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PORNOGRAPHY & VILIFICATION OF RELIGION

LAW ADVANCEMENT AND POLICY CONSIDERATION

A POLICY PAPER BY ELSA MALTA'S
SOCIAL POLICY ORGANISING COMMITTEE

Opportunities Ahead in Social Policy

ELSA Malta would like to thank...

*Yet again our Legal & Social Policy Organizing Committee has amalgamated months of hard work, co-operation, planning & research to produce our second policy paper entitled '**Pornography & Vilification of Religion; Law advancement and policy consideration**'. This issue has long been discussed, and there also has been proposed specific legislation on this matter. We are proud to also be contributing on such a relevant issue.*

ELSA Malta remains committed to be pro-active on several important issues that have a social impact. We will be there voicing our opinion, proposing legislation and discussing ideas. This policy paper is a clear example. We believe that it is surely our duty, as a law student organisation to be relevant in today's society and keep up to date with new proposed legislation.

Many people are behind such a project, and without them this would surely not have been possible. Our thanks goes to:

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*On behalf of the ELSA Malta Social Policy Office, we hope that you enjoy reading our paper, take the time to evaluate our suggestions, and lastly to follow us and support us in our aim - to always be **#pro-active!***

Thank you.

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Introduction

The topics of pornography and vilification of religion are two very sensitive topics particularly due to the fact that the Maltese society has always had strong ties with the Roman Catholic Religion. Hence, both pornography and the vilification of religion were frowned upon without room for discussion. However, society is developing and is no longer centred on the Roman Catholic Religion in the fanatic way that previous generations were. A change in the mentality of a society brings about the need to update legislation and regulate certain matters that are becoming of an increasing concern.

Nowadays, the offences catered for by articles 163 and 164 of the Criminal Code dealing with the Vilification of Religion are nowadays no longer as vital as they were when they were first implemented. Furthermore, a different perception was taken through Bill 113 of 2015 in which one is faced with the struggle that one finds between the offences of the vilification of religion as opposed to the Fundamental Human Right of the Freedom of Expression. Apart from the growing Maltese mentality away from the Roman Catholic Religion, there is also the increase in importance given to fundamental human rights. Citizens are now more aware of their rights and invoke such with all the possible measures available to them, such as the Maltese Courts and more recently the European Court of Human Rights. Bill 113 of 2015 proposes a drastic change to the Criminal Code, mainly the removal of articles 163 and 164 in order to safeguard the Freedom of Expression without breaching the Freedom of Worship which is safeguarded through articles 165 and 82A. There were various opinions on such proposed changes, particularly opposing views expressed by the Opposition Party and the Curia.

Pornography is the largest and most profitable industry in the world and in Malta, the popularity of pornography is not an exception. Thus, it is inevitable that the government enacted certain laws in order to regulate such a pressing matter as it deems most applicable at the time. The question arises as to the way of regulation, the strictness of the laws and the perception that one takes. On the one hand, there are those who argue that the opening of sex shops and the display of pornographic material, although not extreme is not only shameful but also a detriment to women's rights since women are being portrayed as objects and this will take away from their dignity. However, on the contrary, others may argue that opting to not regulate such a pressing matter is not the solution. Such amendment to the law needs to be fulfilled as soon as possible cause it is more beneficial to have a regulated matter in which the law states what is and what is not 'accepted' such as child pornography and revenge porn as opposed to opting to remain silent and suffering other severe consequences such as having the mentality of 'doing what one pleases' since it is not catered for by law.

Whether or not Bill 113 of 2015 is proposing the ideal changes and regulations is thus another thing. What is certain is that for society to be able to operate correctly, one must enact laws and make sure that they are enforced. Moreover, it must be certain that the changes that are being proposed are in Malta's best interest and will benefit the citizens the most. With regards to the vilification of religion, it must be made sure that if such articles are indeed removed, that the Fundamental Human Right of Worship is

safeguarded in its widest forms through articles 165 and 82A and when it comes to the issue on pornography, it must be made sure that revenge porn, and extreme pornography such as that involving a corpse or animals or anything involving children in a pornographic manner is sought to be punished as applicable.

Vilification of Religion

1. A historical overview of Vilification of Religion.

The Collins English Dictionary defines the word “vilify” in the following manner: *‘to revile with abusive or defamatory language; to make vile; debase; degrade’*.¹

Vilification of Religion is a certain behaviour that incites hatred, serious contempt or serious ridicule of a particular religion. Examples of such behaviour may include encouraging violence against people who believe or belong to the religion or religious group, or heartening hatred.²

In the case of *‘The Police vs. Peter Bridle et’* (29th January 1948), the court held that whilst the mere disagreement and arguments against a particular religion which are within reasonable limits, are not sufficient to induce such an offence of vilification, if the

...limits of rational and dispassionate discussion are not observed, when violent and gross language is used, and indiscriminate abuse is made use of, instead of argument, and sacred objects are treated with offensive levity, then such a charge is well founded.

An example of the interpretation of ‘vilification’ that the courts made can be illustrated in the 1962 case of *‘The Police vs. Rokku Abdilla’*.³ The case concerned the comparison by a Labour Party President of the Zurrieq club, of the Archbishop Michael Gonzi, with ‘Nero’, an Emperor of a ruthless empire. In such a case, the court held that in a Roman Catholic country like Malta, ‘it was injurious to compare the Archbishop on the basis of the cruelty of historical personages like Nero’.

Laws concerning Vilification of Religion are there to promote tolerance between religious groups. However, despite their harmonious aim, in today’s ‘multicultural’ society, their postmodern foundations are often seen as infringing the right of ‘freedom of speech’. They are sometimes regarded as a way of silencing any criticism.⁴ There is undeniably a need to find a balance between one’s freedom of expression and the right to ‘freedom of worship’. However, there is a fine line between the two and therefore, it may be difficult to determine which remarks are adequate and which are defamatory.⁵

¹ Collins English Dictionary, < <http://www.collinsdictionary.com/dictionary/english/vilify> >

² Racial and Religious Vilification’, The Human Rights Commission
< <http://www.humanrightscommission.vic.gov.au/index.php/types-of-discrimination/racial-and-religious-vilification> >

³ Vella Matthew, ‘[ANALYSIS] A right to Offend’ (14th October 2015)
<<http://www.maltatoday.com.mt/printversion/58102/#.Vr2uBPkrLrc> >

⁴ Zimmerman Augusto, ‘The Postmodern Underpinnings of Religious Vilification Laws: Implications for Democracy and Freedom of Speech’, *The Western Australian Jurist* (2013)(Vol. 4) < <https://www.murdoch.edu.au/School-of-Law/document/Publications/The-Western-Australian-Jurist/4WAJ85---Zimmermann.pdf> >

⁵ Zammit Cutajar Tony, ‘Freedom of Speech and Defamation’, *Times of Malta*, (February 11 2016)

For centuries there has been the problem of trying to find such a balance between the right to freedom of expression and freedom of religion. Freedom of expression is found under Article 10 of the European Convention on Human Rights (ECHR) and argues that this right includes the freedom to have an opinion. Article 9 then deals with the right for freedom of thought, conscience and religion and states that no person shall be restricted from exercising such right.⁶

The United Nations Declaration on Human Rights (UNDHR), drafted in 1949, also provides protection for both religion and freedom of expression in the respective Article 18 and Article 19. These Articles correspond to those found in the ECHR (Articles 9 and 10) since Article 18 deals with the protection of the right to '*freedom of thought, conscience and religion*' whilst Article 19 deals with the right to freedom of expression.⁷

1.1 Current legislation revolving around the topic.

Currently, Vilification of Religion is catered for by Article 163 and Article 164 of the Criminal Code.

The *actus reus* for this offence is when one 'by words, gestures, written matter, whether printed or not, or pictures or by some other visible means, publicly vilifies the Roman Catholic Apostolic Religion'.⁸ Regarding the *mens rea*, as the Court made clear in the case of '*Rex vs. Harvey*' this constitutes in 'that which is the necessary or natural consequence of that what he does'. The only difference is with regards to punishment.

Article 163 was introduced by the Legislative Assembly in 1933 and this section predates the current Constitution of Malta which was adopted in 1964. Title IV 'Of Crimes against the Religious Sentiment' was added by Act 28 of 1933.1, whilst the sections themselves were added by Act 28 of 1933.2.

Article 163 deals particularly with the vilification of the Roman Catholic Apostolic Church; however, it does not limit itself to speaking only about religion in general but also extends to the vilification of persons who profess their faith, or ministers, or any objects of worship. Through Article 163, Article 2 of the Constitution, which states that the Roman Catholic Apostolic Religion is the official religion of Malta, is confirmed. The fact that the punishment is higher to that which appertains to other 'religions or cults' highlights its superiority. In the case of Article 163, the punishment for vilifying the Roman Catholic religion at the moment, is that of imprisonment from one to six months.

Article 164 on the other hand appertains to the vilification of other religions or cults which are tolerated by law. In the case of Article 164, the punishment attributed is that of one to three months imprisonment. Therefore, drawing just upon the punishment,

< <http://www.timesofmalta.com/Articles/view/20160211/opinion/Freedom-of-speech-and-defamation.601949> >

⁶ European Convention on Human Rights < http://www.echr.coe.int/Documents/Convention_ENG.pdf >

⁷ 'Religion and Free Speech: It's Complicated', Index on Censorship (1 March 2013)

< <https://www.indexoncensorship.org/2013/03/free-expression-and-religion-overview/> >

⁸ Article 16, Chapter 9 Laws of Malta, The Criminal Code

one can deduce that the Roman Catholic religion is of more 'value' so to say in that its vilification is more harshly punished.⁹

Another relevant article is Article 165 which criminalizes the disturbance of any religious function, ceremony or service of either the Roman Catholic religion or any other religion tolerated by law. In this case, the punishment would be that of imprisonment for a term not exceeding one year.¹⁰

One must distinguish these articles from Article 82A¹¹ which deals with 'Incitement to Racial Hatred', in which 'religion' is mentioned. This offence is regarded as more harsh than those offences stipulated in Articles 163 and 164 and this can be noted since the punishment for 82A is that of a term imprisonment from six to eighteen months. The basis for a harsher punishment is that of the use of violence or threats. This crime is related to the stirring up of 'violence' and hence, as in many other criminal offences, violence is considered to be an aggravation, thus calls for a more serious punishment. As a result, it is evident that the constitutive elements for these crimes are distinct from one another.

The Constitution of Malta goes further than just stating the official religion of the state. Under Chapter IV of the Constitution which is titled 'Fundamental Rights and Freedoms of the Individual', one finds Article 40 which deals with the 'Protection of Freedom of Conscience and Worship'. The difference which lies between Article 2 and Article 40 of the Constitution is that whilst Article 40 is entrenched, since it is a fundamental human right, Article 2 is not. This means that it would be relatively harder to amend Article 40 than Article 2.¹²

1.2 The Proposed Changes to the current law.

Bill 113 of 2015 was introduced on the 7th July 2015 (sitting No. 285) and it put forward the proposal for the amendments of Articles 163, 164 and 165. It held that the aforementioned and explained Articles 163 and 164 should be repealed and that Article 165 should be amended in a way that would place the Roman Catholic religion and other religions under the same title; 'any'.

⁹ Aquilina Kevin, *Religion Needs Protection*, Times of Malta, July 22 2015

<<http://www.timesofmalta.com/Articles/view/20150722/opinion/Religion-needs-protection.577592>>

¹⁰ Article 165, Chapter 9 Laws of Malta, The Criminal Code

¹¹ Article 82A deals with the incitement to racial hatred; Article 82A (1) states, 'Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.'

¹¹ Martin Ivan, 'Vilification of Religion laws to be more reflective of today's society' – *Minister* (2nd February 2016) Times of Malta

¹² Mifsud Bonnici Giuseppe, *Now that Human Rights Are Entrenched...*, Times of Malta (February 27, 2006)

<<http://www.timesofmalta.com/Articles/view/20060227/opinion/now-that-human-rights-are-entrenched.61886>>

Furthermore, the punishment for Article 165, that of a term not exceeding one-year imprisonment would be changed to reflect that if the impediment does not cause any serious danger, then the person who committed the unlawful act would be liable to a punishment for contraventions. However, in the case that such offence causes serious danger, then the punishment stipulated is increased by one degree.

