CRL 2007 SUBSTANTIVE CRIMINAL LAW 2

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SUBSTANTIVE CRIMINAL LAW II

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Calumnious Accusation

This crime is largely considered to be an **offence against the Public Administration**, and more specifically, a **transgression against the proper administration of justice**.

> (1) Whosoever, **with intent to harm any person**, shall a**ccuse such person before a competent authority** with an offence of **which he knows such person to be innocent**, shall, **for the mere fact of having made the accusation**, on conviction, be liable […]
>
> (2) Where the crime is committed with **intent to extort money or other effects**, the punishment shall be **increased by one degree**.
>
> **Art. 101**, *Criminal Code*

Thus, the essential elements of this crime are:

1. The **Accusation of an Offence** made to a **Competent Authority**
2. The **Intent to Harm** the Accused
3. The **Awareness** of the Accuser that the Accused is Innocent

Before delving deep into the inherences of these elements however, it is of utmost importance to understand the process of prosecuting an alleged offender under criminal law.

Procedure

Firstly, it is important to keep in mind that in Criminal Procedure, the initiation of criminal proceedings is **a public function entrusted to the Government**. Thus, the Government's authority is exercised on behalf of the state either through the **Executive Police** or the **Attorney General**. This governmental action is carried out ***ex officio*** in instances where the involvement of the injured party's complaint (***kwerela***) is NOT necessary to initiate legal proceedings, or when the law does not explicitly delegate such authority to private individuals.

Procedurally speaking, **the law allows any person to provide information to the police** about an offence that is subject to prosecution *ex officio* – given that they have become aware of it in any way. Moreover, the Code also grants the right to any person who feels aggrieved by an offence to file a complaint to the Executive Police against the alleged offender, whether known or unknown. These methods of bestowing information and filing complaints represent two avenues through which the police are notified of the commission of an offence.

Another type of ***notizia criminis*** is the 'report', signifying the notification that certain public officers are expressly **obligated by law** to make regarding an offence they have become aware of in the course of their official duties.

The Accusation of an Offence made to a Competent Authority

The definition of an 'accusation' is confined to the formal methods outlined in the procedural law mentioned earlier. For the offence of calumnious accusation to be consummated, it is **NOT necessary for the information**, **complaint**, **report**, or any other **notice** of the offence **to meet all the formal requirements prescribed by procedural law**. Any action intended to initiate criminal proceedings against an innocent person is adequate.

Maino stipulates that the procedural law's formal requirements are designed to ensure the **accuracy of the writing** and the description of the facts and circumstances, rather than providing **immunity** to informally made calumnious accusations that could expose the victim to similar risks.

CASE LAW: ***The Police v. N. Brincat*** – the Accusation

In this case, **Judge Montanaro Gauci** argued that, for this crime to subsists, the accusation (***denunzia***) of the offence must be **spontaneous**, and **not merely voluntary**. Therefore, if the accusation was made, for example, in response to police questioning, it would NOT give rise to a charge of calumnious accusation. Instead, the appropriate charge in such cases would be of **defamation**.

The false accusation presented to the competent authority **must pertain to an offence**; in other words, it must relate to a fact that possesses the nature of a criminal wrongdoing, even if it is merely a contravention. The rationale behind this requirement is straightforward. Only when an act is ascribed to an individual, qualifying as a criminal offence by law, does the competent authority have **the grounds to initiate legal proceedings against the accused**. It is in such instances that the **accused may face potential harm through the misguided application of penal justice**.

Consequently, if the alleged fact does not constitute a criminal offense, regardless of its moral reprehensibility, harm, or damage to character or reputation, the initial component of the calumnious accusation crime is not met. The imputation of such a fact may, under appropriate circumstances, amount to **slander** or **defamation**.

CASE LAW: ***The Police v. Vincenzo Attard*** – the Accusation

"Biex ikun hemm ir-reat ta' falza denunzja hemm bzonn li d-denunzja falza tkun dwar delitt jew kontravvenzjoni li jaghtu lok ghal azzjoni kriminali persegwibbli quddiem il-Qorti ta' Gustizzja Kriminali."

CASE LAW: ***The Police v. Giuseppe Attard*** – the Accusation

In this case, **Judge Montanaro Gauci** made another assertion pertinent to this offence. He purported that **a charge of calumnious accusation fails if the accusation is not directed towards an offence that warrants the pursuit of a criminal action** within the Courts of Criminal jurisdiction. Moreover, this also applies to instances wherein falsely attributed facts may subject the victim to **disciplinary measures** and punishment imposed by authorities other than the Criminal Courts.

CASE LAW: ***The Police v. Joseph Seychell*** – the Accusation

"L-akkuza jew denunzja, ghallfinijiet tal-kalunja ma tirrikjedi ebda formalita partikolari; l-unika haga li hi rikjesta hi li dik l-akkuza jew denunzja issir quddiem awtorita kompetenti, jigifieri awtorita' li ghandha is-setgha li tipprocedi biex tinvestiga u eventwalment tressaq il- Qorti lil dik ilpersuna li tkun allegatament ikkomettiet dak ir-reat."

The Intent to Harm the Accused

The individual who provides information, lodges a report, or files a complaint with the appropriate competent authority against another person **may have reasonable grounds to believe**, or at least suspect, the accused of the alleged offence.

Despite the possibility that subsequent evidence may reveal the innocence of the accused, **the law should not justly punish the accuser who acted without malice and merely exercised a legitimate right**. Even Roman Law – which sternly addressed false accusations – purports that th**e acquittal of the accused is not sufficient cause for imposing punishment on the accuser**.

Magistrates in Roman Law were obligated to investigate the accuser's intent (***accusatoris consilio***) and the rationale behind the accusation, **absolving them from calumny punishment if their error was deemed justifiable**. Moreover, such punishment could not be warranted if the accuser had acted **impulsively** or **imprudently** without contemplating the repercussions of their accusation.

In our legal system, which necessitates the intent to harm, similar principles are applicable. The "harm" referred to in this context may entail **exposing the victim to the potential initiation of criminal proceedings and subsequent punishment**. Indeed, for the crime of calumny to be sustained, the **possibility of such legal proceedings is indispensable**.

Maino contemplates that there is **NO absolute necessity for the accusation to explicitly mention the accused by name**; it suffices if the information, report, or complaint contains the necessary particulars for identification. Detailed facts or specific legal references are not obligatory for a false accusation, as long as it provides sufficient material to initiate legal proceedings.

Since the false accusation must expose an innocent person to criminal proceedings, if the alleged offence requires the injured party's complaint for prosecution, mere informal information may not meet the criteria for calumny. Thus, **Pessina** argues that a **formal complaint** from the entitled party is necessary.

Furthermore, in alignment with the principle that potential harm to the victim is a vital condition, **Carrara** contends that is generally accepted that **the crime of calumnious accusation does not arise when the falsely imputed fact is no longer punishable due to prescription**. Calumny is deemed punishable because it can mislead the administration of justice into wrongly convicting an innocent person, and this legal risk does not materialize if the information, report, or complaint itself reveals that the criminal action is extinguished or barred.

In the context of the requisite intent to harm, it is widely contested whether a **calumnious accusation made by an individual to defend themselves from a charge**, or a calumnious accusation ***per exceptionem***, should be subject to punishment.

Pessina draws a distinction, contending that **no calumny crime is committed when a person already facing charges attempts to exculpate themselves by accusing another and shifting the responsibility**. In such cases, Pessina proceeds by saying that the accuser's primary intention is NOT to harm others, but rather, to safeguard themselves. However, if a wrongdoer, fully aware of committing an offence, accuses another to divert attention from themselves, they are not only guilty of the offence they have not been charged with yet, but should also be convicted of calumny for falsely accusing someone they know to be innocent.

Carrara also makes a differentiation, granting **immunity for calumny committed to avoid a capital charge, albeit never in less severe cases**. However, **Mortara** suggests that the most reasonable solution is that:

"The right to self-defence cannot justify such a serious violation of another person's personality."

Therefore, the purpose of self-defence does NOT absolve one from the crime of calumny.

The Accuser's Knowledge that the Accused is Innocent

This knowledge forms the specific formal aspect of the crime and suspends the intention to harm the victim. While our law, following the Napoleonic Code, requires both **the intention to harm** and **awareness of the innocence of the accused** as essential elements of this crime, other legal codes (ex. **Art. 212 of the 1889 Italian Code**) only require the latter.

Maino stipulates that given the knowledge, therein lies all the deceit: the crime, even in its moral element, is complete. Therefore, it is unnecessary to add the adverb 'maliciously', nor that the defamer had the intention to harm.
This is because **accusing someone of a crime for which one knows them to be innocent can only be malicious**: it can only be done with the intent to harm them, and with the characteristic intent of this offence, to divert public justice from the right path, making magistrates unwitting accomplices to others' injustices and exposing an innocent person to danger.

The agent must possess definite knowledge of the innocence of the accused individual against whom the information or complaint is directed, in order for it to be deemed a deliberate and malicious false accusation. **Mere factual falsity in the accusation, without such awareness, is insufficient**. As previously stated, **this falsity could be unintentional and therefore not malicious**, such as when an informer wrongly accuses someone whom they genuinely believe to be guilty.

Carrara states that **it is essential not only for the accused to prove their innocence, but also for the offended party who denounced them as the perpetrator of the crime to be proven to have had knowledge of this innocence**. Any justifiable reason for believing in good faith will suffice to absolve an offended party who, albeit mistakenly and hastily, believed the accused to be the true perpetrator of the crime.

Roberti contends that any misinformation, report, or complaint that does not stem from malicious intent may only lead to **liability for damages due to unjust accusation if the agent is found guilty of negligence in civil matters**.

CASE LAW: ***Rex v. Catarina Debono***

In this case, the court quoted Roberti and highlighted that the agent must possess knowledge of the accused's innocence at the time of laying the information or making the complaint. This is evident from the wording of **Art. 101**, which deems the **crime complete merely by the act of lodging the information or making the complaint**. Therefore, all legal requirements must be met at the moment the false accusation is made. **Subsequent knowledge of innocence will not render the informer or complainant guilty of calumny**. **However, if despite acquiring such knowledge, the informer or complainant persists in the prosecution, provides false evidence, or induces others to do so, they may be guilty of other offences, but not of calumny**.

The question arises whether calumny is restricted solely to falsely accusing an innocent person or **extends to cases where the guilt of an offender is wrongly exaggerated**. **Puccioni** argues that **calumny persists even when an offender's responsibility is falsely enhanced**. He notes that in falsely attributing aggravating circumstances, the accused remains innocent, and the malicious intent of the accuser in distorting the severity of the accusation should not go unpunished. Conversely, **Pessina** suggests that **calumny laws target only the fabrication or exaggeration of accusations**, and **NOT alterations that fundamentally change the nature of the offence**. He thus argues that, while partial falsehoods may hinder justice, they also facilitate the discovery and punishment of offences, hence balancing the scales.

Roberti adds that if someone **falsely accuses another person of a crime**, but **the main accusation is still true and punishable**, then the **courts should NOT consider them a liar just because they exaggerated a detail that turned out to be false**. In such cases, the harm to justice caused by the exaggeration is **balanced out by the benefit of uncovering a crime**. So, unless the accuser also lies about a testimony, they should not be punished for the exaggeration alone.

Calumny vs Defamation

In the past, defamation was punishable under our Criminal Code through **Art. 252**. In fact, the difference between the two was heavily discussed in the 1979 judgement: ***Il-Pulizija v. Christine Abramovic***. However, with the enactment of **Act XI of 2018**, this provision was **repealed** from our Code. Presently, defamation is governed by the **Media and Defamation Act** (**Cap. 579**). Thus, defamation is no longer contemplated by our Criminal Code.

Subornation of Witnesses, Referees, or Interpreters

> Whosoever, in any civil or criminal proceedings, **suborns a witness**, a **referee**, or an **interpreter**, **to give false evidence** or **to make a false report or a false interpretation**, shall, on conviction, be liable…
>
> **Art. 102**, *Criminal Code*

Our law splits instances of this offence into **3**.

> (a) where the false evidence, report or interpretation has been given or made, to the punishment to which a person giving false evidence would be liable;
>
> **Art. 102 (a)**, *Criminal Code*

If a witness, referee, or interpreter is brought before the court and subsequently acquitted due to personal defences, the **individual who suborned them remains criminally liable** if the falsehood of the testimony, reference, or interpretation is objectively proven.

It is important to note that the **law does not require proof that this false evidence directly influenced the outcome of the proceedings**; rather, it must be demonstrated that it was given to the **potential detriment of justice**.

> (b) where there has only been an attempt of subornation of a witness, a referee, or an interpreter, to the same punishment decreased by one or two degrees;
>
> **Art. 102 (b)**, *Criminal Code*

The Criminal Code also addresses cases where there is an **attempt to suborn**. This occurs when a witness, referee, or interpreter solicited for subornation **does not actually provide false evidence, interpretation, or reference**.

> (c) where the subornation has been committed by the use of **force**, **threats**, **intimidation** or by **promising**, **offering** or giving of an **undue advantage** to induce false testimony, to the punishment mentioned in paragraph (a) increased by one or two degrees.
>
> **Art. 102 (c)**, *Criminal Code*

Our Criminal Code also addresses instances where subornation is carried out through **force**, **threats**, **intimidation**, or the **promise**, **offer**, or **provision of an undue advantage** to induce false testimony.

Here, **Maino** suggests that **subornation followed by an effect is punishable in any form it may have occurred**, provided that the instigations of the suborner were the determining cause of the main offence. That which is not followed by an effect is punished only if committed through threats, gifts, or promises. However, **Tuozzi** adds that the latter methods of subornation, **when not followed by any effect**, constitute an **attempt**.

CASE LAW: *Rex v. Curmi*
This case concluded that the employment of threats, gifts, or promises is gravely serious, and poses a **significant threat to the proper administration of justice**. Moreover, such means are so malicious that they, in themselves, constitute the **commencement of the execution of the crime** of the *iter criminis*

Preparation or Production of False Documents

> Whosoever, in any **civil** or **criminal proceedings**, shall cause **a false document to be prepared or shall knowingly produce a false documen**t, shall be liable to the same punishment as the **forger** thereof.
>
> **Art. 103**, *Criminal Code*

In both civil and criminal proceedings, the agent of this crime will be awarded the same punishment as the one given to the forger thereof.

The Italians referred to this as '***Istruire e produrre carte false'***.

Hence, anyone who fabricates, assembles, or presents a false document for **civil** or **criminal** proceedings, and anyone who **knowingly presents such a document**, **even if they did not create i**t, is **treated by the law as if they had forged the document themselves**.

Perjury

Perjury in Certain Criminal Trials

(1) Whosoever shall give **false evidence in any criminal proceedings** for a **crime liable to a punishment higher than the punishment of imprisonment for a term of 2 years**, either against or in favour of the person charged or accused, shall, on conviction, be liable to imprisonment for a term from 2 to 5 years.

(2) Where, however, the person accused shall have been sentenced to **a punishment higher than that of imprisonment for a term of 5 year**s, the witness who shall have given false evidence against such person in the trial, or of whose evidence use shall have been made against such person in the trial, shall be liable to such **higher punishment**.

Art. 104, *Criminal Code*

Our law does not explicitly define the crime of perjury or false testimony, also known as legal or judicial perjury in other legal systems. However, certain essential elements characterise such a crime:

1. A **Testimony Given in a Cause**.
2. An **Oath Lawfully Administered by the Competent Authority**.
3. The ***Actus Reus*** (the Falsity).
4. The ***Mens Rea***

First however, it is crucial to understand who the agent of this offence may be.

The Agent

Both in accordance with the Criminal Code and the Code of Organisation and Civil Procedure assert that all persons boasting a **sound mind** may be admissible as witnesses, and that **age is not a relevant factor** when considering one's eligibility for providing a testimony.

(1) Every person of sound mind is admissible as witness, unless there are objections to his competency.

Art. 629, *Criminal Code*

No person shall be excluded from giving testimony for want of any particular age; it shall be sufficient that the court be satisfied that the witness, though not of age, understands that it is wrong to give false testimony.

Art. 630, *Criminal Code*

All persons of sound mind, unless there are objections against their competency, shall be admissible as witnesses.

Art. 563, *COCP*

Whatever may be the age of a witness whom it is intended to produce, he is admissible as such, provided he understands that it is wrong to give false testimony.

Art. 564, *COCP*

Until **1909**, our Code did not allow defendants in criminal cases to give evidence in their own defence. However, through **Ordinance VIII** of that year, provisions similar to **§1 of the UK 1898 Criminal Evidence Act** were introduced.
This enabled every person charged with an offence to be a "competent" witness, though not "compellable," meaning they could give evidence if they wished, but could not be forced to testify except upon their own request.

Art. 634 of the Criminal Code encompasses this concept, stating that:

(1) The party charged or **accused** shall, **at his own request**, **be admitted to give evidence on oath immediately after the close of the prosecution**, saving the case where the necessity of his evidence shall arise also at a subsequent stage, or the court sees fit to vary the order of the evidence; and **such party may be cross- examined by the prosecution**, **notwithstanding that such cross-examination would tend to incriminate him as to the offence charged**:

Provided that the **failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecutio**n.

(2) The **provisions of the law relating to witnesses shall apply to the accused who gives evidence on oath**.

Art. 634, *Criminal Code*

It is important to note that as a preliminary rule, the defendant in a criminal case is precluded from being compelled to provide his testimony on the basis of the **human right privilege against self-incrimination**. However, if the defendant chooses, by his own volition, to testify in his own case, then he may NOT opt to remain silent when cross-examined by the prosecution.

CASE LAW: *Il-Pulizija v. Wigi Attard*

In this case, it was ascertained that **perjury may be committed by the accused** in his own criminal case.

Conversely, in a **civil case**, both the **claimant** and the **defendant** are **compellable witnesses**.

CASE LAW: ***Vella v. Camilleri***

Justice Harding here determined that in cases within the jurisdiction of the Court of Magistrates, initiated upon the complaint of the injured party, the complainant holds the status of a competent witness. Consequently, regardless of any prior doctrine, if the **complainant provides false testimony under oath during the trial, they are subject to the same charge of false testimony as any other witness**.

1 – A Testimony Given in a Cause

Testimony given outside of a legal proceeding may constitute **forgery** or, if under oath, **extra-judicial perjury**, but NOT false testimony as defined within the scope of this discussion.

Testimony, in this context, refers to any **statement** or **declaration** made before a court of law during judicial proceedings according to the law. It encompasses statements considered to have probative value regarding the stated facts and is a crucial form of evidence in legal proceedings.

Perjury can be committed by any individual appearing as a witness before a judicial authority in a contentious legal proceeding, whether criminal or civil. **The distinction between criminal and civil cases affects the severity of punishment**, but the essential elements of the crime remain consistent.

Giuseppi Falzon remarks that it is crucial that the legal proceeding involves contentious events requiring a decision. Therefore, false testimony provided in non-contentious proceedings, such as those before the **Court of Voluntary Jurisdiction** or in a preliminary inquiry before the **Court of Magistrates**, does not constitute false testimony but may fall under the category of extra-judicial perjury or false swearing.

2 – An Oath Lawfully Administered by the Competent Authority

The form of oath to be administered to witnesses shall be the following:

You A. B. do swear (or do solemnly affirm) that the evidence which you shall give, shall be the truth, the whole truth, and nothing but the truth. So help you God.

Art. 632, *Criminal Code*

(1) Witnesses or other persons required to take the oath shall swear to tell the truth, the whole truth and nothing but the truth.

Art. 112, *COCP*

For the offence of perjury to occur, the **testimony must have been given under oath**, lawfully administered by a competent authority. And this aligns with **English law** understanding. Hence, if the testimony is not provided under oath, regardless of its falsity, it will NOT constitute the crime in question. Conversely, the **1898 Italian Code** does not discern between forums requiring an oath or not – the **difference pertains only to the quantum of the punishment**.

CASE LAW: ***Il-Pulizija v. Marzouki Bent Adbellatif***

"Min **jixhed falz waqt kawza** .... ma jitqiesx mil-ligi li dak l-agir tieghu jikkostitwixxi biss 'gurament falz', *sic et simpliciter*, izda jikkostitwixxi '**spergur**', cioe', **falza testimonjanza**; mentre min **jiehu gurament falz f'dawk l-okkazzjonijiet l-ohra li mhumiex waqt kawza** ...., hemm ikun qed jiehu gurament falz, izda **ma jkunx qed jikkommetti d-delitt aktar serju ta' spergur**...

Moreover, the **oath must be taken personally by the person testifying**.

(3) Witnesses shall be **sworn previously to their examination**, and the oath shall, unless the law provides otherwise, be administered to them by the **registrar**.

Art. 577 (3), *COCP*

Additionally, religion becomes involved when one swears himself in. This is done so that the testifying person is induced with a certain burden to tell the truth, of whose pressure would ultimately be as equally potent as the faith he professes in his chosen religion.

A witness professing the Roman Catholic faith **shall be sworn according to the custom of those who belong to that faith**; and a witness not professing that faith shall be **sworn in the manner which he considers most binding on his conscience**.

Art. 111, *COCP*

The **French Court of Cassation** has ruled on multiple occasions that this requirement is not fulfilled if certain elements of the oath are **omitted**.

According to **Carrara**, while the phrase "*You swear*" may suffice to remind the witness of the sanctity of the oath from a religious perspective, it **may not fulfil the legal requirement**. This is because the witness might mistakenly believe that their duty under the law is only to avoid falsifying the truth about the specific matters they are asked about, rather than disclosing all relevant information or being truthful in everything they say, whether asked about it or not. Therefore, the specific wording of the oath holds significant importance, as the mere phrase "*I swear*" m**ay not adequately convey the full legal obligation of the deponent**.

Finally, the competent authority pertinent to the crime of perjury is a **court**, **tribunal**, or **disciplinary board**.

The court, before which an oath is to be taken, shall have power to warn the party about to take the oath, as to the obligation of the oath and the **consequences of perjury**.

Art. 113, *COCP*

CASE LAW: *Improved Design Limited v. Antoine Grima*

Bilkemm ghandu ghalfejn jinghad li b'"falz" wiehed irid hawn jifhem "**xi haga li ma taqbilx mas-sewwa**" u MHUX semplicement "xi haga li l-parti ma taqbilx maghha" jew li haddiehor jaraha b'mod iehor. Fi kliem iehor, biex jista' jintwera li nghad il-falz taht gurament irid jintwera li **xi fatt imieri dak li nghad**. **Tali fatt irid jirrizulta mill-atti u mhux jissemma biss bhala argument**. Li kieku kien hekk, u l-fehma li ma taqbilx kienet tista' titqies bhala "falz", kieku jista' tassew jinghad li ma tezistix kawza mqar wahda fejn ma jinghadx il-falz!

3 – The Actus Reus (The Falsity)

In **English law**, a person commits perjury if, while lawfully sworn as a witness in a judicial proceeding, they **knowingly make a false statement that is material to the proceeding** or i**f they do not believe it to be true**.

Archbold contends that the statement must be **false in fact**, or if true, the **defendant must not have known it or believed it to be true**. Thus, this is also referred to as '***il-perċezzjoni tax-xhud***' in Maltese.

The **Italian Code** deems anyone guilty of the crime if they **affirm what is false**, **deny what is true**, or **fail to disclose what they know about the facts of the case**. Although our law does not explicitly define what constitutes falsity in testimony, it **follows the same principle as laid down in the Italian Code**.

Chaveau and Helie here add that **false testimony cannot occur unless a statement has been made**. Moreover, **the refusal to make the statement cannot be considered as the statement itself**, and furthermore, the witness does not deceive justice, he merely refuses to provide it with the information it could have.

The **refusal to testify** is addressed by a special provision in the Code, granting the Court **authority to order the arrest of any witness who refuses to be sworn or to testify**, detaining them as long as necessary or deemed appropriate, considering the witness's defiance and the case's significance. It may also constitute a crime if the witness falsely **claims an excuse to avoid their obligation to testify when required by the competent authority**.

However, **a mere refusal to speak CANNOT constitute false testimony**.

Indeed, this **refusal should not be confused with the failure to disclose relevant information during testimony**, even if not specifically asked. Taking an oath obliges the witness to disclose the complete truth. Failure to do so, whether by omission or denial, constitutes a breach of duty. If done in bad faith or with criminal intent, it constitutes the crime of false testimony.
For example, a witness failing to declare the innocence of someone falsely accused or denying knowledge of relevant facts when they actually do connotes false testimony. Similarly, if a witness denies having seen or heard relevant facts without good faith, it may be difficult to prove intent. However, if it is established that the witness knowingly denied despite having witnessed or heard, it constitutes false testimony.

CASE LAW: *R. v. Mawby* – Swearing without knowing Veracity = Perjury

Here it was ascertained that **a witness may assert something true but still be guilty of false testimony if they did not know it to be true or did not believe it to be so**.

In English law, **swearing to a fact without knowing its veracity constitutes perjury**, even if the fact is indeed true but unknown to the witness at the time of swearing.

CASE LAW: *Allen v. Westley* – False Testimony in True Facts

This case affirmed that **false testimony may be committed even in situations wherein although the witness says something true**, **he or she was not present to witness and affirm the fact he is reporting in a Court of law**.

This runs similar to **Carrara's** philosophy, who asserted that, scientifically, it is taught that **false testimony can also be given by someone who affirms something true in itself but falsely claims to have seen it**; the falsehood lies not in the fact itself, but in the fact that the witness did not actually see it. The criterion for the falsehood of the testimony does not depend on the relationship between what is said and the reality of things, but on the relationship between what is said and the knowledge of the witness.

However, for the crime of false testimony to be established, it is **essential that the falsity be relevant to the case**, as expressly stated in the **1914 UK Perjury Act**. This requirement applies equally to our law, which aims to uphold the integrity of judicial proceedings. If the falsity concerns circumstances entirely irrelevant to the case and could not influence the outcome, the **crime cannot arise because there would be no possibility of the injury that justifies punishment**.

Maino similarly states that **falsely asserted or maliciously concealed circumstances must be relevant to the case or influential in its decision for false testimony to occu**r.

Roberti emphasises that **merely being false is insufficient to deem testimony criminal**; it must also be found to **potentially influence a false judgment**.

Moreover, both the COCP and the Criminal Code supplement this line of thinking by expressly stating that **all evidence produced must be relevant to the case at hand**, and that the **Court must reject any irrelevant or superfluous evidence**.

The determination of what is "material" depends on the circumstances of each case. **Archbold** holds that in England, even a testimony regarding a witness's credibility is considered "material."

CASE LAW: ***Il-Pulizija v. Zammit***

It was ascertained here that if the falsity could have affected the decision, regardless of whether it actually did, then the crime is consummated. The mere **possibility of injuring the administration of justice** characterises this crime, and actual injury is not always necessary for prosecution.

CASE LAW: ***Il-Pulizija v. Galea***

In this case, **Judge Montanaro Gauci** declared that is not strictly required that the false evidence be recorded in writing for a charge of this crime; **testimony can also be proved through oral evidence**.

4 – The Mens Rea

The intentional aspect of the crime of false testimony lies in the awareness of stating a falsehood or concealing the truth. Any mistake or forgetfulness negates the criminal intent. In simpler terms, the falsity must be deliberate and intentional; otherwise, it cannot constitute this offence. Therefore, a witness who testifies falsely, genuinely believing it to be true, does not commit this crime.

It is possible for an eyewitness to **inadvertently misinterpret crucial details of a fact**, deceiving themselves in good faith. Additionally, factors like fear, strong emotions, or sensory misperceptions can distort perception. Hence, to establish this crime, besides proving the actual falsity and potential harm to justice administration, criminal intent must be demonstrated. **Chaveau and Helie** also add that a strong **presumption of such intent** arises if the deponent gains some **advantage** from the false testimony or if they were **corrupted**.

On the contrary, the **criminal intent does not necessarily involve a desire to harm any specific individua**l. In criminal proceedings, the crime occurs whether the false testimony is given against or in favour of the accused. Similarly, in civil proceedings, what goes against one party naturally benefits the other.

The motive of the offender, as with most crimes, is irrelevant. As **Rauter** suggests, the nature of the offence is indifferent to the motive behind the false testimony**; it suffices that the action was done in bad faith or with criminal intent**. There is criminal intent even if the witness had no intention to harm any particular party.

Since the object of the crime is the truth as known by the witness, and the right that justice has to know it from them, the intent exists because it knowingly contravenes this obligation to tell the truth.

CASE LAW: ***Il-Pulizija v. Ruth Mary Baldacchino***

This judgement quoted **Giuseppi Falzon**, who analysed this offence by saying that since the subject matter of the crime is the truth, as the witness knows it, and that justice has the right to know it from him, the **criminal intent exists precisely because it knowingly contravenes this obligation to tell the truth**.

There is debate among authorities regarding whether a person is liable for punishment for false testimony if they provide false deposition to protect themselves. The **Italian Code of 1889** addressed this issue, **exempting from punishment anyone who, by telling the truth, would unavoidably expose themselves or a close relative to serious harm to their liberty or reputation**. However, only a reduction in punishment was granted if the false testimony exposed another person to criminal proceedings or a conviction.

