CRL1010 PRINCIPLES OF CRIMINAL LAW

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MALTA

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Introduction to Criminal Law

Crimes are peculiarly malevolent legal wrongs which society fiercely condemns. There exists no inkling of a doubt that most crimes originate from intrinsic wickedness, however, one must identify the difference between civil wrongs and criminal offences.

Firstly, however, the distinction between a **crime** and a **contravention** has to be made. The gravity of an offence constitutes to it being classified as a crime or contravention; for instance, the presence of a ***mens rea*** (which is the intent fuelling the execution of a crime) gives rise to a crime, not a contravention. For a contravention to be committed, a *mens rea* is not required (ex. illegal parking, driving counter to a one-way road, urinating in public, etc.) – listed all in **Art. 338-340** in the Criminal Code of Malta.

In *Crimes and Misdemeanours*, **Blackstone** claims that

"***…murder, theft, and perjury are 'mala in se' because they contract no additional turpitude from being declared unlawful by the inferior legislature."***

By 'inferior legislature', Blackstone refers to the human being as a lawgiver, thus implying that the superior lawgiver is God Himself.

Many crimes still comprise of little to no ethical blame. Legally, treason is considered to be the gravest of all crimes, but as Sir Walter Scott stipulates, it is the product of mistaken virtue, thus meaning that even though it is highly criminal, it is not necessarily disgraceful. Hence why the distinction between civil wrongs and criminal liabilities is so thin yet so deep. One might violate the national speed limit while driving, but that does not necessarily mean that I am evil. Incest is a massive breach of social norms; however, it still isn't the necessary consequence of a malicious mind.

The inherent definition of what constitutes a civil or criminal breach resides with whether it is a public or private violation. However, even a crime against the state may not necessarily imply criminal offence. Breaching a contract made with the State is no different than breaching a contract made with another subject. For instance, an action made by the State to recover money owed to it after being the victim of tax evasion is proceeded within civil contexts.

Crimes committed against the highest numbers are naturally construed to be the most cancerous for a community. In fact, Roman Jurists identified crimes that were particularly harmful to the public as ***delicta pubblica*** (and these crimes were thus tried by the *judicia pubblica*).

These terms did not, unlike the suggestions of Justinian's Institutes 1, 4 and 18, originate from the aforementioned writings, but rather, were the product of the rule that every Roman Citizen reserved the right to prosecute any other Citizen – who would then be put to trial before the Comitia Centuriata, which comprised of the Roman people.

But moving back to more modern times, one might also be tempted to note that even actions benefitting the public may constitute criminal offences. Blocking a public road to lay down gas pipes is, in itself, a beneficial act to commit. However, the means utilised to achieve such an end may not conform with the laws of the State; thus implying that unauthorised roadblocking is criminally unlawful.

Certain writers also argue that crimes become mere *wrongs* when the injured party may be, in some way or the other, remedied. If the injured cannot be compensated however, that makes the act purely criminal. However, this line of thought can be easily combatted by the fact that there exist strains of criminal offences wherein the injury can be easily remedied (ex. intentional offences against property); so does that mean that they should also depreciate in grievousness? [see '**Trattato di Diritto Penale, Vol. I**, by Vide Florian]

The confusing relationship between criminal offences and civil wrongs becomes compromised by the fact that nowadays, it is common legal knowledge that every criminal offence necessarily implies a civil proceeding in order for the injured party to attain possible compensation.

> ***"Every offence gives rise to a criminal action and a civil action".***
>
> **Art.3** of the Criminal Code of Malta

Thus, it may be concluded that the intrinsic nature of an act does not determine its participation in criminal or civil breaches, but rather, the magnitude of the injury incurred, the liability it entails, and the ultimate proceedings directly following it are the margins by which one may separate a criminal act from a civil wrong.

> ***"A criminal offence may, therefore, be defined as a legal wrong which exposes the doer to a punishment to be inflicted upon criminal proceedings."***
>
> **Notes on Criminal Law, Vol. I**, by Prof. Sir A. J. Mamo

Criminal Intent

How does one identify criminal intent? **Carrara** insists that human beings possess two capacities for criminal volition; and it is only when these capacities function in sync can a true criminal intent be formulated - ***la capacita di volere*** (the capacity to act/volition) and the ***capacita di intendere*** (the capacity to understand). If you understand it, and you volitionally execute it, then you form the intent. **If ONE of these ingredients is missing/impaired, then the criminal intent is not formed**.

Therefore, if you possess one of the above, but fall short of the other, then you fortunately harbour some type of defence in front of the courts of law.

But what intent must be formed for one to partake in criminal activities? The **Generic** and **Specific** intent to cause harm are the by-products of such intent.

Generic Intent: fully knowing that one is committing an illegality.

Specific Intent: specifically intending a desired *outcome* (ex. wilful homicide – intended to kill and thus proceeded to do so).

Actus Reus

According to the theory of Francesco Carrara, one requires the *actus reus* in order for him to be liable for criminal responsibility – which is the physical and material aspect of a crime; the inherent consummation of the crime itself. The *actus reus* may also be described as any event subject to the control of the human will.

In Carrara's theory of criminal liability, the criminal act could either be:

- **Positive** (acts of *commission*); ex. committing grievous bodily harm unto someone.
- **Negative** (act of *omission*); ex. failing to call an ambulance when seeing a fatally injured cyclist on the road, remaining passive, and gawking at the dying person.

Acts may also be:

- **Internal**; acts originating from within, i.e., the mind.
- **External**; acts performed by the physical body, ex. to hit.

One cannot be held criminally liable for bearing negative thoughts. An outward and external act derivative from such negative thoughts is that which renders their agent criminally liable.

Every act is made up of **3 different factors**:

1. **The Origin**; emanating from a mental or physical activity/passivity of the agent. Ex. *muscular contractions when raising a rifle and pulling the trigger*.
2. **Circumstances**; the context which opens the possibility for the crime to occur. Ex. *the fact that the rifle is functional and loaded, and that the person going to be killed happens to be in the line of fire*.
3. **Consequences**; the fruit of the physical act. Ex. *the explosion of the gunpowder once the trigger is pulled, the aerial path taken by the bullet, and the death*.

Whatever act the law prohibits is so prohibited in respect of its *origin*, *circumstances*, and *consequences*. No bodily motion is, in itself unlawful, but if the above elements constitute an unlawful character, then the bodily motion becomes offensive. To crook one's finger is not illegal, but to do so with the aim of pulling a trigger changes the climate of the scenario.

The harmful consequences of an act prohibited by the law need not always, however, be actual: they may be merely anticipated. An act may be mischievous in the eye of the law in two ways: either in its *actual results* or in its *tendencies*. In fact, the law may even punish attempts.

Mens Rea

The actus reus on its own is not enough to constitute criminal liability. The guilty mind, the *mens rea*, must also be present.

Before the law can justly punish an act, an enquiry must be made into the mental attitude of the agent. For although the act may have been materially criminal, the mind and will of the doer might have actually been innocent.

The ***material*** character of an act depends on its physical nature, circumstances, and consequences of it. Its ***formal*** character however depends on the state of the mind or will of the actor.

The *mens rea* entails 2 distinct mental attitudes of the agent towards the deed: **Intention** and **Negligence**. Only in cases wherein a person commits an offence wilfully or through negligence is the *actus reus* accompanied by the *mens rea*.

There are 2 types of guilty minds:

1. A guilty mind with ***dolus*** (wrongful intention); or
2. ***culpa*** (culpable negligence).

The offender may have either committed a wrongful act on purpose, or may have done so carelessly.

A person is considered to have acted with *dolo/dolus* when the wrongful act that he commits is done purposely and because he actually intended to carry that act.

Conversely, ***culpa* is a when a wrongful act is carried out because the agent lacked the sufficient care required to avoid such an act from taking place**.

There have been various theories employed in order to distinguish which strain of *mens rea* a perpetrator person had at the time of the crime. There may be exceptions wherein the law sees fit to hold a man responsible for his acts, irrelevant of whether they were intentional or not.

Before imposing punishment, the court must be sure of two things:

1. That the material condition of the act the has been committed, by reason of its harmful tendencies or results, is subject to being repressed by way of penal discipline.
2. That the punishment being incurred on the agent is sure to ward the criminal formal condition of the agent from resurfacing ever again in the future.

Maltese courts rely heavily on Carrara's Theory, which strives to draw a distinction between the aforementioned concepts. Carrara outlines that the distinction drawn out is that which discerns between **direct intention** and **indirect intention**.

Moreover, certain offences which are carried out with one type of intention, are punishable in a different way than offences that are carried out with a different type of intention. The intention with which an act is carried out usually deciphers the cruelty of the crime; for example, in the difference between wilful homicide (**Art. 211**) and involuntary homicide (**Art. 225**) – which both carry a massively different sentence and require different requisites for their consummation to occur.

The difference between the two lies within the *intention*. In wilful homicide, the type of intention is ***dolo*** – as both the foresight that certain consequences will follow from the act *and* the desire for those consequences is present. In involuntary homicide however, the intent is ***culpa*** – as the former two factors of *dolo* are missing.

Therefore, let us recapitulate:

Intention is the purpose or design with which an act is done. It is the *foreknowledge* of the act, coupled with the *desire* of it. **An act is intentional if and only if it pre-existed as an idea before the act in question was committed**.

Holmes: "*intent will be found to resolve itself in two things: foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act*."

According to Carrara, **Direct Intention** (***dolus***) is when the foreknowledge of an act is coupled with the desire of it. In other words, the effects of one's act are foreseen and desired and carried out in such a way that they ensure the ensuing of the desired consequence. Moreover, Carrara makes a very important point in saying that the intention would still be considered as direct even in scenarios wherein the consequences of one's acts are foreseen and desired, *but the means used are those which can possibly achieve that desired result*. **Therefore, whenever the consequences of one's act are foreseen as certain or even as probable and desired, the intention is direct**.

Indirect Intention may be **Positive** (***dolus***) or **Negative** (***Culpa / Casus***). **An indirect intention, according to Carrara's theory, is a situation wherein the result of one's act was merely a *possible* consequence of that act, and this consequence was either not foreseen at all or foreseen but not desired** (ex. intending to push someone, but not foreseeing nor desiring the possibility of the victim falling and hitting his head on the curb, thus resulting in his death).

Intention may also be **Positive** or **Negative**:

Positive: when the result of someone's act is *foreseen* and, notwithstanding such foresight, the means used were *desired* even if the ensuing result was NOT desired. Positive Indirect Intent amounts to *dolo*, because although the ensuing event was not desired, one could have foreseen the effects and the means used relates to the consequence. Ex. throwing a stone towards a person, aware of the possibility that it *might* hit his head and kill him, but not necessarily desiring so. Therefore, the agent knew of his wrongdoing; that his act was injurious to a right of others protected by criminal law.

Dolo requires:

1. The power of volition.
2. Knowledge that what the offender is doing is wrong.
3. Foresight of such circumstances.

Negative Indirect Intention (***Culpa / Casus***) is **when the possible event was not only undesired, but was not even foreseen**.

Culpa (negligence):

The presumption that every man knows and intends the natural and probable consequences of his act is a **rebuttable presumption**. This presumption will be rebutted by poof that the accused, at the time he committed the act, was not in a position of forming a mind capable of devising a wicked intention (***dolo incapax***).

The accused cannot be held to have intended a result if he proves that the consequence resulted was **a**) *not an obvious consequence resulting from his act*; **OR b**) *that the consequence resulted was product of a mix of other circumstances functioning in the background, of which the agent was not aware*.

However, if the accused was aware that certain consequences might follow the act which he contemplated on doing, and deliberately proceeded to commit the act, then he is considered to have intended the consequences which followed, even though he might have hoped that they do not.

Casus (accident):

Pure accident does not give rise to any type of criminal liability. Inevitable accidents or mistakes – which connote the absence of both wrongful intention AND culpable negligence – are typically sufficient grounds for exemption from criminal responsibility.

↓ ←←←←←	←←← **Intention** →→→	→→→→→ ↓
Direct	↓	**Indirect**
↓	↓	↓
Positive	**Positive**	**Negative**
	↓	↓
	Dolus	***Culpa / Casus***

An example includes:

> *"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."*
>
> **Art. 211** of the *Criminal Code of Malta*

This amounts to direct intention & positive indirect intention.

Direct Intention = "*with intent to kill*"

Positive Indirect Intention = "*to put the life of such other person in manifest jeopardy*"

One must note that only some crimes have words such as "*maliciously*", "*wilfully*", "*knowingly*", and "*fraudulently*" in their legal provision. Usually, such words merely alter the burden of proof.

There are some offences that do not require the *mens rea* to exist in order for the accused to be found guilty. The *actus reus* on its own suffices in order for criminal liability to arise. These instances are referred to as **offences of strict/absolute liability**, and are simply an exception to the rule that criminal liability arises when one has both an *actus reus* and a *mens rea.* For example, **contraventions** are situations wherein an offence exists, and criminal liability would arise by proof of the act itself.

Strains of Criminal Intent

Generic intent: a situation wherein the accused is simply intending to do an act that is illegal; a situation in which one has the intention of doing something that is illegal.

In bodily harm, Maltese courts apply the principle of ***dolus indeterminatus determinator ab exitu*** – meaning that the generic intent is punishable by the outcome that it caused. The punishment that one receives will depend on the outcome, on the harm that one has caused.

Specific intent: a situation wherein the accused has the intention of committing a particular offence. In some cases, specific intent is required by the definition of certain crimes, and this specific intent is constituted by the particular desire the agent bore when committing the crime.

Determinate: when the issue falls completely within the boundaries of the intent: in other words, when the idea and the fact, the will and the deed, the design, and the issue, are completely coincident. The crime corresponds precisely to the crime intended. A wants to *kill* B, and actually kills him.

Indeterminate: when the agent intended and desired to produce a result, but had thought about the possibility of producing a more serious result, without, however, *wishing* to produce such a graver result. If such a graver result actually ensues, then the intent of the agent with reference to the event is said to be indeterminate.

Good Faith: A person is said to have acted in good faith if he has committed an act that objectively runs counter to the law, but without *any* intention of violating said law and also without any intention of committing a wrongful act at all.

CHECKPOINT

Carrara: ***capacita di volere*** and ***capacita di intendere***. *Mens Rea* and *Actus Reus* must BOTH be present for criminal liability to occur. Exception in cases of offences bearing **strict liability**.

Actus Reus (*the* ***material condition)***:

Positive (commission)

Negative (omission)

External (to hit)

Internal (the mind is the origin). However, **negative thoughts** are NOT incriminating.

3 factors of every *actus reus*:

1. **Origin**
2. **Circumstances**
3. **Consequences**

Mens Rea **(***the* ***formal condition*****)**:

2 types of intention: **Dolus** (intentional) or **Culpa** (negligence/unintentional)

Indirect Intention may be **Positive** (Dolus) or **Negative** (Culpa/Casus).

Positive Direct Intention*:* when the result of someone's act is *foreseen* and, notwithstanding such foresight, the means used were *desired* even if the ensuing result was NOT desired.

Negative Indirect Intention: when the possible event was not only undesired, but was *not even foreseen*.

IF not foreseen but could have been foreseen = *culpa*

IF not foreseen and could not have been foreseen = *casus*

Criminal Intent may be:

Generic (intending to commit any illegality). **Generic intention to cause bodily harm** = ***dolus indeterminatus determinator ab exitu***.

Specific (intending to cause a specific offence).

Determinate (**idea** of crime, **consummation** of crime, and **outcome** of crime occur as intended).