Therefore, the proposed changes are those of 'decriminalizing the Vilification of Religion' through the repeal of Articles 163 and 164 and therefore also eliminating in the process the hierarchy that existed between the Roman Catholic religion and other religions through these articles. Moreover, the reduction in punishment of the only article which will remain (Article 165) is close to the repression of such vilification. Article 165 will punish, so to say, more 'extreme' acts than those which were originally found in Articles 163 and 164. The *actus reus* of Articles 163 and 164 will therefore no longer be punishable. However, the *actus reus* of Article 165, meaning the disturbance of any religious function, ceremony or service will still be punishable but with a reduction in punishment to that which is currently specified in the law.

This bill received different reactions by the public. Justice Minister Dr. Bonnici claims that this was done to contribute for the better exercise of the right to Freedom of Expression¹³ and although it is true that the church would be less protected, Vilification of Religion would still remain a crime through Article 82A.¹⁴

1.3 Current Debates regarding the proposed changes on a local scale.

The introduction of this Bill was immediately disapproved by the Opposition. During the second hearing of the bill¹⁵, the Opposition's Shadow Justice Minister, Dr. Azzopardi described the bill as being 'the most short-sighted and dangerous decision the government has taken so far'. Presenting a set of five pictures from French satirical newspaper Charlie Hebdo as examples of religion vilification, he stated that even though everyone had a right to freely express themselves whilst not enforcing their religion on others, one should not be offensive.¹⁶

The Curia also objected to the bill in question. In its position paper, it stated that vilification should be distinguished from other aspects like criticism, censure and hate. Thus, in other words it said that Articles 163 and 164 could not be confused with Article 82A as to vilify means to 'render vile' and therefore what the law is forbidding here is

¹³ This is protected by Article 41 of the Constitution and by Article 10 of the European Convention on Human Rights.

¹⁴ Martin Ivan, 'Vilification of Religion laws to be more reflective of today's society' – *Minister* (2nd February 2016) Times of Malta

< <http://www.timesofmalta.com/Articles/view/20160202/local/vilification-of-religion-to-be-decriminalised-to-be-more-reflective-of.601041> >

¹⁵ This was held on 2nd February 2016 (Sitting No. 352).

¹⁶ 'Decriminalisation of Vilification of Religion 'shortsighted and dangerous', criminalisation of revenge porn welcomed' (2016) Times of Malta

<<http://www.timesofmalta.com/Articles/view/20160202/local/decriminalisation-of-vilification-of-religion-shortsighted-and.601060>

><<http://www.timesofmalta.com/Articles/view/20160202/local/decriminalisation-of-vilification-of-religion-shortsighted-and.601060>>

the 'malicious, abusive debasement of religion, its adherents and its leaders.' Moreover, it stated that since Article 2 of the Constitution of Malta states that the Religion of Malta is one of the most fundamental civic values, it did not make sense that the State was now allowing for its vilification. Thus, the Curia's conclusion was that Articles 163 and 164 should not be repealed and should be amended only to the extent that no difference should exist between the sanctions imposed on those vilifying the Roman Catholic religion and those vilifying any other religion or non-belief.¹⁷

With the proposition of the bill, Fr. Joe Inguanez brought out the sense of irony that is at play. In mid-August, a customer of TK Maxx complained that T-shirts being sold with the slogan 'Je suis over it' were mocking the Charlie Hebdo attacks. This led up to the company apologising for any offence that customers might have taken, explaining that this was never the intention. Sales were withdrawn from 280 stores including the online fashion site 'Asos'.¹⁸ As many others engaged in the debate, he asks whether the revocation of such laws is in fact implementing the right of Freedom of Expression.

Is it just to have religious sentiment no longer a crime but a contravention?¹⁹ If as Hon. Bonnici explained, the intention is to reflect modern society, a democratic society with fair justice and equal rights; however, does that mean it is acceptable to have someone's sacred beliefs insulted? Is that the spirit of freedom of expression?²⁰

The Curia's Constitutional argument was enunciated deeply by Professor Kevin Aquilina²¹ who stated that 'the clause proposing the repeal of the criminal protection to the State religion is in a Constitutional mess: it makes a mockery of, is derisive of, and is in contempt of, the Constitution.' He said that even though there was nothing explicit in the Constitution obliging Parliament to establish a law for the criminalization of Vilification of Religion, this must be so by necessary intendment, as there should never be a strict and rigid interpretation of the Constitution. Furthermore, he argued that the Constitution can neither have full effect nor can it reign supreme if its state institutions which are defined in Article 2 of the Constitution are not properly protected.²²

It is a fact that the Freedom of Expression is not an absolute freedom and this was accentuated by both Prof. Kevin Aquilina and Dr. Tonio Borg in their arguments against the bill. Dr. Borg argued the government's view that the offence of vilification restricts

¹⁷ 'POSITION PAPER ON THE DECRIMINALISATION OF THE PUBLIC VILIFICATION OF RELIGION AND OF PORNOGRAPHY', The Church in Malta (Curia), (7th August 2015)

¹⁸ Aisha Gani, 'TK Maxx Withdraws 'Je Suis Over It' T-Shirt From Sale After Complaint', The Guardian (2015)

< <http://www.theguardian.com/business/2015/aug/12/tk-maxx-je-suis-over-it-t-shirt-charlie-hebdo-complaint> > accessed 13 February 2016.

¹⁹ Inguanez Fr. Joe, 'No Emotions, We're Maltese!' Times of Malta (2015) <

<http://www.timesofmalta.com/Articles/view/20150902/opinion/No-emotions-we-re-Maltese.582846> > accessed 13 February 2016.

²⁰ Said Frans, 'Obscene Vilification', Times of Malta (2015) <

<http://www.timesofmalta.com/Articles/view/20150918/letters/Obscene-vilification.584834>> accessed 13 February 2016 >

²¹ Professor Kevin Aquilina is the Dean of the Faculty of Laws at the University of Malta.

²² Professor Kevin Aquilina, 'Retain vilification law' (6th October 2015) Times of Malta

<<http://www.timesofmalta.com/Articles/view/20151006/opinion/Retain-vilification-law.587114>>

the Freedom of Expression as a 'myth' and even went on to say that this bill provides for 'a misguided mission'. Moreover, he compared Malta with Italy and argued that if a neighbouring country that no longer practices Catholicism as the State religion²³, considered it appropriate to keep the offence of Vilification of Religion, why should we, who even affirm the Catholic religion as the 'religion of Malta' in the Constitution remove the offence from the Criminal Code?. Being the Minister who had piloted the bill which led to the introduction of Article 82A of the Criminal Code, he agrees with both the Curia's and Professor Aquilina's arguments that the essential elements forming this Article are not to be mixed up from those making up Articles 163 and 164.²⁴

On the other hand, there are those who took a different perspective of the bill in question. Dr. Bencini is one of such persons as he agreed with the removal of Articles 163 and 164 due to the reason that they're 'redundant' whilst affirming that the objective of these articles was performed better and more efficiently by the provisions of Article 82A. He rejects the point made by some that through this bill, the government would be decriminalizing the vilification of the Catholic religion. Dr. Bencini states that the only difference created by the bill is that the protection which was previously restricted only to the Catholic religion has now been extended to a whole range of civil rights and liberties, which is the way it should be in a regime of Fundamental Human Rights. Moreover, he upheld that all Fundamental Human Rights should be treated and protected equally by the State.

To uphold any one fundamental human right, whether it be that of gender or of religion, would put an onus on the State to provide equal protection to all the other fundamental human rights as protected by the Constitution and the European Convention of Human Rights.²⁵

Mr. Ingram Bondin also supported the government's bill. First of all, he claimed that it was discriminatory that there should be a difference between the punishment that exists for vilification of Catholicism (up to six months imprisonment) and that afforded to other 'cults tolerated by law' (up to three months imprisonment)²⁶. Moreover, he continues to argue that there is nothing in the Constitution, forcing Parliament to establish a law for the criminalisation of Vilification of Religion. Although it is true that the Maltese State valorises Catholicism, a value which is even embedded in Article 2 of the Constitution, Mr. Bondin fails to see the reason of why a liberal Constitution like ours should resort to what he calls 'a fascist criminalisation of strong dissent.' Finally, he argued that the argument made that Article 163 was implemented to contribute to the spirit of Article 2 of the Constitution cannot be true as it was passed by the Legislative Assembly in 1933 and thus it precedes the Constitution. He states that the

²³ In Italy, the Catholic religion was deemed no longer to be the State religion after the new Concordat in 1983.

²⁴ Dr. Tonio Borg, 'Why vilify vilification now?' (21st August 2015) Times of Malta <<http://www.timesofmalta.com/Articles/view/20150821/opinion/why-vilify-vilification-now.581365> >

²⁵ Dr. Austin Bencini, 'Vilification of Catholic religion' (13th July 2015) Times of Malta <<http://www.timesofmalta.com/Articles/view/20150713/opinion/Vilification-of-Catholic-religion.576375> >

²⁶ This difference was made clear in Articles 163 and 164 of the Criminal Code

real reason of why it was passed in the first place was to protect 'a politically meddlesome and militant Catholic Church'^{27, 28}.

In his parliamentary speech, Dr. Bonnici insisted that this will make us more European. He stated that many of the European countries had done away with vilification laws and when the EU set hate crimes, it made sure that it would not limit artistic expression. He insists that although some had shown their concern for such change, this change is much needed. He emphasises mainly on the importance of artistic expression and states that many influential authors have shocked society to get their message across.²⁹

1.4 Local Jurisprudence tackled by the Maltese Courts.

Regarding jurisprudence, one doesn't find a lot of case-law related to Articles 163 and 164. However, as can be seen in cases like '*The Police vs. Krishanu Bhattacharjee*' (Court of Magistrates as a Court of Criminal Judicature) (14th July 2006)³⁰ and "*Il-Pulizija v. Jonathan Saliba*" (Court of Criminal Appeal) (23rd October 2009)³¹, these Articles do sometimes come into question.

In the former case, the accused was charged with several offences one of which was:

Publicly [vilifying] the Roman Catholic Apostolic Religion which is the religion of Malta, by means of gestures and/or words, and/or offended the same religion by vilifying those who profess such religion and its ministers, and/or anything which forms the object of, or is consecrated to, or is necessarily destined for Roman Catholic worship, in terms of Article 163 of Chapter 9.

However, in this case, the court exempted the defendant from any criminal responsibility due to the fact that at the time of the crime, he was found to be insane. The experts had concluded that the defendant had suffered an acute psychotic episode with frank schizophrenic symptoms, and thus no punishment should be imposed upon him for his actions.

On the other hand, the latter case presents us with a more interesting situation. In this case the defendant had been brought to court due to the fact that he had worn the costume of a nun during a spontaneous carnival. According to the Court of First Instance (Court of Magistrates as a Court of Criminal Judicature), it couldn't find the defendant guilty as he wasn't wearing anything considered as being sacred and he also did not vilify the religion with any gestures:

²⁷ It is a fact that in the past the Church used to interfere a lot in the politics and in fact both in the 1930s and in the 1960s there were what we now refer to as politico-religious crises.

²⁸ Mr. Ingram Bondin, 'Remove vilification law' (9th September 2015) Times of Malta
<<http://www.timesofmalta.com/Articles/view/20150909/opinion/Remove-vilification-law.583691>>
><<http://www.timesofmalta.com/Articles/view/20150909/opinion/Remove-vilification-law.583691>>

²⁹ Parliament ta' Malta, 'Plenary Session Sitting Number: 352' (2016).

³⁰ Application number 341/2006

³¹ Application number 120/2009

Illi mill- provi prodotti rrizulta illi l- imputat kien liebes libsa sewda b' fardal abjad u maktur iswed bl- abjad li certament ma jammontawx ghal xi abiti sagri. Inoltre lanqas ma rrizulta illi l- imputat kien qieghed f' xi hin jaghmel xi gesti oxxen jew li kien qed ikasbar ir- Religjon Kattolika. Jirrizulta illi lanqas kien liebes xi salib, kurcifiss jew xi oggett iehor konness mar- Religjon Kattolika. Kwindi l- akkuzi ma jirrizultawx ippruvati u l- Qorti qed tillibera lill- imputat minn dawn l- akkuzi.³²

Although the Court of Appeal stated that this interpretation taken by the Court of Magistrates was incomplete³³, it still affirmed its decision as a nun's clothes couldn't be considered as sacred. Moreover, it stated that a nun couldn't be considered as a minister of Religion as she couldn't commit any liturgical acts like a deacon can. Due to these conclusions, this accused was also liberated from the crime with which he was accused.