This issue is contested by the French. The **Court of Colmar** excused a false witness from guilt because declaring a fact would have exposed them to criminal proceedings. However, the **Court of Cassation** annulled this decision, stating that the law made no exceptions, and the sanctity of the oath did not permit any. **Thus, a witness could not be excused from fulfilling their sacred duties imposed by the oath due to personal considerations**. This decision was criticised by the abovementioned **Rauter** but supported by **Dalloz**.

Under our legal framework, the accused, while competent to give evidence, is not compelled to do so. However, if they choose to testify, they can be cross-examined, even if it might incriminate them. In such cases, the accused is subject to the same rules as other witnesses, and making a false deposition renders them guilty of false testimony.

CASE LAW: ***Il-Pulizija v. Vassallo***

For all other witnesses, including parties in civil actions, the general rule is that **no witness can be compelled to answer questions that might incriminate them**. If a witness is asked such a question but **fails to claim privilege and gives a false reply under oath**, they are **guilty of false testimony**.

This rule also applies to the accused regarding replies that might incriminate them for offences other than those they are already charged with. Thus, this notion applies only to depositions that could subject the witness themselves to criminal proceedings.

Giuseppi Falzon reminds that if a **witness provides false testimony to protect someone else** or to **prevent any other form of harm**, they would be guilty of the crime. **Art. 633 (3)** of the Criminal Code grants the Court to excuse witnesses from giving evidence against close relatives or from replying to questions that might reveal their own wrongdoing. If the Court does not exercise this discretion, the witness must testify truthfully, and providing false testimony under these circumstances constitutes the crime of false testimony.

Furthermore, **advocates**, **legal representatives**, **priests**, and other individuals bound to secrecy by law **cannot be compelled to disclose privileged matters**. However, if they voluntarily provide evidence and make a false statement, they would be guilty of the crime.

Retraction

Our Criminal Code does not explicitly address the issue of retraction. However, our jurisprudence has acknowledged a fundamental principle regarding the retraction of false testimony made during a trial.

CASE LAW: ***Il-Pulizija v. Karl Carmel Azzopardi***

"Illi huwa pacifiku li d-duttrina ta' "retraction" ghalkemm ma tirrizultax daqstant cara mill-Kodici Kriminali, **tapplika minghajr ebda dubju u giet accettata mill-Qrati taghna f'kazijiet ta' spergur**."

According to **Pessina**, a witness who retracts false testimony before the conclusion of the trial cannot be prosecuted for perjury, as the **retraction nullifies the offence**. This principle is grounded in the idea that until the trial's conclusion, a **witness's testimony remains provisional**, and any harm caused can be rectified if false statements are retracted in time.

CASE LAW: ***Rex v. P. Borg***

The court ruled that **timely retractions negate the offence**. It is good to note that both the Criminal Code and the COCP allow witnesses to make **additions** or **corrections** to their testimony before the trial concludes, indicating that **retractions made within this timeframe are valid**. However, retractions made after this point, except in cases where a death sentence has been passed but execution has not occurred, do not mitigate the offence.

Furthermore, **Harding** suggests that the witness's retraction need not be entirely spontaneous; **voluntary retractions suffice**.

Moreover, when suspicion arises regarding the falsity of evidence, the court can order the arrest of suspected individuals. **Maino** adds that in such cases, if proceedings are initiated against a witness for false testimony, **any retractions made before the trial's conclusion may not absolve them of liability if the trial has been suspended due to the false testimony investigation**.

CASE LAW: ***Il-Pulizija v. Marzouki Bent Adbellatif*** CONT'D

"**Retraction is an incentive** and an opportunity given to a witness to correct his version or deposition so that his/her untruthful deposition does not lead to and cause damage to the person accused or to any other person. The effect of retraction is that the **possibility of creating an injustice is eliminated and that no irreversible harm is caused to others**."

Ultimately, the crime of perjury **reaches its completion upon the conclusion of the criminal proceedings in which the false testimony was given**.

The offence is not considered complete when the witness initially testifies falsely. Instead, its consummation occurs when the respective criminal proceedings reach a resolution and become ***res iudicata***. This is because the witness retains the opportunity to retract any false statements during the ongoing proceedings.

Punishment

False testimony carries different levels of severity depending on whether it occurs in a civil or criminal case. In **civil cases**, where the stakes are typically financial, the **harm caused by false testimony is usually reparable**. However, in **criminal cases**, where justice and public order are at stake, **false testimony can lead to irreparable harm**, either by aiding the guilty or harming the innocent. Therefore, the law imposes harsher punishments in criminal cases due to the more serious consequences involved, such as imprisonment.

Perjury in Other Criminal Trials

> Whosoever shall give false evidence in any criminal proceedings **for an offence not referred to in the last preceding article**, either **against** or **in favour of the person charged** or accused, shall, on conviction, be liable to imprisonment for a term from 9 months to 2 years.
>
> **Art. 105**, *Criminal Code*

By looking at the possible term of imprisonment attached to the offence for which the accused is facing, one notices that this provision is also applicable to **contraventions**.

Perjury in Civil Proceedings

> (1) Whosoever shall give **false evidence in civil matters**, shall, on conviction, be liable to imprisonment for a term from 7 months to 2 years.
>
> (2) The provisions of sub-article (1) shall apply to any person who, being a **party to a civil action**, shall make a **false oath**.
>
> (3) Whosoever shall make a **false affidavit**, whether in Malta or outside Malta, knowing that such affidavit is required or intended for any civil proceedings in Malta, shall, on conviction, be liable to the punishment mentioned in sub-article (1).
>
> **Art. 106**, *Criminal Code*

In both civil and criminal proceedings, perjury involves the same elements, but the severity of the punishment varies.

CASE LAW: *Il-Pulizija v. Ruth Mary Baldacchino* CONT'D

"Illi l-azzjoni penali ghar-reat ta'l-ispergur a tenur ta'l-artikolu 106 tal-Kodici Kriminali u cioe' r-reat hekk ismejjah judicial jew legal perjury, jipotizza t-tehid ta' gurament falz fil-kors ta' kawza pendenti quddiem Qorti. Illi l-artikolu 106 jitkellem dwar l-ispergur fil-kawzi civili li jipotizza tlett istanzi ta' spergur fi proceduri civili u cioe' **l-ispergur mix-xhud**, **l-ispergur minn persuna li hija parti fil-kawza civili** u **l-affidavit falz**."

Perjury by Referee or Interpreter

(1) Any referee who, in any **civil or criminal proceedings**, shall **knowingly certify false facts**, or maliciously give a **false opinion**, shall, on conviction, be liable to the punishment to which a false witness is liable under the preceding articles of this Sub-title.

(2) The same punishment shall apply to any person who, when acting as interpreter in any judicial proceedings and upon oath, shall knowingly make a false interpretation.

Art. 107, *Criminal Code*

The elements outlined in Art. 104, 105, and 106 are consistent with those of Art. 107. However, it is important to note that **retraction does NOT apply to this particular article of the law**. Art; 107 addresses intentional acts of perverting the truth by a referee or interpreter, rather than mere mistakes or inadvertence.

False Swearing

(1) Whosoever, in any other case not referred to in the preceding articles of this Sub-title, shall make a **false oath before a judge**, **magistrate** or **any other officer authorised by law to administer oaths**, shall, on conviction, be liable -

(a) to imprisonment for a term from 4 months to 1 year, if the oath be required by law, or ordered by a judgment or decree of any court in Malta;

(b) to imprisonment for a term not exceeding 3 months, if the oath be not so required or ordered.

(2) The provisions of this article **shall NOT apply to promissory oaths**.

Art. 108, *Criminal Code*

In contrast to judicial perjury, which occurs during court proceedings, **extra-judicial** perjury refers to false statements made outside of court. **Art. 108** specifically addresses **false statements made on oath by individuals in non-court proceedings**, where there are no formal court proceedings involved. Thus, Art. 108 does NOT apply to criminal proceedings. False swearing in criminal proceedings is tantamount to **Art. 104** (perjury).

The False Statement

(1) Witnesses or other persons required to take the oath shall swear to tell the truth, the whole truth and nothing but the truth.

Art. 112, *COCP*

In this context, the individual must have made a false statement, encompassing both **verbal** and **written declarations**.

Mens Rea

The individual must knowingly make a false statement, indicating that the falsehood was **intentional**. Thus, it is crucial that the **person making the statement is fully aware of distorting the truth**.

If a statement is objectively false due to **ignorance**, **forgetfulness**, or any other **non-malicious reason**, **criminal liability under this article does not apply**.

Actus Reus

The material aspect of this crime is that the false statement, whether spoken or written, **must have been made under oath**. The manner in which the oath is administered is irrelevant; it could be the Catholic form, swearing on the Qur'an, or any other solemn procedure as prescribed by law. The key requirement is that the person taking the oath speaks the truth.

> A witness professing the Roman Catholic faith **shall be sworn according to the custom of those who belong to that faith**; and a witness not professing that faith shall be **sworn in the manner which he considers most binding on his conscience**.
>
> **Art. 111**, *COCP*

The Oath Taken in Front of a Competent Authority

The oath must be administered by a person authorised by law to do so, such as a **judge**, **magistrate**, **commissioner for oaths**, or **other public officers with the legal authority to administer oaths**.

> (1) The Minister responsible for justice may from time to time, by warrant under his hand, appoint persons, being public officers, public employees, advocates, or legal procurators, to be Commissioners for Oaths, and may at any time revoke any such appointment.
>
> **Art. 3**, *Commissioners for Oaths Ordinance (Cap. 79)*

Ultimately, all those appointed as Commissioners for Oaths by the pertinent Minister will have their name published in the Government Gazette.

Finally, it is important to remind that this offence concerns itself ONLY with **assertory oaths**, which **affirm** or **deny present or past facts**, and **NOT to promissory oaths**, which bind a person to future obligations.

Punishment

Art. 108 (a) and (b) specify the punishment for this offence, distinguishing between **oaths required by law** or **oaths ordered by a court judgment**, and **oaths not mandated by law or court order**. The former includes **oaths necessary for legal procedures** (such as obtaining a precautionary warrant or testifying in a magisterial inquiry, while the latter pertains to situations such as **filling out a form that requires confirmation under oath**. The punishment is more severe when the oath is mandated by law or court order.

False Swearing vs Perjury

Perjury occurs when a person provides false evidence during a court case, constituting a violation as per Art. 104. However, Art. 108 addresses situations where individuals do not testify during court proceedings and thus do not commit perjury as defined in article 104. Instead, Art. 108 applies to **cases where oaths are ordered by law**, such as during a **magisterial inquiry** or when **filling out official applications requiring an oath**. In these instances, there are no ongoing criminal proceedings involved.

CASE LAW: ***Il-Pulizija v. Joseph Zammit***

In this case, the court clarified that **Art. 108 excludes perjury in criminal trials and applies to other cases where false oaths are taken before authorised officials**.

Interdiction

(1) The court shall, in passing sentence against the offender for any crime referred to in this Sub-title, expressly award the punishment of general interdiction, as well as interdiction from acting as witness, except in a court of law, or from acting as referee in any case whatsoever.

(2) Such interdiction shall be for a term from five to ten years in the cases referred to in the last preceding article, and for a term from ten to twenty years in any other case referred to in the other preceding articles of this Sub-title.

Art. 109, *Criminal Code*

In addition to other punishments prescribed under the respective articles, if a person is convicted of either calumny, perjury, or false swearing, he or she will be interdicted ai termini of **Art. 10** of the Criminal Code.

If a person is found guilty of **perjury**, they are **disqualified from holding public office or employment**. This type of interdiction differs from that outlined in the Civil Code. Despite being interdicted, individuals convicted of perjury can still enter into contracts, vote, and engage in other civil activities.

In cases of **general interdiction**, the court mandates that the judgment be published in the Government Gazette. This publication serves to inform government departments and the community about the interdiction of the individual specified in the judgment.

Fabrication of False Evidence

(1) Whosoever shall **fraudulently cause any fact or circumstance to exist**, or **to appear to exist**, in order that such fact or circumstance may afterwards **be proved in evidence against another person**, with **intent to procure such other person to be unjustly charged with**, or **convicted of**, any **offence**, shall, on conviction, be liable to the punishment established for a false witness, in terms of the preceding articles of this Sub-title.

Art. 110 (1), *Criminal Code*

The insertion of this offence in our Criminal Code was spurred by **Andrew Jameson**, who purported that fabricating false circumstantial evidence, false swearing about circumstances, or creating fake documents can all lead to wrongful convictions and **hinder justice**. These actions are variations of the same offence, aiming to **obstruct the proper administration of justice**. However, only the latter two are explicitly prohibited by the law. It is clear that someone cleverly arranging circumstances, such as **planting evidence** or **staining clothes with blood**, c**an be as misleading to a judge or jury as if they had lied under oath**.

Other **Continental Codes** treat this offence as a derivative of the crime of calumnious accusation.

Maino introduces **two forms of calumnious accusation** here, and suggests that false accusation, whether made verbally or in writing through any information, report, or complaint, constitutes the **direct form** of calumnious accusation. In contrast, the **fabrication of false evidence of a crime against an innocent person constitutes the indirect form, known as real calumny**. This includes scenarios like placing incriminating objects at a crime scene or planting stolen items on someone. **Antolisei** concurs.

The essential components of this crime are evident from its definition. The ***actus reus*** involves **fabricating evidence**, which entails **causing a false fact to exist or appear**, potentially incriminating an innocent person. The ***mens rea*** involves the perpetrator's **intent to wrongfully convict or charge the individual with the offence**. Even if the falsely accused person is not ultimately convicted or charged, if these two elements are present, the crime still stands.

CASE LAW: ***Il-Pulizija v. Luigi Duca***

This case quoted **Prof. Mamo's** assertions who, whilst quoting **Maino** in this regard, stated that unlike the direct calumnious accusation, which is completed upon reporting to the competent authority, the **indirect form is not considered complete until the fabricated fact or circumstance becomes known to the authorities**.

For example, simply depositing contraband items in someone's house with the aim of incriminating them does not fulfil the crime until those items are discovered by law enforcement.

In essence, while the act of placing the false evidence may constitute an attempt, the crime is never considered consummated until the fabricated evidence comes into contact with the agents of justice and undergoes investigation and discovery.

CASE LAW: *Il-Pulizija v. David Mizzi*

The Court here commented that Art. 110 (1) addresses the offence of **real** or **indirect calumnious accusation**, **distinct from the verbal and direct form covered in Art. 101**. This offence involves an agent fraudulently creating or causing the appearance of facts or circumstances that can later be used as evidence against someone else.

In both direct and indirect calumnious accusations, the *mens rea* is the desire to harm another person. However, in the context of Art. 110 (1), merely speaking words is not sufficient to constitute the offence. Instead, the *actus reus* of the creation of tangible evidence of a crime with the intent to use it against the other person is required. And moreover, this creation of false evidence must be communicated and made known to the competent authorities for its malicious nature to be activated.

"Ir-reat ikkontemplat fl-artikolu 110 (1) tal-Kodiċi Kriminali hu dak tal-kalunja reali jew indiretta u jiddistingwi ruħu mill-kalunja verbali jew diretta kontemplata fl-artiklu 101 billi jirrikjedi li l-aġent b'qerq materjalment ħoloq jew materjalment ġiegħel li jidger li hemm fatt jew ċirkostanza bliskop li dan il-fatt jew ċirkostanza tkun tista' tinġieb bħala prova kontra persuna oħra. Kemm fil-kalunja diretta kif ukoll f'dik indiretta, lelement formali tar-reat jikkonsisti filli wieħed ikollu l-ħsieb li jagħmel ħsara lil persuna oħra billijagħmel mill-ġustizzja strument ta' inġustizzja kontra dik il-persuna oħra. Mhux biżżejjed issempliċi kliem... iżda hu meħtieġ li jinħolqu traċċi jew indizzji materjali bil-ħsieb li dawn ikunu jistgħu jintużaw kontra dik il-persuna."

CASE LAW: *Il-Pulizija v. Jackson Micallef*

"Without any doubt, it was the accused who committed the material act which led to the **filing of the report in respect of the *parte civile***. This material act was committed by the accused fully conscious of the fabrication of evidence on his part."

The Simulation of an Offence

> (2) Whosoever shall lay before the **Executive Police** an **information regarding an offence knowing that such offence has not been committed**, or shall **falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence**, shall, on conviction, be liable to imprisonment for a term not exceeding 1 year.
>
> **Art. 110 (2)**, *Criminal Code*

This provision was introduced into our Code via **Ordinance IX of 1911**, and closely mirrors **Art. 211** of the **1889 Italian Code** in its substantive content.

Carrara suggests that the act of simulating an offence is deemed criminal due to several factors:

1. It **undermines the administration of justice** by leading it astray.
2. It **incites public alarm** upon news of the offence.
3. It **causes inconvenience** and **financial burden** to law enforcement officials.
4. It **poses risks of suspicion and harassment to law-abiding citizens** attempting to verify a fictitious occurrence.

Maino contends that this offence differs from calumnious accusation in that it **does NOT target a specific individual with an accusation**, thus **lacking the intention to wrongly convict or charge an innocent person**. Furthermore, unlike calumny, this crime does NOT presuppose the nonexistence of the alleged crime; rather, it is about **falsely presenting an incident**.

Mens Rea

To commit this offence, one must harbour a **specific intent to deceive** or **obstruct the course of justice** by falsely reporting or fabricating an offence that they know did not occur. This specific intent is crucial, recognising that it undermines the integrity of the justice system. However, if the simulation of the offence is motivated by a **direct intent to harm or injure another individual**, it transforms into the crime of **calumnious accusation** rather than mere simulation of an offence.

Actus Reus

Akin to calumny, simulation can manifest **verbally** or **directly**, as well as through **tangible** or **indirect** means. The former entails making a **formal denunciation** to the Executive Police, with the crime being **completed upon submission of such information**, rendering **subsequent confession ineffective in absolving the perpetrator**.

Thus, the *actus reus* manifests itself either when:

1. One **submits information** regarding an offence which the agent knows does not exists (**verbal/direct** simulation).
2. One **devises false traces** of a non-existing offence in a manner prone to giving rise to criminal proceedings (**real/indirect** simulation).

Verbal/Direct Simulation

Verbal/Direct simulation entails presenting a **denunciation**, which encompasses a report, information, or complaint (*kwerela*) concerning an offence to the Executive Police, with the knowledge that the reported offence has NOT occurred – such as reporting a theft which never happened.

The main delineation between **Art. 110 (2)** and **Art. 101** lies in the a**bsence of specifying the perpetrator**. Once a person is singled out, Art. 101 would be applied instead of Art. 110 (2). Thus, in cases of verbal/direct simulation, a fabricated offence is reported to the police by an individual, and the crime becomes consummated upon the submitting of such information to the authorities. **Subsequent admission** by the informant of the falsehood does NOT absolve the agent of this crime, and a **retraction** subsequent to the filing of a report does not avail the perpetrator either.

Similar to Art. 101, strict adherence to formalities prescribed under our Criminal Code (particularly **Art. 537**) is **NOT obligatory for denouncing an offence to the executive police under Art. 110 (2)**.

> An information may be laid either verbally or in writing:
>
> Provided that where an information is laid verbally, it shall, except in cases which admit of no delay, be reduced to writing forthwith and shall be signed by the informer, or, if he is unable to write, by the Police officer by whom it is reduced to writing.
>
> **Art. 537**, *Criminal Code*

CASE LAW: *Il-Pulizija v. Anthony Farrugia* – Formalities

In this case, the court clarified that **formalities need not be observed in verbal/direct simulation**, even suggesting that **verbal communication suffices**.

The phrase "lay before" in Art. 110 (2) is interpreted broadly as simply **bringing the matter to the attention of the police**.

CASE LAW: ***Il-Pulizija v. Eugen Galea*** – Denunciation NOT to mention alleged offender.

In this case, it was ascertained that specifying alleged individuals rendered the offence under Art. 110 (2) invalid. Therefore, the report, information, or **complaint must pertain solely to an offence, and NOT to a specific person**. In fact, the defendant in this case was acquitted on the basis that the prosecution charged him under Art. 110 (2) – which was rendered inapplicable due to the fact that the defendant had specified a particular person in the complaint.

Finally, it is important to note that the *kwerela* submitted must concern a **crime** or **contravention**.

CASE LAW: ***Il-Pulizija v. Vincenzo Attard*** – This crime to pertain to crime/contravention.

"F'sentenza mgħotija mill-Qorti tal-Appell Kriminali, ġie sostnut li biex ikun hemm ir-reat ta' '*falza denunzja*', hemm bżonn li id-denunzja falza tkun dwar delitt jew kontravvenzjoni li jagħti lok għall azzjoni kriminali perseguibli quddiem il-qorti tal-ġustizzja kriminali."

Real/Indirect Simulation

Consider a scenario where an individual, aiming to feign a theft, deliberately breaks locks, places a ladder against a wall, and fabricates other evidence to simulate a crime convincing enough to prompt the Executive Police to launch a formal investigation and uncover the purported crime. These **false traces suggest real/indirect simulation**. Additionally, this is what insurance fraud usually entails.

In cases of real/indirect simulation, the fabrication may pertain to any crime or contravention. Furthermore, it must be orchestrated in a manner that enables the initiation of criminal proceedings to investigate the alleged offence. It is important to note **that actual initiation of criminal proceedings is not a requirement**; rather, there must be the **potential for such proceedings to be initiated**.

CASE LAW: ***Il-Pulizija v. Joseph Zahra*** – Real/Indirect Simulation

The defendant was convicted *inter alia* of simulating an offence when he created and submitted a report which falsely showed that there had been irregularities and illegalities in a **Government tender**. This report was furnished with details of telephone calls, flights, and meetings, all which were mentioned in a manner which would induce the pertinent authority to believe the allegations of said report.

CASE LAW: *Il-Pulizija v. Mel Spiteri* – Real/Indirect Simulation

The defendant was involved in a traffic accident resulting in the death of the victim. At the time of the incident, he was driving a vehicle with registration number FTO050. Subsequently, he concocted a plan to inform his father that his car had been stolen during the accident. His motive was to avoid being identified as the driver responsible for the accident and the victim's death. To support his false claim, the defendant **created false evidence by breaking the driver's door window**, **making it appear as if his vehicle had been stolen at the time of the accident**. The Court found the defendant guilty, inter alia, under Art. 110 (2).

"Dan kollu jfisser illi l-elementi kollha tar-reat tas-simulazzjoni formali jew indiretta, jinsabu sodisfatti ghaliex huwa ppruvat illi l-imputat, meta kisser il- hgiega tal-vettura u rrapporta lil missieru li l-vettura in kwistjoni kienet insterqitlu, b'qerq holoq tracci ta' reat b'mod li setghu jinbdew proceduri kriminali."

CASE LAW: *Il-Pulizija v. David Mizzi* – Verbal/Direct vs Real/Indirect Simulation

The court elucidated the distinctions between real/indirect simulation and verbal/direct simulation.

It clarified that in instances of **verbal/direct simulation**, the **perpetrator presents information to the Executive Police about an offence, fully aware that said offence did not take place**.

Conversely, in cases of **real/indirect simulation**, the perpetrator **fabricates evidence of an offence in a manner that could prompt the initiation of criminal proceedings for its investigation**.

Furthermore, the court emphasised that the key element of this crime is the perpetrator's awareness that the offence they are reporting to the Executive Police did not genuinely occur.

CASE LAW: *Il-Pulizija v. Francine Cini* – Verbal/Direct vs Real/Indirect Simulation

"Iz-zewg reati huma differenti. L-ewwel subartikolu jikkontempla r-reat tal-kalunja reali jew indiretta konsistenti fil- holqien bil-qerq ta' reat bil-ghan li dan jiswa bhala prova kontra persuna ohra. It-tieni reat jirreferi ghal-denunzja ta' reat minn agent li jkun jaf li dak ir-reat ma sehhx u dan minghajr ma jindika espressament l-persuna responsabbli ghal dak ir-reat inezistenti"

Hindering Persons from Giving Necessary Evidence

(1) Whosoever shall hinder any person from giving the necessary information or evidence in any civil or criminal proceedings, or to or before any competent authority, shall, on conviction, be liable to imprisonment for a term from four months to one year or to a fine (multa).

Art. 111 (1), *Criminal Code*

Mens Rea

The agent for this crime must have the **specific intent** to hinder a person from producing the necessary evidence or information to the pertinent authorities.

Actus Reus

For this crime to subsist, there must be an act of **commission** or **omission** da parti of the agent, exhibited by the offender's demeanour, words, actions, and overall attitude.

Moreover, there must be a **causal link** between the agent's actions and the inability of the other person of producing the necessary evidence or information.

CASE LAW: *Il-Pulizija v. Alfred Attard*

"L-element materjali ta' dan ir-reat jikkonsisti:

(i) f'att ta' persuna (ta' kummissjoni jew ommissjoni), komportament, attitudini, gesti, kliem bil-fomm jew bil-kitba; li (2) ma jhalliex persuna ohra (u ghalhekk jinhtieg in-ness kawzali) (3) tagħti t-tagħrif jew provi meħtieġa."

Jurist **Falzon** states that among the main requirements for this offence lies the **physical or moral coercion of a person to not provide the necessary evidence in a case** (the ***coazione fisica o morale***), so that if there is no sufficient act to prevent the evidence or if the evidence that was intended to be prevented is not necessary for the proper definition of the case, both civil and criminal, no proceedings for the alleged offence are instituted.

The consummation of this offence occurs immediately upon impeding another person, even if only temporarily, or when **preventing them from providing information or evidence to the appropriate authority on a specific occasion**. Conversely, if the perpetrator engages in an act or omission targeting the obstruction of the other person from providing essential information or evidence, yet the individual still manages to provide the required information or testimony, this constitutes an **attempted offence** by the perpetrator.

CASE LAW: *Il-Pulizija v. Alfred Attard* CONT'D

"Mid-dicitura ta' din id-disposizzjoni, ir- reat ikkunsmat javvera ruhu hekk kif il-persuna l-ohra effettivament tkun giet mxekkla jew ma thallietx – imqarr jekk b'mod temporanju, ghal qasir zmien jew f'okkazzjoni wahda partikolari (fejn din setghet eventwalment xehdet jew taghat l-informazzjoni) - tagħti t- tagħrif jew provi meħtieġa."

Ultimately, the actions of the agent in this case did not suffice in impeding a witness from providing his testimony. Therefore, the agent was convicted only for the attempt of this offence.

CASE LAW: *Il-Pulizija v. Annabelle Grech*

In this case, the court determined during a witness' cross-examination that the **accused had failed to influence the mentioned witness** to alter the conclusion she had independently reached in the report intended for court presentation. Consequently, **the court concluded that the accused could NOT be found guilty under Art. 111 (1)**.

"Ghal darba ohra l-atti huma ghal kollox sajma mill-provi li jissostanzjaw din l-imputazzjoni. Mhux talli hekk, talli kif gia sottolineat l-istess Andreana Gellel in kontro-ezami taghmilha cara li l-imputati fl-ebda hin ma influwenzawha biex tvarja, tbiddel jew taqleb xi konkluzjoni milli hi kienet waslet ghaliha. Mir-rapport ma biddlet xejn u lanqas ma hasset li kellha tibdel. Tkompli tghid li hija fl-ebda hin ma hassitha mhedda minkejja li l-imputati qalulha b'mod car li ma qablux mal-konkluzjonijiet fir-rapport taghha ghax ma kienx fl-interess tat-tfal. Apparti minn hekk meta l-Appogg rceviet it-telefonata fis-sistema on call taghha u din ingabet ghall- konjizzjoni tal-istess Gellel, hija mill-ewwel infurmat lill-Imhallef bil-kontenut ta' din it- telefonata u anke talbet direzzjonijiet minghandu dwa rkif kellha timxi. Din il-Qorti ghalhekk ma tarax kif dan ir-reat jista' jirrizulta fic-cirkostanzi."

Suppression, Destruction, or Alteration of the Traces of a Crime

(2) Whosoever, **in any case not otherwise provided for in this Code**, shall **knowingly suppress**, or in any other manner **destroy** or **alter the traces** of, or any **circumstantial evidence** relating to an offence, shall, on conviction, be liable –

(a) if the offence is a crime liable to a punishment not less than that of imprisonment for a term of 1 year, to the punishment laid down in sub-article (1);

(b) in the case of any other offence, to imprisonment for a term not exceeding 3 months or to detention or to a fine (ammenda) of not less than €2.33.

Art. 111 (2), *Criminal Code*

This section of the law serves as an **umbrella provision** for any situations not already covered by the Code.

Mens Rea

This offence involves **intentionally suppressing**, **destroying**, or **altering evidence** related to a crime. It specifically pertains to tangible evidence associated with the crime, such as physical objects like the *corpus delicti* or clothing used in the commission of the offence. This **excludes any verbal or written statements**. The act of suppression, destruction, or alteration **must be in connection to tangible evidence**.

