract agreed between the parties,

so before the parties sign the contract before a notary, the contract is vatted by the Court and the judge gives the go-ahead to the parties for the publication of the contract.

What does the prosecution have to prove?

1) That an order was given by the Court or by a contract ordering a particular person to pay maintenance towards his dependants (his wife, his ex-partner or the children). Here, the prosecution must exhibit before a court of law, a legal copy (true copy of the original) of the decree or judgement of the court or of the contract agreed and entered into between the parties.

2) That the sum fixed by the Court or laid down in the contract was not paid by the accused within in 15 days from the day in which according to such order or contract, such sum should have been paid.

The failure to pay maintenance must be done voluntarily. It is up to the accused to prove on the basis of probability that that particular order of the Court by means of a judgement or a decree or else the contract entered into between the parties, was revoked, altered, or declared null and void and consequently, maintenance alimony is not due to his dependants.

This was even stated in –

- *Il-Pulużija v. Donald Gilford* (COCA 05/04/2022).
- *Il-Pulużija v. Alfred Camilleri* (COCA 18/09/2002),

"Fil-kamp kriminali biex tirrizulta l-htija ta' natura kontravenzjonali taht l-imputazzjoni bhal dik dedotta kontra l-appellant bizzejjed li jigi pruvat il-fatt tal-ordni tal-Qorti kompetenti li tordna l-hlas tal- manteniment - u normalment dan isir bl-esebizzjoni ta'kopja legali tad-Digriet relattiv - u li l-akkuzat ikun naqas li jhallas l-ammont li jkun ordnat li jhallas mill-Qorti kompetenti fil-periodu imsemmi fil- komparixxi u - trattandosi ta' reat kontravvenzjonali - li dan ikun sar volontarjament . Mill-bqija konsiderazzjonijiet ohra jistghu biss u f ' certi kazijiet jittiehdu in konsiderazzjoini ghall-fini tal- applikazzjoni tal-piena , fejn il-Qorti ghandha diskrezzjoni li tapplika piena karcerarja ta' detenzjoni jew ammenda , jew addirittura, kif sar f' dan il-kaz , gie applikat l-art. 9 u 11 tal-Kap.152 , b' mod li l- appellant gie liberat taht provvediment li ma jaghmilx reat iehor fi zmien sitt xhur u ordnat ihallas il- manteniment minnu dovut fl-ammont ta' LM135 ghall-hames gimghat imsemmija fil-komparixxi."

Keep in mind that the aim of this article of the law is to put pressure on the persons who are reluctant to pay maintenance to pay the maintenance due by them to their dependants. This was even stated in *Il-Pulużija v. Publius Said* (COCA 09/07/2003).

Failure to pay maintenance is considered to be a breach of the pertinent Court order since the offender would have breached a court order by failing to pay maintenance. Also, keep in mind that this offence is considered as a contravention against public order. In fact, in *Il-Pulużija v. Carmel Pace* (COCA 30/11/2011), the Court held that the offence contemplated by means of article 338(z) of the Criminal Code is an offence against public order. It also held that criminal proceedings are instituted *ex officio* and there is no need for the complaint of the injured party, meaning of the dependants, for criminal proceedings to be

initiated. The judgement also held that normally, the aggrieved party files a report with the police claiming that he/she has not received maintenance or alimony from the other party. The duty to pay maintenance arises from the judgement of the Court or else, from the contract agreed by the parties. The Court states that it is the duty of the person ordered to give maintenance to actually affect payment of such maintenance to the other party.

In *il-Pulużija v. Raymond Cutajar* (COCA 02/09/1999), the Court held that a decree ordering a particular person to pay maintenance or else, a contract entered into between the parties, remain valid. This until it does not result from the acts of the proceedings that that particular decree or contract was revoked or until it does not result that that decree or contract were declared null. In fact, it stated that *"ordni għall-ħlas tal-manteniment kontenut f'digriet mogħti mis-Sekond Awla' jew f'kuntratt bonarju jibqa' validu għall-fini u effetti kollha tal-artikolu 338(z). Kemm il-darba ma jkunx jirrużulta li dak id-digriet jew kuntratt ġie espressament revokat jew altrumenti mibdul mis-Sekond Awla'. U salv il-prova tar-rikonċiljazzjoni jew ta' dikjarazzjoni ta' Qorti oħra kompetenti li dak id-digriet jew dan l-ordni kien nul."*

What happens if there is a change in the circumstances in the life of the accused?
For example, the accused states that he is sick and therefore, he cannot work or that he is passing through some sort of financial difficulties. Is he/she absolved from the obligation to pay maintenance or alimony? This does not absolve the person from paying maintenance. This applies even if you lose your job. You have to file an application before the Family Court, requesting it to alter the decree or contract. You cannot take the law in your own hands and just decide not to pay. You have to obtain the Court's authorisation.