Earlier that same year the court had reached the same conclusion in a case against *Wesley Zammit* where although he was dressed in something similar, it definitely did not amount to the sacred habit that nuns wear and this certainly does not amount to a breach of Article 163. This is of course as long as he was not wearing a crucifix or another religious symbol to indicate that his aim was to vilify the Roman Catholic Apostolic Religion.³⁴

A local case that is worth mentioning is '*Il- Pulizija Spettur Pierre Micallef Grimaud vs. Stephen Nappa*' where the defendant was charged and given a prison term under Articles 163 and 165, as he spoke offensively towards the Catholic Apostolic religion and threatened the priest that he would burn him alive during a service.³⁵

1.5 A comparative overview of other Jurisdictions.

In comparative law, the sphere being analysed is usually referred to as '*blasphemy laws*' which imply in one way or another limitation on freedom of speech in the interest of religious institutions or religious social orders.

Blasphemy laws are incompatible with the *International Covenant on Civil and Political Rights*. This was made clear in the United Nations General Comment number 34 of 2011 which discussed the freedom of opinion and expression. Malta has ascended to this covenant in 1990 albeit with some reservations³⁶. Paragraph 48 of the UN General

³² Application number 118/2009

³³ The Court of Criminal Appeal had stated: '*Din, kif inghad, hija enuncjazzjoni inkompleta tal-ipotesi tal-ligi, u allura l-Avukat Generali kellu dritt jappella, kif effettivament ghamel.*'

³⁴ *Il- Pulizija Vs Wesley Zammit* [2009] Court of Magistrates (Gozo) Criminal Court, 117/2009 (Court of Magistrates (Gozo) Criminal Court).

³⁵ *il- Pulizija Spettur Pierre Micallef Grimaud Vs Stephen Nappa* [2010] Court of Magistrates of Criminal Jurisdiction, 329/2010 (Court of Magistrates of Criminal Jurisdiction).

³⁶ Treatiesunorg, " (Treatiesunorg,) < <https://treaties.un.org/pages/viewdetails.aspx?chapter=4> > accessed 12 November 2015

Reservations:

"1. Article 13 - The Government of Malta endorses the principles laid down in Article 13. However, in the present circumstances it cannot comply entirely with the provisions of this Article;

Comment number 34 of 2011 states that blasphemy (Vilification of Religion) is incompatible with the Covenant and thus, it would not be acceptable to have laws which discriminate in favour or against religious beliefs or its believers. However, the UN goes on to state under this Article that such argument cannot be used in order to silence or punish criticism.³⁷

1.51 United Kingdom

In the case of *'Whitehouse vs. Lemon'* in the UK, the House of Lords held that blasphemous libel is committed if there is a publication which includes any writing mentioning God or Christ, the Christian religion, the Bible or any sacred subject, through the use of words which are abusive or offensive and thus as a result vilify the Christian religion.

However, through Working Paper No. 79, it was argued that such provisions on the Vilification of Religion were no longer justified because with the changing circumstances present in the country at that particular time, such limitation was no longer 'necessary' per se. The argument then shifted onto the distinction drawn between the protection of religion and religious beliefs, the protection of society, the protection for individual feelings and the protection for public order. Drawing upon such distinctions, it became evident that while at present, society's needs call for the penalties imposed for the offences of racial hatred, the same can't be said for the Vilification of Religion.³⁸

It was held that when it comes to the protection of religion and religious beliefs, whilst the law on Vilification of Religion is justified for the believers, it is not justified for non-believers and therefore this could lead to a controversy since the need for such laws was not one which was commonly agreed upon. However, one must take into consideration that since the UK was considered to be a Christian country, then such abolition of blasphemy laws would constitute 'an official declaration that England was no longer a Christian Country'.³⁹

Amongst the various reasons that were given in favour of the abolition of blasphemy laws, one could mention Freedom of Speech and also the fact that the imposition of penalties due to offences of Vilification of Religion was not a proper function of Criminal Law. Furthermore, such law became irrelevant, in that it was no longer needed because English society was no longer based on religion.

After due consideration, the House of Lords passed the amendment to the Criminal Justice and Immigration Bill abolishing the common law of blasphemy and

2. Article 14 (2) - The Government of Malta declares that it interprets paragraph 2 of Article 14 of the Covenant in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts;

3. Article 14 (6) - While the Government of Malta accepts the principle of compensation for wrongful

³⁷ International Covenant on Civil and Political Rights, (2011)

<<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> >

³⁸ Criminal Law, Offences against Religion and Public Worship, (1985)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235882/0442.pdf >

³⁹ IBID

blasphemous libel. This was done also after consultation with the Archbishop of York and the Church of England who agreed not to oppose the government's amendment despite questioning the timing of such amendment.⁴⁰

Having said so, Britain has still replaced such provisions with a more general law against the incitement to religious hatred. The main difference was that there was the repeal of the words 'abusive', 'insulting' and thus only threats aimed at inciting religious hatred would be a crime.⁴¹

Therefore, nowadays, the UK has no legal provision which holds as an offence, the Vilification of Religion⁴². When comparing this to the proposed amendments being made to the Maltese law on the topic, these amendments are undoubtedly closer to the position in the UK. However, with that being said, the Maltese amendments are still in a way more protective of religion than the UK Law because apart from having Article 82A which deals with the incitement of religious hatred, under Article 165, the Maltese criminal code would still punish extreme acts of Vilification of Religions, whether catholic or other religions.

1.52 The Netherlands

The offence relating to Vilification of Religion in the Netherlands was initially drafted in the 1930's. This offence was catered for by Article 147 of the Dutch Criminal code.⁴³ However, it became evident, particularly from the fact that this provision had not been used for half a century that blasphemy law was no longer needed in 21st Century Holland.⁴⁴

Such decision to repeal blasphemy law had been welcomed by international activists who also believe that blasphemy laws are not only outdated but they impose restrictions and threats on the right to freedom of speech.⁴⁵

Despite having repealed their Article 147 dealing with blasphemy laws, they have still kept their Article 136c which mentions that it is an offence to incite religious hatred, and that such incitement is liable to a term imprisonment of not more than a year or a fine of the third category. Furthermore, it goes on to state that if this behaviour is made a habit or even worse, a profession or if it is committed by two or more persons working

⁴⁰ 'Lords approve abolition of blasphemy', National Secular Society (2008) <
<http://www.secularism.org.uk/lordsapproveabolitionofblasphemy1.html>>

⁴¹ 'Incitement to Religious Hatred', The Christian Institute
< <http://www.christian.org.uk/resources/theology/apologetics/christian-freedoms-and-heritage/incitement-to-religious-hatred/> >

⁴² Section 79, Criminal Justice and Immigration Act (2008)
<<http://www.legislation.gov.uk/ukpga/2008/4/section/79> >

⁴³ Firma Terry, 'Dutch Scrap One Anti-Blasphemy Law but Keep Another' (2013), The Friendly Atheist
< <http://www.patheos.com/blogs/friendlyatheist/2013/12/03/dutch-scrap-one-anti-blasphemy-law-but-keep-another-intact/> >

⁴⁴ 'Dutch approve move to scrap blasphemy law' (2012), BBC News, <
<http://www.bbc.com/news/world-europe-20530428> >

⁴⁵ Bezhan Frud, 'Dutch Parliament to Revoke Blasphemy Law', (2012), RFERL ,
<<http://www.rferl.org/content/dutch-parliament-revokes-blasphemy-law/24785198.html> >

together, then the punishment would be that of a maximum term imprisonment of two years or a monetary fine of the fourth category.⁴⁶

When considering that The Netherlands is somewhat a more liberal country, it is seen that there is a lot of similarity between this country's laws and those of the UK. Having said that, the comparison between the Dutch Law as it is now after the abolition of blasphemy laws and Bill 113 of 2015, there is similarity between their Article 136c and our Article 82A. However, Malta would still remain more protective and conservative of religion through the proposed Article 165 catering for extreme acts, despite the punishment having been reduced to that of contraventions.

1.6 Case Law of the European Court of Human Rights (ECtHR).

The European Court of Human Rights (ECHR) has often stressed on the importance of Freedom of Expression as 'one of the essential foundations of a democratic society'.⁴⁷ Although the European Union does not have any laws on blasphemy and leaves it up to the member states to legislate on their own merits, according to their country's needs, through the secularization of Europe and the ever-growing importance which is being given to the right of freedom of expression, the offence of blasphemy is gradually being repealed and abolished from many criminal codes of member states.⁴⁸

A very important event that caused more countries in the EU to scrap their laws on Vilification of Religion was particularly that of the Charlie Hebdo massacre in Paris. One of such countries was Iceland who claimed that "any legislation restricting freedom of expression (...) is out of step with modern human rights concepts."⁴⁹ Therefore, blasphemy laws are not only seen to be a restriction on the right to freedom of expression but seen as a burden which is holding back states from developing and getting in line with the needs of society at present.

On the 27th November 2014, the European Parliament passed an all-party resolution to show disapproval towards Pakistan's blasphemy law and criticised the punishments that were attributed for this offence which were life imprisonment and the death penalty. The European Humanist Federation held that it is only through the complete elimination of blasphemy laws that it is ensured that the rights of the minorities and non-believers are safeguarded and that there is no breach of their Fundamental Human Right to the right of Freedom of Expression.⁵⁰

Therefore, Bill 113 of 2015 seems to be more in conformity with the ideals of the European Union. Although there still are some European Member states which have

⁴⁶ Article 137(c), Dutch Criminal Law < <http://www.wetboek-online.nl/wet/Sr/137c.html> >

⁴⁷ 'Is Europe the land of freedom of expression?', End Blasphemy Laws < <http://end-blasphemy-laws.org/countries/europe/> >

⁴⁸ IBID

⁴⁹ 'EU COUNTRIES URGED TO REPEAL BLASPHEMY LAWS', (2015), Reporters Without Borders for Freedom of Expression < <http://en.rsf.org/irlande-european-union-blasphemy-law-13-07-2015,48104.html> >

⁵⁰ 'Time for the EU to end its hypocritical stance on Blasphemy', (2014), European Humanist Federation. < <http://humanistfederation.eu/news-fhe.php?pages=time-for-the-eu-to-end-its-hypocritical-stance-on-blasphemy-laws> >

the offence of Vilification of Religion under their statutes, this seems to be changing slowly, and in fact these countries are already at a minority and thus, through such change, the mentality of the European Union is leaning towards being against blasphemy laws, even though it might not take a formal stand against it.

1.61 Case Law of the European Court of Human Rights (ECtHR)

The aim of Bill 113⁵¹ is as follows:

*...to update the provisions of the Criminal Code on crimes against religious sentiment also given that since these laws have been enacted in the 1930s the Criminal Code has been amended several times in order to impose criminal sanctions on the instigation of religious and other forms of hatred and to provide for the better implementation of the right to freedom of expression with regard to the striking of the necessary balance between the right of everyone to receive and impart information and ideas...*⁵²

The punishment of Vilification of Religion and the right of Freedom of Expression, which is enshrined in the Constitution of Malta and in the European Convention on Human Rights, certainly overlap, and can even be viewed as being contradictory, but is this so? Or can there be a reasonable balance between the two? In light of these issues, it would be worthy to consider several judgments of the European Court of Human Rights (ECtHR).

1.62 Restrictions on one's Freedom of Expression

The right to freedom of expression is one of the fundamentals of a democratic society, and it is necessary for the self-fulfilment of every citizen. Without freedom of expression, society cannot be said to be really free. As has been stated by the ECtHR, Article 10 of the European Convention on Human rights which provides for this freedom, applies not only to information or ideas that are non-objectionable or that lack interest by the public, but due to the demands of pluralism, it applies also ideas that are offensive, shocking or disturbing to the state or any sector of the population, and such sector may include a religious group.