CASE LAW: *Il-Pulizija v. Gordon Pickard* – Personal Favouritism

"...bl-ahhar parti **allura tirreferi ghal provi materjali u mhux ghal xi dikjarazzjoni jew stqarrija inveritjiera**. Illi il-**Codice Penale Taljan** illum qasam dawn ir-reati f'zewg disposizzjonijiet distinti, bl-**Art. 378** jitkellem dwar "***il favvoreggiamento personale***" u l-**Art. 379**, fuq dik "***reale***", li madanakollu jeskludi l-ahhar parti tad-disposizzjoni tal-artiklu 225 u cioe' dak tar-reat in dizamina. Illi allura meta l-Art. 378 jitkellem fuq il-*favvoreggiamento personale* irid ifisser lli:

The crime of **personal favouritism** (*favvoreggiamento personale*) **is conceivable in the case of knowingly aiding the perpetrator of a crime in evading investigations not yet underway**, provided that they are **clearly foreseeable by the agent based on concrete elements within their knowledge**.

Additionally, the court emphasised that the **intention behind such actions must be to obstruct the course of justice**

Moreover, the act of suppressing, altering, or destroying evidence must be done **knowingly**. It is not a matter of recklessness but of deliberate action.

Actus Reus

The agent must actively suppress, destroy, or alter any traces pertinent to a particular crime.

Prof. Mamo makes it clear that although the offender in this crime may be anyone, it **does not actually include the parties directly involved in the offence**, namely the accused. **Impallomeni** is quoted here, who remarks that if the accused, after committing the crime, proceeds to suppress, alter, or destroy any circumstantial evidence, his actions would be considered a **continuation of the primary offence**.

Therefore, if a person is accused of suppressing circumstantial evidence and then proceeds to alter the traces of the crime, it constitutes the same offence and is viewed as an extension of the primary offence. This factor is taken into consideration in determining the **punishment**.

The offence is considered complete **without the necessity of actually deceiving the police**. Therefore, it is NOT required that the police are deceived or that an investigation is initiated as a result. The mere **potential harm to the administration of justice is deemed sufficient**.

CASE LAW: *Il-Pulizija v. Gordon Pickard* CONT'D – Agent may be unrelated to accused.

The Court here ruled that the act of suppressing, destroying, or altering circumstantial evidence related to a crime is **sufficient in itself**, **without any requirement for an agreement with the accused party**.

The suppression of evidence may be carried out by a **party unrelated to the accused**, not necessarily implicated in the crime. Ultimately, the crucial aspect is that the agent's actions directly and intentionally involve suppressing, altering, or destroying traces of circumstantial evidence linked to a specific offence.

CASE LAW: *Il-Pulizija v. Justin Borg*

The Court deliberated on whether this offence could be committed by the perpetrator of the primary offence or by any other individual not directly involved in the commission of the crime.

The Court determined that if the suppression, alteration, or destruction of circumstantial evidence occurs immediately after the primary offence, it is deemed a **continuation** of the primary offence. Conversely, if such actions occur after some time has passed, they are considered a **separate** offence. The determining factor is the **timeframe** between the original offence and the suppression, alteration, or destruction of circumstantial evidence.

Rape

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

Provided that whosoever shall engage in **non-consensual vaginal**, anal, or **oral penetration** with any other **part of the body not mentioned in sub-article (1)** on the body of another person, shall, on conviction, be liable to imprisonment for a term from **three** (3) to **nine** (9) years:

Provided further that **penetration with any bodily part shall be deemed to be complete by its commencemen**t, and it shall **not be necessary to prove any further acts**.

(**1A**) Whosoever shall engage in **non-consensual vaginal**, **anal** or **oral penetration** of a sexual nature with an **object**, whether the object is intended for activities of a sexual nature or otherwise, shall, on conviction, be liable to imprisonment for a term from **three** (3) to **twelve** (12) years:

Provided that **penetration with an object shall be deemed to be complete by the commencement** of the penetration with that object, and it shall **not be necessary to prove any further acts**.

Art. 198, *Criminal Code*

By definition, **Harris** contends that rape connotes **carnal knowledge of a woman**, **without her consent**. This may occur:

1. By **force/fear** of **bodily harm**;
2. By **fraud** (ex. submission as a consequence of the agent portraying himself to be a doctor who is about to conduct surgery on the victim);
3. By **impersonation of someone's husband**; or
4. When the victim is **asleep** or **sufficiently imbecile** to understand the nature of the act in question.

In our Maltese legal system, the crime of '**rape or carnal knowledge with violence**' occurs when an individual, **through the use of force**, engages in **carnal knowledge** with another person of **either gender**. Therefore, this offence involves two fundamental ingredients:

1. The **Carnal Knowledge**
2. The use of **Violence**

Amendments to Art. 198

It would bode well to first understand the many amendments this provision has experienced over the years.

Act XXXI of 2007

This focuses on the **protection of minors**.

This Act introduced **Art. 204A, 204B, and 204C**, substituting the previous Art. 208A. This amending Act thus introduced provisions aimed at **protecting persons under the age of 18 from activities such as prostitution**. These newly introduced articles reflect the following legal instruments:

- The **2004 Council Framework Decision** (on **combatting Sexual Exploitation of Children** and **Child Pornography**)
- The **Optional Protocol of the United Nations on the Sale of Children, Child Prostitution and Child Pornography**.

Act IV of 2014

This led to an **increase in punishment for offences against minors** alongside the implementation of the **Istanbul Convention**.

This Act sought to **increase the punishment of offences wherein minors are victims**. This therefore amended Art. 202, 204, 204A-204D, 205, 208, 208A, 208AA, 208AB, 208AC, 208B, and 209A. This also introduced Art. 208C of the Criminal Code, criminalising the **aiding**, **abetting**, and **instigating of certain crimes against minors**, such as Art. 204, 204A-204D and 208A-208AB.

Act IV of 2014 thus implemented Directive 2011/93 EU 13th December 2011, on **combatting the sexual abuse and sexual exploitation of children and of child pornography**.

Act XIII of 2018

This **repealed the Domestic Violence Act**, introduced the **Gender Based Violence Act**, and completely redefined rape.

This Act sought to repeal the Domestic Violence Act and replace it with a wider Act which **incorporated gender-oriented violence**, manifested through the Gender Based Violence Act. Domestic Violence is still catered for under this act, for it encompasses such crimes alongside crimes of a gender pediment. This act also brought an **end to the Violence Ratification Act**.

This Act also brought a very important amendment to the law of rape (**Art. 198**), in turn altering the definition of the crime. The offence of rape has always been contemplated by the Criminal Code, yet in 2018 it faced a major overhaul. The offence of **sexual harassment** (**251A**) was added by virtue of this act.

It also brought **changes to the law of defilement of minors**, as well as the offence of **abduction** and of **participation in sexual activities with minors**. It also amended Art. 201 and 202, and even **increased the punishments** of Art. 216, 217, 218, 220, and 221, of **GBH** and other **bodily harms**.

Quintessentially, this changed the requisite of **violent carnal connection to non-consensual carnal knowledge**, and **introduced anal and oral penetration by any other body part**, or **by objects**.

Prior to 2018, the law stipulated "***Carnal knowledge done through violence***", which could only subsist via genital, vaginal or anal penetration.

In effect, this Act also implemented the **Council of Europe Istanbul Convention** on Preventing and Combatting Violence against Women and Domestic Violence.

The Istanbul Convention, which is the spirit behind the overhaul on the crime of rape as brought by Act 13 of 2018, served 3 purposes:

1. To **contain those behaviours that are considered unwanted** by criminalising such activity;
2. To **establish a framework mechanism** so that a support system exists to combat such unwanted behaviour;
3. To **establish a monitoring system** of such offences.

While the traditional scope behind the convention was to protect women from sexual assault or behaviours of a similar nature, recognition is also provided to those people who are considered vulnerable to such offensive behaviour. While the Istanbul Convention provides mainly for the protection of women, the **Maltese Legislator sought to extend such protection to all vulnerable people**, as indicated by the **neutral wording** governing these offences.

Act LXIV of 2021

This introduced **Art. 198 (1A)**, stating that rape may be committed by **any object**, **whether intended for sexual activities or otherwise**.

This Act also amended the Criminal Code and other relevant laws on sexual offences and other matters related to minors. It amended Art. 198, leaving it changed by two very important legal instruments (Act XIII of 2018 and Act LXIV of 2021). It also amended Art. 199 of **abduction**.

It also amended Art. 203, being the offence of **defilement of minors**, as well as Art. 203, 204, 204A, 204B, C, and D, 208A, 208AA. It also **repealed Art. 209**.

The main difference between Act XIII of 2018 and Act LXIV of 2021 is that the former outlines **non-consensual carnal connection in broader terms**, encompassing **vaginal** or **anal penetration** with **any bodily part** or **object**, as well as **oral penetration with any sexual organ**.

In contrast, Act LXIV of 2021 added **Art. 198 (1A)**, which mentions the **non-consensual penetration of the vagina**, **anus**, or **mouth** with an **object**, ***regardless of whether the object is intended for sexual activities or not***. Consequently, the punishment for this offence **when committed with an object** now ranges from **3-12 years** of imprisonment.

Overall, **the first provision covers a wider range of non-consensual sexual acts**, while the **second provision focuses specifically on non-consensual penetration with objects**. Additionally, the second provision appears to have a **lower minimum penalty compared to the first provision**.

CASE LAW: *Il-Pulizija v. Stephen Bonsfield,* 2006 – Rape Amendments

This case contemplated the crime of **marital rape** very vigorously because the crime was **not introduced until 2018**, and thus, during this case, the **crime was not yet considered to be an act of rape**, despite it possibly falling under **Art. 207** – of violent indecent assault.

"Illi dwar kemm hi koncepibbli l-akkuza ta' stupru kontra konjugi meta s-suggett passiv ikun il-konjugi l-iehor, l-awturi w l-gurisprudenza Taljanaw Ingliza, li minnhom il-Qrati taghna jidderivu hafna mill- insenjament legali taghhom, mhumiex konkordi. '

Manzini asserts that:

"*Relationships between spouses* – **Since coercion, to constitute a crime, must be illegitimate**, **the spouse who coerces the other spouse, through violence or threat, to engage in natural sexual intercourse under normal conditions is NOT punishable**. Indeed, among the purposes of marriage, a "**remedy for concupiscence**" is also provided.

But if one spouse coerces, through the aforementioned means, the other spouse into sexual intercourse, the crime of sexual violence undoubtedly exists."

In this case, reference was also made to **Smith and Hogan**, who asserted that despite that it was previously unconceivable for a man to be accused of rape against his wife, owing to the marital vow that all acts done in marriage is done consensually, it appears that this is no longer the case, for **criminal law should not be based upon fiction**, but rather **facts**. If the wife **retracted her consent to partake** in sexual encounters with her husband, then the **husband is nonetheless found guilty of rape**.

Before **1992**, under **English Law**, **marital rape was not prosecutable against spouses in marriage**, since it was believed that cons**ent is presumed for every act done within marriage**. The law was changed, and today, marital rape is a recognisable offence under U.K law.

Further, **Prof. Mamo** holds that **marital rape may subsist in the case of unnatural carnal connection with one's wife, with violence**.

"Issa fil-kaz in ezami, apparti li qed jigi allegat li kien hemm penetrazzjoni anali u vaginali bi prodotti goffi tal-ortikoltura – fatt li ma jikkostitwix ir-reat ta' stupru imma se mai dak ta' attentat vjolent ghall-pudur, qed jigi allegat ukoll li kien hemm penetrazzjoni anali da parti tal-membru virili tal-appellant segwit minn sess orali forzat, fejn l-appellant inserixxa il-membru tieghu forzatament f' halq martu, hekk kif kien immedjetament wara l-penetrazzjoni anali. Dan l-agir – ovvjament jekk sar bi vjolenza u kontra r-rieda espressa tal-mara - fil-fehma ta' din il-Qorti jikkostitwixxi fid-dawl tal-awtur u gurisprudenza appena citata, r-reat ta' stupru vjolent. Inutili l-d-difiza tipprova targumenta li seta' kien hemm kongungimenti ta' dan it-tip fil-passat fejn il-mara setghet kienet konsenzjenti biex toghogob lil zewgha. Li jghodd hu jekk il-kunsens tal-mara kienx jezisti fl-incident tal-5 ta' Lulju, 1998 u xejn aktar. Dan ghaliex il-mara ghandha kull dritt li tirrifjuta li tippartecipa f' atti kontra n-natura anki jekk fil-passat, ghal raguni jew ohra, tkun ikkonsentiet ghalihom. U jekk dawn l- atti jigu kommessi bi vjolenza jew bit-theddida ta' vjolenza kif qed jigi allegat li gara f' dan il-kaz, ikun jissussisti r-reat in dizamina ta' stupru vjolent, oltre dak ta' attentat vjolent ghall-pudur fuq imsemmi, kommess bl-uzu ta' l-inseriment ta' "foreign bodies" jew oggetti estraneji ghall-fini ta' penetrazzjoni anali w vaginali, dejjem jekk jirrizultaw pruvati."

Mens Rea

Before the 2018 Amendments, Art. 198 narrowly defined rape as **carnal knowledge achieved through violence**. However, these amendments aimed to prioritise the concept of consent and the physical act over violence. Consequently, this shifted the focus of the *mens rea*. Previously, the *mens rea* required **intention towards both violence and carnal connection**, implying that **the latter resulted from the former**. This emphasis on violence also extended to other sexual offenses, such as abduction and assault, which were subsequently renamed to remove associations with violence.

The revised Criminal Code now considers lack of consent as the pivotal element of the *mens rea*. This indicates the **perpetrator's intent to penetrate without the victim's consent or recklessness regarding her lack of consent**.

CASE LAW: *Il-Pulizija v. Joseph Magro*

The abovementioned was affirmed by the Court of Appeal in this case:

"**Carnal connection necessarily occurs without the victim's consent**."

Consequently, **Maltese law now aligns with British common law**, where **lack of consent is paramount in defining rape**, **regardless of the presence of violence**.

J.H Bogart references the **2003 UK Sexual Offences Act** – which defines consent as the "***freedom and capacity to make that choice***," emphasising conscious and mentally capable decision-making. **Aristotle** similarly emphasises voluntariness as **conscious choice**. Accordingly, the amended Art. 198 includes provisions emphasising voluntary consent, considering the individual's circumstances and emotional state, thereby safeguarding sexual autonomy.

Despite the shift towards consent-based definitions, **the amendments still acknowledge violence as a means to undermine consent**. However, instead of being integral to the definition of rape, **violence is now delineated in a separate subsection**. This recognises various forms of violence that can coerce non-voluntary behaviour, even when consent is technically given.

Nevertheless, judicial decisions continue to reference and emphasise violence in sexual offence cases, essentially underlining that rape under Art. 198 still, effectively, involves violence.

Carnal Knowledge

The aspect that sets this crime apart from that of '**indecent assault**' is the occurrence of **carnal knowledge** – indicating a **sexual connection**. Importantly, this connection **does NOT have to be fully consummated** (as worded in the proviso of **Art. 198**: "*Provided further that* ***penetration with any bodily part shall be deemed to be complete by its commencement****, and it shall not be necessary to prove any further acts*").

In English law, when establishing carnal knowledge for offences punishable under the **1861 Offences Against the Persons Act**, proving the actual **emission of seed** is not necessary. Instead, the carnal knowledge is deemed complete upon demonstrating **penetration** alone. Notably, **even the slightest penetration is sufficient**, and there is no requirement to prove the rupture or injury to a female victim's hymen.

Carnal knowledge may also involve an unnatural connection – as stipulated in **Art. 198 (1A)**.

CASE LAW: ***Il Pulizija v. Douglas James***

"Hu veru li fid-dottrina u l-gurisprudenza Taljana jipprevali l-koncett li l-att tal-introduzzjoni tal-verga maskili "**per bocca**" [(by mouth)] jammonta ghal **kongugiment karnali** kontra natura. Pero', ghandu jigi osservat li din l-estensjoni hi aktarx dovuta ghall-fatt li l-Art. 425 tal-Kodici antik Taljan tal-1850 kien juza, mhux il-kliem "congiungimento carnale contro natura", imma l-kliem "**congiungimento carnale contro natura**", u ghalhekk gew komprizi, kif jispjega **Gabriele Pincherle**, anki l-attijiet li jissimlaw il-"**coito**" [(sexual intercourse)], bhal ma huma "la **fellazione**, la **irrumazione**, la **sodomia**, cioe quegli atti che si comprendono sotto la espressione di '**venere nefanda o mostruosa**'".

[…]

Invece, il-**Kodici Malti** juza l-kliem "**kongungiment karnali kontro natura**", cioe **MHUX** "**atti di libidine contro natura**", imma "**kongungiment karnali kontra n-natura**".

[…]

Jista' anki jizdied li r-regola dettata fil-liġi, fis-sens li l-**kongungiment karnali jitqies sar anki "fil-bidu" tal-kongungiment**, tadatta ruhha ghall-**kongungiment sodomitiku**, imma **MHUX tant ghall-att** "**per bocca**"; ghax fil-kungress karnali "**per anum**" jista' jkun hemm **grad wiehed jew iehor ta'** "**penetration**", imma fl-att "**per bocca**" **din il-gradazzjoni ma tantx hi kncepibbli**, ghax **jew hemm jew ma hemmx l-introduzzjoni tal-organu genitali**".

This stance was changed by the **2018 Amendments**. Now, oral sex without consent **constitutes rape** – as affirmed in ***Il-Pulizija v. Rhys Fiteni***.

Amendments to the Actus Reus

In Maltese law, the crucial distinguishing factor between rape and violent indecent assault lies in the concept of **carnal connection**, or the *actus reus*. Prior to the 2018 Amendments, rape was defined as carnal knowledge involving vaginal penetration. This definition aligned with the **Black Law dictionary**, **equating "carnal knowledge" with sexual intercourse**. In fact, the courts, in cases such as ***Il-Pulizija vs. Rhys Fiteni***, clarified that **carnal knowledge occurred through genital penetration**.

Under the old law, rape was limited to vaginal penetration by the penis, excluding other forms of penetration which would constitute violent indecent assault or defilement of minors for victims under eighteen. **Antolisei** entertained the possibility of **anal** and **oral penetration**, but **Manzini's** view, emphasising **genital organ penetration**, **prevailed in Maltese courts**.

CASE LAW: ***Il-Pulizija v. Douglas James sive Jack Sheddon*** – Pre 2018 Amendments
This case demonstrated an **exclusion to oral penetration from constituting carnal connection**.

CASE LAW: ***Il-Pulizija v. Yulian Vasilev Iliev*** – Pre 2018 Amendments
Similarly, in this case, vaginal penetration occurred by finger and oral penetration by the penis, and accused did NOT face charges of rape, but rather, of violent indecent assault.

However, the **2018 Amendments expanded the definition of rape to include other forms of unwanted sexual contact and assault**. The term "carnal connection" now encompasses anal and oral penetration by other body parts or objects, **aligning with the 2003 UK Sexual Offences**. This Act defines rape as **penile penetration of the vagina**, **anus**, or **mouth without consent**, acknowledging that f**orced oral sex is equally traumatic and violating as other forms of penetration**.

Violence

This distinctive feature defines the nature of the crime of rape. It represents a fundamental aspect integral to the crime, and NOT merely an exacerbation of it.

Chaveau & Helie purport that such vio**lence must be directed specifically at the person involved**: *oportet quod violentia sit facta personae*. Thus, they contend that **force exerted on a door in order to access the victim does NOT constitute rape** if the other party subsequently submits, albeit willingly, to the carnal knowledge.

The **law refrains from detailing the specific nature of the violence required**, as such a specification would be impractical. The essence is to assess, in each case, whether the carnal knowledge occurred against the will of the victim, despite any resistance they could reasonably offer based on their physical strength and energy. Determining the necessary intensity, character, and degree of violence in advance would be futile and perilous, as these factors heavily depend on the individual character and circumstances of the crime victim, requiring an examination of the situational context according to common life experience.

Maino suggests that when considering the **age**, **health condition**, **strength**, and **temperament** of the victim, it may happen that the **means**, which, when considered in themselves, should generally be deemed ineffective, **achieve their intended purpose**. Conversely, apparatus and methods that are generally considered suitable may turn out to be ineffective due to the specific age, health, strength, and temperament of the victim.

Our Criminal Code, akin to others, establishes specific presumptions concerning the element of violence. According to **Art. 201**, it is stipulated that unlawful carnal knowledge is automatically assumed to be associated with violence in the following scenarios.

> Unlawful carnal knowledge and any other indecent assault, shall be **presumed to be non-consensual**:
>
> (a) when it is committed **on any person under 12 years of age**;
>
> (b) when the person abused was **unable to offer resistance owing to physical or mental infirmity**, or for **any other cause independent of the act of the offender**, or in consequence of any **fraudulent device** used by the offender.
>
> **Art. 201**, *Criminal Code*

Constructive violence is deduced primarily from the young age of the victim. In the case of **very young children**, who are inherently inexperienced, it is conclusively assumed that they are **incapable of consenting to the act**, **comprehending its nature**, or **offering any resistance**.

Regarding mental infirmity as a basis for incapacity to resist, **Maino** contends that **proving total insanity is not necessary**; it suffices to demonstrate that the victim, due to mental infirmity, was **incapable of understanding the material and moral gravity of the act**.

In cases of incapacity arising from causes unrelated to the offender's actions, this encompasses situations such as where the victim is in a state of insensibility due to alcohol, having been **intentionally intoxicated by the perpetrator**, even if the liquor was administered solely to induce excitement. Another instance is when the victim is **asleep**.

Fraudulent devices employed by the offender include actions such as **impersonating the husband** or using other **false pretences**.

CASE LAW: *R. v. Linekar* – Fraud

In this case, consent was vitiated by fraud. The Court ruled that the deception must be either as to the **nature of the act** or as to the **identity of the agent**.

Finally, it bodes well to note that the Istanbul Convention ushered the introduction of Art. 198 (1A) – which expands the horizons of this offence and renders applicable to situations wherein an inanimate object is used for penetration to occur. Moreover, this offers an expanded indirect protection to males who eventually suffer such an offence.

CASE LAW: *MC v. Bulgaria* – Violence should NOT be a necessary requisite

The ECHR criticized harshly those legal systems where violence was a key element of the offence.

The Court held that:

"**Proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy**".

In accordance with contemporary standards, the EU member states' positive obligations under **Art. 3** and **Art. 8** of the **ECHR** must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, **including in the absence of physical resistance by the victim**.

The Use of an Object

The *actus reus* of this offence may manifest itself in three different ways – the penetration of a genital organ with a genital organ, the penetration of a genital organ with any other body part which is NOT a genital organ, and penetration committed by an object – which was ingrained in the Criminal Code first in 2018, and was subsequently tweaked a little bit by Act LXIV of 2021, thus introducing Art. 198 (1A).

Hence, Art. 198 (1A) pertains to the insertion of an object into the anus, vagina, or mouth. It suggests that for such penetration to qualify, there must be a **sexual intent associated with the use of the object**. This implies that the motive behind the act should carry a sexual nature, **although the object itself need not inherently be sexual**.

This form of penetration involves the use of an object and hinges upon its "sexual nature." Therefore, **not every instance of object penetration would meet the criteria of this offence**, but rather those instances imbued with a sexual aspect. The **law does not explicitly define or grade what constitutes this sexual aspect**, leaving its interpretation and determination to individual cases.

It is crucial for the Courts to ascertain the presence of the sexual nature of an act, as the **focus is on the sexual organ of the victim**, rather than the perpetrator. This necessitates understanding the intent of the perpetrator. While there may be instances of vaginal or anal penetration, **lacking the sexual element would negate the commission of a criminal offence**. For example, **medical procedures** involving vaginal penetration for diagnostic purposes would not fulfil the sexual nature requirement.

In such medical scenarios, consent is typically present, and the intent is not sexual. However, **if the medical procedure serves as a pretext for sexual gratification**, even within a medical setting, the sexual element remains. Therefore, the element of sexuality cannot be dismissed outright, and each case must be evaluated individually to determine its presence.

Furthermore, the law specifies that the **carnal connection need not be completed for it to be considered present.** The **commencement** of the carnal connection suffices to fulfil this requirement. Essentially therefore, the law does not demand completion of the entire act; the commencement alone is deemed sufficient, as stated in the second proviso to Art. 198 (1), which declares that penetration with any bodily part is complete upon initiation, eliminating the necessity to prove further acts.

Advantages of the Amendments to Art. 198

The redefinition of carnal connection represents a significant improvement, as **it now encompasses all potential scenarios faced by victims, eliminating ambiguity in determining whether an act constitutes rape**. This comprehensive definition covers all intentional sexual penetrations, providing clarity and coherence in legal proceedings.

Similarly, the revision of the *mens rea* is a positive step forward. Recognising the **diverse reactions and behaviours of victims in such situations, a rigid, one-size-fits-all approach is inadequate**. Research indicates that rape victims may experience paralysis or tonic immobility, freezing in response to the imminent threat and fear they encounter. This phenomenon, highlighted by **Prof. James Hopper of Harvard Medical School**, underscores the scientific understanding of why some women may exhibit no outward reaction during assault. Such reactions are attributed to inherent vulnerabilities and ingrained instincts of passivity and submissiveness.

Consequently, the previous requirement of violence as a precondition for rape was deemed **outdated** and **contentious**, failing to align with the realities of human behaviour. Moreover, this requirement often resulted in **numerous rape crimes going unreported**, as **not all assaults leave visible physical evidence on the victim's body**. Furthermore**, many rapes occur in non-violent contexts**, particularly those perpetrated by acquaintances.

Disadvantages of the Amendments to Art. 198

The challenge with framing lack of consent as the *mens rea* in sexual offenses lies in the **difficulty of determining whether consent was indeed given or absent**. Consequently, establishing lack of consent in cases of rape presents a more formidable hurdle compared to proving the presence of violence. This complexity is exacerbated when **consent is coerced** or **invalidated** by various forms of violence, as previously discussed.

Moreover, situations such as **marital rape** or **date rape** further complicate matters, as prior consensual sexual activity may lead parties to **assume ongoing consent** without explicit communication before each act. In such contexts, consent is often assumed rather than actively sought, leading to potential **misunderstandings** or **misinterpretations**.

Therefore, it is imperative to assess the presence or absence of consent on a **case-by-case basis**, recognising the unique circumstances and dynamics involved. Each case should be approached with sensitivity and nuance, **avoiding a one-size-fits-all approach**.

Prostitution

Various questions have been explored by legal scholars on this matter. One such question is the scenario where the victim is a **common prostitute** or is widely known for lacking chastity or common decency. In **England**, the consensus is that **it is not considered a valid excuse that the woman subjected to the crime was a common prostitute or a concubine of the perpetrator**. **Continental doctrine**, namely that of **Chaveau & Helie**, purports that the woman's habitual debt is NOT an obstacle to the existence of the crime, because **her dissolute life would not be enough to legitimize any attack on her person**. The law that punishes violence extends its protection to everyone, regardless of their habits, profession, or tendencies.

Harris contributes to the conversation and points out that the circumstances surrounding the woman being a **prostitute**, the **defendant's mistress**, or having a **morally questionable character** ought to weigh heavily with the **jury** when considering the **likelihood that the sexual encounter occurred without her consent**.

CASE LAW: *R. v. Bloodworth* – Pre-existing Sexual Tendencies

Archbold denotes here that the commission of the offence may be inferred from all the circumstances. **Evidence tending to show pre-existent sexual passion between the parties is admissible**.

Marital Rape

English law proposes that **a husband cannot be charged with rape against his wife**. However, **Archbold** notes that this proposition may not necessarily apply in every conceivable case.

CASE LAW: *Regina v. N.N* – Marital Rape

In this case, **Sir Arthur Micallef** ruled that the **crime of rape can be established if a husband engages in unnatural carnal connection with his wife, using violence**.

“If the law did not include the offence mentioned under the provisions of the said article, the notable and remarkable absurdity would arise that a wife, solely by virtue of being a wife, should be deemed subject to any violent act of the kind in question, which her husband might choose to subject her to."

Thus, this explained that if one were to rule out the possibility of raping one’s wife, then this would imply the **notion that being a wife renders oneself justifiably subject to any type of violence the husband may desire to incur**. Thus, it is inherently *important* for the idea of rape within marriage to subsist as an offence in our Criminal Code, especially vis-à-vis public policy.

CASE LAW: ***Il-Pulizija vs Stephen Bonsfield*** – Marital Rape

The Court found the accused guilty of marital rape with respect to certain acts of **unnatural carnal connection** that the husband has committed on his wife, accompanied by violence. The court considered the **possibility of marital rape in the case of separation or divorce**, in a court order against one of the spouses from molesting the other spouse, in contagious diseases, and unnatural carnal connection.

Consent

Unlawful carnal knowledge and any other indecent assault, shall be **presumed to be non-consensual**:

(a) when it is committed on any person **under 12 years of age**;

(b) when the person abused was **unable to offer resistance** owing to **physical** or **mental infirmity**, or for **any other cause independent of the act of the offender**, or in consequence of any **fraudulent device** used by the offender.

Art. 201, *Criminal Code*

Art. 201 creates a presumption of a lack of consent in the two abovementioned scenarios. The first scenario is irrebuttable, and is founded upon a state of fact. However, the second scenario is wholly rebuttable, because it is based on the subjective vulnerability of the victim.