Indeterminate (intending to produce a certain result swaying between a stretched ambit of severity, of whose possibilities may all ensue depending on the circumstances of the consummation of the crime).

In Good Faith (not intending to commit an offence).

Negligence

This part of Carrara's theory of criminal liability deals with those offences where the intention is *negative indirect intent*. Where the criminal intent in a criminal offence is ***culpa***, we enter the realm of **involuntary offences**.

Our Criminal Code refrains from giving any definition of negligence in the general provisions. Most of the time, responsibility for the crime is incurred on account of "***imprudence, carelessness, unskillfulness in an art or a profession or non-observance of regulations***." These words are not defined, but it is clear that the law is referring to the general absence of care and precaution pertaining to the duty of the defendant to take in the circumstances.

Therefore, ***culpa*** **exists when a wrongful act is committed because a person acted without the sufficient care required to avoid such an offence from taking place**. However, if the ensuing harm was not only unforeseen, but also unforeseeable, then there cannot be any question of criminal liability in respect of such harm ('*unforeseeable'* meaning that it was unforeseeable by the standard of care which the law requires every person to employ in his actions).

In cases of culpa, the law demands the positive use of such care as is calculated to avoid the possibility of such injury or harm. It is very relevant to point out that when we are determining the standard of care that is required from each and every one of us, one must keep in mind that the principle that we use is that of the ***bonus paterfamilias***, which is a maxim emanating from Roman law whereby the standard of care required from us is not the *highest* degree of care, but the standard of care that would be required from the ordinary and reasonable man capable of taking care of his family

Therefore, no man is punishable because he has not used any degree of care higher than that which could have been expected from a reasonable man in the same circumstances.

Carrara maintains that what amounts to reasonable care depends entirely on the circumstances of the particular case as known to the individual whose conduct is the subject of the inquiry.

CASE LAW – ***The Police*** vs ***Saverina Sive Rini Borg*** (1998):

Saverina was a woman who was accused of selling drugs, and as a result, was facing charges related to drug trafficking. In terse, someone bought heroin from Saverina, overdosed, and died due to such drugs. The prosecution contended that apart from drug trafficking, Saverina be charged with involuntary homicide. The defence argued that the victim voluntarily went to buy drugs; therefore, he was not, in any way whatsoever, compelled by Saverina to do so. Therefore, the question put forward by the defence was: 'why should she also be held liable for his involuntary death? What is the *culpa* over here – could she have foreseen that by giving him heroin he would overdose?'

The court of criminal appeal argued that when *culpa* is related to *non-observance of regulations* (since there are regulations that provide who, when, and how medicines can be prescribed), the fact that somebody gave out substances without any authorisation to do so is thus in breach of regulations intended to safeguard people from harm. Therefore, transgressing such regulations connotes *culpa*.

Theories on *Culpa*

Subjective Theory: first propounded by **Carmigiani** and elaborated on by **Carrara**, this theory contends that negligence is a subjective fact, a particular state of mind. It consists of a failure to be **alert**, **circumspect**, or **vigilant**, whereby the true nature, circumstances, and consequences of a man's acts are prevented from being present in his consciousness.

The wilful wrong-doer is he who knows his act is wrong; the negligent wrong-doer is he who *does not know* it but would have known it were it not for his mental indolence. Since negligence is a voluntary failure to take care in estimating the probable and foreseeable circumstances, we have to look at the subjective character that we are dealing with. In determining whether there was a breach in the standard of care, and therefore something which could have been foreseen was not, we have to ask how the person we are judging saw the situation.

So, Carrara defines negligence as **the voluntary failure to take care in estimating the probable and foreseeable consequences of one's acts**. In this definition, the essence of negligence is made to consist in the "possibility of foreseeing" the event which has not been foreseen. The agent who caused the event complained of did not intend or desire it but could have foreseen it as a consequence of his act if he only had minded: so, his negligence lies in his failure to foresee that which is foreseeable.

According to Carrara, if the act was done with an innocent purpose (***animo mocendi***), there is mere negligence in respect of the effect produced because not foreseeing that a thing may happen and foreseeing that it will not happen amounts to the same thing.

For instance, I fire my gun at a wild beast in the thick of a forest. In the background however, a man, of whose presence I was unaware, lingered. Misfortune decided that I hit him instead of the wild beast, thus resulting in his unintended death. I had not foreseen that the man was there, but if I *could have* foreseen it, then I am guilty of negligence.

Objective Theory: according to this theory, negligence is NOT subjective, but an objective fact. It is not a particular state of mind, but a particular **kind of conduct**. It is **a breach of the duty of taking** care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct.

Therefore, there is no need to put ourselves in the mind of the accused. What is being determined here is not the particular state of mind of the accused but rather an examination of the particular state of conduct that he employed.

For example, someone who drove after drinking and ran over someone. That individual cannot defend with the argument that he is heavy weight drinker, and was thus not drunk while driving; because each and every one of us is expected not to drink and drive in order to safeguard the safety of others.

The breach of that regulation would be tantamount to pure misconduct. Since *culpa* is a breach of the duty to take care, to take precautions when acting, to ensure that we act in a way that is not harmful to others, to avoid acting in a way that is unreasonably dangerous, the objective theory maintains that what we should be examining is an objective state of conduct. For this theory, whether the event could or could not have been foreseen by the offender is irrelevant.

In order for *culpa* to arise it is necessary that the breach in the standard of care expected out of us and the harm that ensued are intrinsically related to one another.

Therefore, liability by negligence arises NOT when the harmful consequences of one's acts have been foreseen and waved off, but where such consequences have NOT been foreseen, but COULD HAVE been foreseen had the offender administered a higher degree of care.

Contributary negligence is a situation whereby the person who is harmed has by his own actions contributed to the accident itself. In other words, contributory negligence would arise when the person who has been injured has himself breached the standard of care that is required from him as a reasonable man in society. So, both the accused and the victim have breached the standard of care required of them.

Contributory negligence does not exclude criminal liability. It is relevant **only for the purposes of *punishment***. In other words, the court in its discretion that it has in imposing punishment will exercise that discretion by keeping in mind whether there was contributory negligence.

It is no defence that the mischief was caused by the negligence of others as well as of the defendant. If the mischief incurred by the negligent act of several persons, then they all become guilty.

The fact that other persons besides the defendant were also negligent does not avail him. Similarly, contributory negligence on the part of the victim is not a ground for defence. However**, if the negligence of the defendant would not have, by itself, caused the injury *without the contributory negligence of the victim*, then the defendant is not liable.**

This principle, however, proceeds only where the act or omission of the victim was deliberate and voluntary, and not necessitated or provoked by the original negligence of the defendant; or where it was the victim himself who gave the first cause to the injury suffered by him, by unlawful conduct without which the injury to himself would not presumably have happened.

On the other hand, if the accident is attributable completely to the person who has been injured, then the accused bears NO criminal responsibility because he has now been placed in what is referred to as a state of **sudden emergency**.

CASE LAW – *Clive Tanti* case:

Both a car and a motorbike were travelling at devilish speeds in Rabat. They clashed with each other, resulting in the death of the biker. Thus, here one may notice a direct causal connection between the action of the accused and the injury that happened. There was clear contributory negligence because the drivers were both in breach of a regulation relating to speed limits.

CHECKPOINT

Negligence (*culpa*) = **negative indirect intent**.

"***imprudence, carelessness, unskillfulness*** *in an art or a profession* ***or non-observance*** *of regulations*."

Law demands the **standard of care** taken by the ***bonus paterfamilias***. No care higher than this is expected, but 'reasonable care' depends on the circumstances of the case.

CASE LAW: The Police vs **Saverina Sive Rini Borg** (non-observance of regulations when administering medical substances – narcotics – and caused the death by OD of a customer. Therefore, culpa).

Subjective Theory on *Culpa* (**Carmigiani** and **Carrara**): negligence is a subjective fact depending on a **state of mind**; **the voluntary failure to take care in estimating the probable and foreseeable consequences of one's acts.**

Objective Theory: negligence is an objective **faulty mode of conduct** (ex. drunk driving). Therefore, standard of care is not satisfied.

Contributory Negligence: victim is harmed due to his own negligence, which activated the negative repercussions of the offender's negligence. This does not exclude criminal liability.

CASE LAW: **Clive Tanti Case** (car and motorbike collision).

Criminal Liability

In a criminal court of law, verdicts are awarded after the judge/s progresses through **4 levels of certainty** regarding the possible criminal liability of the accused:

1. **Possibility**: a question of whether a criminal offence could or could not possibly happen; it does not, in any way, suggest blame, and a verdict can never be issued on the grounds of possibility.
2. **Probability**: when the chances significantly tilt towards the domain of blame and guilt; now, one can discern not between possibility, but within the limits of most probable guilt according to the evidence provided. This level of certainty is still not sufficient for a valid verdict to be issued.
3. **Beyond reasonable doubt**: or "*beyond the shadow of a doubt*", as Lord Denning would say; this asserts that a verdict can only be issued after the defendant is found guilty on the grounds of a probability so heavy, that no rational appeal could ever instil doubt in the magistrate's mind regarding the guiltiness of the accused.
4. **Certainty**: known only to God Himself; an aspect which lies within unachievable parameters on this limited world.

With regards to **presumptions**, they can only be of two types in a court of law: **Rebuttable** (ex. in money laundering, the law presumes that you do not have an explanation for the source of funds, therefore, the burden shifts onto the accused to rebut that presumption, as he now has to prove that the source of the funds were legitimate) and **Irrebuttable** (ex. you cannot rebut the presumption that everyone knows the law).

With regards to changes in laws appertaining to penalties for criminal offences, the accused gets the most merciful penalty between the old and new legislation. So, for instance, if a person was accused of an offence, and by the time of the hearing, the punishment for said offence was legally amended, the accused will get the lesser penalty of the two.

> ***"If the punishment provided by the law in force at the time of the trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded."***
>
> **Art. 27 of the** *Criminal Code of Malta*

So what would happen if the law got amended *after* a sentence has been issued, and an accused is already found to dwell in prison? There exist two schools of thought regarding this issue: the principle of ***dura lex sed lex*** ('hard law but still law'; informally equating to 'tough luck, but that's the law'); or the bestowing of the '**Prerogattiva tal-Piena'** (wherein the Head of State can personally dip his fingers in the punishment of an offender already in jail, and utilise whatever power is vested in him to absolve his or her jail time once the legislation regarding said sentence changes. However, this happens as long as the Head of State adheres to the advice of the Minister of Justice).

In criminal law, law can NEVER be retrospective, but only prospective.

CHECKPOINT

4 Levels of Certainty

Irrebuttable & Irrebuttable Presumptions

Changes in the law – accused awarded with the **most merciful punishment. If** the accused is **already in prison,** ***dura lex sed lex*** OR **Prerogattiva tal-Piena.**

Vicarious Criminal Liability

Vicarious criminal liability refers to **liability befalling a body of persons** – an organisation borne of legal personhood. Thus, in this context, one does not prosecute a *single person*, but *officials representing an organisation* (**Art**. **13** of the *Criminal Code*).

Vicarious liability attributes an offence committed by an organisation to the people in charge of it. Therefore, it is people like director, managers, and CEOs that are held criminally responsible for an illegal act carried out by the organisation they are running. As an organisation bereft of its own legal personality cannot show up for itself in a court of law and be punished accordingly, criminal liability is thus extended to the person/s representing them.

The person/s being arraigned in court instead of the company itself must be:

- **In charge *at the time of the commission of the crime***; and
- **Capable of *making managerial decisions***, and ***deciding on critical matters***.

Therefore, the persons who had executive powers during the commission of offence will be held responsible **unless they successfully prove that the offence was carried out unbeknownst to them**, or that the person in charge during the commission of the offence **did everything in his power to avert the consummation of such an illegality** (**Art.13** of the *Criminal Code*).

In cases of vicarious liability, the prosecution needs to prove that an offence has been committed by a **body of persons**. And in order for the persons who are charged to be found innocent, **the burden of proof shifts unto the accused**. In vicarious liability therefore, the prosecution must prove that an offence was committed and that it was committed by a body of persons, but other than that, the burden of proof now suddenly lies on the shoulders of the defendants.

However, doesn't this cross swords with the principle of **self-incrimination**? The Maltese Constitutional Court maintains that ***as long as the presumption of guilt is a rebuttable presumption***, and ***as long as the defendant is given all his other basic elementary rights***, then **shifting the burden of proof unto the defendant is NOT unconstitutional**.

An example of this shift of the onus of proof unto the defendant is in **money laundering** legislation – wherein there is a provision stating that if a person's style of life is not commensurate with his income, then there is a presumption that that person's income is coming from an illicit activity. Thus, the person in question is guilty of money laundering unless he proves that the money contributing to his luxury are, in fact, legitimate.

If the person/s being arraigned in court is found to be guilty, then he/she/they will be awarded with personal punishment. More than one officials may be charged for the same crime pertaining to their organisation, but then, the court has to carry out an analysis of the actions of each and every member of the committee who was brought into court. It could very well happen that the court arrives to the conclusion that either *none* of the officials are guilty, *all* are guilty, or that only one or few are guilty, whereas the rest may be innocent.

Vicarious liability may result in offences borne of *culpa*, as well offences derived of *dolus*. In the case of *dolus*, one could have a company bribing government officials in order to make sure that the company takes is given a particular tender.

Nowadays, there are many strands of legislation catering for the concept of vicarious liability, where criminal liability extends to persons who are not the actual physical persons who have committed the offence, but are responsible for the organisation they represent via *ad hoc* legislation:

1. **VAT Legislation** (**Cap. 406** of the *Laws of Malta*) – even the employee has a responsibility to give a VAT receipt, therefore, the provisions of this Act also apply to him.

2. **Health and Safety Regulations**

3. Regulations appertaining **places of entertainment** which need a license to operate, wherein the licensee is responsible for, say, not letting persons under the age of 17 to enter a club.

CASE LAW – '***The Police*** vs ***Michael Zammit***, 2012 (Court of Criminal Appeal):

Michael Zammit was the company secretary of a gaming corporation that provided online gaming services. And this particular company ended up facing financial difficulties and ended up not being in a position to pay its wages to its employees.

Consequently, the directors of this company decided to just quit and leave the island. In an attempt to get their wages paid to them, the employees went to a government department, specifically the **DIER**, which deals with issues regarding non-payment of wages.

The DIER realised that the directors of this company left Malta and therefore, asked whom they shall charge criminally with not having paid the wages of these employees. They decided that the only person left was the company secretary, who, ironically, was not being paid himself. The DIER sued the company secretary on the basis that he was the only representative of the company left in Malta.

However, the company secretary managed to prove, on a balance of probabilities, that he ought not to be found guilty of this offence because the offence was committed without his knowledge; and as far as he was concerned, there was nothing he could have done in order to ensure that this offence did not take place.

CHECKPOINT

Vicarious Liability – extends to a body of persons representing an organisation (*directors*, *managers*, *CEOs*).

The person/s being arraigned in court instead of the company itself must be:

- **In charge *at the time of the commission of the crime***; and
- **Capable of *making managerial decisions***, and ***deciding on critical matters***.

Burden of proof shifts unto the accused (like in money laundering situations).

If the accusation is **rebuttable** and if the accused is given his other **elementary rights**, then the **shift of the onus of proof is NOT unconstitutiona**l.

An example of organisations susceptible to vicarious liability is **VAT Legislation** (employees to give VAT receipt always).

CASE LAW: The Police vs **Michael Zammit** (company secretary and missing wages case).