*This means, amongst other things that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.*⁵³

Thus it is essential, in order to safeguard democracy in a society, to punish 'all forms of expression which spread, incite, promote or justify hatred based on intolerance...provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.'⁵⁴ Thus the court, in assessing whether one's freedom of expression has been infringed, must assess whether the action taken by the authority pursued a legitimate aim and whether it is 'necessary in a

⁵¹ Criminal Code Amendment Act, 2015

⁵² IBID

⁵³ ECHR, *Handyside vs. The United Kingdom* 7 December 1976, app. No. 5493/72, para 49

⁵⁴ ECHR, *Erbakan vs. Turkey*, 6 July 2006, app. No 59405/00 para 56

democratic society'.⁵⁵ With regard to the latter, the court has to determine whether there is a “pressing social need” to take such an action against the applicant and whether there are compelling reasons to do so.⁵⁶

Thus the first approach taken by the ECtHR is that of creating limitations as to one’s freedom of expression, as provided by sub-Article 2 of Article 10 of the Convention. Although hate speech does not demolish the values within the convention, but is restricted in the interest of the public.⁵⁷ The court, in the case of *‘I.A. v. Turkey’* recognized that those who wanted to exercise their religion had to accept that there would be others who would disagree with them and who would criticize them. However, in this case, the comments of the applicant were not just the expression of a disturbing, shocking or “provocative” opinion, but a disparaging attack on the Prophet of Islam. Despite the principle of secularity within the Turkish society, which allowed for the forbearance of criticism of religious doctrine, the believers lawfully felt that certain section of the book constituted an unauthorized and unjustified attack on something that the Muslims considered to be so sacred to them. Thus in the view of the ECHR, the Turkish court had met a ‘pressing social need’ by restricting the applicant’s freedom of expression, and that the fine which was imposed upon him was proportionate to the aims pursued

1.63 Pursuance of a Legitimate Aim

The ECtHR has held that the right to freedom of thought, conscience and religion under Article 9 of the Convention is a fundamental concept in a democratic society and has held that the protection of this right is a “legitimate aim” for limiting the applicant’s freedom of expression in terms of sub-Article 2 of Article 10 of the convention.⁵⁸ The court recognized that Article 10 does not only apply to forms of expression which are not offensive, it also held that one has the obligation to not be grossly offensive, but must ensure that his expression of ideas is contributory to human progress. The above-cited *Otto-Preminger-Institut* case was quoted by the ECtHR in *‘Wingrove vs. UK’* to support the English government in its argument that the prohibition of a film showing St. Teresa engaging in sexual acts with Christ pursued a legitimate aim that is the protection of the rights of Christians who are shocked by this film. (I.e. the protection of rights of others under sub-Article 2 of Article 10 of the Convention).

1.64 Actions by Member State Authorities “Necessary in a Democratic Society”

In the *Wingrove* case it was said that determining whether an action of state authorities is necessary in a democratic society requires ‘assessing the circumstance of a particular case...’ thus, there cannot be fixed rules of what actions are necessary and which are not. This is also evident in *‘Otto-Preminger-Institut v Austria’*. In this case the applicant was charged with “disparaging legal doctrines” as he advertised the screening of a film (which was then seized by Austrian authorities) which portrayed Jesus, Mary and God in a way which offended the Church. The court had considered that this film

⁵⁵ ECHR, *Otto-Preminger-Institut v Austria* 20 September 1994, Application No. 13470/87

⁵⁶ IBID

⁵⁷ Hate Speech Factsheet – European Court of Human rights (November 2015)

<http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf>

⁵⁸ IBID

had been largely advertised to a society where the majority of people were Roman Catholics, and thus still considered it as a public disparagement despite that there was an age restriction and a fee to be paid.

Furthermore, in the *Wingrove* case the ECtHR analysed the law of blasphemy of the UK, which can be paralleled with Vilification of Religion in Malta. In the light of the obligation of state legislators to make laws with “sufficient precision”, the court dismissed the applicant’s defence that it was “inordinately difficult”⁵⁹ for him to know that the film would be regarded as blasphemous, because although there is no exact definition of the offence of blasphemy, there is no dissent or doubt as its definition under English law. Furthermore, the ECtHR held that although many were in favour of doing away with blasphemy laws in Europe, there is not enough agreement that limitations put on materials which are considered to be as amounting to blasphemy are not “necessary in a democratic society”. The Court also established that British blasphemy law does not ban any type of expression which is offensive towards Christianity, but it is the way in which opinions are expressed rather than the opinion itself which the law sees to regulate. Also, the insult must be of such an extent so as to fall within the realm of the offence of blasphemy, thus the court held that the high degree of disrespect with which the religion is treated is in itself a protection from the arbitrary interference of one’s freedom of expression.⁶⁰

1.65 Article 17 of the European Convention on Human Rights

The ECtHR has dealt with cases concerning incitement to hatred and freedom of expression from the perspective of Article 17 of the Convention, which provides that nothing in the convention implies that a group can engage in any activity that will infringe the rights of others. The ECtHR, in the case of *Norwood v. the United Kingdom*⁶¹ has held that ‘the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting their own interests and principles enunciated by the convention.’ In this case the applicant tried to invoke Article 10, with respect to a poster which constituted a ‘public expression of attack on all Muslims’⁶² and thus his request was inadmissible, because if Article 10 was actually invoked, this would be contrary to Article 17.

1.66 Freedom of Expression and Freedom of Political Debate

As has already been stated, prevention of religious intolerance is fundamental in a democratic society, but so is freedom of political debate. The court has pointed out, in the case of *Erbakan vs. Turkey*⁶³ that political leaders should avoid making comment that would trigger religious intolerance in their speeches. In this case the applicant was the former Prime Minister of Turkey. After his termination of office, he was the leader of a political party which was demolished because he participated in activities which were considered to be contradictory to the principles of secularism and was accused of incitement to religious hatred. In view of the freedom of the nature of political debate,

⁵⁹ ECHR, *Wingrove vs. Uk* (25th November 1996) Application no. 19/1995

⁶⁰ IBID

⁶¹ Application no. 23131/03

⁶² IBID

⁶³ 6th July 2006 (application no. 59405/00)

the court had to determine whether there were compelling reasons that could justify a serious punishment in relation to political speech. The court held that the speech was not likely to give rise to a “present risk” or “imminent” danger and thus held that the sentence of a one-year imprisonment given to the applicant, a well-known politician was too severe, and not proportionate to the legitimate aims pursued and thus there had been an unjustified and unnecessary interference with the applicant’s freedom of expression i.e. a violation of Article 10 of the Convention

The ECtHR has mostly recognized the importance of limiting both the expression and manifestations of religion or belief as necessary in order to protect the rights of others and public safety. No restrictions can be placed on one’s right to thinking or believe i.e. the *forum intenum*. The right to criticize another’s belief is to protect those who do not agree, and this can also be related to the Bill 113⁶⁴, which propose for the punishment of interrupting a religious function the punishment established for contraventions, unless such disturbance causes a threat to public safety.⁶⁵

1.7 Suggestions to the House of Representatives.

The Vilification of Religion is without a doubt a very serious and delicate issue. Therefore, before legislating and amending any provisions, one must examine the needs of society today. Society is ever-growing and there is a constant need to update certain provisions. Today’s society is becoming even more mixed, with an increasing number of citizens who believe and practice other religions and also those who opt to atheism.⁶⁶

The fundamental human right of the freedom of expression is just as important as the fundamental human right of worship (right to a religion or religious belief) and thus it is important that one does not infringe the other.

Having said that, this does not mean that Bill 113 of 2015 is offering a free pass to all those who want to ridicule religion. Through Articles 165 and 82A, the disruption of religious functions and the incitement to religious hatred will still be catered for. However, there still is room for improvement in the aforementioned Articles.

Article 165, which deals with the disruption of religious functions should however be amended in a way that creates a distinction between what is specified in the law as ‘serious danger’ and what does not fall under that category. The offences classified as falling under the definition of ‘serious danger’ should have an aggravation of punishment than the one mentioned in the bill, and therefore the courts would have the option of attributing a prison sentence, whilst on the other hand, those which do not fall under such definition would in turn be liable to the punishments of contraventions as already mentioned in the bill.

⁶⁴ Bill no. 113 Criminal Code (Amendment) Bill, 2015

⁶⁵ Ibid, Article 3

⁶⁶ This is very evident due to the influx of immigrants in Malta who are also marrying Maltese citizens and also through the accession to the European Union which has in turn exposed Malta to more cultures and more tourists, even foreign students studying in our country.

Article 82A, currently states that any person who incites religious hatred shall be liable to six to eighteen months imprisonment. However, since this Article, due to the amendments being proposed is going to carry the majority of the burden to make sure that the fundamental human right of worship is safeguarded, then it ought to be amended in a way that specifies more what is meant by 'threats', 'abuse' or 'insults' by means of words or behaviour. It should be clarified and split up in a way that makes it easier to understand, especially after considering the needs of the public.

This bill should not be considered to be the decriminalisation of the Vilification of Religion but should be seen as an amendment to safeguard the right of freedom of expression and to put all religions at par with each other.

Pornography

2. A historical overview on pornography laws.

The liberty of expression, to manifest ideas and thoughts in any mode of conveyance is one of the components of a democracy which encourages human liberty and is also enshrined in the European Convention on Human Rights, ratified by Malta. It encourages the notions of pluralism, tolerance and broadmindedness. However, freedom of expression is not absolute and includes specific restrictions imposed not only by the European Convention on Human Rights, but also by the Maltese Constitution in article 41(2)(a)(ii)⁶⁷. One such limitation is inherently based on the protection of public morals. It holds that any material which invokes or promotes any mode of obscenity or pornography should be criminally punished or to restrict *a priori* the publication of such offensive material.

There is very little Maltese jurisprudence with regards to obscene publications, whether they be artistic or literary publications. This can be mainly attributed to two main laws (one of which has been repealed). The first law was the Post Office Law of 1924⁶⁸, mainly article 28 which was repealed by the 1975 Postal Services Act. The second law was the Customs Ordinance of 1909⁶⁹, namely article 60(b) which prohibited and withheld books deemed to be objectionable or of a pornographic nature. They had the power to examine and check such material and ultimately confiscate it.

Others were of the idea that officers based their decisions to withhold material on the *Index Librorum Prohibitorum*⁷⁰ which was essentially a list of books prohibited by the Vatican, however this was then abolished in 1966.

This kind of censorship was also very present in film and stage productions. Restrictions were very tight which in turn reflected badly on Maltese media as most viewers complained of the severe impositions of obscenity laws. In fact, in a letter sent by Dr. Benny Camilleri to the 'Times of Malta', he complained that '[t]he censors have been so severe to most of the good films being produced today that we are in the position of having to go to London or Rome in order to be able to see a good film.'⁷¹

⁶⁷ (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, protecting the privileges of Parliament, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments

⁶⁸ Chapter 85 of the Laws of Malta), Art 28. This law has since been repealed and replaced in 1975 by the Postal Services Act (Chapter 254 of the Laws of Malta).

⁶⁹ Customs Ordinance 1909 (Chapter 37 of the Laws of Malta), Art 60 (b).

⁷⁰ The Index Librorum Prohibitorum was a list of books prohibited by the Vatican. Promulgated by Pope Paul IV in 1559, it was continuously updated until its formal abolishment in 1966 by Pope Paul VI (Encyclopaedia Britannica).

⁷¹ Dr. Benny Camilleri, Letters to the Editor, (The Times of Malta, 5 November 1970)

In its few judgments on the subject, the influence of the court also had a role to play. The case of 'Il-Pulizija vs Domenico Catalogna'⁷² is one of the few where the court had a say in cases offending the public morals. In this particular case, the defendant was accused of offending the public morals for showing paintings containing nudity to a group of friends in public. The Court of Criminal Appeal, when delivering its judgment emphasized that art should not be used as a tool for displaying any vice or depravity in human nature and society, quoting the famous Italian jurist Cocurullo. In the case of 'Il-Pulizija vs. Anthony Deguara'⁷³, the defendant was also accused of offending the public morals as he played the Italian song 'Nuda' by Domenico Modugno on a juke box in a cafeteria located in Sliema. In its judgment the Court of Criminal Appeal held that the words 'jew b'xi mod iehor mhux imsemmi band'ohra f'dan il-Kodici, joffendi l-morali, l-imgieba xierqa, jew id-dicenza' (in what was then Article 352(z) of the Criminal Code) was comprehensive enough to proscribe any behaviour which in some way offends morals and concluded that the fact that such a song was played on a jukebox in a public place undoubtedly offends public morals.