Coleridge Day contends that there is a difference between consent and submission: **every consent involves a submission**, **but it by no means follows that a mere submission involves consent**.

CASE LAW: ***R. v. Dimes*** – Submission NOT Consent

Once again, **Archbold** contends that mere **submission**, as distinguished from **permission**, is **insufficient to constitute the female as an accomplice to carnal knowledge** – which would thus absolve the initiator of the requisite carnal knowledge constituting criminal liability.

CASE LAW: ***R. v. Stone*** – Consent is Complicity

Archbold here suggests that if there is evidence to go to the jury that the female was a consenting party, they must be cautioned that **if they find her to have consented**, **she then becomes an accomplice**, and her evidence would require corroboration.

When it comes to voluntary intoxication di parti of the victim, **Blackstone** makes some pivotal remarks:

'Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently. ***If he/she is aware of what is happening and the consumption of alcohol or drugs has caused her/him to consent to activity which she would ordinarily refuse, then she has consented not much she may regret it. A drunken consent is still a consent****. If a person has the capacity to make a decision whether to agree by choice, then such a matter is wholly subjective. Although the person would have drunk, if at the time of making the decision, the person was able to understand what she was going to do, then there was still consent.*

However, ***if a complainant becomes so intoxicated that he/she no longer has the capacity to agree****, then there will be* ***NO consent.*** *Clearly, she will not have the capacity to agree by choice or she was so intoxicated through drink or drugs and her understanding and knowledge are so limited that she was not in a position to decide whether or not to agree.*

A person may reach such a state without losing consciousness. This is exemplified in an instance wherein the alleged victim is in a state of knowing that they do not want to take part in any sexual activity with someone, but is incapable of saying so. Alternately the complainant may have been affected to such a degree that, whilst having some limited awareness of what is happening, she is incapable of making any decision at all.'

Thus, Blackstone contends that if a person is asleep or lost consciousness, be it either through drink or drugs, then she is incapable of giving give consent. And this is so even if her body responds to the accused advances.

In tandem, **Archibald** declares that "*In relation to the voluntary consumption of alcohol, on the ability of a person to consent to a sexual activity,* ***consent can only be said to be absent if the effect of the alcohol was such that the victim had temporarily lost the capacity to choose whether to engage in the sexual activity****. Where a victim had voluntarily consumed substantial quantities of alcohol but nevertheless remained capable of choosing whether to engage in such sexual activity and agreed to do so then he/she was consenting*.''

CASE LAW: *R. v. Bree* – Consent in Inebriation

The English Court of Appeal explored the issue of **capacity** and **consent**, stating that if through **drink** or for any other reason a complainant had **temporarily lost her capacity to choose whether to have sexual intercourse**, she would thus NOT be consenting, and any subsequent intercourse which may take place would amount to rape.

However, where a complainant had vo**luntarily consumed substantial quantities of alcohol but nevertheless remained capable of choosing whether to have intercourse and agreed to do so, that would NOT be rape**.

Moreover, if the consent was explicitly given albeit ushered by **fraudulent means** or **devices** employed by the offender, then the **concept of free decision and consent is rendered an illusion**, and thus, a. legal absurdity.

CASE LAW: *R. v. M.* – Subjective & Objective Test for Consent

The English Criminal Court emphasised the application of various tests to establish whether the accused was cognizant of the victim's lack of consent. Ultimately, it is crucial that the **perpetrator is either aware** or **reasonably suspects that the victim is not consenting to the act**.

This analysis requires a **subjective test** – considering the **personal characteristics of the accused**, the **behaviour of the victim**, the **circumstances** leading to the situation, and other factors that assist the court in determining whether the accused could reasonably know or suspect that consent was either not given or being withdrawn.

The court cautioned against relying solely on the subjective test, as it might overlook certain standards of behaviour. Therefore, the circumstances of each case must also undergo the **objective test** – which evaluates **what a reasonable person (*bonus paterfamilias*) would do in such situations**.

Attempted Rape

Another question arising in the context of the crime of rape is whether it allows for an attempt under **Art. 41** of the Criminal Code. The prevailing doctrine asserts that **it does**.

As mentioned earlier, a **commencement of the carnal connection completes the crime**, thus connoting that it is not categorised as an attempt. However, if there are other **acts involving violence that do not initiate the connection itself but signify the beginning of the crime's execution** and are clearly directed towards the carnal connection, then it constitutes an **attempted rape**.

In practice, distinguishing between an attempted carnal knowledge with violence and violent indecent assault can be challenging due to the fact that the material elements of these crimes may not present any significant differences. To make this distinction, one must consider the **intentional element** to determine whether the perpetrator intended, for example, to satisfy their lust independently of carnal connection.

Aggravated Rape

The punishment prescribed for any of the crimes referred to in the preceding articles of this Sub-title, shall be increased by **one to two degrees** if any one or more of the following circumstances results:

(a) when the offender has availed himself of his capacity of **public officer**, or when the offender is a **servant of the injured party**, with salary or other remuneration, or any person otherwise having abused of his authority over the injured party;

(b) when the crime is committed by any **ascendant**, **tutor**, or **institutor**;

(c) when the crime is committed on any **prisoner** by the person charged with the **custody or conveyance of such prisoner**;

(d) when the offender has, in the commission of the crime, been **aided by one or more persons**;

(e) when the offender has, in the commission of the crime, made use of any **arms proper** or **improper**;

(f) when the person on whom the crime is committed, or any other person who has come to the assistance of that person, has sustained any **bodily harm**;

(g) when the offence is committed on a **minor**;

(h) when the crime is committed on the person of:

(i) the **current or former spouse**, **civil union partner** or **cohabitant**; or
(ii) the **brother** or **sister**; or
(iii) an **ascendant** or **descendant**; or
(iv) another person having or having had a **child in common** with the offender; or
(v) another person **living in the same household as the offender** or who had lived with the offender before the offence was committed;
(vi) another person who **is** or **was in a relationship with the offender** whether with the intention of marriage or not;
(vii) other persons who are related to each other by **consanguinity** or affinity up to the third degree inclusively:

Provided that in this paragraph "spouse" includes the person whose marriage with the offender has been dissolved or declared null;

(i) when the crime is committed in the presence of, or **within hearing distance of a minor**;

(j) the offence, or related offences, were committed **repeatedly**;

(k) the offence was committed against a **vulnerable person** within the meaning of article **208AC(2)**;

(l) the offence was committed with the **threat of a weapon**;

(m) the offence resulted in **severe physical or psychological harm for the victim**;

(n) the offender has been **previously convicted of offences of a similar nature**:

Provided that where an aggravation of punishment in respect of the circumstances mentioned in this article is already provided for under this Code or any other law, the higher punishment may be applied.

Art. 202, *Criminal Code*

Ultimately, aggravations to this offence pertain to the agent enjoying a **dominant position** over the victim, who thus exploits said dominant position to facilitate the sexual offence in question.

Prosecuting the Offence

Legal proceedings for rape can only be initiated based on the complaint (***kwerela***) **of the private party**, **unless the offence involves unnatural carnal connection.** However, if the crime is accompanied by **public violence** or any other offence affecting public order, criminal action can be pursued ***ex officio*** – thus independently of the complaint from the private party.

As a final remark, **Art. 207** serves as a residual offence for acts of a sexual nature, albeit those who do not satisfy all the necessary requisites for constituting the offence of rape.

Whosoever shall be guilty of any non-consensual act of a sexual nature which does not, in itself, constitute any of the crimes, either completed or attempted, referred to in the preceding articles of this Sub-title, shall, on conviction, be liable to imprisonment for a term from three to seven years:

Provided that in the cases referred to in article 202, the punishment shall be increased by one degree

Art. 207, *Criminal Code*

Abduction

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

(2) The punishment laid down in sub-article (1) shall be **increased by one or two degrees** where any person abducts, by **fraud** or **seduction**, any person under the age of 18 years.

Art. 199, *Criminal Code*

In our legal system, abduction is categorised into 2 distinct strains. The initial offence involves **forcibly taking someone with the intention of harming them**, and the second type of abduction pertains to **deceitfully or persuasively taking someone under 18 years of age** from the custody of a guardian, caregiver, or educational institution. It is crucial to note that the second type of abduction carries a more severe punishment. The intent to abduct is **generic**, but the intent to cause harm is **specific**.

For the offence of abduction to occur, it is crucial that the **victim is taken or transported from one location to another**. This aspect is fundamental to both forms of the crime. However, the remaining elements of each offence vary significantly.

The ***actus reus*** of this offence is fulfilled **at the moment of the taking**, meaning that the victim does not need to be held for any duration for the offence to occur. In fact, detaining a person is a separate crime encompassed under **Art. 86** (illegal arrest) Once a person abducts another against their will, the offence is committed. Any subsequent detention of the person constitutes an additional crime.

Abduction by Violence

This form of crime is applicable to individuals of any gender, age, marital status, whether they are adults or minors. The determining factor is the perpetrator's **intention to either harm or abuse the victim**.

The offence is deemed **complete upon the act of forcibly taking the person away with the specified intention**. It is **NOT contingent on whether the perpetrator succeeds** in fulfilling their intended purpose.

Abduction by Fraud or Seduction

When abduction occurs through methods of fraud or seduction rather than through violence, it **constitutes a crime if the victim is under 18 years old**, regardless of gender, and is under the guardianship of a parent, tutor, caregiver, or within an educational institution.

The deception might involve **any tactic that places the victim in the control of the perpetrator, against or without the victim's consent**. **Maino** stipulates that this encompasses various deceptive strategies, including luring the victim to a location they would not have willingly gone to without the deception. Additionally, it encompasses tactics such as inducing sleep, intoxication, or unconsciousness in the victim, rendering them unable to resist being taken away.

Chaveau and Helie add that the fraud must consist of **guilty machinations**, **deceptive promises**, and **snares aimed at the inexperience of youth**. Such would be the fraudulent use by the agent of the name and authority of the minor's family to lure them out of their location; the corruption practiced on those entrusted with the minor to have them handed over. And such would also be the manouvres employed to wrest consent from relatives based on false facts.

Seduction involves any **unlawful persuasion**, **inducement**, or **enticement** employed by the perpetrator to convince the victim to accompany them. **Carrara** purports that "for a proper understanding of the juridical meaning of this word, it is not enough to look at the means used but one must also examine the state of mind of the agent behind the use of those means".

Furthermore, while Art. 199 falls under 'sexual offences', it **does NOT restrict the interpretation of the term 'seduction' solely to a sexual context**. Therefore, the aggravation outlined in sub-article (2) is not limited to a sexual context, but is rather broadened to encompass any form of seduction.

CASE LAW: ***Il-Pulizija v. Raymond McKay***

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

The **1980 Hague Convention** stipulates that children taken from one country to another without the consent of the parent left behind should be returned to their country of origin.

Eradicated Extenuations

Act XIII of 2018 deleted the extanuation annexed to the offence of abduction (**Art. 200**) – which formely referred to situations wherein the abductor restored the person abducted. Moreover, it also precluded any discussion regarding situations wherein a person abducts someone with the intent to marry them.

Jameson was always a zealous advocate against any extenuations to this offence – because he argued that even if restored, the person abducted would have already suffered irrepairable damage caused by the offence in question, especially if it led to the desecration of one's body.
However, Jameson recognised and understood that implementing an extenuation to this offence might be tantalising for an abductor's interest, leading to a more probable restoration of an abducted person.

Aggravations

The punishment for abduction and other offences listed under the pertinent Sub-Title undergo an augmentation of one to two degrees contingent upon several circumstances.

These include situations where the offender exploits their capacity as a **public officer**, or when the offender **holds a position as a servant of the injured party with salary** or other remuneration, or any individual who has otherwise **abused their authority** over the injured party.

Additionally, the escalation occurs if the crime is perpetrated by any **ascendant**, **tutor**, or **institutor**. Furthermore, it applies when the offence is committed against a **prisoner** by the individual charged with their custody or conveyance. Moreover, if the offender receives **aid from one or more persons** during the commission of the crime, or if they utilise any **arms**, **proper or improper**, the punishment is heightened.

The escalation also applies when **bodily harm** is inflicted upon the victim of the crime or any other person who comes to their assistance. Similarly, offences committed against **minors**, **spouses**, **siblings**, **ascendants**, **descendants**, **cohabitants**, or **individuals in a relationship with the offender**, whether intending marriage or not, incur increased punishment.

This augmentation also extends to offences committed in the **presence** of, or within **hearing distance of a minor**, as well as those **committed repeatedly** or **against vulnerable persons**. Moreover, if the offence involves the use of a weapon, results in **severe physical or psychological harm for the victim**, or if the offender has **prior convictions** for similar offences, the punishment escalates.

It is important to note that where an aggravation of punishment is already prescribed under this Code or any other law for the mentioned circumstances, the higher punishment will be applied.

The Defilement of Minors

> (1) Whosoever, by **lewd acts**, **defiles a person who has not completed the age of 16 years**, shall, on conviction, be liable to imprisonment for a term from 4 to 8 years:
>
> **Art. 203**, *Criminal Code*

The core essence of this provision mirrors the initial segment of **Art. 335 of the 1889 Italian Code**. It pertains to lascivious actions, **excluding forcible or attempted forcible sexual intercourse**, either physically or constructively, carried out against an individual or in their vicinity, regardless of gender, and **capable of tarnishing their character**.

The initial aspect of the offence pertains to the age of the victim – **who must not have yet completed the age of 16**.

Actus Reus

The material aspect of thie crime involves **lewd acts**. In the **Relazione Ministeriali sul Progetto 1887**, it was explained that the term 'lewd acts' (***atti di libidine***) was deliberately chosen to clarify that **mere verbal statements**, images, literature, or representations, though obscene or indecent, which affect only moral sensibilities, **do NOT qualify as the crime in question**. It is imperative that the defilement occurs through lewd acts.

These lewd acts must occur either **directly on the minor's person** or **in their presence**. Any alternative interpretation would disregard the clear intention of the law, which aims to shield youth from the **detrimental moral impacts** of acts that, despite lacking physical contact, are inherently intended to defile. Furthermore, the **law explicitly refers to lewd acts without making any distinctions**.

Even consensual carnal connection, regardless of its natural occurrence, with a minor, absent any violence, may indeed constitute this offence. Some scholars have contested otherwise, contending that **such intercourse is a purely physiological act and therefore not classified as a lewd act as required by the law**. However, beyond the debate over whether consensual intercourse can be considered physiological for individuals up to around 16 years old, it is **arbitrary to impose limitations on the term 'lewd acts' as defined by the law**, restricting it solely to **pathological** or **abnormal processes**. Thus, its natural interpretation encompasses **all actions aimed at satisfying sexual desires**. Moreover, it is inconceivable that the legislator, who sought to safeguard young individuals from falling prey to the lascivious desires of others, would intend to exclude protection against the most common and complete expression of such desires.

Additionally, the **law itself generally presumes that individuals under the age of 16 are incapable of providing valid consent to sexual intercourse**, which, if voluntary and normal (excluding cases of adultery), would not constitute an offence among adults.

Hence why it makes more sense to subscribe to the notion that even consensual sexual intercourse had with a minor, albeit destitute from any violence or threat, may constitute this offence.

Apart from sexual intercourse, other **less severe lewd acts** carried out on or in the presence of a minor would still constitute the offence, provided they are **intended to corrupt the minor by arousing sexual desire**.

It is important to note that while the law mentions lewd acts in the plural form, it **should not be inferred that a single act**, **if intended to defile**, **would be insufficient**. The plural form is used merely to indicate the category of acts, not the quantity. It would be illogical to argue that defilement should go unpunished merely because it resulted from a single act (presumably serious) rather than multiple acts. The issue at most would be one of severity in determining the appropriate punishment.

Mens Rea

There is **no requirement for a specific intent to defile**. The defilement, whether intended or not, is considered an **inevitable consequence of the lewd acts themselves**.

It is left to the judgment of the court in each case to determine whether the acts were likely to cause defilement. If the acts inherently have this effect, it is untenable to argue that the person who committed them did not also intend the consequences inherent in their nature.

The Defilement

CASE LAW: ***Il-Pulizija v. Thomas Wiffen***

The court ruled that to constitute the completed offence, both the **lewd act and actual defilement must be present.** The lewd act can occur directly on the minor or in their presence. Any **actions**, whether **by nature** or **circumstance**, performed to **arouse sexual desire in either the perpetrator or the victim**, and **capable of piquing the victim's interest**, are deemed **lewd acts** for the purpose of this crime. Therefore, the court expanded the notion of **sexual arousal to encompass not only the perpetrator but also the victim**.

Judge Vincent De Gaetano here quoted **Manzini**, and reiterated that **lewd acts are those intended to arouse one's own lust towards base carnal pleasures**, either for themselves or due to the circumstances in which they are sought to be provoked, or aimed at satisfying such lust.

Furthermore, the court emphasised that the **duration of the encounter** is **insignificant**: "The duration of these acts is immaterial for the notion of a lewd act. There is no doubt in the mind of this Court that the touching of the breasts or of the private parts of a young girl -- in the case under examination appellant's daughter was not yet twelve years old when the first acts were performed -- with the intention either of gratifying one's libidinous tendencies or of arousing the sexual interest of the said girl, are lewd acts."

In the reports cited regarding the draft Italian Code, it was emphasised that **effective defilement of the minor must occur**.

This raises the question of whether the crime can occur when lewd acts are committed on or in the presence of a **minor who is already defiled**, being underage in either case. Ultimately, this notion has been a contested issue among sholars for a long time. Some Continental Courts have held that if the minor is already defiled, they cannot be considered a victim of the crime in question. However, opposing viewpoints argue that there can be **varying degrees of defilement** and that it would be **unwise to leave unpunished the actions of individuals who contribute to the corruption of a minor who has already embarked on the path of corruption**, leading towards a most unrestrained lascivity.

Maino proposes a **middle ground**. He suggests that this inquiry should be made on a **case-by-case basis** by the judges. **Maino** argues that this approach, despite its inherent difficulties and uncertainties, aligns best with the spirit and letter of the law. It avoids the extremes of either always considering the crime present regardless of prior defilement or always excluding the crime if the victim is not new to sexual practices.
He emphasises the **importance of preventing the exploitation of inexperienced or foolish children** who, while fallen into vice, **could still be rescued** if not further victimised.

CASE LAW: ***Il-Pulizija v. Andrew Bonnici***

"**Tifel ta' appena 13-il sena** li jigi espost ghall-eghmil li jaghmel l-appellant, kemm fuqu nnifsu, kif ukoll fuq il- persuna tal-istess tifel, **ma jistax ma jigix korrott anke jekk forsi dak it-tifel ikun diga' jaf certi fatti tal-hajja**, **jew ikollu xi esperjenza sesswali**. Altru esperjenza sesswali fil-kors normali tal-izvilupp fizjologiku ta' dak li jkun, u altru impozizzjoni ta' sitwazzjonijiet determinati minn eghmil zieni, li manifestament jipproducu lezjoni f'integrita' morali tal-minorenni."

CASE LAW: ***Il-Pulizija v. Schembri***

While Maino's reasoning is persuasive, our courts have consistently leaned towards the doctrine that **previous defilement**, regardless of its extent, **does NOT necessarily preclude the existence of the crime**.

CASE LAW: ***Il-Pulizija v. Carmelo Spiteri***

"Huwa fatt li jistghu jinqalghu kazijiet fejn l-allegat suggett passiv tar-reat ikkontemplat fl-Art. 203, minhabba hajja **dedikata ghall-laxxivja u ghall-pjaciri sesswali**, ikun fi stat ta' **travjament morali tant komplet li difficli wiehed jista' jimmagina kif jista' jigi ulterjorment korrott**, u kazijiet bhal dawn gieli gew ikkunsidrati minn din il-Qorti, izda huwa cert ukoll li **l-esperjenza sesswali precedenti mhux necessarjament teskludi l-possibilita' li jkun hemm korruzzjoni** ghaliex kif intqal mill-Qorti tal-Appell Kriminali, in re, ***Il-Pulizija versus George Portelli***, (fejn dik il-Qorti kienet abbraccjat it-tejorija moderata tal-**Maino**), mhux qed jinghad li persuna gia parzjalment korrotta, ma tistax tigi korrotta izjed. **Si tratta ta' kwistjoni ta' bilanc**."

For the crime to be present, **immediate defilement is not necessary**. Even if the individual involved is very young, the crime is not excluded if the **memory of the lewd acts** is likely to cause defilement. In fact, under our law, if the victim is **under 12 years old**, this fact alone is a reason for **aggravating the crime**.

The Age of the Victim

The minor must not have completed the age of 16. If they do, then the crime does NOT subsist. Instead, other charges may be instituted against the defendant, but definitely not that under Art. 203.

This stipulated age was reduced from 18 to 16 years by virtue of **Act XIII of 2018**.

Aggravations

Provided that the offence shall be punishable with imprisonment for a term from 6 to 12 years, where any one or more of the circumstances results:

(a) if the offence is committed on a person who has **not completed the age of 12 years**, or with **violence**, be it **physical** or **psychological**;

(b) if the offence is committed on a person who has **not completed the age of 16 years** by means of **threats** or **deceit**;

With pertinence to **Art. 202 (a)**, the law does not stipulate that the violence must be inflicted directly upon the victim. It **could occur in the victim's presence**, directed towards another person, or even towards an object. However, what the law mandates is a **connection between the use of violence and the sexual activity or defilement**. Therefore, what matters is that as a consequence of that violence, the ch**ild is intimidated and coerced into participating in the defilement**.

Concerning **Art. 202 (b)**, the term "deceit" encompasses all methods or schemes designed to mislead the minor into error, leading them to succumb to the lewd acts of another. **Impallomeni** suggests that, for instance, a **false promise of marriage** could be considered such deceit.

(c) if the offence is committed by any **ascendant** by **consanguinity** or **affinity**, or by the **adoptive parents**, or by the **tutor**, or **by any other person charged**, even though temporarily, with the care, education, instruction, control or custody of the person **who has not completed the age of 16 years**;

Regarding **Art. 202 (c)**, **Maino** suggests that the phrase '*any other person charged with the care the minor*' encompasses situations such as a master's relationship with their servant. The term "charged" (in the Italian text, "*affidata*") should NOT be interpreted solely in a formal sense but rather in the **context of the natural dynamics of the relationship between a master and servant or an employer and employee**.

It would be inconsistent to exclude the aggravation in cases of a permanent relationship stemming from a *locatio operis* while admitting it, as undoubtedly must be done, in cases where an individual has even temporary custody of a minor.

CASE LAW: *Il-Pulizija Supretendent Sammut v. Imputat*, REF 376/2007, 2012.

In this case, **Mgr Dr Jacqueline Padovani** asserted that "Ir-reat tal-korruzzjoni tat-tlett minorenni fuq indikati, huwa ukoll **aggravat bil-posizzjoni ta' fiducja li kien jgawdi l-imputat bhala ziju tar-rispett tat-tfal**, il-ghaliex il-korruzzjoni sehh meta dawn il-minuri gew fdati lilu, mqarr ghall xi zmien, sabiex jiehu hsiebhom, jindokrhom, u /jew jzommhom ai termini tal-Art. 203 (1) (c) tal-Kap 9 tal-Ligijiet ta' Malta."

(d) **when the offender abuses of a recognised position of trust**, authority, influence or during his duties as a professional in the possession of an official qualification and, or warrant to practice as counsellor, educator, family therapist, medical practitioner, nurse, pathologist, psychiatrist, psychologist, psychotherapist, social worker and, or youth worker over the person who has not completed the age of 16 years and one of the circumstance referred to below occurs:

(i) the offender **wilfully** or **recklessly endangers** the life of the person who has not completed the age of 16 years;

(ii) the offence involves **violence** or **grievous bodily harm** to such person;

(iii) the offence is committed with the **involvement of a criminal organisation** [...]

Art. 203 (1A)

(1A) When the **act is consensual between the peers who are close in age** and in the **level of development** and provided that the **acts do not involve physical** and, or **psychological abuse**, the punishment shall be **decreased by one or two degrees**.

In 2021, **Act LXIV** amended this offence by adding sub-article (1A), specifically addressing **situations where minors engage in sexual relations with each other**. Although such activities between minors are still considered an offence, if the conditions outlined in sub-article (1A) are met, the severity of punishment is reduced.

Ultimately, the peers must be **close in age**, maintain a **similar level of intellectual development**, are **capable of acknowledging and giving consent**, and **do not partake in any physical or psychological abuse when having sexual intercourse**.

Art. 203 (2)

(2) The provisions of article **197(5)** [*prostitution of under age descendant by ascendant*] shall also apply in the case of an offence under this article, when the offence is committed by any **ascendant** or **tutor**.

This invokes the application of **Art. 197 (5)** wherever Art. 203 is committed by an **ascendant** or **tutor**. Thus, the agent will fact the repercussions deployed on a defendant convicted with the prostitution of an under age descendant by their ascendant. If an individual is found guilty of this offence, the court has the authority to either **suspend** or **revoke their parental rights**.

Proceedings

Proceedings regarding this offence must be ushered by the complaint (***kwerela***) of the injured party. However, if the crime is committed by virtue of an **abuse of parental authority or tutorship**, then the proceedings shall be instituted ***ex officio***.

(3) Provided that where the injured party **withdraws his complaint**, the **Court may decide and direct the continuation of proceedings against the alleged perpetrator** [...]

Provided further that proceedings **shall be instituted *ex officio*** when the act is committed with **abuse of parental authority** or of **tutorship**.

The reason as to why this crime is contingent upon the complaint of the injured party is because, as **Maino** suggests, the legislator considered it **unbeneficial**, both for **public morality** and for the **peace and honor of society**, to too easily attract the spotlight of justice onto the **deviations of intimate life**, as the exercise of public action could often result in more harm than benefit to the individuals and families that the law aims to protect; and therefore, it was deemed **more cautious and prudent to leave the offended parties the freedom to choose in safeguarding their own dignity**.

Sometimes, the police may not only require a complaint at the outset of proceedings, but it must remain present throughout all stages. In these instances, the **victim's withdrawal of the complaint can lead to the case being dismissed**. However, the majority of cases proceed regardless of the victim's decision to withdraw the complaint, as the proceedings are initiated *ex officio*.

Sub-article (3) introduces a setting wherein it maintains the option for the victim to withdraw the complaint. However, **this does not automatically terminate the criminal process**. Instead, if the court suspects that the withdrawal was not voluntary, it retains the authority to continue the proceedings despite the withdrawal. This hybrid system aims to safeguard victims from potential coercion or threats that may prompt them to withdraw their complaint.

Art. 203A

> Whosoever, by any means other than those mentioned in Art. 203(1), instigates, encourages or facilitates the defilement of a minor of either sex, shall, on conviction be liable to imprisonment for a term from three to six years and the provisions of article 203(2) and (3) shall, mutatis mutandis, apply to an offence under this article [...]
>
> **Art. 203A**, *Criminal Code*

This provision treats the **instigation** and **facilitation** of the defilement of a minor.

Art. 204

> Whosoever in order to gratify the lust of any other person induces a person under age to practise prostitution, or instigates the defilement of such person, or encourages or facilitates the prostitution or defilement of such person, shall, on conviction, be liable to imprisonment for a term from three to six years [...]
>
> **Art. 204**, *Criminal Code*

This crime tackles the **inducing of underage persons to partake in prostitution**. *Prima facie*, this may look very similar to Art. 203A, but in reality, it describes the **specific crime of instigating the defilement of minors by inducing them to take part in prostitution**. Thus, if the prosecution charges a defendant who committed Art. 204 with Art. 203A, the the mentioned accused would probably be acquitted on the grounds of a false charge – because Art. 204 explicitly mentions the inducing into prostitution and the defilement of the respective minor by virtue of that act.

Ulterior Conventions, Protocols, and Directives

The UN Convention on the Rights of the Child

Malta signed this Convention in **1990**, of whose ratio legis contends that the child, by reason of **underdeveloped mental and physical maturity** when compared to that of the reasonable adult man, requires **additional safeguards**.

Art. 1 of this Convention denotes that a 'child' connotes every human being below the age of 18, albeit enless and until the law applicable to the child renders that same child a legal major at an earlier age than the one stipulated.

This convention also encompasses acts of sexual abuse. Therefore, when such acts are committed on so-mentioned children, the Convention pins signatory states under the obligation of providing the necessary legal framework for such offences committed on such minors; particularly those situations wherein a minor is induced or coerced into partaking in illicit sexual activities.

The 2000 Optional Protocol on the Involvement of Childern in Armed Conflict and the **2000 Sale of Children, Child Prostitution, and Child Pornography Protocol**

In the year 2000, the **United Nations** adopted these two optional protocols supplementing the abovementioned Convention.

The purpose of these Protocols is to render the protection afforded by the Convention more potent against sexual offences. Malta ratified the latter optional Protocol through **Act XXXI of 2007**.

Lanzarote – **The 2007 Convention of the Protection of Children Against Sexual Exploitation and Sexual Abuse**

This was adopted by the Council of Europe Convention in 2007, and was intended on further supplementing the UN Convention on the Rights of the Child.