The mere fact that a person loses his job, or he passed through some sort of financial difficulties, or health problems, does not excuse him/her from the obligation of paying maintenance. If a person loses his job, then he has to request the First Court, Civil (Family Section) for a variation of the quantum of maintenance.

After the court evaluates the proof produced by both parties, the Court may decide to accept the request to vary the quantum of maintenance. It is only after the original court decree is varied that the accused may pay a sum different from that imposed in the original decree. Until the accused obtains said variation, then he/she would still be bound to pay the sum imposed in the original decree. Therefore, the person cannot take the law in his/her own hands and simply decide not to pay maintenance. This was stated in the *Alfred Camilleri* case,

"Illi apparti din il-konsiderazzjoni ta' fatt , kif gie ritenut minn din l-Onorabbli Qorti diversament preseduta , (Appell Krim. Pul. vs. Anthony Saliba; 15.7.1998) il-fatt li persuna tisfa' bla xoghol ma jiskuzahiex mill-obbligu taghha li twettaq id-Digriet tas-Sekond' Awla tal-Qorti Civili , obbligu sancit bir-reat ta' natura kontravenzjonali li tahtu hu akkuzat l-appellant . Ir-rimedju li ghandu u li kellu l-appellant kien li jadixxi tempestivament u fi zmien utili lill-Qorti Civili kompetenti biex din , wara li tiehu konjizzjoni tal- provi , tipprovdi billi se mai timmodifika l-ordni dwar il-manteniment . U biss wara li jottjeni tali modifika , li jkun jista' jhallas inqas jekk ikun il-kaz. Sakemm dan isir , jibqa' marbut bl-obbligu tal-hlas skond l- ewwel Digriet ."

In the judgement *il-Pulużija v. Jacqueline Zammit* (COCA 15/05/2003), the Court held that any order given by the Court must be observed *ad literam*. Otherwise, it would seem that the Court of Criminal jurisdiction be seen to be converted into a court of appeal to vary the original decree granted by the Court of civil jurisdiction. So, if a person is aggrieved by a decree given by the court of civil jurisdiction ordering maintenance to be paid, or else regulating access between the parties, the solution is not to take the law in one's own hands and not to pay the maintenance due or else, not to grant access. the solution is to demand the court of civil jurisdiction which initially issued the decree ordering maintenance to revoke, alter or adjust said decree.

You may also wish to read *Il-Pulużija v. Charles Gauci* (COCA 17/10/2002).

So, you cannot simply not pay but you have to file an application before the Family Court, explain your reasons and ask the Court to order a variation of the court decree/judgement or the contract. Unless and until the court exceeds to his/her request of varying thew original decree or contract, then that person remains bound and has to pay the original sum fixed by the court or agreed by the parties, in the absence of which he will be liable in terms of article 338(z).

The defence of impossibility

Sometimes, the accused may put forward the defence that he was in the impossibility to pay maintenance because, for example, he lost his job. The defence of impossibility put forward by the accused cannot be accepted as a general defence to eliminate the obligation on his/her part to pay maintenance or alimony to his ex-partner or children. This was stated in the *Alfred Camilleri* case. in practice, when the accused pays the maintenance due or the alimony due by him or her, then the Court will vary the judgement in the part concerning the punishment. For example, if the Court of Magistrates condemned a person to a period of 2 weeks detention, if then that person appeals and he subsequently pays, then usually, the Court will vary the punishment. It will award him a less onerous punishment. But obviously, the defaulting party has to pay or else it will state that the punishment given by the Court of Magistrates is reasonable and the COCA will confirm the judgement of the First Court.

For a variation in punishment, there must be a change in circumstances meaning that the accused has paid. There is the judgement delivered by the Court of Magistrates, then the accused pays, and the COCA will vary the punishment. This is because you have to keep in mind that the aim of the legislator is to put pressure on the parties to pay the maintenance due. That is the spirit of the law. The aim of the legislator is not to send people to prison.

If the person pays, both at appeal stage and even upon appearing before the Court of Magistrates whereby he will inform that he paid the maintenance due. that will not absolve him, he will still be found guilty but will be given a more lenient punishment. The fact that a person pays does not absolve him for criminal liability but will be taken into account for punishment. In *Il-Pulużija v. Simon Desira* (04/10/2021), the court held that in court proceedings involving maintenance or alimony the aim of the legislator would have been reached when the accused abides himself with the order given by the court or with the contractual obligation to pay maintenance.