In light of these historical and severe realities, many found it hard to challenge the reality imposed by these judgments. Due to these censorship laws, Maltese artists restricted their work to pleasing the general public in order for it to be enjoyed by the general public and ultimately pass the censors test. It is important to keep in mind that times like these weren't as liberal as it is presently and such subjects were deemed to be immoral and a taboo amongst society. Speaking against these would have meant retribution in the form of chastisement and criminal punishment which is evident in the lack of local jurisprudence on this matter.⁷⁴

A step was taken in 1975 with the abolition of the *a priori* tests of censorship of literature and other material by the postal authorities. This was replaced by criminal penalties which are currently found in our law. Thus, material which is proven to be obscene or pornographic in nature would not be prohibited from publication, but rather penalised once it is published.

2.1 The Current law revolving around the subject of Pornography.

Nowadays there are multiple laws on obscenity and pornography, the relevant provisions being article 208⁷⁵ of the Criminal Code, article 7⁷⁶ of the Press Act and most importantly, Article 3 of the Pornography and Obscenity Regulations⁷⁷.

2.11 Article 208 of the Criminal Code

⁷² Il-Pulizija vs Domenico Catalogna et, Court of Criminal Appeal (Inferior), 30 January 1954 (Vol XXXVIII (1954), Part 4, Page 798)

⁷³ Il-Pulizija vs Anthony Deguara, Court of Criminal Appeal (Inferior), 26 November 1960.

⁷⁴ Andrew Sciberras: 'Restoring Open Democracy: The Law of Obscenity and Freedom of Expression in the 21st Century'.

⁷⁵ The Criminal Code (Chapter 9 of the Laws of Malta, Book I, Part II, Title VII), Art.208 (1); added by Act XXVIII of 1975.

⁷⁶ The Press Act (n 53), Art. 7.

⁷⁷ Pornography and Obscenity Regulations (n 27), Art. 3.

208. Whosoever, for gain, or for distribution, or for display in a public place or in a place accessible to the public, manufactures, prints or otherwise makes, or introduces into Malta, or acquires, keeps, puts in circulation or exports, any pornographic or obscene print, painting, photograph, film, book, card or writing, or any other pornographic or obscene article whatsoever...

2.12 Article 7 of the Press Act

7. Whosoever, by any means mentioned in article 3, directly or indirectly, or by the use of equivocal expressions, shall injure public morals or decency shall be liable on conviction to imprisonment for a term not exceeding three months or to a fine (multa) or to both such imprisonment and fine.

2.13 Article 3 of the Pornography and Obscenity Regulations of 1975

For the purpose of sub-article (3) of article 208 of the Criminal Code, an article shall be deemed to be pornographic or obscene if – (a) its dominant characteristic is the exploitation of, or undue emphasis on, sex, or any one of the following subjects, namely, crime, horror, cruelty and violence; or (b) it directly or indirectly advertises or gives information on any article considered to be pornographic or obscene under these Regulations.

Before delving into the merits of each provision, it is important to distinguish between pornography and obscenity. Pornography is defined as ‘material that depicts erotic behaviour and is intended to cause sexual excitement’.

This definition encompasses a wide variety of forms, from magazines to internet videos. Pornography is a multibillion dollar industry based on the sales of different porn media and was classified by Forbes as being a rapidly growing global enterprise, ranking in billions of dollars each year. Nowadays, pornography has taken a whole new dimension because it is now accessible in the comfort of one’s own home through adult film websites. On the other hand, since there is a certain lack on the definition of ‘undue emphasis’⁷⁸, resort must be had to foreign jurisprudence such as the Canadian Criminal Code⁷⁹ which states in article 163(8):

163(8): For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Another similar provision is found in the Obscene and Indecent Publications (Amendments) Act 1955 of New South Wales which holds in article 2(2)⁸⁰:

⁷⁸ See Article 3 of the Pornography and Obscenity Regulations of 1975.

⁷⁹ Canadian Criminal Code (n 27) Art. 163(8).

⁸⁰ Obscene and Indecent Publications (Amendment) Act (n 27), Art. 2(2).

Without prejudice to the generality of the meaning of the word "obscene", any publication or advertisement shall be deemed to be obscene if it unduly emphasises matters of sex, crimes of violence, gross cruelty or horror.

[2.14 A detailed analysis of Article 208 of the Maltese Criminal Code.](#)

Currently, the Criminal Code⁸¹ prohibits “pornographic or obscene articles.” Such prohibition can be found within art. 208(1) and art. 208(2) of the said Code, whereby a number of different types of media sources pertaining to such pornographic content are listed.⁸² The main difference between art. 208(1) and art. 208(2)⁸³ is the relevant manner in which such content is produced or circulated, which the law wants to facilitate for.

One can deduce that there are four main elements to these two provisions. The first is that of intent, which will be expounded upon below. The second is the actual production or circulation of pornographic content. The third is the element of production or circulation of such content being in public. The final element is the relevant media sources of such content. But all these elements taken together beg the question: what actually *is* considered as pornographic material? This will also be discussed below.

The former provision caters for the prohibition of relevant pornographic media sources produced or circulated with the intent of ‘gain’, ‘distribution’, or ‘display’, whereas the latter provision does not seem to explicitly state these requisites of intent. However, with regards to the intent of ‘gain’ this can be presumed - to a certain extent - as being incorporated in art. 208(2) as it clearly talks about trade. And this can be confirmed with the legal maxim: *finis merkatorum lucrum est* - i.e. the main purpose of trade is that of making profit. However, as one may appreciate, profit and gain are not one and the same,

To get a better understanding of what exactly the law considers as pornographic material,⁸⁴ we need to look at art. 208(3) of the Criminal Code, which states that material to be considered as pornographic is ‘to be so regarded in accordance with any regulation made as aforesaid.’ This is implicitly referring to provisions within the Pornography and Obscenity Regulations,⁸⁵ i.e. art. 3(a)⁸⁶ and art. 3(b)⁸⁷ of the said

⁸¹ Criminal Code, Chp. 9 of the Laws of Malta

⁸² And therefore such pornographic sources are presumed to be illegal

⁸³ “Whosoever trades in any article mentioned in subarticle (1), even if such trade is clandestine, or distributes any such article or displays any such article in public or in a place accessible to the public, shall, on conviction, be liable to the punishment prescribed in subarticle (1).”

⁸⁴ And therefore what it wants to render as illegal

⁸⁵ Pornography and Obscenity Regulations, Subsidiary Legislation 9.05 of the Laws of Malta

⁸⁶ “...an article shall be deemed to be pornographic or obscene if ... its dominant characteristic is the exploitation of, or undue emphasis on, sex, or any one of the following subjects, namely, crime, horror, cruelty and violence; or”

⁸⁷ “...an article shall be deemed to be pornographic or obscene if ... it directly or indirectly advertises or gives information on any article considered to be pornographic or obscene under these Regulations:”

legislation on what is to be so considered as pornographic, and what is not, as to the proviso to the said art. 3.⁸⁸

So what is the main distinction between what is to be considered pornographic and what is not, as per art. 3(a) and art. 3(b) as opposed to the proviso to art. 3?

If the content has an overwhelming element of sexual content in it or if it directly or indirectly publicizes such content⁸⁹ it is to be considered as pornographic content as it falls within the ambit of art. 3(a) and art. 3(b), whereas if it is mainly for the interests of “science, literature” and “art,” it falls within the scope of the proviso to art. 3 and therefore is NOT to be considered as pornographic material.

2.2 The Proposed Changes to the current laws.

A recent legal reform, Bill 113 of 2015⁹⁰ seeks to amend the laws regarding Pornography and Vilification of Religion. It aims at striking the necessary balance between the right of receiving and distributing information whilst at the same time protecting vulnerable persons and society in general from certain forms of pornography and indecency. Obscenity laws introduced in 1975 under a Labour government, which generically outlawed articles that ‘unduly emphasised sex, crime, horror, cruelty and violence’, will also be removed⁹¹. Pornography will now be defined as something which is made with the express aim to sexually arouse, and will be allowed to be distributed to adults, provided appropriate warnings will be given.

Amongst various amendments, the new law will cater for the introduction of porn shops in Malta in which pornographic material will be allowed to be displayed as long as clear warning signs are made outside the shops. However, it will still be illegal to distribute pornographic material in public places and to expose children to such material. Safety measures will be taken to prevent minors from entering into such shops by the placing of warning signs outlined in the proposed article 208(4).⁹² The latter will also cater for the licensing of TV Channels that transmit pornographic content on broadcasting platforms by the Broadcasting Authority and the unhindered reception of foreign-licensed pornographic channels. These reforms will not be regulating gentleman’s clubs or by any means permitting live nudity/sex shows; these are currently being regulated by other laws.

⁸⁸ “Provided that an article shall not be considered to be pornographic or obscene to the extent that it serves the public good on the ground that it is in the interests of science, literature, art or learning or other objects of general concern.”

⁸⁹ With an overwhelming element of sex

⁹⁰ Bill no. 113, Criminal Code (Amendment Bill),
< <http://www.parlament.mt/billdetails?bid=537&legcat=13> >

⁹¹Reljic Teodor, “Adults should not be told what they can and what they cannot watch” – Owen Bonnici’ (2015), Malta Today, <http://www.maltatoday.com.mt/news/national/54896/adults_shouldnt_be_told_what_they_can_and_cannot_watch_owen_bonnici >

⁹² “WARNING Persons passing beyond this notice will find material on display which they may consider indecent. No admittance to persons under 18 years of age.”

The general intention of the bill is to decrease censorship in art and thus boosting artistic expression. It is argued that the obscenity trial of novelist Alex Vella Gera and the editor of the student newspaper *Ir-Realtà*⁹³ was the cause célèbre for the anti-censorship movement. Vella Gera and Mark Camilleri were acquitted of obscenity charges on 'Li Tkisser Sewwi', first by a court that found in favour of their fundamental right to freedom of expression. These amendments are elemental for artists as the State and Police can no longer intervene in the work of artists, if all the conditions are abided by the proposed articles 208(3) and 208(4).

One of the most important amendments would be that of 'extreme pornography' which will be banned outright as it is presumed to threaten a person's life, an act which results in a person's severe injury, rape or a non-consensual sexual activity, sexual activity involving a human corpse, and any act involving a person and an animal; thus any act of rape, necrophilia or bestiality as well as any sexual act or image involving a minor as held in the new proposed article 208D. This proposed article was based on the equivalent British laws⁹⁴ which have also caused controversy with their introduction in 2008. The law has been proven to be questionable with regards to pornography portraying bondage-and-masochism (BDSM) genre which is often a violent activity. The lawyer behind the drafting of the new law, Dr. Andrew Sciberras addresses this issue. In fact, in an interview he said 'It's a bit of a grey area...If it's explicit and realistic then the police would have a case to make'.

The new bill also make it illegal to distribute private photos or films of a sexual nature without the consent of the person/s displayed in such material. The new proposed article 208E in fact, makes reference to revenge porn which seems to be a growing trend, especially amongst the younger generation. This issue was previously overlooked and was not catered for legislatively. The punishment for such offence would be a maximum of 2 years imprisonment and/or to a fine [multa] of not more than €5000.

With regards to the proposed bill to amend art. 208 of the Criminal Code, we can see a major overhaul to the law relating to pornography. Art. 208(1) and art. 208(2) now become art. 208D (1) and art. 208D (2) respectively. In these 'new' provisions the spirit of the law seems to be the wish to cater for more extreme pornographic material, as can be seen by the wording in the margin.⁹⁵ Another factor which seems to imply that art. 208D is aimed to cater for more extreme pornographic material is the increase in punishment. Imprisonment has been increased from six to twelve months, to a term of eighteen months to three years. And where before the fine was between €1000 and €3000, now it is being proposed to be between €3000 and €6000.