Corporate Criminal Liability

Corporate entities are **those companies which are considered to be legal persons** and therefore, have a legal identity which is *separate* and *distinct* from the individual members forming that company. These can be **limited liability companies** or **partnerships**. Conversely, **unincorporate entities** are those associations which do NOT have a separate legal personhood, and are thus not considered to be legal persons, but are still strains of associations, clubs, committees, etc.

The increase of commercial activity has nudged country states into reconsidering their stance on criminal liability. **Corporate liability was introduced to the Criminal Code of Malta in 2002**.

Fundamentally, the following criteria need to be satisfied for a corporation to be held criminally liable; the corporation can be held:

- **Vicariously** (liable for the individual acts of its directors/chairpersons).
- **Liable in Itself** (meaning that acts of the director/chairpersons are considered to be the same as if the corporation itself committed those acts).

As stated in the above chapter, **Art. 13 of the *Interpretation Act of Malta*** stipulates that a corporation's director becomes exempt from criminal liability if and only if the offence committed by the corporation was **commissioned without the director knowing about it**, AND if the director put his **ultimate effort in trying to prevent such a criminal act from taking place**.

CASE LAW – '***The Police*** vs ***John Ellul Sullivan* (2004)**':

The courts determined that it was impossible for the accused, being the managing director of the corporation charged with the crime, to not have known what was going on with regards to his own company commissioning particular criminal actions. Therefore, the defendant was thus found guilty.

Further advancements in today's society has, however, led to the need for the ***subjectum criminis*** to also possibly entail a **corporation**. Therefore, and as of **Act III of 2002**, a company in Malta may be held criminally liable and accountable in a court of law – which was a ratification *needed* to be implemented in Maltese legislation since Malta was, at the time, signing treaties with other countries already in possession of such legislation. Moreover, this ratification was required so that Malta could enter the EU without snags.

Under the provision catering for corporate liability (**Art. 121D**), one may find the transposition of vicarious liability, wherein the director, manager, or chief of an organisation is held accountable for criminal offences committed by said company. However, there is also the addition of the assertion that, **under this article, even the company itself can be held accountable, and thus, punished**.

Corporate criminal liability, *unlike vicarious liability*, applies only with regards to a corporate entities registered with the **Malta Financial Services Authority**. Vicarious liability can extend to the officials in either a corporate or unincorporate body, whereas corporate liability applies ONLY to legal persons – i.e. companies or partnerships which are recognised by law as having a corporate existence.

An important element pertaining to corporate liability is that the offence in question **was committed for the benefit of the company in whole, or in part**.

Now, one of the most fundamental tenets of criminal law, of our Constitution, *and* of the rule of law, is that every person who is charged with an offence *must be present in the Court room*. However, companies cannot be present in a courtroom. That would be absurd. And also, Malta does not hold trials in absentia. So what happens?

Since we do not have trials in absentia, the presence of a corporate company in court manifested into the director, secretary manager, or other important company head who is ultimately also being charged with the criminal offence in question. **Therefore, the people brought forward actually *become* the physical manifestation of the company in a courtroom**.

The proviso in **Art. 121D** contends that if the representative of the company concerned is *no longer* an official of that company, legal representation will be vested in the person who is occupying his position instead of him *at present times*.

If a company is being charged with pollution damage incurred ten years ago, and if the managing director has been replaced ever since, then the present managing director will show up at court just for the sake of legal representation – and NOT because the present director is being charged for crimes committed by other persons ten years ago. This is done purely for the sake of not having trials in absentia.

As punishment, corporate companies may be fined not less than €20K, and not more than €2M. Moreover, a corporate company may be banned from tendering any public contracts, may have its license suspended, and may be liquidated. Clearly, **sanctions given to corporations are purely monetary**.

There are <u>3 requisites</u> needed in order for corporate liability to occur:

1. The offence has to be one which is expressly and specifically decrees to be **susceptible to *corporate* liability** (ex. fraud, money laundering, corruption, etc.). For instance, **Art. 337H** caters *mutatis mutandis* for actions borne of **computer misuse**.
2. The person in tandem with the corporation (ex. director) who is being charged with the offence **must also be found guilty.** Such person is considered to be the *mens rea* AND the *actus reus* of the company. The **Identification Principle** comes into play here; which stipulates that the corporation will be criminally liable provided that the prosecution is able to identify a person who is one of the officers who has committed an offence for the benefit of the company in mind. Moreover, this Identification Principle supports **Carrara's theory of Criminal Liability**, as it transposes the person's *mens rea* and *actus reus* unto the corporation.
3. The offence for which the person was found guilty **was committed for the benefit in whole or in part of the body corporate**. Otherwise, there is no justification in imposing a sanction over a corporate body for offences which could have been committed by the officers in their own interest. By '*benefit*' one refers to something pertaining to monetary value to, and not moral value.

<u>CASE LAW</u> – '***Transco PLC*** v. ***Her Majesty's Advocate*** (2005)':

Transco was in charge of the gas supply. A gas explosion occurred, killing 4 people. It resulted that this explosion occurred because the pipes through which the gas used to pass had corroded very badly.

Given that they had been given the tender by the government to ensure that there is a steady gas supply, it was *their* responsibility to maintain the gas pipes and make sure everything is in check. What Transco did however was delegate this tender to another person, 13 years before the fatal explosion.

The prosecution maintained that Transco ought to be held responsible; and consequently, that corporate criminal liability could be incurred.

CHECKPOINT

Corporate bodies entail a **Separate Legal Personality** (limited liability companies OR commercial partnerships registered with the **Malta Financial Services Authority**) – they become the ***subjectum criminis***.

Corporate liability **introduced in Malta in 2002,** and was **needed for EU accession.**

Offence in question **must have benefitted the company.**

Manifestation of the company (director, secretary manager, etc.).

3 requisites for Corporate Liability:

1. **Offence susceptible to *corporate* liability** (ex. Art. 337H of computer misuse).
2. **Person managing the company must also be found guilty** – he is the ***mens rea*** **and the *actus reus* of the company.** Note the **Identification Principle.**
3. Offence must benefit the company.

CASE LAW: The Police vs **John Ellul Sullivan** (court ruled that it was impossible for him to not know the ongoings of the company's criminal actions, therefore found guilty).

CASE LAW: **Transco PLC** vs Her Majesty's Advocate (gas supply tender, delegated duty, gas explosion).

Criminal Offences

Offence of Commission/Omission

> "[A criminal offence is] the **violation of the law[1] of the state[2] promulgated[3] for the protection of the safety[4] of the subjects** by an **external act[5] of man[6]**, whether **of omission or of commission[7]**, **for which the agent is morally responsible[8]**."
>
> Francesco Carrara

1 – '**violation of the law**': an act or omission may only constitute a criminal offence if and only if it runs counter to the law. No person may be charged of a particular offence unless that particular act or omission is expressly prohibited by law (*nullum crimen sine lege*).

2 – '**of the state**': there must be a breach of the law promulgated by parliament, and is thus enforced by the state.

3 – '**promulgated'**: the breached law in question must be duly enacted and published for the public eye. Moreover, a particular law prohibiting a certain act or omission must also be in effect at the time when the alleged crime is committed. Therefore, once a particular law is promulgated, it is presumed to be known by all those to whom it applies. It does not avail the perpetrator to defend with the argument that he was not aware of the law prohibiting an act or omission he or she has committed (*ignorantia lege neminem excusat*).

4 – '**for the protection or safety of the subjects**': an act or omission constitutes a crime when it violates a particular law which is ultimately designed to ensure the safety of the subjects in a society as a whole. Note also that the purpose of criminal law is to protect and preserve society.

5 – '**an external act**': an evil thought (*mens rea*) on its own does NOT suffice in constituting guilt. Here therefore, we are speaking about overt acts denoting the intention, whether generic or specific, of a particular person to commit a crime of commission or omission.

6 – '**of man**': the act or omission must be carried out by human beings

7 – '**of commission or of omission**': a person may be found guilty of a particular criminal offence either when he does an act which is expressly prohibited by law, or if he fails to act in a way expressly decreed by law.

8 – '**for which the agent is morally responsible**': a person may only incur criminal liability if his act/omission is accompanied by the necessary mental element required to constitute guilt. The guilty mind MUST be present (*actus non facit reum nisi men sit rea*).

In sum, the offence of commission is when the perpetrator acts in a way expressly prohibited by law (ex: ***theft*** in **Art. 261** of the *Criminal Code*). Conversely, an act of omission is when a person fails to act in accordance with the law (ex: ***being a parent or a spouse leaves one's children or spouse in want*** in **Art. 338** (**y**) of the *Criminal Code*).

There are also criminal offences which may be perpetrated through both commission AND omission, such as homicide. An example of homicide through *commission* is when a perpetrator is found guilty of having stabbed someone, thus having the victim fall prey to the malady of death by direct results of the stab wounds.

An example of homicide through *omission* is when a perpetrator fails to carry out the standard duty of care stipulated by the law in the face of a suffering individual. Thus, the victim is left to die by the complacent perpetrator.

CASE LAW – '***Ir-Repubblika ta' Malta*** vs ***Concetta Decelis*** u ***Jason Paul Decelis***':

This was the first ever case of homicide through omission which appeared in Maltese courts.

Jason's lover, Rachel, visited him one night whilst being under heavy narcotic influence. After having sexual intercourse with each other, Rachel fell prey to a sudden attack of what appeared to be an OD (drug overdose). Instead of calling an ambulance, Jason and his mother Concetta assumed the role of her medical carers and tried to take matters into their own hands, trying to bring her back to her senses by splashing her face with water, amongst other things. However, Rachel did not survive this ordeal.

This case led to the introduction of the **Principle of Duty of Care**.

CASE LAW – '***Il-Pulizija*** vs ***Dragana Milajkovic***':

The Court of Appeal held the following definition of an **act of homicide through omission**:

"mill-provi jirrizulta li r-reat *non si tratta* ta' att ta kummissjoni (fejn perezempju persuna jsawwat anzjana), izda att ta **ommissjoni** li huwa, xorta wahda, reat (bhal meta perezempju persuna ma ssejjahx ghall-ghajnuna medika meta jkun evidenti li hija mehtiega; jew meta persuna ccahhad persuna anzjana jew dipendenti minn affarijiet bazici bhall-ikel u xorb)".

In this case, **the convict took video footage of the suffering victim** instead of helping the mentioned victim.

Harris contends that the fact that an act or omission may entail liability to punishment is NOT sufficient to make it a criminal offence unless the punishment is inflicted as a result of criminal proceedings.

Formal Offence

A formal offence is an offence which, committed through act or omission, **violates the law of a State**. Such an act is self-sufficient in producing a complete criminal offence.

In other words, **it is not necessary for a formal offence to be consummated**, because its injurious and negative tendencies intended by the offender are those that make it wrongful in the eyes of the state.

Thus, for example, calumnious accusation (**Art. 101** of the *Criminal Code*) is a formal offence because the crime is complete as soon as the offender maliciously lays defamatory statements against another person whom he knows to be innocent. Hence why it is not necessary that the person against whom the accusation is made be in fact proceeded against or convicted.

Other familiar instances of formal offences are defamation (**Art**. **252**), the forgery of public instruments (**Art**. **179**.), and generally all offences in which the achievement of the criminal purpose of the agent or the event of the injury is not an essential ingredient of the offence.

Material Offences

Conversely, material offences are those offences that **cannot be carried out to its full potential in the absence of the actual injurious event**. Homicide is one example of a Material Offence due to the fact that if the injured party is not, in fact, killed, then it cannot connote homicide.

Here, the completion of the offence requires the accident of the event which, although the offender may have done everything in his power to ensure the consummation of the offence, the offence in question may not actually materialise due to circumstances external to his independent will.

Thus homicide is a material offence because it cannot be said to have been perpetrated unless a man has, in fact, been killed. Other instances of material offences are bodily harm (**Art**. **214**), and all other offences of which liability for the complete offence depends on the actual consummation of the injurious event.

This distinction has practical importance in connection with the doctrine of criminal attempts.

Simple & Complex Offences

A simple offence is an offence which violates no more than a single right, whereas **a complex offence violates more than a single right** (ex. when the same act or omission constitutes an offence under two or more provisions of the same law, or under two or more different laws, or when acts constituting in themselves criminal offences are considered by the law as ingredients or aggravating circumstances of another offence.

Manzini, argues that a complex offence as a perpetration which requires a complex series of acts strung together to form one single transaction. Moreover, Manzini states that the notion of an attempt is inconceivable with regards to simple offences. However, it is important to note that the term 'simple offences' is used to describe the default provision of the law, without the presence of any aggravating circumstances.

Instantaneous & Continuous Offences

An instantaneous offence is an offence of whose nature violates the law so soon that the harm incurred reaches its maximum potential at a single moment in time. The effects of such an offence may continue after its execution, but not due to a perpetual continuation of the offence in question, but rather, due to the natural route of events which cascade straight after said single moment of legal sacrilege ensues (ex. bodily harm, homicide, rape).

A continuous offence (***reato continuato***) (**Art. 18** of the *Criminal Code*) **is an offence which occurs within the same margins of unwavering illegality for a stretch of time, never depreciating in its magnitude of law-violation until being interjected upon by an external force** (ex. illegal arrest).

Thus, there are 2 ingredients beheld by continuous offences:

1) A **wrongful conduct extended interruptedly and without change for a stretch of time**.
2) A **state of things contrary to law** or **a violation of a right or duty** likewise without interruption and completely uniform for a stretch of time.

Therefore, one should not confuse **the continuance occurrence of the effects of an offence** with **the continuance of the offence itself**.

This distinction has significant relevance to substantive law, procedural law, and especially with the application of transitory provisions, the age of the offender, and the prescription period.

Crimes & Contraventions

The above title relates to the seriousness of an offence; with the most heinous being the crime, whereas the lesser strain of offence would be a contravention. No express distinction lies within the Criminal Code of Malta, but crimes and contraventions are separated into Part II and Part III of the Code, respectively.

As a rule, the attempt of committing a contravention is not punishable by law (except for when the law openly states otherwise), however, an attempt to commit any *crime* carries, in its own way, criminal liability.

One does not need to prove the *mens rea* behind a contravention for liability to ensue. The *actus reus* on its own is enough.

Moreover, committing another contravention after having already committed one does NOT make a person a recidivist.

CHECKPOINT

"[A criminal offence is] the **violation of the law[1] of the state[2] promulgated[3] for the protection of the safety[4] of the subjects** by an **external act[5] of man[6]**, whether **of omission or of commission[7]**, **for which the agent is morally responsible[8]**."

CASE LAW: Ir-Repubblika ta' Malta vs **Concetta Decelis** u **Jason Paul Decelis** (OD case, assumed medical care, failed miserably).

CASE LAW: Il-Pulizija vs **Dragana Milajkovic** (took videos instead of helped the victim)

Harris: the fact that an act or omission may entail liability is NOT sufficient to make it a criminal offence unless the punishment is inflicted as a result of criminal proceedings.

Formal Offences (ex. calumnious accusations)

Material Offences (ex. homicide).

Simple & Complex Offences

Instantaneous & Continuous Offences

Crimes & Contraventions

Insanity

Pleading insanity has long been a common trick used by advocates to absolve clients from the fate of entering jail. However, it is presumably highly difficult for one to *prove* such a mental ailment in a court of law.

The mental fitness of the accused can be relevant in 2 cases:

Unfitness to Plead: wherein the accused may be found unfit to plead, or is incapable of understanding the charges brought against him at the time of the trial relevant to the crime he has committed.

Defence of Insanity: wherein the accused has been found to be insane at the time of the (alleged) commission of the offence. Thus (and if successful), the defence results in a verdict of *not guilty* by reason of insanity.