In *il-Pulużija v. Francis Saliba* (19/07/2013), the COCA held that an agreement was reached between all the parties concerning maintenance. The court held that consequently the punishment of detention awarded by the Court of Magistrates was not of any benefit in those circumstances because an agreement was reached, and the defaulting party paid the maintenance due.

If for example, the accused has been found guilty by the COM and he is given a period of detention, and then he files an appeal and notwithstanding this, he still doesn't pay the maintenance due by him, then there would no change in circumstances and the Court will not award a mire lenient punishment. This was held in *il-Pulużija v. Johan Borg Nejagu* (App. 47 2022 03/05/2022).

See also *il-Pulużija v. Mario Mallia* (COCA 08/05/1008).

Article 338(z) Proviso (1)
Normally, when it comes to contraventions, a per this article, they have a prescriptive period of 3 months, even under Chapter 291. But when it comes to this article, we have an exception that the prescriptive period is that of 6 months. The 6 months start to run after those 15 days lapse; from the 16th day.

Article 338(z) Proviso (2)
The offender has to be a recidivist in a contravention under this paragraph, meaning that dealing with maintenance, **not any other contravention**.

Article 338(dd)

> (*dd*) in any manner not otherwise provided for in this Code, wilfully disturbs the public good order or the public peace;

In *il-Pulużija v. Paul Busuttil* (COCA 23/06/1994), the Court held that this offence subsists when there is what in English law is referred to as a breach of the peace. So, there must be a breach of the peace. The essence of the offence is the causing of alarm in the minds of the people. alarm does not necessarily mean personal fear but alarm in the sense that if what is going on is allowed to continue, it will lead to the breaking of the social peace. So, whether or not any particular act amounts to such a disturbance is a question of fact depending on the particular circumstances of the case, and it has to be determined on a case-by-case basis.

In Il-Pulużija v. Joseph Spiteri (COCA 24/05/1996), the Court held that for one to determine whether there has been a breach of public order, one has to determine whether from the acts of the proceedings, it results any voluntary conduct which creates any psychological disturbance or agitation. When it comes to this contravention, one has to determine whether in the then prevailing circumstances, the accused actions which technically constitute a breach of the peace were inevitable.

So, when it comes to this contravention, one has to determine whether the accused's actions were inevitable. In fact, this was stated in *Il-Pulużija v. Monica Polidano* (COCA

25/06/2001) the Court held that in the case of article 338(dd) of the Criminal Code, one has to see whether the actions of the accused were inevitable. For example, if a person is being assaulted and is defending him/herself, said actions are considered to be inevitable in those circumstances, although technically they would amount to a breach of public peace.

- *Il-Pulużija v. Pio Galea* (COCA 17/10/1997)
- *Il-Pulużija v. Noel Tanti* (COCA 05/05/2005)
- *Il-Pulużija v. Marius Camilleri* (COM 01/04/2002)

In *il-Pulużija v. Maria Concetta Green* (COCA 19/11/1999), the Court held that exchange of words even if injurious in themselves without even knowing to what the argument may lead to, or if it may lead to something more serious, such as damage to property, this does not amount to a breach of peace as necessitated by means of article 338(dd) of the Criminal Code.

Article 338(ee)

> (*ee*) disobeys the lawful orders of any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever, unless such disobedience or interference falls under any other provision of this Code or of any other law;

Normally this contravention is given in conjunction with articles 95 and 96. In Il-Pulużija v. *Mario Victoria sive Marvic Attard* (COCA 25/06/1997), the Court that a lawful order given by the police or by any other authority must always be obeyed without any delay. An order is considered to be a legitimate order if it is *prima facie* legitimate, meaning if its contents and form are prima facie legal.

If a person at first, refuses to obey a lawful order and then subsequently, obeys that order, then that would not amount to criminal responsibility under this article of the law.

Article 338 (ll)

> (*ll*) when ordered by a court or bound by contract to allow access to a child in his or her custody, refuses without just cause to give such access;

This is the contravention dealing with access and access visits.

Access may be regulated by –

1) Means of a court judgement;
2) By means of a court decree issued *pendente lite*;
3) Means of a contract agreed between the parents of the child or children.

In *Il-Pulużija v. Etienne Mizzi* (COCA 04/04/2003), the Court held that article 338(ll) of the Criminal Code does not speak about the non-observance of a condition imposed in a Court decree. What is penalised by this disposition of the law is the refusal without just cause to give access to the other party.