Malta signed this Convention in **2010**, which came into force two years later in **2012**. Once again, it obliges signatory states to adopt the necessary measures in order to criminalise the following:

- The engagement of sexual activities with an individual who has **not yet attained the age required to be able to legally consent to sexual acts** (which, under Maltese law is that of **16 years** [**Art. 204 (c)**]).
- The engagement of sexual activities with children through the use of **force**, **coercion**, or **threats**.
- The **abuse of one's trust or authority** over a minor in order to participate in such activities.
- The **abuse of a minor's vulnerability** caused by mental or physical infirmities, thus owing to a state of dependance, in order for the active subject to induce the mentioned minor into participating in such sexual activities.

Directive 2011/93 EY on the EY Parliament and Council on Combatting Sexual Abuse and Sexual Expoitation of Children and Child Pornography

Fundamentally, this supplements the last preceding Convention, with special attention focused on the mentioned scenarios.

Prostitution

The law posits 3 different crimes pertaining to prostitution. **Art. 204** punishes **prostitution of people underage**; **Art. 197** punishes the **prostitution of a person underage by an ascendant**; and **Art. 205** punishes the **prostitution of people of age**.

Prostitution of Persons Under Age

> (1) Whosoever in order to gratify the lust of any other person induces a person under age to practise prostitution, or instigates the defilement of such person, or encourages or facilitates the prostitution or defilement of such person, shall, on conviction, be liable to imprisonment for a term from three to six years:
>
> Provided that the offence shall be punishable with imprisonment for a term from six to nine years, if any one or more of the following circumstances results:
>
> (a) if the offence is committed to the prejudice of a person who has not completed the age of twelve years;
>
> (b) if the offence is committed by deceit;
>
> (c) if the offence is committed by any ascendant by consanguinity or affinity, by any one of the adoptive parents, by the spouse or tutor of the minor, or by any other person charged, even though temporarily, with the care, eduction, instruction, control or custody of the minor;
>
> (d) if the offence is committed habitually or for gain.
>
> (2) The provisions of article 197(5) shall also apply in the case of any offence under this article, when the offence is committed by the spouse, by an ascendant or by the tutor.
>
> **Art. 204**, *Criminal Code*

This provision immediately asserts that anyone is able to commit the crime (***whosoever***). It furthers by elaborating upon the elements that constitute the offence, namely the material element (***induces a person under age to practice prostitution***…) and the formal element (***in order to gratify the lust of any other person***).

Actus Reus

Irrespective of the *actus reus*, one of the prerequisites for an offender to be found guilty of Art. 204 is that **the victim is a minor**. Art. 204 provides for 3 forms of the actus reus:

1. **Induces the victim** to practice prostitution;
2. **Instigates the defilement** of such person; and
3. **Encourages** or **facilitates** the prostitution or defilement of such person.

1. Induces the Victim to Practice Prostitution

The term 'induces' refers to the action whereby the offender attempts to lure and encourage the minor to undertake prostitution. The law does not elaborate upon the *modus operandi*, and thus, the *actus reus* may encompass a variety of situations, including but not limited to **verbal encouragement**, **promises**, **gestures**, etc. The **crime is complete upon the mere inducing**, and thus the **child need not actually partake in prostitution** in order for the crime to subsist.

If the agent deploys **violent means**, then the crime becomes **aggravated** by virtue of **Art. 204A**.

> (1) Whosoever -
>
> (a) with violence, threats, coercion or force compels a person under age into prostitution or into participating in a pornographic performance, or
>
> (b) knowingly makes any gain or derives any benefit from the conduct referred to in paragraph (a), shall, on conviction, be liable to imprisonment for a term from six to twelve years.
>
> **Art. 204A**, *Criminal Code*

In order for Art. 204 to become aggravated by means of Art. 204A, thus deploying violence, threats, coercion or force, the **offender must assume an active role**, for his actions must point towards such violent acts. Hence, **mere knowledge or passivity does NOT render the crime aggravated**.

2. Instigates the Defilement of a Minor

The term 'instigates' denotes the offender's acts that **lead towards a principal act**, in this case, the defilement of the minor. This goes beyond mere encouragement, for it suggests **moving over and above verbal manipulation**. This *actus reus* is distinguished from the crime contemplated under Art. 203 for the simple reason that in this case, it is **a third party who is instigating or leading towards the eventual defilement of the victim**. The third party is not directly defiling the victim, but rather is encouraging another to perform lewd acts which lead to such defilement.

3. Encourages or Facilitates the Prostitution or Defilement

Under this limb, the offender is NOT inducing, inciting, or encouraging the minor to perform prostitution, but is rather **making the prostitution or defilement thereof possible**. Under this limb, **the offender need not even meet the minor**, so long as he **provides facility for the prostitution to subsist**. The mere **provision of a room**, **vehicle**, **space**, etc, for the defilement or prostitution to take place in is sufficient for the crime to subsist.

Furthermore, the crime would subsist **even if the offender instigates another to induce the child to partake in prostitution** (an instigation to instigate). Contrary to the other limbs, this third segment does not require the offender to exercise any form of influence onto the minor, but rather a third party.

Art. 204 does not have, as a requirement, the **scope of profit making**. The **offender needs NOT derive any form of benefit**, whether monetary, personal, sexual, or otherwise, from the prostitution of the minor, **so long as such prostitution is done to gratify the lust of any other person**.

Mens Rea

The formal element to the crime contemplated by Art. 204 is the scope of gratifying the lust of any other person. Thus, **the prostitution may be carried out in order to derive benefit to a third party**. It is this element which distinguishes this offence from the offence of the defilement of persons under the age of 16, as governed by Art. 203.

CASE LAW: ***Il-Pulizija v. Mark Azzopardi*** - Formal element as the distinguishing element between Art. 203 and Art. 204
"Mill-kliem tal-liġi huwa evidenti li l-element formali hawn huwa l-intenzjoni tal-ħati li jiddisodisfa z-zina ta' ħaddieħor u mhux mela tiegħu innifsu. Fliema każ allura, wieħed jista' jitkellem dawr ir-reat ta' koruzzjoni ta' minorenni."

Thus, the **prosecution must prove that the prostitution was done in order to gratify a third party's lus**t, and **NOT the lust of the offender**.

Inducing a Minor To Practice Prostitution or to Participate In Pornographic Acts

(1) Whosoever in order to gratify the lust of any other person engages, recruits or causes a person under age to practice prostitution, or to participate in pornographic performances, or profits from or otherwise exploits a person under age for such purposes, shall, on conviction, be liable to imprisonment for a term from five to ten years.

(2) The offence shall be punishable with imprisonment for a term from six to twelve years, if any one or more of the following circumstances results:

(a) when the offender wilfully or recklessly endangered the life of the person under age;

(b) when the offence involves violence or grievous bodily harm on such person;

(c) when the offence is committed with the involvement of a criminal organisation within the meaning of article 83A(1);

(d) when the offender abuses of a recognised position of trust, authority or influence over the person under age.

Art. 204B, *Criminal Code*

Art. 204B punishes a variety of acts, namely:

1. The **engagement**, **recruitment**, or **causing of a minor to practice prostitution**.
2. The **participation in pornographic performances**.
3. The **making of profit from** or otherwise exploiting a person for such purposes.

The formal element required in Art. 204 is identical to that required in Art. 204B. The difference is that under Art. 204, the law refers to the **inducement of a minor to practice prostitution**, whereas Art. 204B refers to t**he engagement or recruiting of a person under age to practice prostitution or to participate on pornographic performances**. Thus, under Art. 204B there is an **element of reward** connoted with the crime, whether it be a **promise**, **monetary consideration**, or **otherwise**.

Furthermore, Art. 204B speaks of **participation of the minor in prostitution**, which may be argued to pertain to a lower extent of involvement when compared to Art. 204, which refers to practicing prostitution. Thus, under Art. 204B **it is not necessary for the minor themself to take part in the prostitution, so long as the minor is somewhat involved**.

The aggravations to Art. 204B, listed under Art. 204B (2) subsist upon **general harm** or **endangering of the victim**, or else in the case wherein the **offender abuses of his position of trust** over the victim.

Prostitution of a Person Under Age by an Ascendant

(1) Any ascendant by consanguinity or affinity who, by the use of violence or by threats, compels, or, by deceit, induces any descendant under age to prostitution, shall, on conviction, be liable to imprisonment for a term from six to twelve years.

(2) The same punishment shall be applied to anyone of the spouses or tutor who, by the use of violence or by threats, compels, or, by deceit, induces to prostitution his or her spouse under age or the minor under his or her tutorship.

(3) If the ascendant or any one of the spouses, by the use of violence or by threats, compels, or, by deceit, induces the descendant or his or her spouse, of age, to prostitution, he or she shall, on conviction, be liable to imprisonment of a term from three to six years.

(4) The punishment prescribed for the crimes referred to in the preceding sub-articles shall be increased by one to two degrees in the cases referred to in article 202, as applicable.]

(5) A conviction under this article shall entail the forfeiture of every authority and right granted to the offender over the person or property of the spouse or of the descendant to whose prejudice the offence shall have been committed, and, in the case of the tutor, his removal from the tutorship and his perpetual disability from holding the office of tutor:

Provided that where the rights of the offender over the person to whose prejudice the offence has been committed consists of rights of parental authority the forfeiture provided for in this sub-article shall not apply automatically but may be imposed by the court after it has considered all the circumstances of the case and in imposing such forfeiture the court may also impose conditions:

Provided further that in the cases referred to in the above proviso the court may, upon the application of the offender, and only after appointing any expert that it may deem fit to appoint, remove or vary the conditions of the forfeiture, after being satisfied that a material change in circumstances justifies such revocation or variation of conditions.

Art. 197, *Criminal Code*

Under Art. 197, the law restricts and confines the offender to an **ascendant** of a **descendant** under age. There is an evidently strong bond between the offender and the victim – a bond which was taken advantage of and **manipulated** in order for the victim to perform acts of prostitution. The relationship may arise either out of consanguinity or else by affinity (marital bond).

Upon immediate reading of the provision, it may be observed that the law does not specify the intent required for the crime to subsist. Instead, it describes the *modus operandi* which may be deployed so as to commit the offence.

Actus Reus

The *actus reus* required for this offence is the **inducing of a descendant who is under the age of 18 to partake in prostitution**, through the use of **violence**, **threats**, **compelling**, or **deceit**. If none of the four modes of completing the crime are proven, yet there was prostitution of a minor, then the crime may be **charged under Art. 204**, but not Art. 197. Therefore, the ruling out of prosecution by Art. 197 does NOT exclude the prosecution by Art. 204.

Prosecution of a Minor by a Tutor, Husband, or Wife

The crime under Art. 197 may still subsist if the victim is not a descendant of the offender, but instead a tutor, husband, or wife. The punishment (6-12 years) remains untouched independently if the crime is consummated by means of Art. 197 (1) or by Art. 197 (2).

Prostitution of Persons of Age

The third crime contemplated under the Criminal Code punishing prostitution is governed by Art. 205 and speaks of **prostituting persons of age**.

> Whosoever in order to gratify the lust of any other person, by the use of violence, compels or, by deceit, induces a person of age, to practise prostitution, shall, where the act committed does not constitute a more serious offence, be liable, on conviction, to imprisonment for a term from three to seven years:
>
> Provided that the offence shall be punishable with imprisonment for a term of four to nine years, if it is committed –
>
> (a) with abuse of authority, of trust or of domestic relations; or
>
> (b) habitually or for gain.
>
> **Art. 205**, *Criminal Code*

Art. 205 is considered to be a **residual offence**, punishing all other forms of prostitution not otherwise punishable under the Criminal Code, as indicated through the phrase "*where the act committed does not constitute a more serious offence*".

The elements are similar to those of Art. 204 insofar as there is a requisite to **intend to gratify the lust of any other person for the crime to subsist**, thus sharing the same *mens rea*.

The difference is that under Art. 205, the victim **must necessarily be a major at law** in order for the crime to subsist. Furthermore, the *actus reus* must involve **violence**, **compelling**, or **deceit** to be coupled with the inducing of a person of age to practice prostitution.

The aggravations under Art. 205 (a) and Art. 205 (b) speak of **abuse of trust** and of **habit and gain**, respectively, and punish the crime with imprisonment of 4-9 years.

Upon a reading of this crime, it appears that the inducing of another person of age to practice prostitution, without the use of violence, deceit, or compelling, is **NOT punishable**.

The White Slave Traffic (Suppression) Ordinance

In relation to prostitution, an important legal instrument that comes into play is **Cap. 63 of the Laws of Malta** – the **White Slave Traffic (Suppression) Ordinance**. This legal instrument was brought into effect in 1930 as it ratified the UN International Convention for the Suppression of the White Slave Traffic.

The ordinance aims at suppressing the traffic or abuse of persons for sexual intentions. The ordinance is very specific in preventing the abuse and trafficking of persons for sexual purposes. The trafficking of persons for non-sexual purposes (i.e., forced employment) would be governed by other provisions of the Criminal Code.

> (1) Whoever, in order to gratify the lust of any other person, compels by means of violence or threats, or induces by deceit, a person who has attained the age of twenty-one years to leave Malta for purposes of prostitution elsewhere or to come to Malta from elsewhere for the purposes of prostitution in these islands, shall be liable, on conviction, to imprisonment for a term not exceeding two years, with or without solitary confinement:
>
> Provided that the punishment shall be imprisonment for a term from two to ten years, with or without solitary confinement, if the offence is committed -
>
> (*a*) by an ascendant by consanguinity or affinity, by the adoptive father or mother, by the husband or the wife, or by a brother or sister; or
>
> (*b*) by means of abuse of authority, of trust or of domestic relations; or
>
> (*c*) habitually or for gain.
>
> (2) A conviction under this article shall entail the forfeiture of every authority and right granted to the offender over the person or property of the person to whose prejudice the offence shall have been committed.
>
> **Art. 2**, *Cap. 63*

Art. 2 of the Ordinance seeks to punish those who, with **the intent of gratifying lust of another**, **traffics another**, **over the age of 21**, **outside** or **inside** of Malta for the purposes of **prostitution**, through use of **violence**, **threats**, or **deceit**. The punishment for such activities is imprisonment not exceeding 2 years, comparatively and relatively less when compared with the punishments for inducing prostitution in Malta (3-7 years when done on a person of age).

Art. 3 then goes on to punish the **inducing of a person under the age of 21 to leave or enter into Malta for the purpose of prostitution**, **WITHOUT the requisites of violence**, **deceit**, or **compelling**.

(1) Whoever, in order to gratify the lust of any other person, induces a person under the age of twenty-one years to leave Malta or to come to Maltafor purposes of prostitution elsewhere, or encourages or facilitates his departure from Malta or arrival in Malta for the same purpose, shall be liable, on conviction, to imprisonment for a term from two to five years, with or without solitary confinement:

Provided that the punishment shall be imprisonment for a term from three to ten years, with or without solitary confinement, if the offence is committed -

(a) to the prejudice of a person who has not completed the age of twelve years; or

(b) by means of violence or threats, or by deceit; or

(c) by an ascendant by consanguinity or affinity, by the adoptive father or mother, by the husband or wife or tutor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the person under the age of twenty-one years; or

(d) habitually or for gain.

(2) every authority and right granted to the offender over the person or property of the person to whose prejudice the offence shall have been committed, and, in the case of the tutor, his removal from the tutorship and his perpetual disability from holding the office of tutor.

Art. 3, *Cap. 63*

Both Art. 2 and Art. 3 punish the situations wherein (a) **a person is taken from Malta elsewhere for the purpose of prostitution**, or (b) **a person is brought into Malta for the purposes of prostitution**, with the different and respective age requirements.

A person who **voluntarily** leaves or enters Malta for the purposes of prostitution does NOT fall within the ambit of Art. 2 and Art. 3 of the Ordinance.

Art. 5 of the Ordinance discusses illegal detention of a person within a **brothel**.

(1) Whoever detains, or is wilfully a party to the detention of a person, against his will, in any brothel, or in or upon any premises used for purposes of habitual prostitution, even if such person may have resorted to such place of his own free will, and may have remained there to practice prostitution, and notwithstanding any obligation or debt which such person may have contracted with any person whomsoever, shall be liable, on conviction, to imprisonment for a term not exceeding two years, unless a higher punishment is applicable under any other provision of the Criminal Code or of any other law.

Art. 5, *Cap. 63*

The elements for the crime contemplated under Art. 5 are three-fold:

1. The **detention** or the **wilful participation** in the **detention of a person**.
2. **Against the will of the victim**.
3. In any **brothel** or **premises used for the purposes of prostitution**.

The location pertaining to this offence must refer to the **unlawful detention of another in a brothel or other prostitution-based premises**. This article would apply **even in the case of agreement or obligation**, or even **contract**, between the **manager** of the brothel and the **prostitutes**. The proceeding sub-articles then defines detention for the purposes of Art. 5.

> (2) A person shall be deemed to detain another person, for the purposes of this article, if, with intent to compel such other person to remain in a brothel or in or upon any premises used for purposes of habitual prostitution, he withholds from such other person any wearing apparel or other property belonging to the latter, or, where wearing apparel has been lent or otherwise supplied to such other person, he threatens such other person with legal proceedings if the latter takes away with him the wearing apparel so lent or supplied.
>
> (3) No legal proceedings, whether civil or criminal, shall be taken against such other person for taking away or being found in possession of any such wearing apparel as was necessary to enable such other person to leave such premises or brothel.
>
> **Art. 5**, *Cap. 63*

Thus, **detention is presumed to subsist in the situation wherein the agent holds and withholds some property of the victim**, or else **wherein the agent threatens with legal proceedings against the victim in the case wherein the victim attempts to take away with clothing lent or supplied by the agent**. The law further protects the victim, holding that **such threatened legal proceedings may not bear fruit**, for no legal proceedings may be brought against a person who takes away or is found in possession of wearing apparel necessary to take part in brothel prostitution.

> (1) Any person who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person, shall be liable, on conviction, to imprisonment for a term not exceeding two years:
>
> Provided that where that other person has not attained the age of eighteen years, the offence shall be punishable with imprisonment for a term from eighteen months to four years.
>
> (2) Any person who in any street or other public place or in any place exposed to the public loiters or solicits for the purpose of prostitution or for other immoral purposes, shall be liable, on conviction, to imprisonment for a term of not more than six months.
>
> (3) A person shall be deemed, until the contrary is proved, to be knowingly living, wholly or in part, on the earnings of prostitution, if it is shown that he lives with, or is habitually in the company of, a person practising prostitution or that he has exercised control, direction or influence over the movements of that person in a manner as to show that he is aiding, abetting or compelling the prostitution of that person with any other person or generally.
>
> **Art. 7**, *Cap. 63*

Art. 7 further **punishes the person who knowingly lives on the earnings of the prostitution of any other person**. Art. 7 (3) then elaborates upon the requirements which constitute the knowing living, wholly or in part, on the earnings of prostitution. Such requirements are that the agent must live with, or is habitually in the company of, a person practising prostitution.

Thus, **a single occasion of monetary gain** arising from prostitution would **NOT constitute living thereon**.

Brothels

(1) Whoever shall keep or manage or share with others in the management of a brothel or of any house, shop or other premises or any part thereof which is or are, or is or are reputed to be resorted to for the purpose of prostitution or other immoral purposes shall be liable, on conviction, to imprisonment for a term not exceeding two years and to a fine (multa) not exceeding four hundred and sixty-five euro and eighty-seven cents (465.87).

(2) Whoever knowingly lets for hire or permits the use or shares in the profits of any vehicle used for the purpose of prostitution or other immoral purposes shall be liable, on conviction, to imprisonment for a term not exceeding six months and to a fine (multa) not exceeding one hundred and sixteen euro and forty-seven cents (116.47).

(3) A person shall be deemed to share in the management of a brothel or of any house, shop or other premises or any part thereof for the purpose of prostitution or other immoral purposes, if he partakes directly or indirectly of any of the profits of such management, or takes an active part in the management of such brothel, house, shop, premises or part thereof.

Art. 8, *Cap. 63*

Whoever keeps any shop, lodging-house or hotel or any private apartment and suffers or permits such shop, lodging-house, hotel or apartment or any part thereof to be used as a place of assignation for the purpose of prostitution or any other immoral purpose shall be liable, on conviction, to imprisonment for a term from one to six months.

Art. 9, *Cap. 63*

Whoever owns or has under his administration any house or other premises and knowingly lets or permits the use of the same for the purpose of prostitution or other immoral purposes, shall be liable, on conviction, to imprisonment for a term from one to six months.

Art. 10, *Cap. 63*

Therefore, it is **illegal to let** or **hire a premises for the purposes of prostitution** or any other immoral purpose.

Revenge Porn

(1) Whosoever, with an intent to cause distress, emotional harm or harm of any nature, takes or discloses a private sexual photograph or film without the consent of the person or persons displayed or depicted in such photograph or film shall on conviction be liable to imprisonment for a term of up to five years or to a fine (multa) of not less than four thousand euro (€4,000) and not more than eight thousand euro (€8,000), or to both such imprisonment and fine.

Art. 208E, *Criminal Code*

Introduced in **2016**, Art. 208E addresses the **non-consensual disclosure of private sexual photography and films**.

CASE LAW: *Il-Pulizija v. Cyrus Engerer*

Under Maltese law, revenge porn terminology was precluded from the Criminal Code. This case however, was the first to shed light on the Maltese position on revenge porn.

Mr. Engerer was implicated in a disturbing incident involving explicit photos of Mr. Camilleri, with whom he had previously been in a relationship. Following the dissolution of their relationship, these photos, stored on Mr. Camilleri's private computer, were **illicitly obtained and circulated among his acquaintances**. Mr. Engerer faced accusations of unlawfully accessing and disseminating the sensitive images, allegedly with the intent to harm Mr. Camilleri's reputation and dignity. While the incident bore the hallmarks of what is commonly referred to as "revenge porn," the Maltese legal system lacked specific terminology to address such offences at the time.

Ultimately, Mr. Engerer was found guilty and received a **2-year suspended sentence** for his actions. This case underscored the emergence of a relatively new form of crime, fuelled by technological advancements that enable the rapid duplication and dissemination of images within the confines of one's home. In response to this growing issue, several jurisdictions, including the United Kingdom, have enacted legislation explicitly targeting revenge pornography.

Primarily, there must be the **direct intent to cause distress or emotional harm to the victim** by virtue of the release of a **photo** or **film** of a **sexual nature** depicting the victim. Most importantly, there must exist a **lack of consent in releasing such private photo or film**.

The **accused must have the capacity of understanding the actions being committed**. Thus, a generic intent and understanding will NOT suffice for the subsistence of this crime. Such intent distinguishes between perpetrators who have committed the crime motivated by personal desires and others motivated by other reasons such as for fame or financial return.

Furthermore, the law defines 'disclosure' of photos and film as to include the **publication**, **distribution**, **trade**, **circulation**, or **unauthorised use** of private sexual photography and films by any means. Thus, this element requires the **actual transfer** in some form of another of the photo or film from one person to another, which **under UK law is not distinguished**.

This crime may NOT subsist when, **the photo is sent to the person displayed**, or **when the photo is sent to prevent**, **detect crime**, or is **reasonably required or authorised by the court for judicial proceedings**. Furthermore, the images must be of a sexual nature, meaning that they must include some depiction of the persons genitals or public area.

In Malta, legislative changes were thus introduced through the **2018 amendments** to the "***Gender Based Violence and Domestic Violence Bill***" sought to address such offences. These amendments included provisions to enhance penalties for individuals convicted of revenge porn-related crimes and eliminated the requirement that the photos be obtained without the subject's consent or knowledge. However, despite these legal updates, the narrow and stringent criteria outlined in the law have limited its effectiveness, resulting in challenges in effectively protecting victims of revenge porn.

CASE LAW: ***Il-Pulizija v. Michael Ellul Vincenti***
In this case, the fact that the accused had scanned a **photo of his wife topless with a telephone number at the bottom and shared on the internet**, rendered the photo as **pornographic material**.

Homicide

*Book First, Part II, Title VIII – **Of Crimes Against the Person***

The inherent rights of an individual include **life**, **personal safety**, and **reputation** – all of which **Carrara** contents to be integral to one's personality as a citizen. Our Criminal Code makes mention of **Crimes Against the Person**, and this category of offences under our legal system encompasses various actions that infringe upon these hallowed rights.

Specifically, this section includes offences such as **homicide**, **bodily harm**, **abortion**, **administering poisons or injurious substances**, **abandonment** and **exposure of children**, **threats**, **private violence**, **defamation**, and the **disclosure of secrets**.

Examining this list of offences, our focus will naturally commence with those affecting the security of an individual's person, considering the term in the context of a living human body. Among these crimes, homicide stands out as the most significant, given the gravity of taking a life. But most importantly, all these crimes affect **the living body of a human person**.

Homicide

Generally speaking, homicide refers to the killing of one person by another – dubbed as ***caedis hominis ab homine***. However, the act leading to a person's death may vary in intent, encompassing **deliberate intent to cause death**, **intent to cause bodily harm**, or **unintentional death through negligence**.

These categories, therefore, include **wilful homicide**, homicide ***praeter intentionem***, and **involuntary or negligent homicide**. Although they result in criminal liability, the degrees of liability differ, with the distinguishing factor being the **formal** or **mental element**.

Additionally, there are justifiable homicides, which are not considered criminal at all, and excusable homicides, which, for specific reasons, are less severe. Examples of both may be found under **Art. 223** and **Art. 227**.

It is crucial to note that the legal meaning of 'excusable' in our jurisdiction does NOT align with the UK definition provided by Kenny.

Each offence pertaining to homicide must be analysed separately. The gravest, or what **Blackstone** calls "**the highest crime**" is that of **wilful homicide** – defined by the same jurist to be "**against the law of Nature that man is capable of committing**".

However, let us first revel in scenarios wherein such an offence is either **justified** or **excused** by law.

Wilful Homicide

Art. 211

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

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

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

Art. 211, *Criminal Code*

The law defines wilful homicide in **Art. 211**. From this article, the following essential elements may be construed:

1. The **Taking of a Human Life**
2. An **Act of Man which Destroys Life**
3. The **Malice** in the Killing
4. The **Specific Intent** to **Kill** or put one's life in **Manifest Jeopardy**

The Taking of a Human Life

This condition specifies that the commission of the crime is **limited to a person who is currently alive**, regardless of age, mental or physical state, sanity, injuries, or impending death from other causes (such as illness or a death sentence), provided that the person was still alive at the time of the killing. One cannot kill that which is already dead.

Inflicting wounds on a lifeless body, despite revealing a twisted homicidal intent, amounts to an **impractical attempt**. Conversely, causing the death of a foetus in the mother's womb does NOT qualify as homicide. Rather, that denotes the crime of **infanticide**. For an act to be considered homicide, the child must have "***come into the world***," meaning it must have been born and born alive.

In English law, it is asserted that "***the birth must precede the death, but it need not also precede the injury***." Consequently, if a **child is born alive and later dies due to injuries received in the womb**, the person who inflicted those injuries may be charged with **homicide**. Similarly, if a **fatal wound is inflicted on a child during the process of being born**, such as on the delivery bed when the head appears and before the child breathes, it may be considered murder if the child is subsequently born alive and dies as a result.

However, it **must be proven that the entire child has genuinely been born into the world in a living state**. The child must have an **independent circulation** to be considered alive, being born alive when it exists as a live child, breathing and sustaining its life solely through its own lungs, without relying on any connection with its mother for its existence or vitality.

However, it was stated in **Archbold** that the **presence of the umbilical cord** connecting the child to the mother **does NOT exempt the killing from being classified as murder**.

Ultimately, **Maino** purports that if the child is born alive, it does not appear necessary to prove the child's capability for continued life (***vitale***).

CASE LAW: ***Rex v. Horry*** [affirmed in ***Rex v. Onofrejczyk***] – Beyond Reasonable Doubt

"At the trial of a person charged with murder, the **fact of death is provable by circumstantial evidence**, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime.

Before he can be convicted of the crime, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt: **the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for**".

Ultimately, there must be a **link of causation** (***ness ta' kawzalita'***) between the taking away of a human life, which is the caused consequence of the agent's act of commission or omission. Without this link of causality, then a lot of doubts are bound to arise. The defence could thus purport that the victim could have died by **natural causes** or through **suicide** if the prosecution fails to prove that there is a link of causation between the defendant's acts and the death of the victim.

CASE LAW: ***Il- Pulizija v. Michael Ellul Vincenti*** – Circumstantial Evidence

Hemm ukoll il-**provi cirkostanzjali** illi johrogu minn dan il- process, provi illi huma wkoll **imporanti**, a dirittua mpellenti ghall-prosekuzzjoni, **li jwasslu ghal konkluzjoni wahda u wahda biss**.

CASE LAW: ***Repubblika ta' Malta v. George Spiteri*** – Circumstantial Evidence

Il-**prova indizzjarja** trid tkun wahda **assolutament univoka**, li tipponta biss **minghajr dubju dettat mir-raguni lejn fatt jew konkluzjoni wahda**…

An Act of Man which Destroys Life

The life taken must be purloined by an **act of man**. **Blackstone** contends that the killing may be by **poisoning**, **striking**, **starving**, **drowning**, and of **a thousand other forms of death by which human life can be overcome**.