NB: it is up to the accused to prove that he was insane during the commission of the alleged crime, as everyone is automatically assumed to be sane in a court of law.

The Maltese Criminal Code does not provide an explicit definition of insanity, but the influence of Common Law and works originating from the pen of revered criminal theorists such as Sir Anthony Mamo have birthed the understanding that 'legal insanity' connotes a 'disease of the mind' which, thus, demolishes the accused's capacity for acknowledging the grievous nature of their offence.

"Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person -

(a) was in a state of insanity; or

(b) was constrained thereto by an external force which he could not resist."

Art. 33 of the *Criminal Code of Malta*

The M'Naghten Rules

The M'Naghten Rules were constructed in order to rule out whether an accused pleading insanity in court was, in fact, insane at the time the crime was committed. The term originates from the historical persona, Daniel M'Naghten who, while under the impression that he wanted to kill him, decided to murder the then-British Prime Minister, Sir Robert Peel by shooting him. Mistakenly however, M'Naghten ended up shooting the Prime Minister's secretary, Edward Drummond, instead. Medical experts then ruled out that M'Naghten was severely psychotic, thus resulting in him not being found guilty of the offence committed.

Naturally, this reaped havoc across the country, and the House of Lords demanded that the Lords of Justice whip up a legal definition of insanity:

> ***"Insanity was a defence to criminal charges only if at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong".***
>
> Queen v. M'Naghten, 8 Eng. Rep. 718 [1843]

In the UK, this is the only form of insanity accepted in courts of law; the M'Naghten Rules (or the Right or Wrong Test) are as follows:

1. Every man is **presumed sane** unless proven otherwise.

2. To establish the defence of insanity, it must be proven that the accused was **gripped tightly by a mental malady which hindered his or her capacity for reason,** and thus rendered the defendant **incapable of acknowledging the illegal nature of the act being committed,** whilst also being **alien to the capacity for discerning right from wrong**.

3. Every man is **presumed to know the law of the land**.

4. The alleged offender must have thought that, during the time of the commission of the crime, he was not aware that he was committing an illegality, and was thus bewitched by a spell of **delusion**.

> ***NB**: rules 3 and 4 are **NOT** adhered to in Malta.*

Moreover, since the baptism of the M'Naghten Rules, courts have also strived to enhance them by adding **volitional insanity** to the equation; which refers to persons of generally perfect mental health, but who were in an abysmal state of mind during the time of their criminal offence – thus being rendered **temporarily insane**. Malta does not admit to temporary insanity because in applying the second M'Naghten rule, the individual must be suffering from a terminal mental malady. And it is important to note that diseases of the mind are permanent in nature.

Malta also brandishes the "**Irresistible Impulse Test**". With this test, the accused will be found <u>not guilty</u> by reason of insanity if they can successfully prove that, as a result of a mental infirmity, they failed to resist the impulse to commit the crime of which they are accused of due to the mental incompetence of controlling their actions.

For example, the mother of a child who has been molested shoots and kills the alleged molester. In view of her actions, the mother could argue that she was so rabidly infuriated by the violation of her child that she was incapable of controlling

her actions. Moreover, the mother need not have been diagnosed with a mental defect to bring the Irresistible Impulse Test argument to the table.

In the robbery trial of **Rex vs Hay**, it was established that the capacity to understand is not the *only* capacity one bases his actions upon. Therefore, it may be the case that even though one is capable of discerning between right or wrong, *and* is aware that he is committing a wrong, a disease of the mind renders the person in question incapable of controlling his volition (ex. kleptomania).

In **The Police vs Nicholas Grech** (judged by Consuelo Scerri Herrera), the accused was arraigned for crucifying cats in Mosta, but was acquitted after having been diagnosed by three specialists as mentally insane. He was instead referred to Mount Carmel Hospital – indefinitely.

Medical opinions possess heavy weight in court judgements, as they highlight the medical issue; but alas, courts of law are not legally obliged to adhere to them. However, although the courts are not legally bound to abide by medical opinions, courts of law *ought* to follow said medical opinions (lest they have a particular reason not to).

In the **Republic of Malta vs Abner Aquilina**, various medical experts voiced their opinion – having three experts saying that Abner is insane, while having another three medical experts denying that assertion.

In rare cases of **Automatism** (**The Police vs Mario Gatt**), the defendant is established to have been legally sane during the commission of the alleged crime, but alas, he or she did not have the capacity to control what they were doing. Thus, either the *actus reus* or the *mens rea* are found to be omitted. Automatism raises three requirements for it to ensue as a defence in a court of law:

1. The accused had no control over his actions.
2. The lack of control was not product of a disease of the mind.
3. The automatic conduct was not self-induced.

Therefore, Automatism may, for instance, take place when the defendant was in a state of concussion, PTSD, or psychosis which, in themselves, were caused by external forces. If the above states of being were the result of self-induced factors (such as narcotics), then the defence of Automatism may not be deployed in a court of law. Ultimately, a verdict of not guilty due to Automatism leads to acquittal, whereas a verdict of not guilty due to Insanity leads to detention in a mental hospital.

Once a disease of the mind has been successfully established in a court of law, then the **Defect of Reason** of the defendant logically ensues – which introduces the possibilities that the defendant did not know the nature or quality of his act OR that the defendant did not know that his act was wrong.

Coercion

"Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person –

(a) was in a state of insanity; or

(b) was constrained thereto by an external force which he could not resist."

Art. 33 of the *Criminal Code of Malta*

Coercion denotes that, in the commission or omission of a criminal offence, one's actions were not borne of a voluntary nature, Therefore, one's volition becomes hijacked by an external factor insofar as having a coercive element so strong that it completely nullifies one's *capacita di volere*.

There are 4 prerequisites one must satisfy in order for him to have the defence of Coercion under his belt:

1. An **external force** must be present, NOT an internal force such as hunger or rage. Ultimately, this force is nothing short than a threat – verbal or written. This external force must also be **irresistible** and completely unavoidable regardless how much one may try to avert it. To be passive and unresisting does not bequeath oneself with the defence of coercion, because one did not even try to elude this threat in the first place, leaving the potentiality of aversion completely unexplored.
2. **Threat Perception**: to this, authoritative jurists place one fundamental criteria: that in order to succeed in maintaining the defence of coercion in a court of law, one must convincingly show that the threat perceived was *greater* than the harm caused by the accused when committing the offence under the alleged coercion. If the harm caused is *equal* to the threat perceived, then the defence of coercion may NOT be applied.
3. ***Jus Necessitatis* (Law of Necessity)**: when a major external force ***(force majeure)*** places the pressured person in a situation wherein he or she cannot save themselves without injuring the rights of some other person who has committed no wrong against them. In other words, this tackles the situations wherein the necessity of committing a crime arises in order to save one's own life.
4. **Civil Subjection***:* when a ranked official pleads not guilty because he was, at the time of the commission of the alleged crime, following an order emanated from a higher power. However, one must thus also prove that they did not know that the order they were given at the moment of the alleged crime was illegal in the first place.

Intoxication

"Save as provided in this article, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if –

(a) by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition, and the state of intoxication was caused without his consent by the malicious or negligent act of another person"

Art. 34 of the *Criminal Code of Malta*

For the defence of intoxication to be deployed in court, a lawyer must first prove that the intoxication imposed on his client was **Accidental** (extraneous to /caused by a third party), and **Complete** (i.e. so severe that it obliterated the accused's ***capacita di intendere*** and his ***capacita di volere*** when the crime occurred). If the accused's state of intoxication satisfies these criteria, then he or she also possesses the defence of intoxication under their belt.

An interesting case to note was one presided by Magistrate Mintoff Cunningham in 1942, wherein the accused was legally proven to be intoxicated. However, the opposition pointed out that the testimony given by the defendant was so lucid the testimony *itself* implied that, even though the defendant was intoxicated at the time of crime, he still knew ever so clearly what happened during the commission of the crime.

"(b) the person charged was by reason of the intoxication insane, temporarily, or otherwise, at the time of such act or omission.

Art. 34 of the *Criminal Code of Malta* (cont'd)

This section asserts that if a person enters the domain of *Insanity* due to his becoming intoxicated, then the defendant's attorney bears the right of protecting his client with the Insanity defence stipulated in **Art. 33** of the *Criminal Code of Malta* (see above chapter). Therefore, when merging insanity with intoxication, it necessarily implies that, due to the intoxication administered during the crime, the accused happened to suffer a disease of the mind via the brain damage caused by the intoxication itself. Ergo, once one reaches this state of being, the inherent source of intoxication becomes irrelevant, because insanity becomes the new topic of discussion.

(3) Where the defence under sub article (2) is established, then, in a case falling under paragraph

(a) thereof, the person charged shall be discharged, and, in a case falling under paragraph

(b), the provisions of articles 620 to 623 and 625 to 628 shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence.

Art. 34 of the *Criminal Code of Malta* (cont'd)

This section appertains directly to situations wherein the accused suffers from degrees of intoxication so severe that in no universe could he have ever developed a **Specific** or **Generic intent** (*mens rea*) during the time of the crime. In these circumstances, the accused will not be found guilty of the offence.

(5) For the purposes of this article "intoxication" shall be deemed to include a state produced by narcotics or drugs."

Art. 34 of the *Criminal Code of Malta* (cont'd)

Volitional intoxication does not connote the full potential of the defence of Intoxication, as it defies one of the requirements of Intoxication (intoxication through *external* forces). However, volitional intoxication may negate a *specific intent*.

If the defendant deliberately gets himself drunk in order to attain a desired degree of **Dutch Courage** for him to commit an offence *which he subsequently commits under such an exaggerated level of intoxication that it might be nigh impossible to prove that he had a mens rea at the time of the crime*, he will thus be unable to claim lack of intent.

Young Age

Children do not possess the *mens rea* adults have. Ergo, they do not maintain a fully developed *capacita di volere* and *capacita di intendere*. If a child commits a crime, then the child was, presumably, negligent under the supervision of the ***bonus paterfamilias***.

(1) Without prejudice to the powers of the Minister under the Children and Young Persons (Care Orders) Act and any other law which from time to time provides for measures of protection, help, care, and education of minor persons who would have been identified as persons who have committed crimes or contraventions, a minor under fourteen years of age shall be exempt from criminal responsibility for any act or omission. Powers of the court.

(2) Nevertheless, in a case referred to in sub article (1), the court may, on the application of the Police, require the parent or other person charged with the upbringing of the minor to appear before it, and, if the fact alleged to have been committed by the minor is proved and is contemplated by the law as an offence, the court may bind over the parent or other person to watch over the conduct of the minor under penalty for non-compliance of a sum of not less than one hundred euro (€100) and not exceeding two thousand euro (2,000), regard being had to the means of the person bound over and to the gravity of the fact

(3) If the fact committed by the minor is contemplated by the law as an offence punishable with a fine (ammenda), the court may, in lieu of applying the provisions of sub article (2), award the punishment against the parent or other person charged with the upbringing of the minor, if the fact could have been avoided by his diligence.

(4) For the purpose of the application of the provisions of the preceding sub articles of this article, the parent or other person charged with the upbringing of the minor as aforesaid, shall be required to appear, by summons, in accordance with the provisions contained in Book Second of this Code.

Art. 35 of the *Criminal Code of Malta*

Therefore, the law discerns between different categories of minor children:

1. **0-14**: children in this age group are *doli incapax* - they are incapable of forming the ***dolus*** (the criminal intent). Thus, they are ***doli incapax***. The law therefore creates an absolute and irrebuttable presumption (***iure et de iure***).
2. **14-16**: children in this age group are still not participatory in adulthood. Therefore, a child aged between the ages of 14-16 cannot develop the full potential of the *dolus*; thus the criminal courts decree that they cannot bring the full force of the law on the accused child. However, this presumption of being incapable of forming a dolus is rebuttable in a court of law (***iuris tantum***), as '**mischievous discretion**' is a form of intent capable of being formulated by a child aged between 14-16. Ergo, if it is successfully proven that the child was acting *volitionally* AND with *mischievous discretion* at the time of the offence, then the child will suffer the penalty of the crime as stipulated in the Criminal Code, albeit decreased by one or two degrees.

> ***"The minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission done without any mischievous discretion.***
>
> ***(2) In the case where the act or omission is committed by a minor who is aged between fourteen to sixteen years of age with mischievous discretion and in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees."***
>
> **Art. 37** of the *Criminal Code of Malta*

3. **16-18**: a *iure et de iure* here asserts that children of this age are ***doli capax*** – capable of forming a *dolus*. Still however, the punishment is reduced due to the heavy assumption that children of this age lack a particular degree of experience in life needed to evaluate and weigh the nature of their actions.

The court may also apply **Binding-Over Procedures** – meaning that when a child commits a crime, the court may opt to bind the parents of the child to the offence committed by their son/daughter. However, this procedure may only take place in circumstances wherein the child is *doli incapax*.

Self-Defence

"<u>No offence is committed</u> 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."

Art. 223 of the *Criminal Code of Malta*

Once again, an important ingredient when hoping to formulate a defence revolving around the idea of self-defence is **threat perception**. And it is important to note that threat is almost incommensurable to all its victims. For instance, a person who is equipped with a knife and is running towards the *layman* is worlds different than a person equipped with a knife running towards a trained *Navy Seal*. Therefore, the notion of a 'threat' is determined only when a justifiable reaction equal to the perceived harm of the threat in question is committed.

Mistake

If the accused **mistakenly** believes himself to be under attack, or mistakenly perceives an incoming threat to be greater than it really is/was, then **the defendant is judged on the facts as he *believed* them to be** – even if the mistake made was quite unreasonable in nature. Thus, the accused is found to be <u>not guilty</u> if he applied more force than the reasonable amount applicable to the situation in order to defend himself from the threat he *believed* he was under.

Burden of Proof

In cases wherein the defence of self-defence is raised in court, the **Burden of Proof** rests on the shoulders of the prosecution to prove, beyond reasonable doubt, that the accused was *not really* acting in self-defence at the time of the commission of the crime, or that more force than necessary was administered from his behalf.

Ultimately, the jury is that which decides whether the amount of force applied/used from the defendant at the commission of the alleged crime was reasonable or not – as such a query lies within the domain of fact, not of law. Thus, the jury must take into considerations specific factors of the situation, such as the **ferocity** of the attack, **urgency**, the potentiality of **retreat** in lieu of direct confrontation, and whether the alleged commission of 'self-defence' **persisted** even after the 'threat' faded away.

Ultimately, if the accused is identified to have used **excessive force** to defend himself against the perceived threat, then he or she has no defence based on 'self-defence'. Therefore, this is an "all or nothing" defence.

Duress by Threats

Similarly, **Duress by Threats** covers situations wherein the defendant was (allegedly) forced to break the law because of certain threats imposed upon him/her. It is a general defence available to all crimes except murder and attempted murder.

Actual Necessity *(Jus Necessitatis)*

The Law of Necessity refers to situations wherein persons are forced to commit an illegality against other persons in order to save themselves. For instance, Mamo points out a hypothetical scenario in which a group of shipwrecked individuals kill and eat each other in order to avert death by starvation. To this, Harris stipulates that a commission or omission resulting in criminal offence is NOT justified by necessity; therefore, committing homicide to eat the victim in the above scenario set forth by Mamo would still connote illegal homicide – regardless of the 'necessity' in question.

Rex vs Dudley (1884): Dudley, alongside other individuals, was stranded outshore without any food or drink to sustain their diet. Dudley thus killed and fed on one of the other persons stranded with him, and was thus charged with homicide once alighting onto land once again. The conclusion drawn out was that necessity for self-preservation was NOT a valid defence against the charge of homicide in court.