What do 'give access' mean?
This was defined in *Il-Pulużija v. Natasha Theuma* (COCA 08/06/2007), the Court held that there is a positive obligation on the person who is ordered by the Court or contract to give access to the other party. The words 'give access' mean that the parent who is bound to give access to the other party must **physically consign the child to the other party**. Meaning even if it means shoving the child in the car when the other parent comes and picks him up.

For example, when the child tells his parent that he doesn't want to visit the other parent or the fact that he cries or makes tantrums not to visit the other parents, does not exonerate the parent who is duty-bound to give access to the other parent. The responsibility to give access to the other parent is on the person who the court ordered him/her to give access to the other parent. He/she has to see that the child goes to the access visit and that access is effectively exercised. It is the responsibility of the parent. If a parent refuses without just cause to send the child to access visits, that parent can be found guilty and sent to prison.

In *Il-Pulużija v. Isabelle Cilia* (COCA 17/02/2005), the Court held that the accused did not do any effort to physically consign her son to his father. Consequently, there was no just cause on the part of the accused for her to refuse to physically consign her son to his father when so ordered by the Court.

What does 'just cause' mean?
In *Il-Pulużija v. Carmen Tabone Reale* (COCA 25/07/1994), the Court held that 'just cause' does not mean the same as 'proper cause'. 'Proper meaning fit and unsuitable whereas just has a wider meaning involving acquittable considerations. Therefore, the court in determining whether there was a just cause or not, it must factor in and take into consideration the interests of all the parties (the children and both parents).

In *Il-Pulużija v. AB* (COCA 14/05/2008), the Court held that unless and until the Court order is varied by means of a decree, or judgement, then the original court order must be respected. This means that even in the case where the children would not want to attend access visits, the parent who is duty-bound to give access to the other parent should take the child/children to the access visit with the other parent, even if the child does not want to go to said access visit. Otherwise, the parent who is duty-bound to give access to the other parent or even the child, will be assuming the functions of the Court to change the order issued by the Court ordering access visits. The Court in this judgement, also interpreted the words 'just cause' whereby it stated that in order to see whether there was a 'just cause', one must factor in the interests of all the parties involved. also, the Court order issued by the Court whereby such orders had to be followed *ad literam* and not ignored. The words 'just cause; should be understood as a cause which is objectively just. This consists of in a serious illness affecting the health of the minor, as a consequence of which said minor is confined indoors. The fact that a child does not want to go to access visits, does not constitute a 'just cause'.

For example, if the child after an access visit tells his parent that when he went, he was physically abused by his mother/father, the parent has to file a police report and it has to inform the Family Court to vary that Court order. But unless and until the parent files the application, then that parent is bound by the original court decree and must give access to the other parent.

The granting of access must be **effective**. Meaning that the parent who is duty bound to give access to the other parent must take **all the necessary measures to persuade the child** to attend for access visits. For example, the if the parent takes the child to access visits, and the child starts crying and informs her mother/father that he does not want to go to access visits with the other parent. The parent does not persuade the child to go. That parent will be found guilty under this article of the law since he/she did not take all the reasonable steps involved to persuade the child to attend access visits. Persuasive measures could even include that the parent makes the minor understand that if he/she does not go, then the parent will be charged in Court and incarcerated.

In *Il-Pulużija v. Gertrude Zammit* (COCA 17/06/2015), the Court held that although the parent sent his child to the access visits and consequently, on the fact of it, the parent gave access to the other party, that access, un actual fact, was not effective. The parent bound to give access must take all the necessary measures to ensure that access is effectively exercised, and the child actually attends such access visits with the other parent. The judgment states, "*iżda kellha tara li l-għoti ta' l-aċċess kien wieħed effettiv billi tuża l-arma tal-persważjoni.*"

There were other judgements whereby the Court overturned the judgment of the CoM because it saw that the parent bound to give access took all the necessary measures and steps to give access to the other parent.