The new article dealing with the 'standard' offence of pornographic material is the new art. 208 of the proposed bill. Unlike its potential predecessor, this provision is much simpler in construct, focusing less on specifics and more on the actual display of such pornographic material. It simply protects against the display of any pornographic

⁹³ *Il-Pulizija vs Mark Camilleri*, Court of Magistrates (Malta), 14 March 2011 (unpublished); confirmed in the judgment of the Court of Criminal Appeal (Inferior) 8 February 2012 (Reference 164/2011).

⁹⁴ Section 63 of the Criminal Justice and Immigration Act 2008

⁹⁵ "Offences relating to extreme pornographic images"

material in a public place.⁹⁶ The punishment, unlike the current counterpart art. 208, consists only of a fine between €1000 and €3000; therefore no possibility of imprisonment if it results that the relevant fall within the ambit of this provision.

Whereas with the current legislation, art. 3 of the Pornography and Obscenity Regulations states what is pornographic and where the proviso to such art. 3 of the said Regulations states what is not, with the proposed bill, the proposed new relevant provisions with respect to the standard offence of pornography; are art. 208(4) and art. 208(3), respectively. In fact, the new bill proposes that the Pornography and Obscenity Regulations are repealed and are to be replaced by the Extreme Pornographic Images Regulations, 2015. These regulations seek to replace the now obsolete Pornography and Obscenity Regulations 1975 and is mostly modelled on the Scottish equivalent of the English Criminal Justice and Immigration Act 2008, i.e. the Criminal Justice and Licensing (Scotland) Act 2010. The regulations define what is meant by “extreme pornographic image”, and particular offers a coherent and realistic definition of pornography.⁹⁷

2.3 Local Jurisprudence tackled by the Maltese Courts.

In light of article 208 of the Criminal Code, various cases have been raised regarding the topic. A very recent and important case was that of ‘Police vs. Michael Ellul Vincenti’⁹⁸. The accused had scanned photos of his wife in which she is portrayed topless and posted them on the internet together with her personal mobile number. The Court of Criminal Appeal overturned the judgment given by the Court of Magistrates in its Criminal Judicature, as it had failed to examine the facts of the case properly. Both courts agreed that the photo in question is of a pornographic nature, not necessarily due to the contents of the picture itself, but due to the mobile number which was added, rendering it as pornographic material.

Jista’ oggettivament jitqies bhala li ghamel enfasi mhux xierqa fuq is-sess u li t-tqassim tieghu fuq l-internet ghandu jitqies bhala tqassim ta’ oggett pornografiku ghallfinijiet ta’ l-Artiklu 208 tal-Kodici Kriminali.⁹⁹

The Court of Appeal emphasised that the former court was wrong in its judgment of acquitting the accused as he had taken the photo himself and was the only one who knew of its existence and was in fact in possession of it. He also maliciously combined the number of the victim with the photo and scanned them to put them on the internet,

⁹⁶ “Whosoever displays or permits to display any pornographic material in a public place shall, on conviction, be liable to a fine (*multa*) of not less than one thousand euro (1,000) and not more than three thousand euro (3,000).” - A Bill entitled “AN ACT to amend the Criminal Code, Cap. 9. and to provide for any other matters ancillary or consequential thereto.”

⁹⁷ Sciberras Andrew, ‘A Q&A (Behind-The Scenes) Guide on the Legal reforms Regarding Artistic Censorship’ (2015), Andrew Sciberras, Politics, Law and Current Affairs in Malta and Beyond < <http://andrew-sciberras.blogspot.com/2015/07/a-q-and-behind-scenes-guide-on-legal.html> >

⁹⁸ *Il-Pulizija vs. Michael Ellul Vincenti* [Court of Criminal Appeal] [03/10/13]

⁹⁹ It can be objectively considered as having put unnecessary emphasis on sex and its spreading on the internet is to be considered as the spreading of a pornographic object for the purposes of article 208 of the Criminal Code.

such was found on his computer. In light of all this, the accused was found guilty of Article 208.

2.31 Defilement of minors in relation to Article 208

The offence of defilement of minors as stipulated in articles 203 and 203A of the Criminal Code should also be viewed closely to article 208 of the said Code. The offence of defilement of minors is one of the offences which are categorised as “sexual offences”. The Actus Reus of these offences is very often similar in nature, and there may be instances where the agent’s same material conduct coupled with his intent, may lead to the commission of more than one offence. This offence seeks to punish those lustful acts which though not consisting in carnal knowledge with violence or the attempted carnal knowledge with violence, still have the effect of defiling a minor, whether male or female.

The court, in analysing whether the illustration of pornographic material to a minor is relevant under the umbrella of article 203, held that this is not so. However, this would in itself be punishable under article 208A which includes, inter alia, ‘the showing of indecent material’ as a criminal offence. This was illustrated in the case of ‘Police vs. Andrew Bonnici’ [23/01/1998] [Court of Criminal Appeal]. Here the defendant was accused of showing pornographic material to two 12 year old boys and even committed sexual acts in the presence of a third minor as well as on the minor himself. The court held that such acts were corrupt on the person of the child even though such child may have been already exposed to sexual acts or may already have participated in sexual acts.

The court held that article 208 contemplates many hypotheses. First of all, it cannot be said that the accused had put into circulation the pornographic material, but had acquired and was holding such material. Such holding could only be punishable under article 208 if the material was acquired and was being held for gain or for distribution or for display in a public place or in a place accessible to the public.

Tifel ta’ appena tlettax-il sena li jiġi espost għall-għemil li jagħmel l-appellant, kemm fuqu nnifsu, kif ukoll fuq il-persuna tal-istess tifel, ma jistax ma jiġix korrott anke jekk forsi dak it-tifel ikun diġà’ jaf ċerti fatti tal-hajja, jew ikollu xi esperjenza sesswali. Altru esperjenza sesswali fil-kors normali tal-iżvilupp fiżjoloġiku ta’ dak li jkun, u altru impożizzjoni ta’ sitwazzjonijiet determinati minn eġemil żieni, li manifestament jipproduċu lezzjoni (lesion) f’integrità morali tal-minorenni.

The case of ‘Police vs. Carmelo Sant’ [12/02/2009] [Court of Criminal Appeal] made reference to the parliamentary debates regarding the introduction of article 203A, which refers to instigation of defilement of minors. In this case, the accused had committed a lewd act on his own person in the presence of the minor. Despite the fact that there was no physical contact between the active subject and the passive subject, the Court still found him guilty

.....din l-emenda qed issir minħabba li kien hemm min qal li biex tkun tista’ tgħid li wieħed wettaq għemil żieni jrid ikun għamel kuntatt fiżiku ta’ xi xorta. Per eżempju kien hemm min qal - għalkemm mhux kullhadd

qabel ma dan - li jekk wieħed juri ktieb pornografiku lil persuna taħt l-età' ma jkunx qed iwettaq għemil żieni, u allura hawnhekk qed nagħmluha ċara li din ukoll hija forma ta' korruzzjoni u b' hekk wieħed irid jiġi kastigat għal dan l-għemil.

A similar case was that of 'The Police vs. Jessica Vella et' [19/07/2009] [Court of Criminal Appeal]. In this case the accused (Vella) was a 19-year old who had had sexual intercourse in the presence of a 13-year old girl after the two of them had met two men in a bar and invited them over to a flat. The 13-year old had also engaged in sexual activities with the other man. Although there was no doubt that such man was guilty of defilement, the Court further said that by her behaviour, she exposed and furthermore facilitated the defilement of the minor. The defence held that the minor was not a virgin herself and had participated in flirtatious acts with the two men. However, the Court following previous precedents dismissed their plea as the minor was still corrupted.

This reasoning was primarily adopted in the cases of 'Police vs. Carmelo Grech' [Court of Criminal Appeal] [18/06/1960] and 'Police vs. Lorenzo Baldacchino' [Criminal Court] [30/03/1963] where the Court held that a minor had a right not to be defiled any further, independently from his state of corruption.

A landmark case revolved around a sexually explicit story published by Alex Vella Gera entitled 'Li Tkisser Sewwi' [Fix What You Break] which was handed over to Mark Camilleri, editor of a student newspaper called 'Realtà' for publication in University and Junior College in Malta. The contentious issue was a short story written by Alex Vella Gera which was recounted in the first person, the protagonist's sexual exploits and his distorted view of women as sexual objects in explicit detail. A series of events ensued involving the campus clergy and the University rector which almost lands the two people involved in prison as this writing was held to be in violation of Article 208. The Court of Criminal Appeal [08/02/2012] in its judgment held that to determine whether a certain material is to be considered as one which is pornographic or as obscene, one has to look at whether the writing in question triggers a certain sexual arousal in the reader. This is essential to distinguish between a factual or scientific writing and a work which is purely pornographic. The Court held that in this case it wasn't the intent of the writer that the reader imitates the character of the story, but to emphasise the obscenity of such characters and that the latter should not be emulated.

This case was of particular importance as legal amendments to article 208, the same law of which both Vella Gera and Camilleri were accused of, were announced by Justice and Culture Minister Owen Bonnici, decriminalizing both pornography and blasphemy, and ensuring that any type of material which is not pornographic in nature would be considered as artistic work.

2.4 Current Debates and the Maltese Conception of Obscenity.

[2.41 Arguments against Pornography](#)

Pornography has always carried a negative connotation amongst peers and is usually not seen as a positive influence on society. This is also the case in Malta, where most people view pornography in terms of the adverse effects of the Roman Catholic Religion. Some claim that the viewing of pornography may be one of the causes of a marriage failure as it gives a false perception of women, or may even cause a sexual addiction.¹⁰⁰ Fordham states that:

Pornography creates unreal and unrealistic expectations in the minds of boys and men in regard to their sex lives, frequency of sexual activity, the kinds of acts performed, responsibility and the role of the wives in fulfilling their men's expectations.¹⁰¹

Most research suggests that pornography changes the way relationships are perceived. Authors suggest that exposure to pornography seems to reduce the negative view of pre-marital sex, extramarital affairs amongst other things.¹⁰²

On a more local perspective, the Malta Confederation of Women's Organisation (MCWO) argued that pornography is distorting society's image of a healthy relationship. The MCWO believes that pornography, prostitution, human trafficking and gentlemen's clubs are all interlinked as they are all mainly against women, since the porn industry seeks to gain revenue from the exploitation of women through male consumers. On the other hand, the MCWO held that it has no objection to the amendments concerning vilification of religion, the anti-censorship movement and the new laws concerning revenge porn. During a meeting with MCWO Chairperson, Lorraine Spiteri held:

On top of the exploitation, pornography also involves the humiliation and degrading of the human body and sexuality in general. And unfortunately, through technology, it is now much more accessible than ever before. This is the reality the new law is trying to confront. A lot of young people today – 16 years old and younger – come across porn either by chance, as I said before... and would be naturally interested to know more... or go onto the Internet specifically to look for it.¹⁰³

She further stated that this affects both males and females as it distorts the expectations of a relationships and what people perceive as normal.

The MCWO felt that this legal amendment would not only not bring about progress but regression since they feel that this is a step backwards in the long lasting discussion of equality between men and women since through the transmission of such material, women are once again being portrayed as subjects to the male. The MCWO feels that the sexual acts that women are set to be portrayed in are very degrading on women

¹⁰⁰ Paul, P., 'Pornified: How pornography is transforming our lives, our relationships, and our families.' (2005), New York: Time Books

¹⁰¹ Fordham, G. , 'As if they were watching my body. Pornography and the development of attitudes towards sex and sexual behavior among Cambodian youth.', (2006)

¹⁰²Caroll, J. 'Generation XXX: Pornography acceptance and use among emerging adults. Journal of Adolescent Research, ' (2008), 23, 1, 6-30.

¹⁰³Vassallo Raphael, 'Pornography, we have a problem....| Lorraine Spiteri', (2015) Malta Today <http://www.maltatoday.com.mt/news/interview/55726/pornography_we_have_a_problem_lorraine_spiteri >

and that it is in a way, a form of violence against women and that pornography is the exploitation of women.¹⁰⁴ The organization argued that pornography violates human and bodily integrity and in turn works against women's rights. In fact, the UK office of Children's Commissioner said that 'young people's exposure to pornography is linked to unrealistic attitudes about sex; stronger beliefs that women are sex objects; and less progressive gender role attitudes'.¹⁰⁵ This statement truly encompasses every aspect of the MCWO's argument against Bill 13 of 2015.