> ***"Every person is exempt from criminal responsibility if at the time of the act or omission complained of, such person –***
>
> ***(b) was constrained thereto by an external force which he could not resist."***
>
> **Art. 33** of the *Criminal Code of Malta*

According to this article however, it is clearly asserted that in Maltese law, one shall be rendered exempt from criminal liability if, at the time of the alleged crime, the defendant was constrained to act as he/she did by an **irresistible external force**. Therefore for instance, this law would have still ruled Dudley in Rex vs Dudley to be guilty of homicide – as he committed the offence out of necessity borne of internal forces: starvation.

> ***"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"***
>
> **Art. 224** of the *Criminal Code of Malta*

This applies in circumstances wherein a person administers force in hopes of repelling an *external* force from penetrating his personal and private domicile during the night.

> ***"(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".***
>
> **Art. 224** of the *Criminal Code of Malta (cont'd)*

If a person steals *without* force, then this defence may not be applied; because the elements of malintent must be present against the owner of the private house for the victim to be able to administer repelling force. **A person not using force cannot be perceived as a threat.**

> ***"(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."***
>
> **Art. 224** of the *Criminal Code of Malta (cont'd)*

This directly appertains to crimes of a sexual nature, in which one's prized chastity becomes put in manifest jeopardy.

Mamo mentions 3 qualities a personal threat must satisfy in order for it to be justifiably perceived as a threat:

Unjust: the threat must be **illegal and unjustifiable**. For instance, one cannot plead self-defence if he harms a police officer who arrested him, because the officer has every right vested in him to do such a thing if he deems such an act to be necessary.

Grave: the threat must put one's life, limbs, or chastity in manifest jeopardy.

Inevitable: the threat could not have been avoided in any way (except for self-defence). And to prove that it was inevitable, Mamo tells us that the threat must also be Sudden, Actual, and Absolute.

1. **Sudden**: one was not forewarned about the threat. If a person has been forewarned, the person is obliged to report it or avert it.
2. **Actual**: the threat is active at the moment in which one is acting. For instance, a shot in the back is not active, because it shows that the victim was walking away from the perpetrator, or was not in direct confrontation with the perpetrator. If the threat has been diffused, and a person still decides to apply force regardless of having a deflated threat, then self-defence cannot be used as a defence in court.
3. **Absolute**: there is absolutely no way other than self-defence of averting the threat. If one has the capacity of running, then one is obliged to flee from the perceived threat (***commodus discessus*** – the obligation to run whenever it is convenient/possible to flee from a threat).

Attempt

'Attempt' is an **inchoate offence** – meaning that it does not constitute a perfectly consummated crime. Thus, with the notion of an attempt, we are **extending criminal liability for actions which do not, in themselves, constitute a crime – YET**.

If a person has not fulfilled the execution of a crime in its *totality*, then does the accused walk away? Definitely not. Italian jurists argue that the fact that a person TRIED to commit a crime shows how that same person, successful or not, **exposed people to manifest jeopardy**. However, not every action is concrete enough to put someone under criminal liability. The upcoming theory helps us identify **the moment in which an accused becomes responsible of criminal attempt.**

> **"(1) Whosoever with intent to commit a crime shall have manifested such intent by <u>overt</u> acts which are followed by a commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction [...]**
>
> **Art. 41 of the** *Criminal Code of Malta*

Here, the **overt** and external act **must be followed by the commencement of the execution of the crime** for one to be criminally liable. Therefore, an attempt is identified *only when the execution of the crime succeeds it*.

Therefore, let us first consider Carrara's ***Iter Criminis*** (journey of the crime) for us to fully understand when an attempt may be identified:

The Intention

↓

The Preparation

↓

The Commencement of the Execution

↓

The Completion of the Crime

These four stages describe a perfect crime. But in an attempt, only the first *three* requirements are those that have to be fulfilled.

Carrara gives us 2 theories to help us discern from the Preparatory and the Commencement of the Execution:

Il Criterio dell' Univocita' (criterion of unambiguity) – Carrara believes that actions which, *prima face*, appear innocent cannot be justifiably related to the commencement of the execution. However, if certain circumstances change, the actions that appear innocent on surface level may turn sinister (ex. buying a knife VS buying knife *after threatening someone*).

Therefore, Carrara dichotomises Preparatory acts into two:

Absolute Preparatory Acts: actions absolved from ingredients constituting the Commencement of the Execution of a crime.

Conditional Preparatory Acts: acts which *could* entail the Commencement of the Execution of a crime, and *would* put people's rights to actual danger if followed up by their respective execution of the crime itself, but if and only if these actions are coupled with a particular criminal intent (*mens rea*). Thus, this induces doubt. A judge/jury may not be certain on the malintent of the Preparatory Act *itself*; therefore, the defendant should remain unpunished because there is no certainty beyond reasonable doubt that the Preparatory Acts committed were there to deliberately pave the road for the prospective execution of a crime. However, if these Conditional Preparatory Acts espouse other material circumstances which leave no reasonable doubt as to what crime is about to be committed, then that is when one's criminal liability for Attempt shows its face.

Theoretically, Carrara's thesis is very viable. In practice however, it does not make the grade. 'Ambiguity' is very equivocal in its definition, and a single, objective conclusion may, very probably, never be reached.

Therefore an objective threshold must be found. So Carrara gives us a second theory, and scraps the idea of ambiguity. Instead, he creates four identifiers which pinpoint a criminally liable attempt:

Il Suggetto Attivo Primario (Primary Active Subject): the offender

Il Suggetto Attivo Secondario (Secondary Active Subject): the means or instruments used by the offender when committing the offence.

Il Suggetto Passivo dell' Attentato (Passive Subject of the Attempt): the person/s or object/s on whom force was applied, but of whose nature *does not constitute the consummation of the ultimate crime intended* (ex. shooting/killing the guard before opening the vault of the bank).

Il Suggetto Passivo dello Consumazzione (Passive Subject of the Consummated Offence): the person/s or object/s on whom force is applied, and of whose nature *directly constitutes the consummation of the crime* (ex. using force on the money of the vault to consummate the crime of theft).

The first two criteria dwell within the domain of Preparation. Once one achieves the third criteria, an Attempt is established; and when satisfying the fourth and final criteria, one may rightfully identify a Crime.

Preparatory acts on their own are not punished as 'preparatory acts'. **One is punished for a preparatory act if and only if the preparatory act itself is illegal** (ex. buying an unlicensed weapon). Naturally, the third and fourth criteria of Carrara's thesis constitute criminal liability.

"(a) if the crime was not completed in consequence of some accidental cause independent of the will of the offender, to the punishment established for the completed crime with a decrease of one or two degrees;

(b) if the crime was not completed in consequence of the voluntary determination of the offender not to complete the crime, to the punishment established for the acts committed if such acts constitute a crime according to law."

Art. 41 of the *Criminal Code of Malta (cont'd)*

Voluntary Desistance

Ultimately, it is very important to note **that if an offence was not completed due to the voluntary desistance of the offender, then the alleged attempt may not be punishable**. If the act of the offender was interrupted by a force external to the offender, then the desistance does not become voluntary. **The agent of the crime must volitionally desist the act for his attempt to be rendered unpunishable.**

Desistance is usually spurred through a sudden influx of emotions in the face of choosing whether to consummate a crime or not – such as guilt, fear of punishment, and sudden pity for the would-be victim.

However, even if the agent volitionally desists the consummation of his crime, if his preparatory acts are deemed by the court to be criminal in nature, then he will naturally be punished accordingly for the preparatory acts themselves.

Jameson supports this by arguing that when criminal offences do not ultimately take place due to an agent's voluntary desistance, the agent in question should suffer the consequences appurtenant to the actions he has already committed – regardless of the lack of the consummation of the crime itself (as long as the acts already committed are of a criminal nature).

Public Expediency should be a key factor in fuelling an agent's interest in desisting the consummation of his would-be crime. This Utilitarian mindset renders the is offender aware that carrying out the crime in its entirety would thus cause undesirable discomfort within a social community.

Carmigiani intervenes here by stating that in cases of voluntary desistance, the punishment for the attempt on its own should be *reduced*, rather than excluded.

Impossible Attempt

An impossible attempt is one regarded to be impossible to be carried out; therefore, the agent is rendered incapable of commissioning the actual crime.

The **Objective Theory** states that the attempt is unpunishable if the means used when attempting to commission a crime are virtually incompetent of actually succeeding in doing so (ex. attempting to shoot someone with a toy gun).

The **Subjective Theory** however points a finger to the *mens rea* of the agent wishing to commit the crime – even if the crime is impossible to carry out. Therefore, this theory suggests that such an attempt should be punishable even though the eventual completion of the crime resides within the domain of impossibility.

In Malta, the Objective Theory is that which is adhered to – as long as the means used remain absolutely incapable, and NOT relatively incapable, of committing the crime.

Absolute Incapability is when the means used may never, in no possible universe, consummate the attempted crime (ex. shooting someone with a toy gun).

Relative Incapability is when the means used *may* succeed in carrying out the desired criminal act, depending on the person/object upon which force is exerted (ex. poisoning someone with a very good immune system, thus not succeeding in killing him VS poisoning someone with a very poor immune system, thus succeeding in killing him).

Incitement

Another form of an inchoate offence, an inciter is someone who tries to assist, influence, encourage, or pressure another party into committing a crime. It is a crime of *specific intent* – meaning that the accused must intend the full offence to be committed.

It matters not whether the crime incited is ultimately consummated, as such a factor does not belittle the fact that the inciting nonetheless occurred. The only possible variable which depends on the consummation of the incited crime is that the inciter may hence become a secondary participant if the crime is ultimately completed. Liability for incitement may only be put on one's shoulders if and only if the crime being incited is possible at the time of the incitement.

An inciter is also regarded to be an accomplice to a crime, even if he or she is not the direct *autore* of the offence in question (as stipulated in Art. 42 of the Criminal Code of Malta).

Mistake of Fact

Mistake is not, strictly speaking, a defence. However, a 'mistake' or 'accident' **can negate liability if its effect also renders a person's *mens rea* null**. Generally speaking, this defence is deployed with other defences in a criminal court of law.

If the *mens rea* required is either borne of intention or recklessness, then any mistake hinting at the fact the defendant did not either intend an element of the *actus reus* OR did not (subjectively) realise the risk involved in the *actus reus*, then the *mens rea* is negated.

NB: 'Recklessness' is legally defined as the state of mind by which a person deliberately and unjustifiably pursues a course of action while consciously disregarding any potential risks produced by the action to be committed (**see 'R vs Cunningham (1957)'** – Cunningham attempted to remove a gas meter in order to steal the money inside; but unbeknownst to him, the gas meter was connected to the neighbouring house. Consequently, Cunningham caused a gas leakage, and poisoned the neighbour during her sleep… a consequence begotten by recklessness).

According to **Caldwell**, a person is reckless if he does not heed the potentiality of a risk when the risk in question would have seemed obvious to the ordinary person. In this definition of recklessness, it is difficult to see how a person could have also made a mistake – because a 'mistake' connotes implies that a person actually put some thought into his actions, albeit ultimately arriving to a mistaken conclusion.

If an offence requires only **Negligence** with regards to a specific element of the *actus reus* then, according to the hypothesis employed in court (*ex hypothesi*), only a Mistake with regard to the element of the *actus reus* in question may negate the Negligence of the perpetrator.

But if no *mens rea* is required with regard to a specific element of the ultimate *actus reus*, then even an honest and reasonable mistake (with regard to that element) will not be able to absolve the accused from criminal liability. Thus, this constitutes **Strict Liability**.

Not knowing the law of the land does not constitute the defence of Mistake – ***ignorantia juris neminem excusat***.

Fundamentally, when deploying the defence of Mistake, one must satisfy the following criteria:

Essential: The mistake must be of such a character that, had the supposed circumstances been true, then they would have prevented any degree of guilt from entering the mind when committing his alleged crime. For instance, if a man kills his maid while being under the steady impression that she was a burglar penetrating his private property, then his mistake of arriving to such a supposition offers a good defence in a criminal court. Likewise, if a man takes what he truly and convincingly believes to be his own, then the alleged thief cannot be found to be guilty of theft.

A mistake of fact which has such a character that, had the supposed circumstances been real, the act would have still remained criminal, does not exempt the defendant from criminal liability. Thus, it is no defence for a burglar to say that he mistook house number 1 for house number 2 when breaking in to steal whatever he desired; because the inherent act itself is criminal nature, regardless of whether the party it was committed against was a mistaken target.

Inevitable: The mistake must be of such a character that it could not have been avoided by the exercise of reasonable care.

Therefore, a mistake which is of an Essential and Inevitable character absolves a person from all criminal liability.

For instance, in '**The Police vs Dennis Sgendo (2000)**', the defendant's lawyer argued that his client stole property which he mistook to be abandoned. Thus, the Criminal Court of Appeals decided that there was a lack of *mens rea* in Sgendo's mind during the commission of the crime.

Similar to the inherent nature of Mistake, one finds **Accident**, which also renders oneself exempt from criminal liability (***nullum crime nest in casu***). According to **Harris**, Accident is utilised in two senses:

1. An Accident, which is the consequence produced by some external force over which the accused had no control.
2. An Accident, which is the *unintended* consequence of voluntary acts which are, in themselves, not unlawful to commit and are not borne of negligence.

According to **Sharlot**, simply being *ignorant* regarding a factual matter does not constitute a valid defence. This is because a claim of 'mistake' implies that the defendant actually addressed the situation and applied a certain degree of thought; thus meaning that the accused suffered a mistake of the facts he ultimately evaluated. Inherent ignorance of the facts in question is no justifiable excuse.

Justification vs Excuse

The primary distinction between the two is that **in justification, no offence is committed.** In an excuse, one *does* have responsibility, and *is* found guilty – but owing to the special circumstances under which the offence was committed, **the law provides a reduction to one's punishment**. For instance, Self-defence is justifiable; whereas a Crime of Passion is excusable.

> ***"Wilful homicide shall be excusable –***
>
> ***(a) where it is <u>provoked</u> by a grievous bodily harm, or by any crime whatsoever against the person, punishable with more than one year's imprisonment;"***
>
> **Art. 227** of the *Criminal Code of Malta*

Here, the key word is "provoked". This legal term refers to provocation administered through instances of grievous bodily harm, offences against the person, attempts at defamation, and others. Therefore, the defendant must thus prove that he committed the offence in question only because he was pinned under the grip of provocation. In fact, the defendant must not only prove that he lost control due to provocation, but must also show that the ordinary person would have also lost his or her self-control if they were placed in the same exact situation. Ergo, if one successfully proves that, then the defendant gets a *reduction in punishment*.

> ***"(b) where it is committed in repelling, during the daytime, 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;"***
>
> **Art. 227** of the *Criminal Code of Malta (cont'd)*

This relates to Art. 223 of Actual Necessity when committing a crime. In the instance stipulated above, one notices the importance shed on the time of day – as certain important factors may differ greatly according to what time a crime is commissioned (ex. the amount of light, the chances of bystanders roaming around, etc.). Therefore, if a homeowner kills a person breaching his home at night, his actions will be *justified*; whereas if the same action was to be committed during the day, he will be *excused* (as long as any other necessary prerequisites are satisfied).

"(c) where it is committed by any person acting under the <u>first transport of a sudden passion or mental excitement</u> 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;"

Art. 227 of the *Criminal Code of Malta (cont'd)*

This section refers to instances wherein one acts upon the **first transport of emotions he or she feels**. Therefore, after the cooling period succeeding the first transport of emotions ensues, one is rendered incapable of pleading not guilty under the defence of Crime of Sudden Passion.