The termination of life can result from either a **deliberate action** (commission) or a **failure to act** (omission). Certain instances of inaction require minimal discussion.

CASE LAW: ***The Count Ugolino della Gherardesca Case*** – Omission

Count Ugolino perished in the Tower of Pisa because the individual who had imprisoned him **intentionally neglected to provide him with food**. Thus, the victim unquestionably died at the hands of his imprisoner.

However, if another individual, merely a bystander, witnesses this situation and, despite having no obligation to provide food to the prisoner, chooses not to assist, would they be held accountable for homicide? In such circumstances, a morally upright person would undoubtedly feel compelled by principles of morality and humanity to aid their fellow human being. Nevertheless, under positive law, **this individual could NOT be punished for the death because their inaction was not the causative factor**.

Arabia contends that if person with a **direct duty to prevent crime**, such as a policeman, fails to prevent a killing, they would **NOT be deemed guilty of homicide unless they were an accomplice**. This is because the killing, in such instances, does not directly result from any action on their part.

However, if an individual has the responsibility to supply food, as in the case of a prison warden, to a prisoner, and deliberately omits to do so with the requisite intent, resulting in death, they would be considered culpable of homicide. In England, **Archbold** holds that **intentional neglect** by individuals in charge of vulnerable persons — whether children, imbeciles, lunatics, or the sick and aged — by purposefully failing to provide essential sustenance, among other necessities, may be classified as murder if it leads to fatal consequences.

When it comes to acts of omission, **Antolisei** purports that the duty of care is '***un obbligo giuridico a contenuto positivo***.'

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

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

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

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

CASE LAW: ***Il-Pulizija* v. *Dragana Milajkovic*** – Omission

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

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

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

Pincherle suggests that the act which destroys one's life must be of a **material nature** – thus functioning physically on the body of the now-deceased. Thus, an act that affects **morale**, for example causing pain or fear which would thus result death, would NOT be sufficient for the notion of murder. However, this notion is largely contestable, as it is commonly held by courts that **it is certainly not necessary for the means to be material**, because if moral torture emanating either from **pain**, **fear**, or the **deprivation of will**, becomes capable of killing, then **such acts may very well be culpable of homicide**.

In summation, **Altavilla** asserts that the means can be **physical** or **moral/psychological**; and that it is a well-known fact that **both fear and pain are capable of causing death**.

The UK subscribes to this notion. **Kenny** purports that "***It used to be thought that killing by a mental shock would not be murder; but, in the clearer light of modern criminal science, such a cause of death is no longer considered too remote for the law to trace***".

Therefore, this is not a matter of principle, but rather, one of evidence.

In England, for an act to be considered murder, **death must occur within a year and a day**. However, in the Maltese legal system, when the intent is homicidal (as opposed to legislation involving bodily harm of which death ensues), there is **NO specified time limit** after the injury within which death must occur to sustain a charge of wilful homicide. This aligns with the laws of **continental Europe** and **Scottish law**.

Kenny argues that the time restriction in England ***was* a sensible precaution** considering the limitations of medical science in **medieval times**, but is no longer justifiable given the advancements in **forensic medicine today**.

The concept of '**killing by perjury**', which involves causing an innocent person to be sentenced to death through false evidence, is **NOT classified as murder in English law**. However, ***in foro conscientiae*** (from a moral standpoint), it is tantamount to killing with a weapon. It may be considered the **most malicious form of intentional homicide**, displaying a **higher degree of premeditated malice and guilt**. Our legal system, 'killing by perjury' is **NOT recognised** – especially since Malta does not boast the death penalty in its punitive laws. Instead, **perjury** and the **suborning of witnesses** is regulated under **Art. 102**.

The Malice in the Killing

To qualify as wilful homicide, the act of taking a human life must be malicious (***doloso***). In this context, "malicious" does not imply the original and common meaning of ill-will, enmity, spite, or personal malice towards the individual. Instead, it simply denotes that **the killing must be unlawful**.

In our legal framework, a person can be deemed guilty of wilful homicide even if, due to a mistake or accident, they unintentionally killed someone they had no intention of harming – they might have been the victim's **close friend** or even their own **best friend**. The term "maliciously" in this definition signifies a **general evil design**, reflecting the **awareness of committing an unjust act**. This distinction is crucial to separate wilful homicide from other forms of homicide where the intention to kill may be the same but is not considered criminal because it is sanctioned or permitted by the law, lawful authority, or is otherwise justifiable.

The Specific Intent to Kill or put one's life in Manifest Jeopardy

This overarching criterion serves as the key factor distinguishing wilful homicide from all other forms of unlawful killings. The term "maliciously" characterises the general criminal intent, signifying the **awareness of engaging in an unlawful act**. While other words convey the specific criminal intent of wilful homicide, they must precisely denote the **intent to kill** or, at the very least, **expose another's life to unmistakable danger**. This specific intent is the distinctive attribute of the crime, and without it, the offence CANNOT occur, **nor can there be any attempt at it**.

This specific intent plays a crucial role in differentiating bodily harms that constitute an attempted wilful homicide from those that do not, leading to punishment as the complete offence of bodily harm. For instance, if the person injured dies after sustaining bodily harm, but it is established that the offender did not intend to kill or endanger the victim's life, the crime of wilful homicide does not apply due to the absence of that specific intention. Instead, it would be categorised as the lesser crime known as ***homicide praeter intentionem*** – which is embodied in our Criminal Code as **bodily harm from which death ensued** under **Art. 220**.

Furthermore, this specific intent distinguishes wilful homicide from **homicide by misadventure** and **involuntary homicide**. In both types of homicide, there is an absence of intent to harm (***animus nocendi***). Homicide by misadventure results from pure accident (***casus***), making it non-attributable to anyone. In contrast, involuntary homicide stems from an act of negligence, which lacks criminal intent and is penalised as an independent minor offence.

It is important to note that, according to our law, the intent in wilful homicide need not necessarily be the positive desire to "kill" (***animus necandi***). It suffices if the intent is to "put the life of another person in manifest jeopardy." When the intent is "to kill," it is considered **direct**, whereas the intent "to put the life of another in manifest jeopardy" is deemed **positive indirect**.

The law acknowledges that, from a moral standpoint, there is **no substantive distinction** between a person with a clear intent to kill and someone who, without actively desiring to kill, performs an act inherently likely to cause death and indeed results in such an outcome.

The awareness that an act is likely to result in death, or the reckless disregard for whether death will occur or not, is legally treated on par with the positive intention to kill. **The law presumes that every individual intends the obvious and natural consequences of their voluntary actions**: ***dolus indeterminatus determinatur ab exitu***.

CASE LAW: ***Rex v. Holloway,* 1628** – Intent

In English law, the **intent solely to harm**, without the specific aim to kill but using **means intrinsically likely to cause death**, is deemed **sufficiently malicious to constitute murder**.

Kenny reminds the story of a park keeper, intending to punish a mischievous boy cutting branches from a tree, tied the boy to his horse's tail and began to beat him. The horse, frightened by the blows, started off, dragging the boy and causing fatal injuries, leading to the park keeper being held guilty of murder.

However, the specific intent discussed as essential for wilful homicide should not be misconstrued as implying **premeditation**. While evidence of premeditation facilitates proving the required specific intent, it is NOT a necessary element. In some legal systems, such as **Art. 366 of the 1889 Italian Code** and **Art. 348 of the Codice delle Due Sicilie**, premeditation is recognised as an **aggravating factor**, but NOT an essential element of the crime.

A person who forms the intent to kill or put another's life in manifest peril and carries out the act during a sudden quarrel, even without evidence of prior calculated intent, commits willful homicide. This may be excusable in certain cases – such as in **Art. 227 (c)**.

Kenny notes that the **malice need not genuinely be premeditated**, except in the sense that **every desire must necessarily precede**, even if only momentarily, **the desired act**. Therefore, the term "premeditated" in the definition is either false or superfluous.

The specific intent for willful homicide persists **even when the person killed differs from the intended target**, or when the offender did not specifically aim to kill any particular individual.

> The provisions of Art. 211 shall also apply **even though the offender did not intend to cause the death of any particular person**, or, by **mistake** or **accident**, **shall have killed some person other than the person whom he intended to kill**.
>
> **Art. 212**, *Criminal Code*

This stance aligns with English law.

CASE LAW: ***Il-Pulizija v. Marco Farrugia*** – *Actus non facit reum nisi mens sit rea* / Specific Intent

"Gja' la darba huwa necessarju li sabiex ikun hemm dan id- delitt, bhal kull delitt iehor, mhux bizzejjed li jigi pruvat l- element materjali biss, izda l-prosekuzzjoni trid tipprova, **lil hin minn kull dubju ragjonevoli**, li kien jezisti fl-istess hin li qed isir l-att materjali, l-**element tal-*mens rea***, l-element formali…"

CASE LAW: ***Ir-Repubblika ta' Malta v. Salvatore Gauci*** – Specific Intent

The Court here held that, for one to understand the intention, one needs to **examine both the material act** that occurred and the **circumstances surrounding that material act**.

It is essential to see what **weapon** was used, **how** it was used, **where** it was directed, or to **whom** it was directed, the **discourse** exchanged before, **during**, as well as **after** the use of the weapon, and the **effects** of the use of the weapon — whether **inflicted directly** or **indirectly**, considering both the **immediate** and **subsequent consequences**.
Although it is true that one must consider the intention derived from both the material act and the **antecedent**, **concomitant**, and **subsequent** circumstances of the same material act, the **intention always remains a subjective matter**—meaning what the agent had in mind at the moment they committed the act — and **NOT simply an objective question of what a reasonable person should have anticipated or known**.

CASE LAW: ***Repubblika ta' Malta v. Nizar I. Mustafa Al Gadi*** – Specific Intent

A **forensic scientist** was appointed by the Court to conduct an autopsy on the deceased, Margaret Mifsud. During the testimony, the forensic scientist asserted that Margaret Mifsud's death resulted from **the intentional act of pinning her chest while she lay on the car seat with her back reclined**. The perpetrator **sat on her chest**, preventing the natural expansion of her chest and causing **cardiorespiratory failure** secondary to traumatic asphyxia. The Court categorically identified the incident as a homicide, ruling out the possibility of it being an accident, as **the perpetrator would have been aware of the victim's struggle for breath**.

The Court highlighted that the accused, despite being trusted by the victim, did not have any romantic motives. The forensic analysis indicated that during a sexual encounter, the victim allowed the accused to lunge onto her chest. However, the Court argued that **if the accused had sought sexual gratification, he should have immediately realised the potential harm to the victim and disengaged**. The accused's post-facto actions, such as **changing the position of the victim's body to simulate a natural death**, were considered evidence of an **intent to kill** or place the victim's life in **manifest jeopardy**.

The Court referred to Art. 211 and emphasised that proving willful homicide requires demonstrating that the ***actus reus*** **is accompanied by the intent to kill or place another's life in manifest jeopardy**. The determination of intent should be based on a **cumulative consideration of all the facts** and circumstances surrounding the case. It was asserted that the accused, by continuing the act despite the victim's distress, exhibited the requisite criminal intent for willful homicide.

CASE LAW: The ***Salvatore Di Grazia*** Case – Circumstantial Evidence vis-à-vis Intent

Mariella Cimò, the accused's wife, had vanished; and was last seen by her neighbours. This led to the absence of a *corpus delicti*, necessitating the prosecution to rely on circumstantial evidence. The case unfolded with testimonies and depositions from relatives affirming **marital discord** between the couple and neighbours attesting to the victim's distress during instances of **domestic violence**.

These accounts were bolstered by the victim's documented **history of filing police reports** detailing domestic violence on multiple occasions. Furthermore, surveillance footage captured an individual with similar physical attributes and behaviours as the husband struggling to place a **notably heavy garbage bag into the trunk of his car**. The husband's demeanour, actions, and **conduct post his wife's disappearance**, which sharply contrasted with his usual behaviour, also contributed to the body of circumstantial evidence.

Upon comprehensive evaluation of these various pieces of evidence, the Court reached the conclusion that the husband was indeed responsible for the death of his wife. This verdict underscores the notion that **circumstantial evidence can substantiate a case of willful homicide even in the absence of a physical corpse**.

CASE LAW: ***Ir-Repubblika ta' Malta v. Francis Casaletto***– Specific Intent

L-intenzjoni hija **indiretta** meta l-**event kien sempliċiment konsegwenza possibbli tal-*actus reus***, liema event jew **ma kienx previst** jew **kien previst iżda mhux mixtieq**.

- **Jekk tali event kien previst** u minkejja dan l-***actus reus* kien mixtieq u volontarju allavolja l- konsegwenza ma kinitx mixtieqa**, l-**intenzjoni indiretta tissejjaħ pożittiva**.

- Jekk mill-banda l-oħra, l-**event possibbli ma kienx la mixtieq imma lanqas previst**, l-**intenzjoni indiretta tissejjaħ negattiva**.

Premeditation

The presence of a specific intent, crucial in establishing willful homicide, **should NOT be equated solely with premeditatio**n, defined as a **deliberate and planned mindset preceding the act**. While evidence of premeditation simplifies the demonstration of specific intent, such intent can still be established even without explicit proof of premeditation.

Premeditation, also termed **malice aforethought**, involves a predetermined plan or intention to carry out an act, fully aware of the consequences it will bring. This preconceived design makes proving intent more straightforward. However, in scenarios like road rage, where the perpetrator has no prior acquaintance with the victim, premeditation may be absent, yet criminal intent can still exist. **The absence of premeditation does not negate the presence of criminal intent**.

Indeed, the presence of premeditation streamlines the prosecution's task in establishing criminal intent, as it provides clear evidence of a planned intention to cause harm. Nonetheless, the subjective nature of intent doesn't invariably render it more challenging to prove than the act itself.

Killing the Person not Intended to be Killed

Kenny highlights the various forms of *mens rea* considered sufficiently malicious to constitute murderous intent:

1. **The intention to kill a particular person, but not the one who actually was killed**.

For instance, if a person aims to shoot 'A' with the intent of killing 'A' but accidentally kills 'B' instead, the law treats this killing of 'B' not as an accident but as murder. The legal concept ***malitia egreditur personam*** signifies the **transfer of *mens rea* from the contemplated result to the actual one.**

2. **The intention to kill, but without selecting any particular individual as the victim**.

This is often termed as **universal malice**. **Blackstone** illustrates this as when a person resolves to kill the next individual encountered and successfully carries out the act.

Another example is that of **Malays**, which refers to an ethnic group who boast a tendency of inducing themselves with a homicidal frenzy through hemp use, thus engaging in a violent spree known as ***amok***.

Maino affirms this notion and articulates that when there is the death of a man voluntarily caused by the act of another, the **mistake regarding the person killed does NOT take away the voluntariness of the murder**: there was the intention of the criminal to kill; and in fact, there was a killing.

Arabia resurrects Roman Law and reminds that even during the time of the Romans, the ***Lex Cornelia de Sicariis*** declared that it was NOT promulgated to protect the life of a particular person, but was enacted to preserve all men – ***ipsam humanitatem tuetur***.

Punishment & Defence

In cases where, by **mistake** or **accident**, the person killed is different from the intended target, the **perpetrator will still benefit from any excuse that would have reduced the punishment for the crime if it had been committed against the intended person**.

This principle also holds true under the **Art. 52 of the 1889 Italian Code** – which is applicable to ALL crimes, and not just that of wilful homicide or bodily harm. This provision states that if a crime is committed by mistake or through any other acci
dent against a person different from the intended target, all circumstances that would have mitigated the punishment if the crime had been committed against the intended person shall apply. Naturally, the **same principle extends to circumstances that would entirely exclude punishment** – such as in justifiability clauses mentioned in **Art. 223** of our Criminal Code.

As **Art. 211** has it, a person convicted of wilful homicide shall be punished with **imprisonment for life**. However, the imposition of life imprisonment as a penalty for homicide has come under scrutiny from a human rights perspective. Over the past decade, individuals have argued that the **absence of periodic review of such sentences could constitute a violation of human rights**. Primarily, convicts contend that **life imprisonment without the opportunity for review may amount to inhuman and degrading treatment or punishmen**t, as stipulated in **Art. 3 of the ECHR**, which has been incorporated into Maltese law.

CASE LAW: ***Abdulah Oshalan v. Turkey***

At the European Court of Human Rights, numerous convicts have raised concerns that **life imprisonment fails to serve its rehabilitative and restorative purposes**, thereby questioning its legitimacy. They argue that punishment should primarily focus on rehabilitating the offender. While punishment serves various objectives such as rehabilitation, retribution, and deterrence, the ECtHR has examined the practice of life imprisonment within member states to assess its compatibility with the Convention.

In essence, the ECtHR has determined that **life imprisonment itself does NOT inherently violate Art. 3 of the Convention**. However, the Court emphasised that such sentences should be imposed following careful consideration of all relevant factors, including mitigating and aggravating circumstances. Additionally, the ECtHR scrutinised certain forms of life imprisonment that deprive convicts of any possibility to present mitigating factors or special circumstances. This examination ensures that the imposition of life imprisonment remains in line with the principles of justice and human rights outlined in the Convention.

Addressing the Jury

CASE LAW: ***Ir- Repubblika ta' Malta v. Albert Ellul*** – Addressing the Jurors
This case held that just as the presiding judge in a jury trial is **not bound to mention and refer to every submission made by the parties**, similarly, they are **not obliged to mention only what the parties referred to**. Naturally, in situations where the defence is asserting that a specific act has been committed, such as wilful homicide, and the submissions relate only if certain justifications are applicable in those circumstances, it can be said that **it is pointless to address alternative arguments that could effectively create confusion in the minds of the jurors**. However, the fact that alternative arguments are not mentioned **does NOT constitute irregularity**.

CASE LAW: ***Ir-Repubblika ta' Malta vs John Camilleri*** – Interfering with the Verdict of the Jurors
Even if, from the appreciation of evidence made by this Court, it leads to a conclusion different from that reached by the jury, it does not disturb the discretion exercised by the jury in assessing the evidence, and it should replace it only when it is evident that the jury manifestly misappreciated the evidence and, therefore, legitimately and reasonably arrived at a conclusion that is not supported by the evidence before them. Indeed, as always emphasised, this **Court does not invade the territory reserved for the jury unless the verdict obtained from them is manifestly wrong in the sense that no reasonable and legitimate jury could have arrived at it**. This means there must be a clear contradiction for everything resulting from the process, without any other way, except that the obtained verdict is excluded as unfounded.

Lord Widgery explains that if the overall feel of a case leaves the court with a **'lurking doubt'** as to whether an injustice may have been done, then a **conviction shall be quashed**, notwithstanding that the trial was error-free.

Instigating Suicide

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

Examining this portion of legal doctrine reveals several key points. Historically, many legal scholars argued that **if suicide is not considered a crime due to the termination of the individual's capacity to be prosecuted, how could inciting a non-criminal act be deemed a crime**?

This dilemma inherently leads to the prohibition of such incitement, as the existence of a distinct criminal offence, separate from intentional homicide, hinges on the occurrence of suicide. Consequently, **the perpetrator cannot be charged with homicide since the victim took their own life**. Causation plays a pivotal role here; if my actions did not directly contribute to the death, I cannot be held accountable for intentional homicide. This analysis stems from the legislative history surrounding the issue.

This provision within our Criminal Code was incorporated following the **1889 Italian Codice Penale**. Notably, the terminology "**incitement**" is consistently employed throughout the law, including marginal provisions, sometimes interchangeably with "**instigation**". Understanding the nuances of this offence and its interpretation by our courts is crucial.

Actus Reus

For this section to be applicable, the **first requirement is the occurrence of a suicide**. Without an actual self-inflicted death, whether successful or attempted unsuccessfully, any act of incitement or assistance will not warrant punishment.

Thus, the main elements of the *actus reus* are twofold:

1. **Prevailing upon another to commit suicide.**

OR

2. **Providing assistance**.

Prevailing Upon Another to Commit Suicide

The term "***determina***" was borrowed from the Italian version, implying an important meaning. It signifies that **merely passing a comment or suggestion**, which leads another person to commit suicide, **does NOT suffice for guilt under this section of the law**. Put simply, mere suggestion or indirect encouragement of suicide does not warrant conviction. The **legislator aimed to avoid convicting individuals solely based on casual suggestions**.

Instead, the legislator intended to prosecute individuals who **actively** and **persistently foster the idea of suicide in another person's mind**. The focus lies on constantly convincing and pushing the individual towards suicide, **to the extent that the act can be attributed to the perpetrator's conduct**. It is this continuous and forceful implantation of the idea that the law seeks to address.

The Italian Code mentions "*La parola determina circoscrive meglio il concetto della legge al suicidio in duce anche co lui che in altri rafforza l'idea del suicido*." Thus, if an individual already has a **pre-existing intention to commit suicide** and another person merely reinforces that intention, the latter **would NOT be held liable under this section of the law**. This provision does not cover scenarios where the individual's suicidal thoughts were not prompted by another person's instigation. In essence, **if the idea of suicide was already formed independently, it falls outside the scope of this article**.

Moreover, the Italian Code posits that "*Mentre al suicido determina co lui che nefanaxxera il proposito*." Therefore, **the individual who initiates the idea of suicide is the one who "determines" i**t. It does not pertain to situations where someone merely reinforces or **approves an already existing idea of suicide**. The law specifically addresses cases where the **perpetrator creates the idea in the victim's mind**.

"**Inducing**" refers to **reinforcing** the idea, while "**determining**" entails **soliciting** and forming the basis of it, essentially triggering it.

Providing Assistance

Assistance in aiding suicide can manifest in various ways, but the offence only occurs when the **assistance provided is genuinely effective**. The assistance must be significant in facilitating the suicide, actually leading to its occurrence. Thus, effective assistance must be **tangible** and **contribute directly to the suicide**. It must involve providing **material aid that directly facilitates the act** – hence similar to the requisites needed for **complicity**.

CASE LAW: *Il-Pulizija v. Erin Tanti*
"The charges of wilful homicide and instigation to commit suicide may seem contradictory and/or mutually exclusive. They should be read and considered independently and separately from one another. It will hence be up to the jurors to establish which of those two criminal charges, if any, is proved beyond reasonable doubt after having been given the relative guidance and instructions by means of the summoning up of the presiding judge." The jurors would determine the facts."

Bodily Harm

A bodily harm may be either **grievous** or **slight**.

Art. 215, *Criminal Code*

Classifying Bodily Harm

There is a gargantuan difference between **slight**, **grievous**, and **very grievous bodily harm**.

Grievous bodily harm is regulated under **Art. 216** – wherein the **risk of danger** of the effects in the pertaining sub-articles is highlighted.

If the bodily harm not only entails the potential danger described in Art. 216, but results in any **permanent functional debility of health**, any **permanent functional debility of an organ**, any **permanent defect in a part of the physical structure of the body**, or any **permanent mental infirmity**, then the grievous bodily harm is regarded as **aggravated** and subject to more severe punishment. The permanence of such debility, defect, or mental infirmity is deemed to exist ***even when it is only probable***.

In such scenarios, **Art. 218** takes effect, and **very grievous bodily harm** (***gravissima***) is incurred.

Any bodily injury that lacks the effects specified in Art. 216 or Art. 218 is considered to be **slight** – as per **Art. 221**. Essentially, a bodily injury is considered slight if it is not severe. In principle, Art. 221 serves as a **residual offence** for whenever the consequences borne by bodily harm are not as serious as those stipulated in prior provisions.

Grievous Bodily Harm

(1) A bodily harm is deemed to be **grievous** and is punishable with imprisonment for a term from **1 year to 7 years** -

(a) **if it can give rise to danger of** –

(i) **loss of life**; or

(ii) any **permanent debility of the health** or **permanent functional debility of any organ** of the body; or

(iii) any **permanent defect in any part of the physical structure of the body**; or

(iv) any **permanent mental infirmity**;

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

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

(d) if it causes any **mental** or **physical infirmity** lasting for a period of **30 days or more**; or if the party injured is **incapacitated**, for a like period, **from attending to his occupation**;

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

(2) **Where the person injured shall have recovered without ever having been**, during the illness, **in actual danger of life or of the effects** mentioned in sub-article (1)(a), it shall be deemed that the **harm could have given rise to such danger only where the danger was probable in view of the nature or the natural consequences of the harm**.

Art. 216, *Criminal Code*

The Mens Rea

The absence of specific mention of criminal intent beyond wilful homicide in the legal definition of this crime does NOT negate the requirement for intent.

Unintentionally caused bodily harm may fall into two categories: it can either be **purely accidental** (***casus***) and therefore NOT subject to criminal punishment, or it may be deemed **negligent** and consequently punishable as **involuntary**.

For the commission of the crime of wilful bodily harm, **it is imperative that the injury is intentionally caused**. However, the requisite intention is characterised by ***animus nocendi***, a **generic intent to cause harm**, without necessarily mandating a specific intention to inflict the precise type of bodily harm that ultimately results.

In essence, **it is not necessary that the intention was to produce the exact extent of harm that has been inflicted**. As elucidated previously, the term "intention" in legal context encompasses all foreseeable consequences of an act, irrespective of whether the agent of the act possesses a genuine desire to produce those consequences or acts recklessly regarding their occurrence. Therefore, in cases involving bodily harm, if the doer's intent is to cause injury, they are held accountable for the actual harm caused, guided by the principle ***dolus indeterminatus determinatur ab exitu***.

CASE LAW: *Ir-Repubblika ta' Malta v. Pascalino Cefai* – Intent

This case held that as per legal doctrine, intent is categorised as **indirect when the occurrence is merely a potential outcome of the *actus reus***, and this event was either **not anticipated** or was **foreseen but not sought**.

Within **indirect intent**, distinctions are made based on the **foreseeability** and **desire of these consequences.** If the consequences were foreseen, yet not desired despite the voluntary *actus reus*, the intent is termed **positive indirect**. Conversely, if the consequences were neither desired nor foreseen, the intent is labelled **negative indirect**.

Direct intent and positive indirect intent fall under the category of ***dolus***, requiring **volition**, **knowledge**, and **foresight**. In contrast, **negative indirect intent** leads to ***culpa*** (culpable negligence) or ***casus*** (accident).

CASE LAW: *Il-Pulizija v. Brian Vella* – Recklessness

The court distinguished between **recklessness** and **negligence**. The main difference is that recklessness is a state donned by the offender when he **foresees the negative consequences** which will probably be borne by his prospective actions, albeit disregarding them completely due to a significant attitude of **indifference**. Conversely, negligence is inadvertent and involves an absence of such foresight.

Maltese law considers recklessness to be on par with homicidal intent.

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

The landmark UK judgement which affirms the above is ***R v. Cunningham***.

The Damage Incurred

The concept of bodily harm, as stipulated by the law, encompasses **injuries to the body** or **health**, as well as **mental derangement**. **Carrara** purports it is inconsequential whether the act manifests its impact on the physical body, causing wounds, cuts, or stabs, or on the mental and psychological state of the victim, inducing shock or other forms of mental unsettlement. The **crucial factor is the causal link between the accused's actions and the resulting harm, irrespective of whether it pertains to the physical or mental realm**.

Maino asserts that the **absence of direct physical violence directly applied to the victim's body does not alter the legal considerations**. Even in situations where no physical force is directly exerted, such as in instances of prolonged exposure to damp and cold conditions or providing the victim with only noxious and unhealthy sustenance, it remains possible to induce the effects envisioned by the law.

In all such scenarios, the **resulting impact constitutes a form of harm or injury intended to disrupt the health or well-being of the victim**.

Furthermore, it is widely accepted that it is **NOT a prerequisite for the injury to be directly inflicted by the perpetrator**. In this context, a person can be deemed culpable of the offence of bodily harm if, for example, they assault someone with a weapon, and the **victim sustains an injury while attempting to disarm the aggressor in self-defence**. Similarly, the same principle applies if an individual is pursuing another with a weapon, and the pursued person, in an effort to escape, grasps at something that inadvertently causes harm. The crucial factor is the **causal connection** between the assailant's actions and the resulting injury, irrespective of whether the injury is directly caused by the offender or indirectly incurred during defensive or evasive manoeuvres by the victim.

CASE LAW: ***Rex v. Martin*** – The Damage

In the moments just before the conclusion of a theatre performance, the accused, with the **deliberate intent and consequential result of instilling fear** in individuals leaving the theatre, extinguished the gaslight on a staircase frequently used by a substantial number of exiting patrons. Additionally, with the purpose and outcome of impeding the exit, the **accused placed an iron bar across the doorway through which the crowd had to pass to leave**. The sudden extinguishing of the lights led to panic among a significant portion of the audience, resulting in a frenzied rush down the staircase. The pressure and turmoil caused by the crowd forced those at the front against the iron bar, leading to **severe injuries** to several audience members.

The legal judgment held that based on these circumstances, the **accused was rightfully convicted of unlawfully and maliciously causing grievous bodily harm to those left injured**. This case underscores an important principle, namely, that the **accused can be convicted even if there was no specific intent to harm a particular individual**, and any injuries caused to someone other than the intended target due to mistake or accident are still legally actionable.

The term "**deform**" implies a more serious condition than "**disfigure**." Any external injury that **diminishes the appearance of the face**, **neck**, or either of the **hands** is deemed a sufficient "**disfigurement**" to classify the bodily harm as grievous, provided it is not too trivial.