In turn, as a reply to the claims and worries made by the MCWO, the Broadcasting Authority argued that they have a duty to oversee anything before it has been transmitted and that they have both the right and the duty to stop anything which could be deemed to be harmful and offensive from airing on television. Furthermore, they explained how the provisions of the protection of minors are to be left untouched and that anything concerning child pornography would never be allowed to be transmitted.¹⁰⁶

In another article written by Professor Kevin Aquilina, he feels that the legal amendments proposed in bill 113 of 2015 introduce the right to debase, humiliate and objectify women.¹⁰⁷ He feels that the decriminalization of pornography leads to the dehumanisation of women. Rather than seeing this amendment as a step forwards, a regressive step has been taken which deprives women of their innate human dignity and undermines the laborious work undertaken by feminists throughout centuries. The sole advantage in Professor Aquilina's view is that Malta will benefit from this amendment economically at the sole expense of women's rights. In his opinion, with the amendments brought about by Bill 113, 'women's rights come second after that of a thriving and prosperous economy and artistic expression'.¹⁰⁸

2.42 Arguments in favour of Pornography

Weaver¹⁰⁹, in a study with more than 15,000 subjects found that pornography may have a positive impact on one's sex life which may be due to the fact that pornography enables viewers to have more insight on sexual knowledge. Whilst most people object to pornography as it is seen to be degrading for women, authors such as Tiefer¹¹⁰ and

¹⁰⁴Staff Reporter, 'Women's Confederation claims obscenity laws' decriminalisation open door to TV', Malta Today
<http://www.maltatoday.com.mt/news/national/55559/womens_organisations_disappointed_at_pornography_decriminalisation#.VjIVT7erTrd>

¹⁰⁵ 'Women's organisations express dismay at bill allowing pornography' (2015), The Malta Independent
<<http://www.independent.com.mt/articles/2015-07-28/local-news/Women-s-organisations-express-dismay-at-bill-allowing-pornography-6736139600>>

¹⁰⁶Dalli Miriam, 'Pornography "won't be airing freely on television", Broadcasting Authority Says', (2015), Malta Today
<http://www.maltatoday.com.mt/news/national/55630/pornography_wont_be_airing_freely_on_telemision_broadcasting_authority_says#.VjIVOberTrd>

¹⁰⁷ Aquilina Kevin, 'Civil right to objectify women', (2015), Times of Malta
<<http://www.timesofmalta.com/articles/view/20150727/opinion/Civil-right-to-objectify-women.578181>>

¹⁰⁸ IBID

¹⁰⁹ Weaver, J. (2004). Personals, sex sites changing the rules of love

¹¹⁰ Tiefer, L. (1986). In Pursuit of the Perfect Penis. American Behavioral Scientist, 29(5), 579-599.

McKormick¹¹¹ believe that pornography allows the women to be in control of her own body and is a source of empowerment.

Justice and Culture Minister Owen Bonnici when announcing the new amendments held that morality is not static and changes continuously. He added that, 'the State cannot play moral custodian', and insofar as the laws will impact art and culture, added that 'adults should not be told what they can and cannot watch'¹¹².

Being a Roman Catholic country, Malta has very strong ties with religion and the religious community. Therefore, when considering such a delicate matter, it is important to consider the position of the Church. The Church has indeed expressed an opinion, being against the government's proposal; that of decriminalizing the vilification of religion and that of pornography. The Church argues from the moral point of view, stating that we must protect and preserve morality and that it should be a top priority, over all other factors including profits. Furthermore, it argued that this law would go against the teachings of the Church, which always emphasized on the fact that a sexual relationship is not simply there to gain pleasure out of but something which takes place as an act of love between two people¹¹³. The Ministry regarding this point of view held its ground stating that this amendment is long overdue and has to be done to maintain modernity and cater for today's society. However, extreme pornography is to be regulated and children and vulnerable persons will still be protected.

Therefore, the above more so confirms the delicacy of the topic. Both sides could be argued – both that the bill is taking away from women's rights and also that it is seeking to regulate an ever-growing industry. This matter is largely subjective as is the whole topic itself. It is a topic which will never be settled upon and something which will continuously be up for debate.

2.5 Comparative Overview.

2.51 The Netherlands

The Netherlands is considered to be a very liberal country. This is because when comparing the country's laws to other countries, especially within the European Union, Dutch law is considered to be more lenient, for example the legalization of the selling and use of soft drugs such as marijuana.

Indecent material and pornography are somewhat regulated by the Dutch Criminal Code and fall under Title XIV; Crimes against morality. Article 240 of the Dutch Criminal Code regulates the exhibition or offering of indecent or offensive images or objects either in a public place or to someone without his/her own request. In this case, the

¹¹¹ McKormick, N. (1994). Sexual Salvation. Westport, CT: Greenwood.

¹¹²Reljic Teodor, "Adults shouldn't be told what they can and cannot watch" – Owen Bonnici', (2015), Malta Today
<http://www.maltatoday.com.mt/news/national/54896/adults_shouldnt_be_told_what_they_can_and_cannot_watch_owen_bonnici >

¹¹³Micallef Keith, "Vilification laws must not be axed"- Church: Decriminalisation of porn not a step forward', (2015), Times of Malta
<<http://www.timesofmalta.com/articles/view/20150808/local/vilification-laws-must-not-be-axed-church> >

person is liable to imprisonment for a period not exceeding two months or a fine of the third category which is a maximum of €4,500.

Article 240a starts to tackle defilement of minors through pornographic material by stating that whosoever is caught with indecent photos or material and exposes such materials to children under the age of sixteen, the person is liable to a maximum of one year imprisonment or a fine of the fourth category i.e. €11,250¹¹⁴. Building upon this article, the following Article 240b (1) prohibits child pornography which is defined as material which exhibits children who have not yet attained the age of eighteen years taking part in sexual activities. In such a case, the punishment imposed would be that of a maximum of four years imprisonment or a fine of the fifth degree which amounts to €45,000. Article 240b (2) then caters for someone carrying out the aforementioned offence in article 240b (1) as a profession or habit in which case the punishment with regards to the jail term would go up to a maximum of six years and a maximum of a €45,000 fine¹¹⁵.

These provisions are further mentioned in article 248 which caters for the aggravation of such an offence by means of grievous bodily harm or death in which case, the former will be punished with imprisonment for a term up to twelve years or a fine of the fifth category and in the case of the latter, the term of imprisonment goes up to a maximum of fifteen years or a fine of the fifth category. Article 248c of the Dutch Criminal Code builds upon the preceding articles regarding the distribution of indecent sexual material involving minors and this shall be punished by imprisonment of not more than four years or a fine of the fourth category.¹¹⁶

The Netherlands have a special team called the 'Police Services Agency' which are responsible for enforcing the laws on child pornography and making sure that minors are not exposed to pornographic material¹¹⁷. Therefore, when one compares Maltese legislation on pornography with that of the Netherlands, it is evident that there is some common ground but also certain areas which are not catered for by Dutch law and vice versa.

Firstly, it is seen that child pornography is commonly understood and accepted to be unlawful and thus is found as illegal in both criminal codes. Both states impose very harsh sanctions of imprisonment or hefty fines. Although both countries seem to be more or less on par with regards the specificity of legislations, the difference is seen when one takes into account the punishments imposed for persons found guilty of such offences. Whereas in the Netherlands, the punishment may go up to 16 years imprisonment or €45,000 in fines, in Malta, the punishments which are supposedly given according to our criminal code do not exceed the term of 6 years imprisonment.

¹¹⁴Dutch Penal Code

<https://www.unodc.org/res/cld/document/nld/1881/penal_code_1881_excerpts_html/Netherlands_Penal_Code_1881_excerpts.pdf>

¹¹⁵ 'Netherlands', (2002), Age of Consent < <http://www.ageofconsent.com/netherlands.htm> >

¹¹⁶ Dutch Criminal Law < <http://www.wetboek-online.nl/wet/Sr.html> >

¹¹⁷ Crime and Crime Prevention, Government of the Netherlands Website, < <https://www.government.nl/topics/crime-and-crime-prevention/contents/sentencing> >

However, what is to be noticed is the fact that despite the Netherlands imposing such sanctions and legislating so many provisions on child pornography and the defilement of minors through pornographic material, they lack provisions on pornography in general. Thus, Dutch law does not regulate any other type of pornography besides child pornography. It does not take a position on whether it is legal or illegal and therefore makes it a liberal country. In Fact, the Netherlands is home to the second largest porn website hosts.¹¹⁸ This certainly indicates the lack of harshness imposed on the citizens of the Netherlands by sanctions and laws. The only restriction that is made is with regards age, making sure that any pornographic material does not fall in the hands of minors. On the other hand, when it comes to pornography which is seen or distributed by and to consenting adults, there is really no restriction or law regulating that. A distinction is not made between standard and extreme pornography whereas in Malta, this distinction was proposed in Bill 113 of 2015 together with a difference in punishments. Furthermore, no law regulates pornographic sex shops or material which is shown on television channels¹¹⁹.

Something important which is being catered for by Bill 113 of 2015 which has not yet been introduced in the Netherlands is that concerning the distribution of indecent material of another person without their consent. If the person shown is a minor, it would constitute an illegality in both countries. However, when comparing the two, it is only Malta, with the introduction of this bill which holds that under article 208E of the bill, any person found guilty of such an offence will be liable to imprisonment for a term not exceeding two years or a fine of between €3000 and €5000. This article also includes any publication, distribution or use of photographs or private sexual films; where private is defined as any photo or film which was taken without the consent of the person involved.

2.52 The United Kingdom

The United Kingdom Criminal Justice and Immigration Act 2008 contains a particular section (part 5) which deals with Pornography. Article 63 speaks about Possession of Extreme Pornographic Images. For the purposes of such provision, article 63(2) defines an 'extreme pornographic image' as an image which is both pornographic and an extreme image. It must have been created with the purpose of sexual arousal. In such a case, it is an offence to be in possession of such an extreme pornographic image.¹²⁰

Sub-article 6 of this article then goes on to describe an extreme image as an offensive image which has an obscene character. This definition is aided by article 63(7) which states that an image falls within the parameters of an extreme image if it is an act which threatens a person's life, if it results or is likely to result in serious injury to a person's private areas or if it involves sexual obscenities with a corpse or with an animal, whether dead or alive.

¹¹⁸Zolfagharifhard Ellie, 'Revealed: the internet porn map of the world reveals US, Holland and Britain as the largest providers in the world.' (2013), The Daily Mail < <http://www.dailymail.co.uk/sciencetech/article-2397058/Internet-porn-map-world-reveals-US-Holland-Britain-largest-providers-world.html> >

¹¹⁹ < <https://answers.yahoo.com/question/index?qid=20091027111623AA2vsN2> >

¹²⁰ UK Criminal Justice and Immigration Act (2008) Page 50

Article 64 deals with Exclusion of Classified Films. It states that 'excluded images' defined in 64(2) as an image which forms part of a series of images in a recording of the whole or part of a classified work, is not included as an offence under article 63. For the purposes of this section, classified work means a video which has a classification certificate issued by a competent authority.

However, it is not considered to be an excluded image if it is contained in a recording of an extract from a classified work or if the nature of the image leads to the assumption of it having been extracted for the purpose of sexual arousal.

There are various defences for persons having been in possession of extreme pornographic images. If the person was not aware of the nature of the image or had not seen the image then this would constitute a defence under article 63. Such would also be permitted if the person in possession had not requested for such an image and had not kept it for an unreasonable time.

Section 69 and 70 of this act deals with 'Indecent photographs of children'. However, these sections only deal with the amendment done to 'The Protection of Children Act 1978 (PCA)'. This act deals with the aspects of the sexual exploitation of children by punishing the unlawful act of taking, making, showing, distributing or possessing for the purpose of distributing and publishing any indecent photographs of minors.¹²¹

For there to be such an offence, catered for specifically by section 1(1) of the PCA, the prosecution must prove that the accused knowingly and wilfully made, took or permitted such photograph to be taken or distributed, knew that the photograph was indecent and obviously that the photograph contained a child.