As a result of mental excitement caused by sudden passion, the law here speaks of the extreme emotion one experiences in an excitable moment. Thus, a person acts upon the first transport of this exciting passion, and hence becomes incapable of reflecting upon it.

The incapability to reflect refers to situations wherein a person becomes gripped tightly under a sudden rush of heated blood which renders said person incapable of foreseeing the consequences brought about by the actions he commits in response to this rush of excitement. However, the intent to kill may still be active. The difference here is that, in such a hypothetical example, there existed no intent to kill prior to the heated rush of emotions; therefore, the decision to kill was established by the first transport of sudden passion, also rendering the perpetrator incapable of reflecting on the consequences of his action – the killing. **The action is deliberate, but lacks premeditation and the foresight of the consequences brought about by the action itself**.

The "reasonable man" is he who lays down an objective threshold. However, this objective man could possess certain subjective elements (such as a concealed degree of misogyny). But other elements, such as age and education, must be taken into consideration. **Ergo, the reasonable man creates an objective threshold**. Thus, the defendant must prove that the reasonable man would have acted similarly/the same in such a heated moment spurred by the first transport of emotions.

And this is why an act of wilful homicide is rendered *excused* under the defence of 'Crime of Passion' under Art. 227 of the Criminal Code of Malta.

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

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."

Art. 227 of the *Criminal Code of Malta (cont'd)*

When acting in an **exceeding limit of self-defence** stipulated by the law, an authority, or the nature of necessity itself, a person is awarded an excused punishment.

Here, the proviso is VERY important to note. Genuine fear or fright may constitute an exceeding of the limits imposed by law; and in this case, **one's actions while taken unawares, or to fear or fright, shall not be awarded any punishment at all**.

Complicity

When an offence requires more than one person to be consummated, complicity takes place. The ***autore*** is the person who commits the ultimate *actus reus* constituting the offence, and the ***co-autori*** are those persons aiding the *autore* in committing the offence in question.

"A person shall be deemed to be an accomplice in a crime if he –

(a) commands another to commit the crime; or

(b) instigates the commission of the crime by means of bribes, promises, threats, machinations, or culpable devices, or by abuse of authority or power, or gives instructions for the commission of the crime; or

(c) procures the weapons, instruments or other means used in the commission of the crime, knowing that they are to be so used; or

(d) not being one of the persons mentioned in paragraphs (a), (b) and (c), in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed; or

(e) incites or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact."

Art. 42 of the *Criminal Code of Malta*

The most important factor which determines who falls under the category of 'accomplice' is **common design** – which is the common intent upon which the aid was given in the first place.

If Party A gives a knife to Party B for him cut a piece of meat, and Party B kills Party C with the knife Party A gave him, that does not render Party A an accomplice. However, if Party A gives the knife to Party B for the sole intention of killing Party C, then Party A becomes the *co-autore* (and Party B would thus be the *autore*).

In '**The Police vs Carmelo Agius (2002)**', the defendant was accused with being the co-author to a violent offence committed by other parties against a particular victim by being present during the commission of the crime. However, it turned out that Agius did not know the brutal intention of the aggressors when accompanying them to the *locus delicti* (scene of the crime); therefore, the court ruled out that mere presence on its own does not equate to complicity.

An accomplice must contribute to the commission of a crime, at least to a certain extent, for him to be labelled as a *co-autore*.

Complicity by **Moral Participation**:

> **"A person shall be deemed to be an <u>accomplice</u> in a crime if he –**
>
> **(a) <u>commands</u> another to commit the crime"**
>
> **Art. 42** of the *Criminal Code of Malta*

To have complicity by mandate (authority), there are 3 steps one must satisfy:

1. The **Order**
2. The **Acceptance** of the Order
3. The **Execution** of the Order

Therefore, if a person refuses an Order, complicity cannot be identified. And if a person accepts an Order, but fails to consummate the Order itself, then the person being ordered cannot be subjected to criminal liability – as long as the circumstances one finds himself are not punishable for conspiracy. Naturally, if a third-party refuses an Order, and the execution of the crime is carried out by the person who, initially, sent out the Order, then it is the person ordering that is criminally liable for the offence.

> **"(b) <u>instigates</u> the commission of the crime by means of <u>bribes</u>, <u>promises</u>, <u>threats</u>, <u>machinations</u>, or <u>culpable devices</u>, or by <u>abuse of authority</u> or power, or <u>gives instructions for the commission of the crime</u>"**
>
> **Art. 42** of the *Criminal Code of Malta*

It is important to note that instigation which is alien to "promises" or "threats" is NOT enough to classify oneself as an accomplice. And naturally, the "promises" or "threats" one employs in order to persuade a third-party into contributing to the commissioning of a crime must be realistic and possible to achieve. An empty promise/threat is as menacing as a toothless lion.

> **"(e) <u>incites</u> or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact."**
>
> **Art. 42** of the *Criminal Code of Malta*

The main difference between provisions (e) and (b) is that here, the intention behind the incitement is that of removing all possible doubts lingering in the mind of the would-be *autore* as to whether or not he should commit the crime.

Complicity by **Physical Participation**:

Once again, there are 3 prerequisites one must satisfy in order for him/her to be rendered an accomplice through physical participation:

1. **Consciousness** of the offence planned and intended by the *autore*, and thus, intention in aiding the *autore* to execute the crime.
2. Accomplice conforms with the **Common Design** shared with the *autore*.
3. The act of the accomplice directly **aids** the commission of the crime.

"(c) procures the weapons, instruments or other means used in the commission of the crime, knowing that they are to be so used"

Again, let us observe the aforementioned 'knife' scenario. If Party A gives a knife to Party B for him cut a piece of meat, and Party B kills Party C with the knife Party A gave him, that does not render Party A an accomplice – *because Party A does not satisfy requirements 2 and 3 mentioned above*. However, if Party A gives the knife to Party B for the sole intention of killing Party C, then Party A becomes the *co-autore* (and Party B would thus be the *autore*) – *because now, Party A satisfies all three requirements stipulated above.*

"(d) not being one of the persons mentioned in paragraphs (a), (b) and (c), in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed"

The three requirements mentioned above are also applicable here.

Moving on, it is important to observe that **complicity cannot exist in offences that have not been consummated, or at least attempted**. Therefore, one cannot be an accomplice to an offence which has not yet materialised.

Also, if a person commits an act in hopes of aiding in the commissioning of a crime, BUT the aiding act in question does not prove to be effective, then the person committing the aiding act cannot be charged with complicity – because, at the end of the day, the offence was consummated regardless of the aiding act (which proved to be inefficacious).

Carrara gives us the following example: Party A abets Party B into killing Party C using poison. Party A thus procures a dose of cyanide for Party B, very capable of killing Party C. However, Party B kills Party C with a knife, rather than with the cyanide procured by Party A. Therefore, Party A cannot be found to be criminally liable.

However, a punishable attempt may still beget accomplices; because there still existed certain persons who contributed to the attempt in question. Moreover, it logically connotes the fact that if the *autore* fails in executing the final stages of the crime, then the accomplice/s also benefit from such failure.

However, if the *autore* voluntarily desists the commissioning of a crime, then does his or her accomplice/s also benefit from such volitional desistance? Jurist **Impallomeni** believes that if the *autore* voluntarily desists the commission of a criminal offence, then both him *and* the accomplice are rendered exempt from criminal liability. However, Carrara stipulates that the accomplice should still be held criminally liable for the attempt – *as the voluntary desistance of the autore thus becomes an accidental cause not borne of the will of the accomplice*.

NB: Malta follows Carrara's doctrine.

Carrara also adds that when the act of complicity comprises of instigation/incitement, the accomplice may abscond from criminal liability as he would thus have the chance of changing his mind and voluntarily desisting his actions (which have possibly aided or have yet to aid the *autore*) – as long as this is done in good time. However, if the accomplice has aided the *autore* in ways that are now permanent and unchangeable (such as the procuring of ideas and instructions), then the accomplice may still be charged with complicity regardless of whether he gets a change of heart.

Complicity cannot be accurately identified in involuntary offences – as involuntary offences bear no *mens rea*.

Similarly, it is a popular notion that **complicity cannot be accurately identified in crimes of sudden passion** – as crimes of sudden passion are unplanned and may thus bear no possible common design. **However**, a possible rebuttal to this may be that persons may, in the first transport of emotions, be quick at forming a sudden common design.

Complicity may be present in an act of omission, as long as the act of omission is one borne of common design. For instance, if a bank security guard intentionally leaves the door open for his fellow robbers to enter the bank and steal the money, then such an act of omission (not exerting force on the door in order to close it) renders one an accomplice.

After an offence has been committed, no new accomplice linked to that offence may be identified. For instance, if Party A steals an item, tells Party B about what he has done, and Party B agrees to safeguard the stolen item for Party A, then Party B is still not considered to be an accomplice in the theft; because complicity would have only been possible had Party B offered his assistance before the consummation of the offence.

Punishing Complicity

The punishment for an offence committed by a multitude of complying persons is not divided between the persons convicted of the crime, but is rather multiplied for each and every single convict.

> **"Where two or more persons take part in the commission of a crime, any act committed by any of such persons, whether he be a principal or an accomplice, which may aggravate the crime, shall only be imputable –**
>
> **(a) to the person who commits the act;**
>
> **(b) to the person with whose previous knowledge the act is committed; and**
>
> **(c) to the person who, being aware of the act at the moment of its commission, and having the power to prevent it, does not do so."**
>
> **Art. 45** of the *Criminal Code of Malta*

Therefore, Art. 45 asserts that each accomplice answers to his portion of guilty contributing to the offence.

Complicity may also occur in contraventions.

Conspiracy

Conspiracy is the planning or agreement to commit a crime between parties, which is a notion stemming from UK common law.

Conspiracy comes from a jurisdiction which does not base itself on Carrara's theory; therefore the notion of having a *mens rea* and an *actus reus* in order for criminal liability to apply to persons conspiring to commit an offence becomes difficult to grasp – because in this instance, the *mens rea* and the *actus reus* may be hard to discern.

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

"(1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.

In Malta therefore, any conspiracy linked to crimes punishable by imprisonment are subject to criminal liability.

(2) The conspiracy referred to in sub article (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons.

Fundamentally, the conspired offence need not be consummated for the conspirators to be found guilty of the crime of conspiracy. The law strives to punish the conspirators for the damage/harm that would be incurred were their conspired plan have been actually executed.

(3) Any person found guilty of conspiracy under this article shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.

(4) For the purposes of sub article (3), in the determination of the punishment for the completed offence object of the conspiracy account shall be had of any circumstances aggravating that offence."

Art. 48A of the *Criminal Code of Malta*

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

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

2. **Persons agreeing**: for conspiracy to take place, at least a party of two or more persons must take shape. However, the conspirators need not have a prior-established relationship with each other. For instance, in 1943, **Carmelo Borg Pisani** was accused with conspiring with members of the Italian regime to overthrow the government. To this, Borg Pisani argued that he did not know the members of the Italian regime (the co-conspirators), therefore, he asserted that he was not, in essence, conspiring. However, the court decided that one need not know his or her co-conspirators on a personal level to form a conspiracy.
3. **Purpose agreed upon**: as stipulated in Art. 48A, the purpose agreed upon must be liable to imprisonment. One cannot be charged with conspiracy if the plan or crime he or she is allegedly conspiring to commit does not yield a character punishable by imprisonment. Therefore for instance, one cannot conspire to commit a contravention.
4. **The *Modus Operandi* (agreement on plan of action)**: this appertains to the *mens rea* behind the offence. In English Common Law, conspiracy becomes present once the co-conspirator's agreement and determination to commit the crime is successfully proven. Therefore, there isn't much reference to the *modus operandi* (mode of operation). In Maltese law however, the prosecution must prove the agreement and determination of the co-conspirators to commit the crime, AND the *modus operandi* agreed upon by the conspirators. Put simply, this *modus operandi* is a detailed plan of action, describing every step of when, how, where and when the offence conspired will take place. And a simple agreement on this *modus operandi* is the final box needed to be ticked in order for persons to be charged with conspiracy. Moreover, the agreed-upon *modus operandi* must be fulfillable for it to be successfully conspired upon.

Proving an abstract notion such as conspiracy can be a hard nut to crack. Normally, plans of conspiracy are drawn out from confessions, eyewitnesses, and other types of evidence (such as video tapes and voice recordings).

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

In '**The Republic vs Steven John Lewis Marsden (2009)**', the accused was arrested for possessing narcotic pills. However, the pills in question were not ecstasy, and were thus, not illegal in the eyes of the laws of Malta. Therefore, Marsden could not be charged with drug trafficking (and nor for the attempt of it). The court then decreed that for Marsden to be convicted of conspiring to import illegal pills, the prosecution had to prove beyond reasonable doubt that Marsden was in agreement with one or more persons to bring narcotics into Malta in order for them to import the pills someplace else. Moreover, as the pills in question were

not even illegal in Malta, the court asserted that the prosecution had to also prove that, on top of having the accused co-conspire with another person, the other person in question had the intention of important illegal drugs in mind.

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

Ultimately, a person convicted of conspiracy shall face the punishment of the conspired offence, albeit decreased by two or three degrees (depending on the discretion of the court).

Punishment

Punishment is the loss of a right or liberty (ex. *imprisonment*). However, less severe strains of punishment do not necessarily connote a loss of liberty (ex. *fines*). Fundamentally, criminal law strives to reduce undesirable behaviour and promote respect towards the law through threats of sanction and punishment.

The **Retributive Theory of Punishment** is derived from Roman culture; supporting the old *'eye for an eye, tooth for a tooth'* adage. Therefore, this theory advocates the notion of retributive balance within a society – punishing transgressors in adequate and relative proportion with the offence they committed.

The **Utilitarian Theory of Punishment** argues that crime must be mitigated for the sake of common good. Thus, this is achieved through 3 ingredients:

1. **Policing** – having an efficacious department for law enforcement.
2. **Deterrance** – the discouraging of persons from committing an offence through three ways:
    - ***Individual***: discouraging a person from committing a crime ever again.
    - ***General***: discouraging mentally concurring persons from committing a crime.
    - ***Long-Term***: teaching persons that committing crimes is undesirable.
3. **Reform** – having a formulated framework for the rehabilitation of offenders, rather than just awarding them with punishment such as imprisonment. Therefore, even if an offender is imprisoned, he will gain from a rehabilitation program which intends on bettering his holistic behaviour. Hence why the term 'prison' has nowadays lost first-place popularity to the alternative term 'correctional facility'.

Malta also brandishes other forms of punishment, such as **probation orders** and **suspended sentences**.

For instance, in '**The Police vs George Zammit**', the courts decided that it would be unfair to punish the accused without giving him ample opportunity for re-integration into society; and that is how punishments such as the suspended sentence offer a second chance for certain offenders.

Art. 7 of the Criminal Code of Malta stipulates the forms of punishment each crime and contravention is liable to. Generally, crimes are punishable by imprisonment, fines (multa), solitary confinement, and interdiction; whereas contraventions are punishable by detention, fines (ammenda), and reprimands.

Imprisonment (Art. 8): time period in prison depends on the seriousness of the offence.

Solitary Confinement (Art. 9): the confining of persons within a confined space, all by their lonesome. No period of solitary confinement may exceed that of 10 continuous days; and from one punishment of solitary confinement to another, there must be a time gap of at least 2 months. Persons subjected to solitary confinement must first be medically inspected in order for the court to ensure that the offender is capable of withstanding such a penalty.