In fact, in *Il-Pulużija v. Michael John Rees* (COCA 29/01/2018), the accused was found guilty by the CoM for not granting access. Then he subsequently appealed. The accused had stated that after the first access visit with her mother, the child felt very unhappy and physically sick, and she kept on insisting that she did not want to see her mother anymore. The judge presiding the Family Court and all the experts appointed by it, were informed of the situation. Mr Michael was advised that visitation rights will be enforced through a martial of the Court. The accused tried to convince his daughter in many ways to see her mother to the extent of explaining to her that if she keeps refusing, he will end up in prison, but the daughter still refused. The accused, Michael, also testified that the Court decreed that a martial will be sent over to make sure that complainant sees her child but when the child saw her mother, she physically pushed her out of the apartment. The Court martial also testified that he was instructed by the Family Court to call to the accused's residence and physically take the child to meet the mother at *Aġenzija Appoġġ* but unfortunately, he did not succeed because the child refused to cooperate. Although the Court martial spoke to the child for 2 hours, together with another female court martial, two police officers and social workers trying to convince the daughter to see her mother, it didn't work. Her father also asked the daughter to comply and to obey the law, but the child still refused. The COCA upon examining the facts of the case, overturned the judgement of the CoM, holding that the accused did everything in his power to meet his obligation to allow visitation rights as

ordered by the Court. The Court also held that the accused had successfully proved that access did not take place due to a just cause.

SUB-TITLE II: OF CONTRAVENTIONS AGAINST THE PERSON

ARTICLE 339

In the case of these sub-articles, you need to complaint of the injured party for the institution of these proceedings.

SUB-TITLE III: OF CONTRAVENTIONS AGAINST PROPERTY

ARTICLE 340

Article 340(d)

> (*d*) commits any other violation of another person's property, to the prejudice of the owner or holder thereof, not specified in the preceding paragraphs of this article, nor otherwise provided for in this Code.

In *il-Pulużija v. Franco Zammit* (COCA 04/02/2020), the Court made reference to another judgement *Il-Pulużija v. Carmelo Galea* whereby the Court held that the contravention contemplate by means of article 340(d) of the Criminal Code does not contemplate a situation whereby a spouse who is the owner denies access to the other spouse from accessing the matrimonial home but this contravention covers other situations that normally consist of entering someone else's property and consequently, violating the other person's privacy.

In *Il-Pulużija v. Emmanuel Vella* (COCA 06/11/2003) the Court held that the harm/prejudice (*ħsara*) contemplated by means of article 340(d) materialises **each and every time the owner or holder of that particular property suffers prejudice even if that prejudice is not quantified in monetary terms** and even if the prejudice does not consist in any material damage.

Keep in mind that this contravention regulates conduct which falls short of the other provisions of the law. in fact, this article states *"not specified in the preceding paragraphs of this article, nor otherwise provided for in this Code."* In *Il-Pulużija v. Charles Gauci et* (COCA 26/01/2011), the Court held that since the appellants were found guilty of the offence contemplated by means of article 85 of the Criminal Code, then they could not be found guilty in terms of article 340(d) of the Criminal Code.

In *Il-Pulużija v. Michael Spiteri* (COCA 20/05/2021) whereby the Court held that the appellant was found guilty of *ragion fattasi* and consequently, he could not be found guilty in terms of article 340(d) of the Criminal Code.

- *Il-Pulużija v. Joseph Attard* (COCA 12/09/2008)
- *Il-Pulużija v. Stephen Francis Haston* (COCA 27/01/2022)

TITLE II: OF THE PUNISHMENTS FOR CONTRAVENTIONS

Discretion of court in the application of the punishments for contraventions
Article 341

> **341.** In any case in which the punishments established for contraventions are to be applied, the court may, according to circumstances, apply such punishments, either severally or cumulatively.

Minimum punishment for blasphemous words
Article 342

> **342.** In respect of the contravention under article 338(*bb*), where the act consists in uttering blasphemous words or expressions, the minimum punishment to be awarded shall in no case be less than a fine (*ammenda*) of eleven euro and sixty-five cents (11.65) and the maximum punishment may be imprisonment for a term of three months - saving always the provisions of Title IV of Part II of Book First.

Disqualification on conviction under article 340(a)
Article 343

> **343.** On conviction for a contravention under article 340(*a*), the court shall, besides awarding punishment, order the offender to be disqualified from holding or obtaining a licence to carry a firearm of the class or description used in the commission of the contravention (including any airgun) for a period of twelve months.

Nowadays, any contravention in terms of article 340(a) is heard before and tried before the Commissioner for Justice so it is the Commissioner who orders the offender to be disqualified from holding or obtaining the said license in terms of article 343.

Forfeiture of articles in certain contraventions
Article 344

> **344.** It shall be lawful to seize and confiscate -
>
> (*a*) *Repealed by: X.1998.52.*
>
> (*b*) the ladders, iron bars, weapons and instruments mentioned in article 338 (*p*);
>
> (*c*) any money found on any person committing an offence under article 338(*ii*).

The forfeiture of the *corpus delicti*.