In the case of 'R vs Oliver Hartrey and Baldwin' the court divided 'indecent images of children' into five categories and gave their sentence based on such categories. These included; images of erotic posing, with no sexual activity. Secondly, non-penetrative sexual activities between children, or solo masturbation by a child. Thirdly, non-penetrative sexual activity between adults and children. Fourthly, penetrative sexual activity involving a child or children or both children and adults and lastly, sadism involving the penetration of, or by an animal.¹²²

Child pornography is always wrong. This is something which is common amongst the countries discussed. Children are innocent and thus any attempt to defile such minors and take away the innocence of the children is wrong. However, this gave rise to certain issues as to whether the use of children in "art" is also considered as pornography. Post-1999, the Interpol Standing Working Group on Offences Against Minors has considered child pornography to be 'the consequence of the exploitation or sexual abuse perpetrated against a child'.¹²³

¹²¹ 'Indecent photographs of children', CPS, <http://www.cps.gov.uk/legal/h_to_k/indecent_photographs_of_children/#a02>

¹²² 'Indecent Images of Children', CPS <http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/indecent_images_of_children/>

¹²³ 'What are the different levels of child pornography?', Jordans Solicitors <<http://www.jordanssolicitors.co.uk/child-abuse/2014/07/what-are-the-different-levels-of-child-pornography/>>

Currently, the Maltese criminal code punishes offences relating to pornographic or obscene articles under article 208. When considering this, in comparison to the UK Criminal Justice and Immigration Act, it is seen that the UK Act goes to great length to define every word in the law, and caters for a number of scenarios which involve 'extreme pornographic images', unlike Maltese law which gives a more general description of the 'offences relating to pornographic or obscene articles'. Our law does not provide a definition of what is to be included under such aforementioned title but simply states that it is up to the Minister of Justice after consultation with the committee to make regulations on what is to fall under 'pornographic' or 'obscene'.

When considering the proposed new bill and the changes that are being proposed, this seems to be more on the lines of UK law as opposed to the current law. This is because, the proposed change focuses more on the regulating of extreme pornographic material rather than pornographic and obscene articles in a general sense.

2.6 The European Union.

Being one of the member states of the European Union (EU), Malta is bound to abide by any legislation put forward by the EU.

Once again, we are faced with Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 which caters for the enforcing of laws against the sexual abuse and sexual exploitation of children and child pornography. This directive tackled four main areas, one of which was that of child pornography which was to include possessing, accessing, and distributing, supplying or producing child pornography. Child pornography is inevitably mentioned in other areas such as that regarding the internet and the soliciting of minors to provide pornographic material of themselves.¹²⁴ This can also be aggravated by certain circumstances such as if the child pornography was carried out against a vulnerable child or done by a person who is a member of the child's family or if committed by a person who is of a particular authority as well as if the person is a recidivist and therefore has committed the same offence numerous times.

On the other hand, when it comes to regulating porn from a wide perspective, that between consenting adults, European Union Law is silent and therefore, it leaves it up to the Member States to legislate on this matter according to what member states deem to be punishable under their law. Therefore, on this matter, states remain sovereign and hold the power to legislate freely. Hence, there is a difference in legislation between EU countries such as the Netherlands where pornography is not legislated upon and therefore legal, as opposed to Malta where pornography, both standard and extreme is illegal. However, what is interesting to note is that there was an attempt to ban all kinds of pornography, back in 2013. The proposal 'calls on the EU and its Member States to take concrete action on discrimination against women in advertising

¹²⁴ Combating the sexual abuse and sexual exploitation of children and child pornography (2011) (directive 2011.93.EU) < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:jl006> >

[with] a ban on all forms of pornography in the media' and therefore, without there being a legislation, one can still witness certain positions within the European Union.¹²⁵

Comparing Malta's legislation with that of the European Union is a bit of a paradox when taking under consideration that any legislation enacted by the European Union is also part of Malta's Law and Malta is bound by it and therefore, one cannot as such compare and contrast one to the other. The only thing that could be said with regards to the discrepancy between legislations is the fact that the European Union, till now, felt no need to regulate beyond child pornography and therefore, Malta does indeed go beyond the EU legislation with Bill 113 of 2015 by regulating standard and extreme pornography. The most important thing to be regarded here is that the bill does not go against any of the provisions of European Union law and it must be pointed out that if the European Union had legislated on this matter prior to the bill, then Malta would have lost the competence to legislate upon this area and would be bound by the laws introduced in EU law.

2.61 Case Law of the European Court of Human Rights (ECtHR).

If the bill is passed as a law, article 208D would be added to the Criminal Code, following article 208C. The former will provide that whosoever, for 'gain, distribution, or for display in a public place, or in a place accessible to the public, manufactures, prints, or otherwise makes or introduces in to Malta, or acquires or keeps, puts into circulation or exports, any extreme pornographic image shall' will be criminally punished. However it would be a defence if he had a legitimate reason for being in possession of that image, if he did not know it would cause extreme pornographic material and if he was sent the image without him having requested it beforehand. 208D further provides that these defences do not hold if the pornographic material involves minors.

This provision seems to be in line with ECHR cases such as 'Karttunen vs. Finland'¹²⁶, wherein the intention of the person in possession of pornographic material was considered to be irrelevant where such material involved minors. In this case the applicant was an artist who had included in her exhibition which was shown at a gallery, several photos of minors engaging in sexual acts. Even though she was convicted, the Finnish courts did not punish her, because her intention was genuine, she displayed such images to create a public discussion. Thus her application was based on her claim that her conviction violated her right to freedom of expression as provided under the Convention. The ECtHR agreed with the Finnish courts that the illegality of child pornography was based on the protection of children from sexual abuse, however, it held that the fact that those images were in her possession and that she exhibited them still made her liable to punishment despite her intention. Thus, the Court held that the domestic court's interference with her right to freedom of expression was necessary and proportionate to the legitimate aim pursued, however the court has been criticized as it seems that it is implying that displaying child pornography is an exercise of freedom of expression, a freedom which is legitimately interfered with.

¹²⁵Waterfield Bruno, 'MEPs to vote on EU "ban on all forms of pornography', (2013) , the Telegraph <<http://www.telegraph.co.uk/technology/news/9917189/MEPs-to-vote-on-EU-ban-on-all-forms-of-pornography.html> >

¹²⁶ No. 387/1989

Similarly in the case of 'Muller and Others vs Switzerland'¹²⁷, the court held that the restriction of the applicant's publication of obscene images was legitimate, and one of the grounds for such legitimacy being the reaction of a man who visited the exhibition of such images. Thus, again we see the protection of the interests of children.

The proposed article 208D, like the Court in the Karttunen case, does not distinguish between the possession, distribution and production of child pornography. Because of this, the case has been criticized¹²⁸ as the reasoning behind making the production and distribution of such materials may not be the same as that used for the possession of such materials¹²⁹.

Article 208 of the proposed bill also provides that where pornographic material is not displayed in a place which is considered as public for the purposes of the offence thereunder, there shall be a warning sign that no person under the age of 18 years shall be allowed to enter. In the case of 'Perrin v. the United Kingdom'¹³⁰ the conviction of a man who provided pornographic images without giving such a warning as proposed in the draft bill was not considered as a violation of his right to freedom of expression. The importance of this case lies in two factors: firstly because one's freedom of expression can be limited to protect the interests of a child, and secondly because the website did not have an age restriction

With regard to manufacturing or making as provided in the proposed article 208D, in 'Soderman vs. Sweden'¹³¹ it was said that the fact that the applicant's stepfather filmed her naked before she went into the shower without her consent did not amount to sexual child molestation, but it could amount to attempted child pornography.

Neither the Criminal Code nor the draft bill define the term 'pornographic' or 'extreme pornography'. The court in the last mentioned case was of the opinion that the stepfather could not be convicted of attempted child pornography because the images were absent of the pornographic element, because in order for it to be pornographic, such an image would have had to be manipulated, but in this case there was no manipulation and it was not placed in a pornographic context, thus the court held that such a charge would not be successful.

With regard to the definition of obscene images, the European Court of Human Rights, in the abovementioned Muller case, held that this changes with changing circumstances and that rigidity is to be avoided. Therefore the court agreed with the Swiss courts that the images in this case were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensibility' and thus the restriction of the applicant's freedom of expression in this sense was necessary in a democratic society.

¹²⁷ No. 10737/84

¹²⁸ *Karttunen vs. Finland: Child Pornography and Freedom of Expression* <<http://strasbourgobservers.com/2011/10/10/child-pornography-and-freedom-of-expression> >

¹²⁹ *R v. Sharpe* (Supreme Court of Canada) SCR 45, 2001 and *Osborne vs Ohio* (no. 88 – 5986) April 18, 1990

¹³⁰ Application no. 5446/03,

¹³¹ Application no. 5786/08

2.7 Suggestions to the House of Representatives.

With regards to the filtering of pornographic sites on the internet, various people have suggested that this measure should be one which the law interferes in. In a blog written by Dr. Anastasio Ghio, he suggested that parents should be the moral custodians for their children and monitor the usage of the internet by their children. Just as employers block certain websites on company computers, parents should also block such websites they deem fit and filter any content which is not considered morally appropriate for children.

Whilst any plans to ensure that our children do not get access to pornographic material are surely laudable, I do not think that legal impositions from Government is the way to go. Technology will always be a step ahead and the best way to protect oneself and our children against the dangers of the Internet is through self-help and technology itself. There are various products available even as shareware, freeware and open source versions which can help parents control and filter their children's internet.¹³²

In an interview with MCWO Chairperson, Lorraine Spiteri, she held that the situation with the Broadcasting Authority would remain the same as it is regulated by European law. However, this seems to be inconsistent with European law due to the fact that the latter does not forbid pornography on TV. The local Broadcasting Authority may not license local porn channels, however other countries, acting under the same EU legislation can and do. Such countries include France, Germany, Hungary and the Czech Republic amongst many others. Thus, we urge the legislators to reconsider this particular provision to keep local legislation in line with EU law.

With the new amendments and the introduction of sex shops, we urge legislators to keep in mind that these shops should be opened in areas which are not as popular and harder to reach by minors, as is the case in foreign countries where special districts are formed for the purpose of these sole shops in order to maximise protection for minors.

¹³² Ghio Antonio (Dr.), 'Blocking of Internet Porn: a legal dilemma?' (2011), ICT Law Malta < <http://ictlawmalta.blogspot.com/2011/01/blocking-of-internet-porn-legal-dilemma.html> >

Conclusion

After the introduction of Bill 113, many people have failed to realize what the common thread between the amendments proposed to pornography and vilification of religion really is. They do not see the link when in fact, it is quite clear. The main objective of this bill is precisely the safeguarding and expansion of the freedom of expression which is recently being given a lot of importance and is recognised much more as a vital fundamental human right. Although this freedom which is even enshrined in the constitution is going to be even less limited than it was before, this will by no means warrant for the abuse of such a freedom and the implementation of such an amendment will make sure that every wrong doing will still go unpunished.

We're living in a time where new laws are flourishing all around Europe about all different kinds of matter. We should not be afraid of such a change but we should contribute to it ourselves. At the same time however, we should always be careful that in amending the law, we respect our own culture. Moreover, we should all be active citizens and whenever parliament introduces a bill in parliament, we should all express our opinion about it. If the majority of the population does not agree with it, parliament would be forced to either discard the bill or to amend it in such a way that it's acceptable to us.

One might say that although many countries have removed the vilification of religion as an offence and many sex shops have been introduced around Europe, this does not mean that we should imitate them and do the same. Some conceived this bill as an attack on religion and on woman's rights. This is quite untrue as all measures have been taken in order so that these values are still safeguarded. Although it's true that we should not introduce any laws which could go against our values, this does not mean that we should keep ourselves in a deadlock where we fear of passing a new law which would be in line with other nations. We should do our best to modernize our nation; such a proactive country will receive admiration and respect from all around Europe. Therefore, with the introduction of this bill, we should be proud that our country is moving forward and keeping in line with others. We aren't by all means throwing religion or woman's rights in the gutter. These laws are a result of a country being proactive in its mentality and an attempt to continue gradually modernizing our nation.

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