Interdiction (Art. 10): prohibiting an offender from partaking in certain social activities (such as formulating public contracts). General interdiction may also prohibit oneself from employment. Interdiction may either be permanent or temporary (with a maximum temporary period of 5 years).

Detention (Art. 12): detainment in prison for not more than 12 months. The person detained is not considered to be imprisoned.

Fine (**multa**): hovers between €23.29 – €1,164.69.

Fine (**ammenda**): hovers between €6.99 – €58.23.

Not paying a multa may lead to imprisonment; calculated as 1 day imprisonment for every €11.65 that go unpaid. The maximum term of imprisonment when not paying a multa is that of 2 years.

Not paying an ammenda may lead to detention; also calculated as 1 day imprisonment for every €11.65 that go unpaid. Detention due to an unpaid ammenda may not exceed 1 month.

Multas and ammendas may also be permitted by court to be paid in instalments.

Reprimand (Art. 15): a rebuking given to an offender by a judge or magistrate in an open court. An offender who shows contempt during a reprimand or admonition may be liable to earning a detention period or a fine (ammenda).

Recidivism

A **recidivist** is a convicted criminal who, after being convicted for the first time, commits another crime.

> **"A person is deemed to be a recidivist if, after being sentenced for any offence by a judgement, even when delivered by a foreign court, which has become *res iudicata*, he commits another offence."**
>
> **Art. 49** of the *Criminal Code of Malta*

Jurists **Carminiani** and **Pessina** argue that recidivists should NOT be awarded harsher penalties upon re-offending; as they would have justly served their prior sentence – which is linked to an offence distinct from the offence committed now.

Jurists **Carrara** and **Impallomeni** however, believe that recidivism is a grave offence, owing to the simple fact that the offender was not affected by prior punishments, and kept committing atrocious acts after serving his/her sentence, nonetheless.

> **"Where a person sentenced for a crime shall, within ten years from the date of the expiration or remission of the punishment, if the term of such punishment be over five years, OR within five years, in all other cases, commit another crime, he may be sentenced to a punishment higher by one degree than the punishment established for such other crime."**
>
> **Art. 50** of the *Criminal Code of Malta*

This article lists the requirements needed for a recidivist to be liable for a more severe punishment. Therefore, there is a time limit of 10 years for prison sentences of 5+ years, and a time limit of 5 years for prison sentences of less than 5 years. For contraventions, the limit is that of 3 months within the expiration of the punishment; if those 3 months are breached, then the recidivist may be subject to being awarded detention for not more than 2 months, a multa, or a prison sentence for not more than 1 month.

> **"For the purposes of the provisions contained in the foregoing articles of this Title, any sentence in respect of any crime committed through imprudence or negligence, or through unskilfulness in the exercise of any art or profession, or through non-observance of regulations, shall not be taken into account in awarding punishment for any other crime, and vice versa."**
>
> **Art. 52** of the *Criminal Code of Malta*

This article stipulates that a person shall not be labelled a recidivist if he commits an *involuntary* crime after the expiration of a prior sentence.

The Suspended Sentence

In a suspended sentence, a transgressor is awarded a sentence of whose nature has not been executed *yet*. This impinges one's chances for employment, as even if the offender is not really in prison, it is, *on paper*, stipulated that the offender in question was actually imprisoned. Therefore, it is quite as if one is imprisoned out of prison. A person suffering from a suspended sentence has recorded jail time in his or her criminal record.

A sentence exceeding the time period of 2 years may NOT be suspended.

In a suspended sentence, the offender knows what the sentence is. Therefore, is the offender breaches a condition imposed on him by the court, the suspended sentence becomes executable, and the offender receives the full blow of the sentence he already knew he had (ex. he/she would go to prison once the conditions of his suspended jail-time are breached). Conversely, in a **probation order**, the offender does not know what his punishment/sentence is.

Ultimately, a court is never obliged to award a suspended sentence instead of an executable sentence. Therefore, a suspended sentence is not a right. Suspended sentences cannot be given in situations wherein imprisonment is awarded for people who fail at paying any stipulated fines, when already serving a prison sentence, when the offender is a recidivist, and when an offence is committed during a probation period.

When a suspended sentence exceeds a time period of 6 months, the offender awarded the suspended sentence may become liable to having a supervisor keep a keen eye on him/her.

When being awarded a suspended sentence, the court may order the offender to remedy the injured party.

The **probation period** is the period of time wherein an offender is re-released into society, exactly after the extinction of the offender's sentence. In a **Probation Order**, the court may assign a supervisor to ensure that an released offender behaves desirably. This period of supervision cannot be less than 1 year, and may not exceed 3 years. In an ideal world, a re-released offender and his/her supervisor form a respectable bond between them, wherein the supervising officer gently educates the ex-convict on how to leave a worthy life amongst other persons in a functional society.

Limitations by Time

There has been much controversy with regards to what happens to criminal cases that are still not finalised when certain legislation appurtenant to them changes. The most important principle of law through time, however, is that **substantive criminal law may never be applied retrospectively** (***lex non habet oculus retro***).

Laws and amendments come into force once the head of state gives his assent through signature. Thus, the legislation in question becomes published in the Government Gazette – exhibited for everyone's eyes to swallow.

Ultimately, there are two types of amendments to criminal laws that might take place:

Procedural Amendments: come into effect immediately (***ex-nunc***).

Substantive Amendments: if these amendments are more favourable to the accused, then they are applied. If they are not however, then they are not applied.

Recently in Malta, a bill was published regarding persons being held in preventive custody who submit themselves to self-inflicted hunger strikes. One of the Degiorgio brothers, who allegedly carried out a hit on journalist Daphne Caruana Galizia in 2017, went on a self-inflicted hunger strike in order to delay court proceedings. The main aim behind this was to trigger the procedural protocol that if a trial by jury does not take place 20 months after the moment of indictment, then the accused reserves the right of being granted bail. But the aforementioned bill tackled this loophole by stating that if a trial by jury cannot take place due to reasons borne of self-infliction (such as hunger-strikes), then the accused shall NOT reserve the right of being granted bail – even 20 months after the initial moment of indictment.

If a new law comes into conflict with a law enacted prior, then the new law is that which is applied (***lex posterior derogat priori***).

The principle of ***res iudicata*** asserts that finalised cases cannot be reopened again, even if legislation appertaining to them has changed. Thus, this administers an admirable amount of fairness between judgements, and mitigates any possible occurrences of *antinomia* between judgements.

> ***"If the punishment provided by the law in force at the time of the trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded."***
>
> **Art. 27** of the *Criminal Code of Malta*

However, the law does not necessarily cater for pending criminal cases. Therefore, one can argue that if the criminal offence one is charged with gets repealed, then the offence in question must not be punished.

In '**The Police vs Agostino Bugeja (1920)**', Bugeja's offence was repealed from the Criminal Code while the case was still open, so his lawyer asserted that his client be rightly acquitted. The court thus abided by the above Art. 27, and awarded Bugeja the least severe punishment to Bugeja (which equated to no punishment at all).

Nowadays however, **Art. 12** of the *Interpretation Act of Malta* asserts that if the punishment for an offence committed at a specific moment in time in the past gets repealed, the accused still faces the punishment stipulated in the law prior to any new amendments to it; and rightly so, because a transgression committed in the past is a transgression against persons or the state itself, regardless of whether or not that transgression may not be regarded to be of such an offensive character *at present times*.

As a general principle, criminal procedure applicable at the time of the trial is that which is applied, irrespective of whether or not the procedure applicable is that which is the most favourable for the defendant. Applying criminal procedure retrospectively would connote an infringement of the basic human rights of the defendant.

When heeding **Roman law**, it can be observed that the Romans abided by the tenet that law provides for the future; and with particular reference to criminal liability, **Ulpian decrees that offences should not be subjected to the punishment imposed by the law in force *at the time of the trial*, but to the punishment prescribed by the law in force *at the time of the commission/omission of the offence*.**

Therefore, one can draw out two conjectures from the above:

1. That if the law against which the offence was committed **gets repealed while the proceedings are still pending**, then such proceedings "fall to the ground", and no sentence against the accused can be issued. Therefore, if a man is tried, and Parliament repeals the criminal nature of the action upon which he stands charged, there thus lingers no further justification as to why the courts should inflict punishment upon him.
2. That if the law against which the offence was committed is **subsequently amended** or changed insofar that although the act is still criminal, the punishments or the conditions of liability become varied (for better or worse), then the *communis opinio* is that the offender should be dealt with according to the law more favourable to him (**Art. 27** of the *Criminal Code*).

In '**The Republic of Malta vs Ravi Ramani (1989)**', the defendant was accused of offences appertaining to narcotics. However, during the proceedings of the case, corroboration regarding evidence appurtenant to offences linked to narcotics was no longer necessary (*sine qua non*). Therefore, the defendant's attorney argued that the amendment could not apply retrospectively. However, the court dismissed this argument and proceeded to apply the procedural amendment in force at the time of the trial (not the alleged crime). Ramani was then found guilty.

Ultimately, **Art. 7** of the **ECHR** stipulates that no person can be punished more harshly than how he would have been punished at the time of the commission or omission of the crime.

Limitations by Territory

The upcoming theories regarding territory and jurisdiction mainly fall under a **Realpolitik** school of thought, which appeals to realism and pragmatism.

The Territorial Theory

> ***"The aim of punishment is not to undo the harm, neither to cripple a human being."***
>
> Cesare Beccaria

The Realpolitik stance appertaining to territoriality asserts that the **criminal jurisprudence of a state should be, without exception, exclusively territorial**. Therefore, the place of punishment should be the same as the place wherein the commission or omission of the offence occurred. This theory is the most traditional in nature.

> ***"Save as hereinafter provided, the breadth of the territorial waters of Malta shall be twelve nautical miles".***
>
> **Art. 3** of the *Territorial and Contiguous Zone Act of Malta*

In Malta, territory extends as far as twelve nautical miles offshore. A person lingering beyond those limits thus lingers outside Maltese territory.

> ***"If any act is committed outside Malta which, had it been committed in Malta, would have constituted an offence against the provisions of this Sub-title, it shall, if the commission affects any computer, software, data or supporting documentation which is situated in Malta or is in any way linked or connected to a computer in Malta, be deemed to have been committed in Malta."***
>
> **Art. 337E** of the *Criminal Code of Malta*

An **extraterritorial offence** is one which happens *outside* of Malta, but it nonetheless infringes the rights or safety of the state. Thus, such a crime will be deemed as if it had been committed within the territories of Malta (as stipulated in the provision below).

The Personal Theory of Jurisdiction

This theory declares that **each state has a right to the obedience of its own subjects, wherever they may be.** Thus, it necessarily follows that a subject may only be tried once he is **extradited** back to his own country; but the possibility of being tried in absence is still on the table – as long as the trial is held within the nation possessing jurisdiction of the offender in question.

NB: Trials in absentia do not take place in Malta.

This Personal Theory of Jurisdiction is subdivided into two aspects, depending to whether the citizen in question is the *offender* or the *victim*:

1. **The Active Nationality Principle**: through this principle, a state assumes jurisdiction in order to punish its nationals for crimes committed anywhere. Thus, this connotes an exercise of the sovereignty of the state. The state has the duty of protecting all its nationals – even when they are abroad – as any wrongdoing committed against them is regarded as a wrongdoing committed against the state they belong to. In turn, a national is imposed with the duty of conforming with the laws of his nation, wherever he or she might voyage to. And if the national violates such standards, then he or she would thus also be committing a wrong against his *own* state. Therefore, according to this theory, the country state of a perpetrator has every right to award the offender in question with adequate punishment – even if the effects of such an offence are not necessarily felt within the national's country (***Lex locus delicti***).

Quid pro quo – the national, wherever he or she may go, has the duty of respecting the laws of the state he or she is in.

2. **The Passive Nationality Principle**: this principle is solely based on the qualities of the person who suffers the wrongs (the victim). The state thus has the duty of protecting its nationals from any offences suffered by them – even if they are found dwelling outside their country; because any wrong imposed upon them becomes considered as thus also being imposed upon the state the victim is endemic to.

"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."

Art. 211 of the *Criminal Code of Malta*

Double Jeopardy (***ne bis in idem***): **the notion that one cannot be tried twice for the same offence**. However, can a person be tried twice for the same *fact*? Because realistically speaking, the same fact can give rise to more than one offence.

> ***"Where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact."***
>
> **Art. 527** of the *Criminal Code of Malta*

To tackle the query of Double Jeopardy, let us take the hijacking incident of Ali Rezaq.

In 1985, an EgyptAir airplane got hijacked by a gang of terrorists led by Ali Rezaq. The plane was landed in Malta, and the terrorists held the passengers aboard the plane hostage. The terrorists started listing certain demands, and every half hour, a hostage was shot – their lifeless cadavers being ejected from the emergency side-door and unto the runway.

As time passed, Egyptian military had arrived in Malta, and started handling the situation alongside the Maltese military task force. But one of the most important things to note is that before the Egyptian commandos started attacking the plane with hand grenades, two Americans were shot and killed.

Ultimately, Ali Rezaq was arrested and tried before a jury in 1988. But at that time, Malta did not have any laws appurtenant to the offence of hijacking, and therefore, a life sentence in prison could not be awarded. Therefore, Ali Rezaq was given the maximum punishment possible at that time: 25 years imprisonment.

To make matters better for Rezaq (and worse for the victims), during his preventive custody detainment in 1987, a Presidential Proclaim was published in the Government Gazette – which bequeathed an amnesty to all prisoners. Moreover, this 1987 amnesty was of a very particular nature, stipulating that even persons held in preventive custody would benefit from it. Therefore, whoever was answering to a sentence with regards to homicide, the prospective penalty was to depreciate by one degree. Therefore, from 25 years maximum imprisonment, Ali's prospective sentence was reduced to 15 years.

While all this was happening, the United States of America were steadfast on their suggestion that they take care of legal proceedings – due to the fact that two American citizens were killed in the commotion. Thus, one may only imagine the enragement suffered by the Americans when news of this amnesty spread.

And in fact, 6 years later in 1993, Ali Rezaq was liberated from prison after having benefitted from the 1987 amnesty AND the rule of remission.

The Americans went ballistic.

When Ali Rezaq was freed, the first thing he did was board a plane headed towards Ghana. To this, the Americans made an agreement with the government of Ghana – shaking their hands over the plan that when Ali Rezaq was to land in Ghana, he was to be escorted by FBI agents already situated in the plane Ali Rezaq boarded.

And their plan functioned like clockwork. Rezaq's fingerprints were taken, and he was thus escorted towards a private CIA airplane already waiting for him in Ghana. While the plane was journeying its way towards the US, a criminal trial by jury took place in his absence, ultimately determining Rezaq to be guilty of hijacking an airplane and committing the homicide of two American nationals. Ali Rezaq was thus sentenced to full life imprisonment.

Ali Rezaq's attorney refused to recognise the authority of the American court, as his sentenced had already been issued six years prior in Malta. However, the American courts asserted that Ali was now being tried for a different criminal offence than the one he was tried for in Malta. And this is how the defence of double jeopardy fell flat.

Self-Preservation Theory/Quasi-Territorial Theory:

Societies have evolved into more complex phenomena, and transport for persons has definitely become much more accessible. Therefore, how is jurisdiction applied when people are in transit between one country and another?

This Quasi-Territorial theory suggests that if an offence occurs on, say, a vessel lingering outside its native territory, the offence in question will answer to the state to which the vessel it occurred upon belongs to.