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

Art. 216, *Criminal Code*

The cavities of the body to which reference is here made are the **abdominal**, the **thoracic** and the **cranial**.

The term "***sfregio***", used in **Art. 372 of the 1889 Italian Code**, on which our provision was modelled, was officially interpreted to encompass "**any harm that can be done to the regularity of the face, the harmony of its features, or even its beauty**." If the injury is more pronounced, causing a notable alteration of the tissues and an unpleasant appearance to the affected body part, such as the face, neck, or hands, the disfigurement evolves into deformity.

It is crucial to clarify that, in our legal framework, the **bodily harm need not result in serious and permanent deformity or disfigurement of the face, neck, or hands to be considered grievous**. However, if such deformity or disfigurement is serious and permanent, it serves as grounds for further aggravation of the offence and an increase in the punishment. For example, the injury would be considered serious and permanent in cases involving the mutilation of the nose or fingers.

CASE LAW: *Il-Pulizija v. Paul Spagnol* – *Mankament* vs *Sfregju*

"... huwa veru li **s-snien ma humiex parti mill-wicc** ...". Il-Qorti però ghamlet caveat importanti hafna meta kompliet "**ghalkemm it-telf ta' hafna snien jistghu jgibu kemm sfregju kif ukoll mankament minhabba l-effett illi jistghu jhallu fuq il-wicc u specjalment fir-regjun tal-halq**."

L-istess sentenza ghamlet differenza bejn **mankament** u **sfregju**, dak tal-ewwel igib **deterjorament tal-aspett tal-wicc** li, anke minghajr ma jnissel ribrezz jew ripunjanza jipproduci **sfiguratament** u ghaddiet biex tikkwota 'l **Manzini** in sostenn.

Sfregju, mill-bandu l-ohra u a differenza ta' mankament hija k**ull hsara li tista' ssir fir-regolarità tal-wicc fl-armonija tal-lineamenti tal-wicc u anke f'dik li hija s-sbuhija tal-wicc**.

U ikkonkludiet "**kollox jiddependi mill-entità tal-hsara**; **mhux importanti x'tissejjah il-hsara fil-gorgo mediku jew popolarment**; dak li hu importanti hu l**-effett li thalli fuq il-wicc**."

Maino stipulates that there is deformation when the lesion incurred leaves the face **completely disfigured**, and when the appearance of the victim is rendered **less pleasant**. The consequential appearance borne by the victim's face **need NOT be reduced to a condition that arouses disgust or horror**.

The **responsibility for the offence does NOT diminish simply because the deformity or disfigurement could be rectified or lessened through specific treatments**, such as **plastic surgery**, or by other means, like using an **artificial denture** or a **glass eye**. Similarly, the **responsibility does NOT decrease even if the deformity or disfigurement is concealed by hair**, a **beard**, a **veil**, or in any other manner. In all these situations, the presence of deformity or disfigurement persists, and the causal link with the perpetrator's act remains unaffected.

(d) if it causes any **mental** or **physical infirmity** lasting for a period of **30 days or more**; or if the party injured is **incapacitated**, for a like period, **from attending to his occupation**;

Art. 216, *Criminal Code*

Art. 216 (d) mentions one's occupation. The *ratio legis* underlying this principle is that an individual may be compelled to take **sick leave** or, if self-employed, be forced to **lose working days**, resulting in **financial loss**. Additionally, the qualifying occupation must be the **primary source** of income for the victim, rather than a minor part-time job.

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

Art. 216, *Criminal Code*

Art. 216 (e) specifically addresses the **acceleration** of delivery. The distinction between Art. 216 and Art. 218 lies in the outcome: Art. 216 pertains to cases where delivery is expedited, resulting in **premature birth**, while Art. 218 involves not only hastening delivery but also compelling it to the extent that it leads to the tragic outcome of the child's death through **miscarriage**.

A grievous bodily harm is punishable with imprisonment for a term from **2 to 10 years** if it is committed with **arms proper**, or with a **cutting or pointed instrument**, or by means of any **explosive**, or any **burning** or **corrosive fluid** or **substance**:

Provided that where the offence is committed by means of any **explosive fluid or substance** the minimum punishment shall be **imprisonment for 4 years** and the provisions of the Probation Act shall NOT be applicable.

Art. 217, *Criminal Code*

Thus, the punishment for GBH may be aggravated if it is committed with **arms proper** – including, but not limited to, **cutting instruments** and **explosives**.

Very Grievous Bodily Harm

(1) A grievous bodily harm is punishable with imprisonment for a term from **5 to 10 years** –

(a) if it causes any **permanent debility of the health** or any **permanent functional debility of any organ of the body**, or any **permanent defect in any part of the physical structure of the body**, or any **permanent mental infirmity**;

(b) if it causes any **serious** and **permanent disfigurement** of the **face**, **neck**, or either of the **hands** of the person injured;

(c) if, being **committed on a woman with child**, it **causes miscarriage**.

(2) Any **debility of the health or any functional debility of any organ of the body**, and any **mental infirmity**, **serious disfigurement**, or **defect** shall be deemed to be permanent **even when it is probably so**.

(3) The punishment for the offences referred to in sub-article (1) shall be that established in article 312 (2) if the bodily harm is committed by means of any explosive fluid or substance.

Art. 218, *Criminal Code*

When observing Art. 216 and Art. 218, one might notice a vast similarity. However, the little detail that separates them from each other is the fact that Art. 216 speaks of the **POTENTIALITY** of incurring the harm stipulated, whereas Art. 218 is invoked if such risk or danger of harm has been **ACTUALISED**.

A salient feature of Art. 218 (*gravissima*) is the **permanence of the effects incurred by the injury caused**. In fact, **Art. 218 (a)** talks about a permanent debility of the health or bodily organ. In tandem, Art. 218 (b) mentions the serious AND permanent disfigurement of the **face**, **neck**, or **hands**.

Another difference between Art. 216 and Art. 218 is that the latter leads to a **tripled punishment** due to the permanence of the harm caused.

There has been considerable debate within jurisprudence, particularly due to a longstanding threshold regarding punishment upheld by magistrates and judges. For a significant duration, acts involving violence were not subject to severe penalties, leading the legislature to contend that certain individuals were essentially "**getting away with it**" due to insufficiently deterrent punishments.

Numerous voices argued that physical harm cases **lacked the necessary deterrent measures**. This prompted a shift in the court's perspective, advocating for an unequivocal stance that effective and operational p**rison sentences must be imposed when physical violence is involved**, deeming a suspended sentence impractical in such instances.

While judges still exercise discretion in evaluating circumstantial evidence, an observable trend is emerging where individuals convicted of causing physical harm are increasingly receiving prison sentences. Some suggest that this sequence of judgments is coalescing into an **implicit sentencing policy**, marking a noteworthy trend in jurisprudence. Although lacking a formal sentencing policy akin to the UK, the recognition of this trend is crucial, potentially streamlining trial proceedings for more expeditious outcomes.

This trend started was predominantly established in ***Il-Pulizija v. Stefano Persiano*** in the Court of Criminal Appeal, and ***Il-Pulizija v. Joseph Zahra***, wherein **Judge Vincent De Gaetano** contended **any form of violence against the person, as a general rule, should entail a punishment consisting in the restriction of liberty with immediate effect**.

Slight Bodily Harm

(1) A **bodily harm which does not produce any of the effects referred to in the preceding articles** of this Sub-title, shall be deemed to be **slight**, and shall be punishable with imprisonment for a term **not exceeding 2 years**, or with a **fine** (multa).

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

Art. 221, *Criminal Code*

As mentioned afore, the offence of slight bodily harm is a **residual crime** in cases wherein Art. 216 and Art. 218 may not be invoked.

Any act such as **stabbing**, **cutting**, or inflicting **contused** or **lacerated wounds**, along with causing **mental shock** or any other harm that disrupts a person's health or comfort in the aforementioned circumstances, would be adequate to establish slight bodily harm.

The specific nature of the instrument or method used, as well as the manner in which it is inflicted, is generally irrelevant. However, if the offence is committed using improper means or any other methods outlined in Art. 217, the standard punishment is significantly **increased**. Conversely, when the impact, both physically and morally, is of **minimal consequence to the injured party**, the regular penalty for slight bodily harm is **decreased**.

GBH from which Death Ensues

(1) Whosoever shall be guilty of a grievous bodily harm from which death shall ensue solely as a result of the nature or the natural consequences of the harm and not of any supervening accidental cause, shall be liable -

(a) to imprisonment for a term from six to twenty years, if death shall ensue within forty days to be reckoned from the midnight immediately preceding the crime;

(b) to imprisonment for a term from six to twelve years, if death shall ensue after the said forty days, but within one year to be reckoned as above.

(2) If death shall ensue as a result of a supervening accidental cause and not solely as a result of the nature or the natural consequences of the harm, the offender shall, on conviction, be liable to imprisonment for a term from five to ten years.

(3) If the bodily harm is inflicted within the limits of the territorial jurisdiction of Malta, the crime shall be held to have been completed within those limits, even if the death of the person injured shall occur outside those limits.

Art. 220, *Criminal Code*

This constitutes a form of homicide known as ***praeter intentionem***. If the perpetrator's intent, while wrongfully causing bodily harm, was **to cause death and death results**, they are culpable for **intentional homicide** rather than GBH from which death ensues.

It is important to note however, that in view of potential mistranslation, **this offence does NOT connote intentional homicide**. For instance, in ***Salvatore sive Salvu Gauci***, the accused pled that he targeted the victim's legs. The circumstances of the case showed that the accused had NO intention to kill the victim. Therefore, although the victim died, the agent did NOT commit intentional homicide, but rather, died as a result of intentional bodily harm. The Court of Appeal determined that there was NO intention to kill, thus, although the Court of Fist Instance found him guilty of wilful homicide, the decision was subsequently amended.

Additionally, when the offender's intent was **solely to inflict bodily harm**, even if severe but not to expose the victim to an evident life-threatening situation, and death results, **it surpasses this intention**. In such cases, the **law CANNOT justly penalise the act as intentional homicide** since the **death was neither desired nor actually foreseen**, and not patently foreseeable as a likely consequence of the act. Consequently, the offender cannot be fairly charged with intentional conduct. Yet, to some extent, the perpetrator must be held accountable for the death resulting from their act, as their intention was directed toward causing wrongful injury to another, albeit to a lesser degree than if they had specifically intended, directly or indirectly, to cause death.

The **Italian Code** does not focus on how easy it is for someone to predict the outcomes of their actions. Instead, it looks at their intention. **If someone intends to harm someone else but plans for a less severe injury than what actually happens, then that is what matters under the law**.

However, **if the death was easily foreseeable because the person intended to cause serious harm, putting the victim's life in clear danger, then they are guilty of intentional homicide if death occurs**. To establish this kind of criminality, it is crucial that the person's intention was NOT to kill or expose someone to obvious danger, but only to cause bodily harm, regardless of the severity, without making death an obvious outcome.

The **material element involves causing severe bodily harm from which death follows**. For legal purposes, the law distinguishes between cases where death results **solely from the nature or natural consequences of the injury** and cases where **accidental causes contribute to the fatal outcome**.

Jameson contends that in situations where the agent's intention was solely to cause bodily harm, the law establishes a **specific time** beyond which, if death occurs, the **agent is not held particularly responsible**. In principle, the time between the criminal act causing the injury and the eventual death of the victim might not affect one's judgment of the offender's guilt. However, for practical considerations and recognising that the fatal outcome was unintentional, **it is deemed fair not to increase the punishment for the serious harm caused when death occurs after a reasonably long time**.

CASE LAW: *Ir-Repubblika ta' Malta v. Salvatore sive Salvu Gauci* – Elements of Wilful Homicide and GBH from which death ensues.

From this case, one may discern between the intent required for wilful homicide. By elimination therefore, one may also draw out the intent required for GBH from which death ensues.

The crime of wilful homicide can be summarised as follows:

1. Either the **accused foresaw death** as a consequence of his acts, and **desired the death of the victim**.

2. The accused **foresaw death as a probable consequence** of the act, and although **NOT desiring the victim's death**, he **anyway performed the act or those acts which he knew would probably cause the victim's death**.

In the absence of either of these points, the judge should conclude that the accused only wanted to hurt the victim who eventually died; and because the accused should be liable for the consequences of his actions, then he should be found to be liable for the crime of **GBH from which death ensues** under **Art. 218**.

CASE LAW: *Ir-Repubblika ta' Malta v. Salvatore sive Salvu Gauci* CONT'D – GBH from which death ensues

In the absence of an intent to cause death and positive indirect intent, the **judicial determination should lean towards the conclusion that the accused solely intended to cause harm to the victim, leading to the victim's eventual demise**. Because the accused is accountable for the repercussions of their actions, they should be held responsible for the crime of **Grievous Bodily Harm (GBH) from which death ensues**.

Establishing criminal intent requires a meticulous examination and analysis of various factors, including the factual circumstances, the specific acts committed, and the surrounding conditions.

Critical considerations include the **type of weapon used**, the **manner** and **method** of its use, the **target** of the blows, and the **dialogue before**, **during**, and **after** the incident.

Notably, the Court of Criminal Appeal **rejected the principle endorsed by the initial court that any blow within the human body could potentially hit a vein or artery**, leading to blood loss and, subsequently, a potential indirect homicidal intent if the victim dies. The Court contested this idea, emphasising that **the intention cannot be automatically inferred from the mere possibility of internal haemorrhage resulting from the offence**.

While it is acknowledged that establishing intent necessitates an examination of material acts and surrounding circumstances, the Court underscores that intent remains a **subjective matter**, rooted in the accused's mental state at the time of committing the act, and other relevant **circumstantial evidence** brought forward during court proceedings.

In this regard, it is also suitable to mention **Art. 257B** – which discusses grievous bodily harm from which death ensues pertinent to **Sub-Title XI** (**Of Abuse on Elderly or Dependant Person**s). The punishment to this crime is aggravated under **Art. 257B (4)** when the victim is **under 70 years of age** (1-2 degrees) and when the victim is **over 70 years of age** (2-3 degrees).

Attempted Bodily Harm

Can a charge of an attempt be possible since the responsibility of the agent may only be assessed in relation to the effects produced?

In cases of attempted offences under **Art. 41**, a prerequisite is t**he intention to commit the specific offence**. Several Italian writers, drawing parallels between the definition of bodily harm in the **1889 Italian Code** and **our Code**, argued that, given this requirement, attempting bodily harm is impossible. According to this view, the responsibility of the perpetrator can only be evaluated in relation to the actual harm produced.

However, this doctrine faced resistance from **Altavilla**, who generally acknowledged the **possibility of charging attempted bodily harm more severe than the harm actually caused**.

Examining the classification of offences as outlined by the law, it is conceivable that certain circumstances, considering the means employed by the offender and their mode of action, could provide certainty about their intention to produce one effect rather than another among those mentioned in the law.

Maino interjects by stating that in cases where doubt persists regarding the severity of the intended outcome by the perpetrator, the principle ***in dubio pro reo*** naturally applies ("in doubt, favour the accused"). **If, however, the actual result produced is punishable with a more severe penalty than the attempt of the intended result, the prosecution has the discretion to prefer the charge carrying the higher punishment**.

CASE LAW: *Ir-Repubblika ta' Malta v. Dominic Briffa* – Attempted GBH

There has been a divergence of opinions among jurists regarding the feasibility of charging attempted Grievous Bodily Harm (GBH) under Maltese Law. Nevertheless, Maltese courts have embraced the viewpoint that allows for the prosecution of attempted GBH, provided there is sufficient evidence demonstrating the accused's specific intent to cause one of the consequences characteristic of GBH.

In this context, **if an individual deliberately strikes a pregnant woman with the specific intent to induce a miscarriage, and if the miscarriage does not occur but all the elements of the attempted crime are present, the accused could be held liable for attempted GBH.**

In prosecuting an attempt, the **burden rests on the prosecution to establish the accused's specific intention to bring about one of the effects outlined by the law**. This requirement emphasises that the accused must have harboured a deliberate intent to achieve the intended outcome, even if the full consequences of the crime did not materialise.

Under certain circumstances, a judge may be convinced, beyond a reasonable doubt, that when a slight injury occurs, the aggressor's intention was not merely to cause a minor injury or a general intent to inflict harm, but a specific intent to cause grievous injury. In such cases, the charge of attempted Grievous Bodily Harm (GBH) becomes plausible.

The court aligned with the argument that, typically, **anyone using a cutting or pointed instrument like a knife to strike another would likely have the intention to cause serious harm, not just a superficial scratch**. While the injury in this instance occurred in the lower parts of the body, it is recognised that **even in these areas**, **blood vessels**, **arteries**, **veins**, **nerves**, and **muscular systems** exist, and if **perforated**, could lead to **severe consequences**.

The court acknowledged the correctness of the first court's stance that for attempted GBH to be established, **there must be a specific intent to cause a particular grievous injury**, as opposed to a generic intent to harm or injure. This specific intent can be inferred from various circumstances. Distinguishing between a mere scratch caused by someone waving a knife for intimidation and a stab wound, as seen in this case, is crucial.

"Din il-Qorti tara li dana il-bran jaqbel anke mad-dottrina li dejjem giet accetatat mill-Qrati ta' Gustizzja Kriminali taghna, u cioe' li **jista' ikollok tentattiv ta' offiza gravi jew tentattiv ta' offiza gravissima, purche' jigi pruvat li l-agent kellu l- intenzjoni specifika li jikkaguna xi wahda min dawk il-konsegwenzi li jikkaratterizzaw l-offiza gravi jew l- offiza gravissima skond il-kaz**. Hekk, per ezempju, ma jistax ikun hemm dubju li jekk persuna isawwat mara tqila bl-intenzjoni specifika li ggieghelha tehles qabel iz-zmien jew bl-intenzjoni specifika li dik il-mara tabortixxi, jekk ma jirnexxilhiex fil-hsieb taghha (u salv l-elementi l-ohra kollha tat-tentattiv) huwa koncepibbli d-delitt ta' tentattiv ta' offiza gravi fl- ewwel lok u dak ta' tentattiv ta' offiza gravíssima fit-tieni lok."

In summary, courts give considerable weight (***piz probatorju***) to **circumstantial facts** such as the nature of the instrument used, the timing and manner of its use, and whether it was prepared for such use.

In cases where actual bodily harm occurs, but the **perpetrator's intent was to cause death**, a legal principle comes into play. If the **means used** or the manner of committing the act had the **potential to result in death**, the offence charged will not be solely for bodily harm. Instead, the charge will be elevated to **attempted wilful homicide**.

Accidental Supervening Causes

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

Art. 219, *Criminal Code*

In ***Ir-Repubblika ta' Malta v. Salvatore sive Salvu Gauci***, the court purported that instances of supervening accidental causes include situations like the **negligence of the attending doctor**, **improper application to a wound**, or the **patient's non-compliance with the doctor's prescription**. In such cases, a new and independent positive fact emerges, separate from the offender's act, which exacerbates the injury, producing effects beyond what the injury alone would have caused.

However, the scenario differs if, for example, the wound transforms into **gangrene** or **septic decay**, or worsens due to its natural consequences or an operation necessitated by the accused's actions. **The rationale is that a person who exposes the victim to a new and serious risk of injury can be held accountable if any extraneous circumstances, not inherently impossible, convert that risk into a certainty**.

It is crucial to note that the concept of **supervening accidental causation categorically does NOT apply to the crime of wilful homicide**. The judge's explanation during the jury's summing up effectively refuted the defence counsel's argument that 'supervening' does not mean following but rather implies a sequence after the act of the agent. The term 'supervening' in the original Italian text, which used the phrase ***'causa accidentale sopraggunta***,' clarifies this meaning. Any misdirection in this section of the law that significantly impacts the jury's decision-making process might warrant a legitimate appeal or even a retrial, especially if it is ***grossolana*** or blatantly incorrect.

Aggravated Bodily Harm

(1) The punishments established in articles 216, 217, 218 and 220, and in sub-articles (1) and (2) of the last preceding article shall be **increased by one degree** when the harm is committed -

(a) on the person of any one of the **parents** or any other **legitimate** and **natural ascendant**, or on the person of a **legitimate** and **natural brother** or **sister**, or on the person of any one of the **spouses**, or on the person of any one of the **natural parents**, or on any person mentioned in article 202(h);

(b) on the person of any **witness** or **referee** who shall have given evidence or an opinion in any suit, and on account of such evidence or opinion, or on the person of a **child under 9 years of age**;

(c) on the person of whosoever was a **public officer** or was lawfully charged with a public duty or is or was an officer or employee of a **body corporate** established by law and the offence was committed because of that person having exercised his functions;

(d) on the person of whosoever was exercising his lawful duties as a **private guard**, a **specialised private guard** or **community officer** in accordance with the provisions of the Private Guards and Community Officers Act.

(2) Nevertheless, no increase of punishment shall take place where the offender, without intent to cause harm to any particular person, or with intent to cause harm to some other person, shall, by mistake or accident, cause harm to any of the persons referred to in sub-article (1)(a) and (b).

Art. 222, *Criminal Code*

Regarding common aggravations, the old Italian adage is consummated; stating that the **law protects the rights of those who are the weakest**. Therefore, the law caters for a higher punishment when the offence is committed against those who are weaker to protect themselves.

Involuntary Bodily Harm

226. (1) Where from any of the causes referred to in the last preceding article a bodily harm shall ensue, the offender shall, on conviction, be liable -
(a) if the harm is grievous and produces the effects mentioned in article 218, to imprisonment for a term not exceeding one year or to a fine (multa) not exceeding four thousand and six hundred and fifty-eight euro and seventy-five cents (€4,658.75);
(b) if the harm is grievous without the effects mentioned in article 218, to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37);
(c) if the harm is slight, to the punishments established for contraventions.
(2) In the cases referred to in sub-article (1)(c), proceedings may only be taken on the complaint of the injured party.

Involuntary Homicide

(1) Whosoever, through **imprudence**, **carelessness**, **unskilfulness** in his art or profession, or **non-observance of regulations**, **causes the death of any person**, shall, on conviction, be liable to imprisonment for a term **not exceeding 4 years** or to a fine (multa) not exceeding €11,646.87.

(2) Where the offender has caused the **death of more than one person** or where in addition to causing the death of a person the offender **has also caused bodily harm** to another person or other persons the punishment shall be that of imprisonment of a term of **up to 10 years**.

Art. 225, *Criminal Code*

This article tackles situations wherein negligence and an obtuse inconsideration of foreseeable circumstances of become the main proponent of an instance of homicide. For this crime to subsist however, courts strive to ascertain the presence of what is deemed to be the **Tripod of Culpa**.

CASE LAW: ***Il-Pulizija v. Mark Piscopo***

"…. t-**trepod tal-kolpa** gie definit bhala:

1. **la volontarieta dell'atto**;
2. **la mancata previsione dell'effetto nocivo**; u
3. **la possibilita di prevedere**.

Bhala konkluzzjoni tad-definizzjoni li din il-Qorti trid taghti lit terminologija culpa, ghalhekk jibqa' dejjem li l-element taghha huwa **volontarjeta' tal-att**, **in- nuqqas ta' previzjoni tal-effetti dannuzi ta' dak l-att**, u l-**possibilta' ta' previzjoni ta' dawk l-effetti dannuzi**. Jekk l-effetti dannuzi ma kienux prevedibbli, hlief b'diligenza straordinarja li l-ligi ma tesigix u li semmai tista' ggib culpa levissima li ma hiex inkriminabbli, ma hemmx htija."

Thus, the 3 elements (tripod) which constitute the crime of involuntary homicide are:

1. The **Voluntariness** of the Action
2. The **Failure to Prevent** the Harmful Act
3. The **Possibility of Preventing** such Harmful Act

Ultimately, foreseeability serves as the distinguishing factor between involuntary and voluntary homicide. If an individual foresaw a potential outcome but took no action to prevent it, then it constitutes intent (***dolo***); however, if the outcome was not directly foreseen but reasonably foreseeable, the accused may be liable for involuntary homicide. **Only when there was no reasonable way to anticipate the harmful event would the accused be absolved of responsibility** (***casus***).

CASE LAW: ***Il-Pulizija v. Breveissen***– Foreseeability

In this case, the accused was charged with having caused involuntary bodily harm to his passengers aboard a speedboat he was driving, when it **hit a pole protruding out of a reef**.

The Court however noted that **no Mariners' Notice had been issued informing mariners of this pole embedded in the reef**. The only notice issued was one which said that the beacon indicating the reef had been destroyed.

For this reason, the Court held that "**in these circumstances there is nothing that the accused could have done to avoid the impact because at night**, **the p**ole (which was not indicated in the Notice to Mariners) **was not visible**. Consequently, it cannot be said that the charges brought against the accused have been sufficiently proved".

CASE LAW: ***Il-Pulizija v. Carmelo Stivala*** – Foreseeability

This case quoted **David Whincup** and asserted that the requirements di parti of the employer to ascertain that he is well- equipped and informed are that:

1. The employer must **ensure that the employee knows the dangers**.

2. The employer must **ensure that the employee knows the precautions to be taken against these dangers**.

3. The employer must **ensure that the precautions are available**.

4. The employer must **ensure that the employee knows these precautions are available**.

CASE LAW: ***Il-Pulizija v. Joseph Grech*** – Foreseeability

In the context of foreseeability arising from imprudence or carelessness, the **consideration of foreseeability holds paramount importance**. It is undeniably clear that driving without maintaining a proper lookout due to factors like **fatigue**, **distractions**, **lack of concentration**, or any other reason makes it **foreseeable that the individual may lack the necessary reflexes to react whe**n, for example, a pedestrian crosses the road or approaches the driver's vehicle. Keeping a proper lookout while driving, which involves being aware of surrounding circumstances, including pedestrians on the side of the road, is a societal norm designed to prevent harm. Therefore, **if a person fails to adhere to this norm and harm results, the driver becomes liable for the unintentional harm caused**.

CASE LAW: ***Il-Pulizija v. Ruth Grech*** – Foreseeability

The court emphasised that in the context of maintaining a proper lookout, it is the **driver's obligation to observe what is plainly visible**. Failure to see what is reasonably visible implies a lapse in keeping a proper lookout.

CASE LAW: ***Il-Pulizija v. Sharlon Mifsud*** – Foreseeability

Foreseeability alone is insufficient. The harm or event must have been **avoidable**, meaning it could have been prevented in the specific case. **Therefore, for the absence of a proper lookout to result in criminal liability, the court must be convinced that, without the lack of such a lookout, either the harmful event would likely not have occurred, or if it did, it would not have occurred to the extent and gravity that actually transpired**.

If the harm in any case could not have been avoided, the link of causation between the absence of a proper lookout and the resulting harm would be absent. **It would be impossible to establish that the lack of a proper lookout was the efficient cause of the harmful event**.

The Objective and Subjective Test of Negligence

CASE LAW: ***Il-Pulizija v. Paul Buttigieg*** – Negligence

Fid-dottrina u l-gurisprudenza kontinentali jezistu zewg teoriji partikolari dwar il-kuncett ta' negligenza: it-teorija hekk imsejha **oggettiva** u dik **suggettiva**.

It-test ghat **teorija oggettiva** mhux wiehed li hu immirat biex jistabilixxi jekk il-persuna ipprevedietx jew setghetx tipprevedi dak l- incident fil-fatti specie partikolari tal- kaz izda **jekk l-agir ta' dik il-persuna jaqax taht l-obbligu ragjonevoli ta' attenzjoni li kull persuna fis-socjeta` hija prezunta li ghandu jkollha f'cirkostanza partikolari**.

Min naha l-ohra t- teorija suggettiva tenfasizza li wiehed jista' jitkellem fuq **agir negligenti jekk ikun hemm nuqqas f'li wiehed ikun alert jew vigilanti bil- limitazzjonijiet tieghu personali f'dak il-kaz partikolar**i.

Therefore, the objective test heeds the would-be behaviour of the reasonable man, whereas the subjective test places hefty emphasis on the subjective limitations imposed on the agent at that particular time of the alleged offence.

Moreover, **Carrara** emphasises that **not having prevented the foreseeable harmful consequence is *dolo***, yet n**ot having been able to foresee such harmful consequences is tantamount to the relieving of guilt**.

Mantovani and **Padovani** purport that *culpa* is present when there is:

1. An **objective requirement** involving the **violation of a rule of conduct**;
2. A **subjective requirement**, namely the **ability to observe such a rule**;
3. The **avoidability of the event by adhering to such a rule**;
4. The **predictability and avoidability**, meaning that the individual had the capacity or the opportunity to behave differently.

Hence, courts consider two factors when assessing whether involuntary homicide occurred. Firstly, they objectively determine if the accused's conduct meets the standard of reasonable care expected of any citizen. And secondly, they subjectively assess whether, given the circumstances, the accused could have been sufficiently attentive to prevent or foresee the harm.

CASE LAW: *Il-Pulizija v. Saverina sive Rini Borg* – Negligence

This judgemenmt elucidates the concept of **negligence**, particularly focusing on its various forms and the element of **foreseeability**. **Art. 225** stipulates that **involuntary homicide requires proof of negligent conduct**, which encompasses imprudence, carelessness, unskillfulness, or the failure to adhere to regulations, resulting in a harmful event. **Negligence involves a failure to adopt precautions, leading to foreseeable harm to the rights and interests of others**.