> ***"…against any person who commits an offence on the sea beyond such limits on board any ship or vessel belonging to Malta".***
>
> **Art. 5 (b)** of the *Criminal Code of Malta*

For instance, if an offence is committed on a Maltese maritime vessel outside the jurisdiction of Maltese waters, Maltese jurisdiction still applies – because the maritime vessel belonged to the sovereign state of Malta. However, it is not uncommon for the state to which the vessel belongs to and the state governing the territory in which the offence was committed to converse between them and discuss on who will judge the offender.

> ***"…against any person who commits an offence on board any aircraft while it is within the air space of Malta or on board any aircraft belonging to Malta wherever it may be."***
>
> **Art. 5 (c)** of the *Criminal Code of Malta*

The term 'aircraft' is defined in the Civil Aviation Security Act of Malta:

> ***"...aircraft" means any aircraft, whether or not a Maltese controlled aircraft, other than –***
>
> ***(a) a military aircraft; or***
>
> ***(b) an aircraft which, not being a military aircraft, belongs to or is exclusively employed in the service of the Government of Malta for customs or police purposes;***
>
> **Art. 2** of the *Civil Aviation Security Act of Malta*

Ultimately, the Civil Aviation Security Act caters for situations in which offences aboard vessels NOT registered under the state of Malta still befall Maltese jurisdiction:

> ***"In exercising its jurisdiction over offences committed on board an aircraft, when Malta is <u>not</u> the State of registration, action over an aircraft in flight can only be taken in any of the following circumstances:***
>
> ***(a) the offence has <u>effect on the Maltese territory</u>;***
>
> ***(b) the offence has been <u>committed by or against a Maltese national or permanent resident</u>;***
>
> ***(c) the offence is <u>one against the security of Malta</u>;***
>
> ***(d) the offence consists of a <u>breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in Malta</u>;***
>
> **Art. 5A** of the *Civil Aviation Security Act of Malta*

<u>The Cosmopolitan Theory of Jurisdiction</u>

This theory looks at the ***forum deprehensionis***, connoting the idea that each and every state has the right to punish any criminal who may pass through its territory. A criminal offence is a criminal offence everywhere; therefore the notion of refuge becomes illusory. It is the duty of all states to help each other in the maintenance of the universal law of order. This theory gained massive popularity when pirates plagued the seas, but nowadays, this theory can be applied to all crimes, and not solely that of piracy. The main snag of this theory, however, is that it maintains a utopic character… and reality is always worlds afar from utopia.

Ultimately, theories regarding jurisdiction all give rise to whether an offender may or should be **extradited** to other jurisdictions in order for him or her to be judged upon.

Extradition

'**Extradition**' refers to the act performed by a particular state whereby an alleged offender is physically transported to another territory/jurisdiction for him/her to be adequately punished.

For instance, according to the Territorial Theory, an alleged offender bearing foreign citizenship need not necessarily be extradited back to his homeland in order for him/her to be punished – as a criminal answers to the laws of the land in which he committed his crime.

However, the inherent concept of extradition also preserves the rights of the person being extradited; as this ensures that he answers to a criminal court abiding by the mere essence of human rights, thus mitigating the possibilities of having a person being subjected to courts presided by foreign states unacquainted with certain human rights principles (such as the ECHR).

There are two methods which serve as a demarcating line for offences worthy of extradition:

1. The **Enumerative Method**: this method simply lists all offences liable to extradition. However, this method is heavily criticisable as certain offences may bear different criteria depending on which country one views them from. Therefore, the possibility for double jeopardy becomes conceivable.
2. The **Eliminative Method**: this method distinguishes extraditable offences through the possible punishment set by the requested or requesting state. Thus, an offence which exceeds the minimum threshold set by a state becomes extraditable.

Art. 5 of the Criminal Code of Malta stipulates that, within Commonwealth countries, only those offences that satisfy the following are extraditable:

- Asserted in the domestic Enumerative list of Malta.
- Beckon a sentence of less than 12 months in the requested state.

Art. 5 of the Criminal Code of Malta also declares that only those crimes that are illegal in both the requesting state and the state wherein the crime was commissioned become extraditable (***nulla pena sine lege*** – there is no crime without law).

In '**The Police vs Fatiah Khallouf (2001)**', the defendant was charged with conspiracy – a crime not catered for in Maltese legislation. Therefore, the request for the accused to be extradited from Maltese soil was aptly denied.

In '**The Police vs Anthony Satariano (1997)**', the defendant was charged with bank fraud both in Malta and the UK – therefore the request for the accused to be extradited was accepted.

In Art. 10 of the Extradition Act of Malta, one may find the **Rule of Speciality** – which asserts that an extradited person may only be tried in the state he is extradited to for the offence for which the request for extradition was initially made, for an offence of a less severe nature than the initial one, or for an offence of whose charges are greenlit by a minister of the state extradited to.

Possible exceptions to extradition include:

- **Political Offences** (also embedded in **Art. 43** of the ***Constitution***) – this is because the written law of Malta does not define a political offence; therefore, the courts are those that have to determine *objective political offences* (ex. against the state) and *relative political offences* (ex. against political events). British courts hold that political offences are those that incur political disturbance, whereas Swiss courts contend that the offence must be one committed against the government. **Murders of Heads of State** (**Art. 10** of the *Extradition Act*) are not necessarily considered to be of a political nature. **Acts of Terrorism** are also not considered to be necessarily political offences, because they are a crime against *mankind*.

- **Cases wherein the country requesting an offender to be extradited may hold racial, political, or personal prejudice against the offender in a court of law.**

- **Double Jeopardy** (***ne bis in idem***) – an exception to extradition is made when the state extraditing the person fears that the person being extradited will be subjected to double jeopardy in the state he/she is being extradited to; in which the perpetrator would be put to trial for facts arising from the same offence *twice* (ex: Ali Rezaq hijack case).
  CASE LAW – '**Il-Pulizija** vs ***Nikolai Magri***': the accused was charged with causing bodily harm unto a third party in a car accident, but was later on acquitted. However, the prosecution found it fitting to file another case for the same offence, shortly after Mr Magri was acquitted. Thus, the accused filed a human rights action, wherein the court ruled that this was an instance of double jeopardy, and thus compromised the fundamental human rights of the accused.

- **Death Penalty** – the refusal for extradition may occur when there is a possibility that the accused will face the death penalty in the state he or she is being extradited to. Generally, the state requesting extradition guarantees the state harbouring the accused that the perpetrator in question will not face the death penalty once he becomes extradited.

CASE LAW – '***Soering*** vs **the United Kingdom**': the US requested Soering to be extradited to from the UK, however, the UK acknowledged the fact that if they extradited Soering to the US, the accused would thus be facing treatment deemed to be inhuman in the eyes of the ECHR (a treaty signed by the UK). Thus, the UK refused to extradite the accused to the US.

- **Conviction in Absentia** – various laws and treaties deny the possibility of extradition of persons in absentia. Maltese criminal law (unlike Italy) does not allow a trial in absentia.

- **Prescription** – if the time limit given by law within which criminal action can be prosecuted elapses, then the possibility for prosecuting said criminal action becomes time-barred. Therefore, **Art. 11** of the *Extradition Act* gives Malta the option of denying extraditing persons if the offence in question becomes time barred.

- **Amnesty** – **Art. 11** of the *Extradition Act* also asserts that Malta may refuse an extradition request if amnesty (or presidential pardon) was granted to a perpetrator.

- **The Return of Nationals** – this pertains to the extradition of nationals back to their home country; which is unconstitutional in civil/continental countries, but allowed in common law states.

Ultimately, the ***aut dedere, aut judiciare*** maxim is a Latin phrase that means "extradite or prosecute." It is a principle in international criminal law that requires states to either surrender individuals accused of committing serious crimes to the jurisdiction of another state that seeks their extradition or to prosecute them in their own courts.

The principle is based on the idea that there should be no impunity for serious crimes such as war crimes, crimes against humanity, and genocide. The principle is codified in several international treaties, including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Rome Statute of the International Criminal Court.

Under the *aut dedere, aut judiciare* principle, states have an obligation to either **extradite** or **prosecute** individuals who are accused of serious crimes. **This principle aims to ensure that those who commit serious crimes do not escape justice and are held accountable for their actions.**

Rules of Interpretation

See also Cap. 249 of the Laws of Malta – the Interpretation Act

The Interpretation Act is the primary tool utilised in Parliament when a legal notice tabled by a minister is to be repealed or amended. The person wanting to repeal or amend said legal notice has to file a motion within 28 days.

Let us first understand the basics: every criminal penal law has 2 parts – the **Precept** (***preceptum legis***), and the **Sanction** (***sanctio legis***). In the Precept, a state prohibits the commission/omission of a specific act; and the Sanction is the punishment awarded to the person partaking in such a commission/omission. Therefore**, the form of punishment awarded by the courts must be one defined by the law itself**. The offence cannot attract a punishment higher or different from that expressed by the law itself (***optima est lex, quae minimum arbitrio iudicis relinquit*** *– that law is best which is left least to the discretion of the one applying it*).

> ***"The interpretation is the mental operation through which one searches for and explains the meaning of the law."***
>
> **Carrara**

Rules of legal interpretation are utilised to pinpoint the exact legal meaning of the written law; therefore, through these specific rules, people administering the word of the law may be thoroughly guided as to how one should decipher the underlying meaning between the written law's fine print.

Rules of interpretation seek to identify the ***ratio legis*** – which is the inherent meaning of the written law stipulated by the legislator when drafting the law in question. Without interpretation, we may never really know the true essence of what a law encompasses.

The **Objective Theory of Interpretation** holds that the will and intention of the legislator and the interpretation drawn out by a servant of the law (such as a judge) are of two completely distinct characters. Fundamentally, the **Literal Interpretation** drawn out from the exact wording of the law is that which is given the highest priority when employing this method of interpretation. Moreover, people upholding this theory assert that a person interpreting a specific provision should also give great heed to the inherent will and intention of the provision itself (the **Logical Interpretation**). However, this theory acknowledges the fact that sometimes, an enacted provision might outlive the legislator who promulgated it, therefore, one must follow the strict wording of the written law.

The **Subjective Theory of Interpretation** criticises the rigidity of the Objective theory and advocates for the exercise of variation and legal adaptability amongst different provisions. Realistically, this theory makes more sense as it disregards law's mathematical nature and embraces the fact that cases in a court of law are very dynamic – owing to the simple fact that persons and their emotions are all but mathematical in nature.

Moreover, the Subjective Theory of Interpretation is subdivided into **3 aspects**:

1. **The Doctrinal Interpretation**: this method describes the exercise of formulating an objective idea regarding the meaning of law based on the many colourful theories of jurists (ex. **Carrara**, **Blackstone**, **Smith & Hogan**, etc.).
2. **The Authentic Interpretation**: this method describes the interpretation supplemented by the legislative body. For instance, an Act of Parliament (the legislature) always has a definition section; and a definition stipulated by Parliament may overrule the 'obvious' meaning of the law. For instance, **Art. 5 of the *Criminal Code of Malta*** offers a precise and legal definition of objects such as "state or government facilities", "public transportation systems" and "permanent residents". The only means by which a definition stipulated in an Act promulgated by the legislature becomes invalid is if an express provision is deemed to run counter with the integrity of the Constitution.
3. **The Judicial Interpretation**: this method describes how courts of law (judges and magistrates) interpret the law brought before them. Therefore, the interpretation drawn out does not possess a universal nature, but becomes solely applicable to the case a judge or magistrate is presiding over. The doctrine of precedence also partakes in this method of interpretation, as one abiding by prior judgements and case law thus also gives great priority to judicial interpretations made to past cases which might be of a similar nature to cases still open today (note that Malta does not follow a legally binding doctrine of precedence). **Manzini** makes an observation here, stating that although this method of interpretation may cause a certain degree of incoherence between judgements, it nonetheless lets judges and magistrates retain a desirable crumb of independence when carrying out judgements.

In case of doubt (***in dubio pro reo***), **the doubt must favour the accused**; as long as the doubt incurred is espoused by ***buon sens*** – meaning that it is reasonable, and not capricious.

In certain cases, provisions do not succeed at drawing out a definite denotation of a word or term. In such circumstances therefore, **Declaratory Interpretations** come to one's aid, assuming two different forms – **Narrow** and **Wide**.

Both types of interpretation are dependent on whether a judge deems a term in a provision worthy of being wide or narrow in its application. For instance, if a word or phrase affords being wide in its definition, then that is how a judge or magistrate will interpret its meaning. In '**Dyke vs Elliot (1872)**', the British court arrived at the conclusion that penal enactments must be interpreted through means embracing fairness; therefore, this case holds that interpretations must be narrow or wide according to which one encompasses the higher degree of fairness.

Extensive and **Restrictive Interpretations** must not be confused with the above Declaratory Interpretations. Extensive Interpretation acknowledges the fact that words and languages may be very capable of representing various meanings extraneous to the will and intention of the legislator. Conversely, Restrictive Interpretation solely concerns itself with the application of words capable of portraying a single and unaltering meaning.

Extensive interpretation is NOT used in criminal law; only Restrictive Interpretation is applied.

Carrara asserts that the letter of the law wants a specific action to be deemed as a crime (and thus, punishable), said act must NOT be punished (***nullum crimen sine lege, nulla pena sine lege***).

An interesting thing to note is that **in Cap.196 of the laws of Malta**, one may find laws forbidding acts of bigamy – however, there lies no specific prohibition with regards to polygamy. Authoritative authors have thus agreed however, that in this specific case, the word 'bigamy' also encompasses the acts of 'polygamy', thus incriminating the act of polygamy as well.

Interpretation by Analogy is NEVER used in criminal *penal* laws because it presupposes that the case at hand is not covered by a legal provision. By using analogies, one seeks to supply lacunae. Analogy is not as strictly prohibited in *procedural* criminal law.

CHECKPOINT

Criminal Penal Law = Precept (*preceptum legis*) + **Sanction** (*sanctio legis*)

Rules of Interpretation seek the ***ratio legis*** (inherent meaning of the written law).

Objective Theory of Interpretation: intention of legislator and interpreter are distinct:

- **Literal Interpretation** (most popular).
- **Logical Interpretation** (heeds the logically drawn-out intention of the legislator).

Subjective Theory of Interpretation (all for flexibility):

1. **Doctrinal Interpretation** (interpretation based on juristic doctrines).
2. **Authentic Interpretation** (heeding the 'definition section' of a promulgated law).
3. **Judicial Interpretation** (the personal interpretation of autonomic judges).

In dubio pro reo, the doubt must favour the accused.

Declaratory Interpretations may be **Narrow** or **Wide** when a judge interprets the ***words*** in a provision.

Extensive Interpretation: acknowledging that words might connote various meanings.

Restrictive Interpretation: restricting oneself to a single connotation of words in a provision.

Extensive interpretation is NOT used in criminal law; only Restrictive Interpretation is applied.

Interpretation by Analogy is NEVER used in criminal *penal* laws.

Latin Vernacular

Ignorantia juris neminem excusat: ignorance of the law is not an excuse.

Actus reus: the physical act of committing a crime.

Actus non facit reum nisi mens sit rea: the act is not culpable unless the mind is guilty.

Nemo iudex in causa propria: no one should be a judge in their own cause.

Audi alteram partem: let the other side be heard as well.

Dolus: malice/malintent.

Culpa: negligence from which damage ensues.

Casus: an event which justifies the occurrence of conflict, thus absolving oneself from criminal responsibility.

Nullum crimen sine lege: one may never be held criminally liable for actions not prohibited by the law.

Nulla pena sine lege: only the law can specify the punishment of a criminal offence.

Optima est lex quae minimum relinquit arbitrio iudicis: that law is best which leaves least to the discretion of the judge; that judge is best who leaves least to his own.

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