Imprudence arises from a lack of caution, **carelessness from inattentiveness**, and **unskillfulness from professional incompetence**. Negligence can also stem from the violation of laws, regulations, or orders aimed at preventing harm to third parties. **Foreseeability is a crucial element in all forms of negligence**, presumed in cases of non-observance of laws, regulations, or orders.

In cases involving the **non-observance of regulations**, the **legislator's foreseeability replaces that of the agent**, making the **harmful event foreseeable regardless of the agent's awareness**.

"Under these forms of negligent conduct, be it imprudence, carelessness or unskillfulness in one's art or profession or the non-observance of regulations, there exists an essential difference, that of foreseeability. This indispensable element, i.e. foreseeability, remains essential under every form of negligent conduct, however to a different extent and at different degrees. It is always the salient feature in every form of negligence, but it partakes of different degrees in all cases of imprudence, carelessness or unskillfulness in one's art or profession, whereas it (foreseeability) is presumed in relation to the non- observance of laws, regulations and similar orders statutorily established. In such cases, any evidence to the contrary is not possible. It is inadmissible. **This, therefore, is an absolute presumption**."

Negligent conduct is defined as voluntary behavior leading to an unintended but foreseeable harmful event, which could have been prevented with reasonable caution.

The judgment emphasises that while contributory negligence does not warrant compensation in criminal law, it can be considered by the court for punishment purposes, though this discretion is not mandatory.

Il-Pulizija v. Peter Stroud reaffirmed these principles.

CASE LAW: *Il-Pulizija v. Manwel Xerri* – Negligence

The court emphasised that in Criminal Law**, establishing criminal liability for a negligent act is a challenging task**. However, certain fundamental principles can be confidently acknowledged.

When an individual voluntarily undertakes an act without necessary precautions, an act inherently posing a danger to others' lives, and another person is killed as a result, the **person performing such an act is deemed guilty of involuntary homicide**. Mere **inadvertence is insufficient to absolve criminal liability**.

Similarly, the mere violation of the law diminishes, and **meeting the degree of diligence adequate for Civil Law purposes is insufficient for Criminal Law purposes**. However, these considerations do not avail the accused if in situations of negligence.

CASE LAW: *Il-Pulizija v. Tarcisio Fenech* – Negligence

In this case, the concept of **negligence**, particularly in relation to the failure to adhere to regulations, can be succinctly outlined. Understanding negligence requires recognition of situations in daily life where one's actions can potentially harm third parties. It is **imperative to take necessary precautions** to prevent such harm and safeguard the rights and interests of others.

Art. 225 of our Criminal Code addresses negligence through terms like **imprudence**, **carelessness**, and **lack of skill in one's profession**. Additionally, the phrase "non-observance of regulations" encompasses not only statutory laws but also **internal rules established by private entities**, such as companies, institutions, or organisations, to ensure safety and prevent harm to individuals, like employees or visitors.

CASE LAW: *Il-Pulizija v. Anthony Pace* – Negligence

Il-Kodici taghna huwa bbazat fuq il-Kodici Taljan tal-1889. Fil- kummentarju tad-disposizzjonijiet relattivi ghal negligenza ta' dan il-Kodici, **awturi Taljani dejjem qiesu li ghandu jigi applikat it-test suggettiv**.4

Jekk wiehed iqis it-termini wzati fil-ligi taghna u cioe` "**nuqqas ta' hsieb u traskuragni**", wiehed jista' jinnota li dawn huma termini li qeghdin jirr**eferu direttament ghall-attitudni soggettiva ta' min ikun hati tar-reat**. Huwa necessarju ghalhekk li wiehed jindika jekk ic-cirkostanzi partikolari tal-kaz kinux jippermettu lill-persuna involuta li tintebah bil-konsegwenzi tal-agir taghha.

The Link of Causation

The negligence da parti of the agent must be linked to the ultimate death of the victim.

CASE LAW: Il-*Pulizija v. Kevin Borg* – Link of Causation
"Illi ghalhekk mela, jinhtieg li bejn l-azzjoni ta' Borg, bejn traffikar, forniment u prokura ta' droga lil Maugeri, u l- mewt ta' l-istess Maugeri, ikun hemm **dak in-ness li jghaqqad dik l-azzjoni ma' dan l-avveniment tragiku**. Dan in-ness hekk imsejjah mill-guristi Inglizi '**chain of causation**'".

CASE LAW: Il-*Pulizija v. Carmen Micallef* – Link of Causation
The presence of a causal chain between the negligent act and the resulting harm is **essential for criminal liability**. For culpability, there must be a connection between the action and the outcome, applicable not only to negligence, imprudence, carelessness, and lack of skill, but also to the failure to follow regulations.

Failure to Act as the Bonus Paterfamilias

The initial aspect of negligence involves the failure to meet the expected standards of behavior based on one's life experiences. Imprudence, carelessness, and lack of skill are not explicitly defined in statutes, allowing the court to exercise discretion in assessing whether an individual falls within these categories of negligence.

CASE LAW: *Il-Pulizija v. Aaron Camilleri*
As **Antolisei** purports, imprudence is essentially recklessness, inadequate consideration, and always implies a lack of regard for the interests of others. As found in the **Novissimo Digesto Italiano**, "**Imprudence is demonstrated by positive conduct that should have been avoided because it could cause a specific harmful event or danger, or that was performed in an inappropriate manner**, **thereby endangering the legally protected rights of others**. It is therefore a form of recklessness, an act without caution."

The law distinguishes between liability stemming from **breaches of ordinary conduct** and **breaches of statutory rules**. In cases of negligence, there must be a causal connection (***nexus***) between the effect and the involuntary actions of the agent.

To determine guilt in such cases, an analogy with the "*bonus paterfamilias*" principle is often employed, reflecting the conduct expected of a person of **ordinary intelligence**, **diligence**, and **sensibility**. This criterion provides guidance to judges, allowing them discretion to evaluate each case's specific circumstances. The judge must consider whether an ordinary person in similar circumstances would have acted similarly.

In cases involving the non-observance of regulations, negligence arises from the same principles as imprudence, carelessness, or lack of skill in one's profession. Failure to adhere to regulations established by authorities to protect others constitutes negligence or imprudence. **It is negligent not only to ignore precautions based on personal life experiences but also to disregard precautionary measures mandated by authority**.

CASE LAW: ***Il-Pulizija v. Joseph Busuttil et*** – Negligence

Busuttil neglected his legal duty to ensure proper safety measures around a trench, which led to an accident. The trench, freshly excavated and unlit in darkness, posed an obvious risk of accidents, which the responsible individuals should have addressed by taking necessary precautions, such as providing adequate lighting. The presence of a no-entry sign nearby does not absolve them of this responsibility. Additionally, the placement of bricks near the trench only increased the danger.

Despite claiming that lanterns were frequently stolen, the **defendants did not take measures to prevent theft or request replacements**, showing a **lack of concern for safety**. None of the defendants took adequate steps to ensure safety around the trench at night, despite the clear need for precautions in such a rural area.

According to the laws of Malta, **officials overseeing construction or roadworks are obligated to illuminate any ditches or trenches to prevent accidents**, regardless of specific orders. Failure to take such obvious precautions indicates a serious disregard for safety and warrants imprisonment rather than just a fine. While the victim's own negligence, such as riding a bicycle without lights, contributed to the accident, it does not absolve the defendants of their criminal liability.

Busuttil, as the superior, bore an even greater responsibility for ensuring safety measures were in place, including proper lighting. His failure to do so exacerbated his liability compared to the other defendants.

Contributory Negligence

Contributory negligence from the victim's behalf does NOT avail the killer as a defence in court. Contributory negligence is pertinent only to the ultimate punishment awarded. However, if involuntary homicide was spurred SOLELY by the contributory negligence of th victim, then the killer will not be found guilty of any crime.

CASE LAW: The ***Clive Tanti*** Case – Contributory Negligence

Both a car and a motorbike were travelling at devilish speeds in Rabat. They clashed with each other, resulting in the death of the biker. Thus, here one may notice a direct causal connection between the action of the accused and the injury that happened. There was clear contributory negligence because the drivers were both in breach of a regulation relating to speed limits. However, **contributory negligence is NOT a defence which avails the killer**. The only effect it may bear is one pertaining to a possible reduction in punishment awarded to the agent.

CASE LAW: *Il-Pulizija v. Laferla* – Contributory Negligence

"In criminal proceedings the **contributory negligence of the victim does not absolve the person causing the damage, bodily harm or death from criminal responsibility unless it is the only cause of that accident**. However, it may be taken into account for the purpose of **punishment**."

[...]

"...**anki kieku l-pedestrian forsi ma esploratx sew it-triq qabel kompliet taqsam, dan ma jezonerax lis-sewwieq mill-obbligi tieghu**. Dan ghaliex .... f' sede kriminali kull **sewwieq iwiegeb ghall-agir tieghu indipendentement minn dak li jaghmel haddiehor**, ammenoche dak li jigri ma jkunx dovut unikament u eskluzivament ghal xi tort da parti tal-pedestrian f' dan il- kaz".

CASE LAW: *Il-Pulizija v. Corporal Moore* – Contributory Negligence

In this case, the court assessed the victim's contributory negligence. It affirmed that **the victim's negligence does not excuse the offender**.

Contributory negligence is NOT a defence unless the victim's actions, independent of the accused's negligence, **caused their own death**. In this case, the accused leased a farm without the necessary license, thus meaning that the property had not undergone necessary speculation as to whether it was adhering to all requisites ensuring safety.

While the victim was negligent for making fireworks without precautions, his negligence was contributory and did not directly cause his death. Whether the fire was caused by spontaneous combustion or a cigarette left near the fireworks, the accused's failure to store flammable materials properly contributed to the incident.

The presence of the cigarette and matches near the fireworks does not necessarily imply the victim left them there. If the accused had followed proper procedures, the flammable materials would have been stored safely.

Justifiability & Excusability

Justifiable Homicide/Bodily Harm

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

Art. 223, *Criminal Code*

This law stipulates that the commission of homicide does not occur in cases where homicide or bodily harm are carried out when they are **expressly ordered** or **permitted by existing laws** or **lawful authorities**.

Cases of **actual necessity** of lawful defence shall include the following:

(a) where the homicide or bodily harm is committed in the act of repelling, during the night-time, the scaling or breaking of enclosures, walls, or the entrance doors of any house or inhabited apartment, or of the appurtenances thereof having a direct or an indirect communication with such house or apartment;

(b) where the homicide or bodily harm is committed in the act of defence against any person committing theft or plunder, with violence, or attempting to commit such theft or plunder;

(c) where the homicide or bodily harm is imposed by the actual necessity of the defence of one's own chastity or of the chastity of another person.

Art. 224, *Criminal Code*

The law provides exemptions when harm is imposed by **actual necessity** in lawful **self-defence**. If an individual reasonably believes that their life is in imminent danger and resorts to using force to protect themselves, the law recognises this as justifiable **self-defence**. The force used must also be **proportionate** to the threat faced. Similarly, the law extends this exemption to situations where homicide is inflicted in the **lawful defence of another person**.

CASE LAW: ***Il-Pulizija v. Augusto Augulario*** – Proving Justifiability

Mhux kull min jagixxi biex jiddefendi ruhu necessarjament jista jinvoka l-Art. 223 tal-Kodiċi Kriminali. Il-ligi titkellem car dwar il-bzonn attwali tad-difiza legittima ta' dak li jkun jew ta' haddiehor. Kemm fid-dottrina kif ukoll fil-gurisprudenza taghna hu ormai stabbilit li biex wiehed jista' jinvoka dina l-iskriminanti l-aggressjoni subita trid tkun **inġusta**, **gravi** u **inevitabbli**. L-element ta' l-inevitabbilta' jigi nieqes meta wiehed, minflok ma jevita l-inkwiet ossia l-glied li jara gej meta dan jista' b'mod ragonevoli jigi hekk evitat, imur minghajr raguni valida jaffrontah b'mod li jipprecipita huwa stess il-konfront fiziku.

CASE LAW: ***Il-Pulizija v. Joseph Psaila*** – Proving Justifiability

To plead self-defence successfully, the law imposes certain prerequisites. The evil threatened by means of an aggression must be **unjust**, **grave**, and **inevitable**. The self-defence must be consummated to avoid consequences which, had they occurred, would cause inevitable harm, and also **to avoid a danger that could not have been avoided in any other way**.

Thus, the danger must be **actual**, **spontaneous**, **absolute**, and **unforeseen**. Otherwise, it could give rise to provocation, not to legitimate self-defence. In self-defence, the evil threatened must be actual and NOT imminent.

CASE LAW: ***Il-Pulizija v. Karmenu Cutajar*** – Proving Justifiability

Biex wiehed ikun jista' jeccepixxi b'success il-legittima difeza skond l-Art. 223(1) tal-Kodici Kriminali hu mehtieg li jirrizulta, imqar fuq bazi ta' probabbilita`, li l-akkuzat ikun ikkaguna offiza fuq il-persuna (jew, fil-kaz ta' akkuza ta' omicidju volontarju, ikun qatel) biex jiddefendi ruhhu jew biex jiddefendi lil haddiehor minn hsara ingusta, gravi u inevitabbli. Hsara hi meqjusa li tkun gravi jekk tkun diretta lejn l-inkolumita` personali ta' dak li jkun, jigifieri jekk dak li jkun (u li allura jagixxi biex jeddefendi lilu nnifsu jew lil haddiehor.

Il-hsara, pero`, trid tkun ukoll inevitabbli, fis-sens li tkun attwali (jigifieri ta' dak il-hin stess, mhux semplici manacca ta' xi haga fil-futur), improvvisa u impreveduta, u li ma tkunx tista' tigi ragjonevolment evitata b'xi mod iehor hlief billi dak li jkun jikkaguna l-offiza fuq il persuna ta' l-aggressur jew joqtlu. Fl-ahhar nett, il-hsara tkun ingusta jekk ma tkunx ordnata jew permessa "mil-ligi jew mill-awtorita` legittima". Jehtieg finalment li jkun hemm element ta' proporzjonalita` bejn il- perikolu ravvizat u l-mezz adoperat biex jigi evitat dak il- perikolu; in mankanza ta' tali proporzjonalita` jkun hemm l- eccess tal-legittima difeza ravvizat fl-Artikolu 227(d) tal- Kodici Kriminali, b'mod li min skriminanti (legittima defiza minghajr eccess) ikun hemm semplici skuzanti.

CASE LAW: ***Il-Pulizija v. Martina Galea*** – Proving Justifiability

Biex omicidju volontarju jkun skuzabbli taht il-paragrafu (c) ta' l-artikolu 241 tal-Kodici Kriminali jehtieg li l-persuna li tikkommettih, fil-waqt tad-delitt, ma tkunx fi stat li tqis l-ghemil taghha mnhabba li tkun taht l-influwenza immedjata (i) ta' passjoni istantanja, jew (ii) ta' agitazzjonital-mohh. Dan l-istat mentali jista' jkun dovut, ghalkemm mhux necessarjament, ghall-provokazzjoni.Fil-kazijiet ta' provokazzjoni, biex l-akkuzat jitqies li ma kienx jista' jqis l-ghemil tieghu jinhtieg li fil-fatt l-omicidju jkun sar minhabba sahna ta' demm u mhux ghaliex kien hemm il-hsieb maghmul tal-qtil ta' persuna jew ta' hsara gravi fuq il-persuna, u illi r-raguni tal-provokazzjoni kienet tali illi, f'nies ta' temperament ordinarju, komunament iggib l-effett li ma jkunux kapaci li jqisu l-konsegwenzi tad-delitt. Rekwizit indispensabbli ghad-diriment tal-legittima difiza hija l-inevitabilita', meta l-akkuzat "***cannot escape though he would***", bil-korolllarju li wiehed ma jistax jitkellem dwar legittima difiza jekk l-akkuzat "***would not escape though he could***".

Excusable Homicide / Bodily Harm

Wilful homicide shall be excusable –

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

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

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

the offender shall be deemed to be incapable of reflecting whenever the homicide be in fact attributable to **heat of blood** and not to a deliberate intention to kill or to cause a serious injury to the person […]

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

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

Art. 227, *Criminal Code*

(1) In the case of wilful homicide excusable in terms of paragraph (a) or (b) of the last preceding article, the offender shall, on conviction, be liable to imprisonment for a term not exceeding two years.

(2) In the case of wilful homicide excusable in terms of paragraph (c) of the last preceding article, the offender shall, on conviction, be liable to imprisonment for a term from five to twenty years.

(3) In the case of wilful homicide excusable in terms of paragraph (d) of the last preceding article, the offender shall, on conviction, be liable to imprisonment for a term not exceeding twelve years.

Art. 228, *Criminal Code*

Wilful homicide is considered excusable if **provoked by a grievous bodily harm** or **any crime against the person punishable with more than 1 year of imprisonment**. Additionally, if the homicide occurs in **repelling the scaling or breaking of enclosures**, walls, or the entry into a house or inhabited apartment during the daytime, the law also considers homicide excusable.

Furthermore, wilful homicide is excusable when committed by an individual acting under the **sudden transport of passion** or **mental excitement**, rendering them incapable of reflection during the crime. This incapacity is specifically defined as being attributable to the **heat of blood** and NOT a deliberate intention to kill or cause serious injury.

Moreover, if the homicide is committed by a person who, under circumstances mentioned in **Art. 223**, **exceeds the limits imposed by law**, **authority**, or **necessity**, it is also rendered excusable. However, it is important to note that any excess in such situations is not subject to punishment if it is due to the person being taken **unawares**, or else driven by **fear** or **fright**.

CASE LAW: ***The Republic of Malta v. Dominic Briffa*** – Art. 227, Legitimate Defence

"Sabiex wiehed jista' jitkellem fuq legittima difiza li twassal ghallgustifikazzjoni jew non-imputabilita` (a differenza ta' semplici skuzanti - art. 227(d)), iridu jikkonkorru, kif diga` nghad, l-elementi kollha li dottrinalment huma meqjusa necessarji, cioe` l-bzonn li l-**minaccja tkun gravi**, tkun **ingusta**, tkun **inevitabbli** u fuq kollox li r-reazzjoni tkun **proporzjonata** ghall-minaccja jew ghall-aggressjoni."

CASE LAW: ***Repubblika ta' Malta v. Nazzareno sive Reno Mercieca*** – Excusability

Il-provokazzjoni u l-legittima difiza huma koncettwalment u anke fattwalment distinti. Fil-kaz tal-legittima difiza wiehed johrog mill-kamp tal-provokazzjoni kompletament u jidhol fil-kamp tal-**minaccja ta' perikolu attwali u immedjat** ta' dak li hu kkontemplat fil-ligi, cioe perikolu ta' mewt jew ta' offiza fuq il-persuna jew fuq il-kaslita. Il-provokazzjoni hija koncett totalment differenti, u **mhux kull att provokatorju jwassal ghal-legittima difiza**.

This case further delves into the *ratio legis* of these provisions. When the court was explaining inevitability, it states the following: "*In order to have an inevitable situation, the danger must be sudden, meaning that the accused did not know of such danger, because if the accused was previously aware of such danger, there would not be legitimate self defence, but provocation. Therefore, self defence and provocation are different defences. Either one of these excludes the other. For self defence, the reaction had been such as to repel an immediate danger, whereas in provocation, the reaction is usually caused by a certain amount of anger.*"

Sudden Passion

CASE LAW: ***Il-Pulizija v. Martina Galea*** – Sudden Passion

The Court here held that the mental state contemplated by Art. 227 (c) can come into effect both as a result of provocation or for other reasons. From an analysis of this provision, the Court concluded that for a homicide to be excusable, the aggressor must be acting under the **first transport of mental excitement at the moment the crime is committed** and thus in the act of committing the crime, thus being rendered **incapable of understanding the consequences of his or her actions**. Thus, the agent would not have been in a state wherein he was capable of reflecting, owing to the immediate influence. **The Court thus equates first transport of sudden passion or mental excitement with immediate influence**.

Both in the case of sudden passion and mental excitement, it is always necessary that the person who kills was under the **direct and immediate influence of either the sudden passion or the mental agitation**. He must thus be under the influence of an immediate state of affairs, which could have been caused, but not necessarily, by provocation.

To constitute a mitigating factor for the purposes of wilful homicide, the sudden passion or mental excitement must cause a person to act under their influence and must be such that they rendered the person incapable of reflecting upon the consequences of his actions.

The proviso to Art. 227 (c) asserts that in cases where provocation is pleaded and has allegedly caused the sudden passion or mental excitement, for the accused to be considered as having been incapable of reflecting on the consequences of his actions, the homicide must have been consummated due to the heat of blood and NOT because there existed the deliberate intent to kill, and that the reason and basis of provocation was such as would, in persons of ordinary temperament, commonly produced the effect of rendering them incapable of evaluating the consequences of the crime.

There is still the criminal intent, but there can never be premeditation, for premeditation would exclude the plea of sudden passion.

CASE LAW: ***Il-Pulizija v. Mariano sive Mario Camilleri*** – Sudden Passion

Anke li kieku f'dan il-kaz si tratta tal-"agitazzjoni tal-mohh" kontemplata fil-paragrafu (c) tal-Artikolu 227 tal-Kodici Kriminali – li certament ma huwiex il-kaz peress li dana l-paragrafu jaghti l-beneficcju tal-attenwanti biss meta l- provokazzjoni ossia l-att provokatorju ikun tali li f'nies ta' temperament ordinarju komunement igib l-effett li dak li jkun ma jkunx jista' jqis l-effett tad- delitt – il-ligi stess sahansitra tikkontempla fl-imsemmi paragrafu (c) il-ko- ezistenza tal-"agitazzjoni tal-mohh" mal-ingredjenti kollha tal-omicidju volontarju, inkluz, ghalhekk, l-ingredjent ta' l-intenzjoni specifika. L-ewwel qorti, ghalhekk, ma qalet xejn kontradittorju; anzi pjuttost jidher li kienet ben konxja tat-tieni parti tal-imsemmi paragrafu (c) u, korrettement, ma applikatx l- attenwanti in kwistjoni, kif jirrizulta mill-artikoli tal-ligi kwotati fis-sentenza taghha.

CASE LAW: ***Il-Pulizija v. Mario Manicaro*** – Ordinary Temperament

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

CASE LAW: *Il-Pulizija v. Augusto Augulario* – Following Art. 235

The Court here held that when one considers the excuse of provocation, one must follow the rule provided for in Art. 235, which entails that **provocation cannot benefit the accused if it did not occur at the point in time of the act which constitutes such excuse**.

The provocations referred to in **articles 227 and 230 shall NOT benefit the offender**, **unless they shall have taken place at the time of the act in excuse whereof they are pleaded**.

Art. 235, *Criminal Code*

CASE LAW: *Il-Pulizija v. Domenic Briffa* – Inevitability

Illi l-mod kif il-kwistjoni ta' l-inevitabilita` tal-perikolu jew minaccja ghandha tigi affrontata hu li wiehed jistaqsi: l- agent (ossia l-aggredit) seta', tenut kont tac-cirkostanzi kollha, ragjonevolment jevita dak il-perikolu jew dik il- minaccja? Jekk il-buon sens jiddetta li l-agent seta', billi jaghmel manuvra jew pass f'direzzjoni jew ohra, jew anke billi semplicement ma jiccaqlaqx, facilment jevita l-periklu jew minaccja li kien qed jara fil-konfront tieghu, allura, jekk ma jaghmilx hekk jigi nieqes l-element tal-inevitabilita` tal-perikolu jew minaccja. Jekk, pero`, mill-banda l-ohra, tenut kont tac-cirkostanzi kollha, il-buon sens jiddetta li l-agent ma kellu jaghmel xejn minn dan jew, anzi, kellu jibqa' ghaddej fit-triq li twasslu aktar qrib dak il-perikolu jew dik il-minaccja, allura b'daqshekk ma jigix nieqes l-element ta' l-inevitabilita`.

Inadmissibility of Excuse

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

The instigator cannot claim to be the provoked party. Additionally, our courts commonly apply certain other restrictions. Typically, **mere words** or **gestures**, regardless of their offensiveness or provocation, **will not justify homicide due to sudden passion if a deadly weapon is used**. However, if provoking words are accompanied by actions like spitting on the defendant or physical assault, they might justify the homicide. Ultimately however, the defence of provocation is usually denied if the defendant initiated the provocation themselves.

CASE LAW: ***Il-Pulizija v. S. Lia*** – Provoker = no excuse

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

CASE LAW: ***Il-Pulizija v. Alana Gauci*** – Provoker = no excuse

"He who invokes provocation cannot be the provoker."

Regarding instances of provocation, it is explicitly stated that they will not be considered a defence unless **they occurred at the moment of the act being excused**. In simpler terms, for the excuse to be valid, the injury or action should have happened promptly after the provocation was received. If there was enough time for emotions to cool down, for reason to regain control, and the person provoked later kills the other, it is deemed **deliberate revenge**, not a result of sudden intense emotions.

CASE LAW: ***Il-Pulizija v. Martina Galea***

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

The Court uses the words 'could have been caused' since such mental state of affairs could also not have been caused by provocation as is the case with infanticide. Even before the introduction of infanticide, there were cases wherein mothers were convicted of the **homicide of their babies but with the mitigation that such mothers acted under the direct and immediate influence of mental excitement** as a result of which the mother was at the moment of the act incapable of reflecting upon the consequences of her actions.

CASE LAW: ***Regina v. Madalena Camilleri***

To constitute a mitigating factor for the purposes of wilful homicide, both sudden passion and mental excitement upon which a person acts under their influence, must be such that the sudden passion or mental excitement rendered the person incapable of reflecting upon the consequences of his actions. In this context, section 227(c) stipulates that in cases of provocation, i.e., in cases where the mitigation of provocation is pleaded and has allegedly caused the sudden passion or mental excitement, for an accused to be considered as incapable of reflecting on the consequences of his actions, the **homicide should have been consummated owing to heat of blood and not because there existed the deliberate intent to kill and that the reason/ground of provocation was such as would in persons of ordinary temperament commonly produce the effect of rendering them incapable of reflecting on the consequences of their actions**.

CASE LAW: ***Il-Pulizija v. Nikolai Borg Oliver***

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

CASE LAW: ***Il-Pulizija v. Alan Gauci***

Here, the Court referred to an interval of time between words in a bar and the subsequent incident on the road. This interval of time was such as to indicate that **a person of ordinary temperament would have considered the consequences of what he had in mind, and of his actions**.

CASE LAW: ***Il-Pulizija v. Aymen Said Jailai el Baden*** – V. IMP

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

For self-defence to be proved, and thus lead to justification and lack of blameworthiness, contrary to the excuses in 227(d), all the constitutive elements which are considered as requisites must be **cumulatively fulfilled/satisfied**, i.e., the **evil threatened by grave**, **unjust** and **inevitable** and the **reaction be proportionate to the threat or aggression**. This is a test how to determine inevitability or otherwise.

One must ask whether the accused, the person attacked, could have, taking into account all the circumstances of the case, reasonably avoided that threat or danger. If common sense and logic leads one to conclude that the accused could have avoided such danger or threat by changing direction or fleeing away or simply by not moving at all, then in such case, the element of inevitability of the threat or danger, is lacking. If, however, on the other hand, taking into account all the circumstances of the case, common sense and logic dictate that the accused did not have to do any of all this, but instead, proceed to get closer to the threat or danger, the constitutive element of inevitability of the threat or danger would be fulfilled."

Excessive Self-Defence

Art. 227 (d) provides for self-defence which exceeds the limits imposed by law as governed under Art. 224. This does NOT necessarily result in punishment, for the proviso holds that any such excess shall not be liable to punishment if it is due to the person being taken unawares, or to fear or fright.

If there is no proportionality in the self-defence, then Art. 227 (d) is invoked and mitigates the punishment ultimately awarded. Art. 227(d) is strongly linked to proportionality, reason being that if self-defence falls within the realm of proportionality, then there is no liability, yet if the limits are exceeded to, and unless there is fright or terror, then there is still punishment, albeit mitigated. This article's proviso demonstrates the **human element** underlying the law.

This concept of excusable circumstance, known as **excess in self-defence**, was explained in a bill presented to the **Council of Government in 1889 by the Crown Advocate**. He stated, "A person, while defending oneself or executing an act permitted by law, may inadvertently cause harm beyond what is necessary. This is considered an offense according to general legal principles, referred to in Italian law as ***'un eccesso di difesa***'. Typically, **individuals convicted of such excess are treated similarly to those involved in excusable homicide or bodily harm**..."

However, such excess in defence is NOT punishable if it arises from **surprise** or **fear** experienced by the individual. In cases where the degree of surprise or fear is significant enough that the assaulted person couldn't reasonably calculate the boundaries of legitimate action, any resulting excess should not be deemed unreasonable, and the individual should be acquitted of any wrongdoing.

Sir Arturo Mercieca supplements this by saying that: "In general, all admit that the right of self-defence is sacred. And such right, at first sight, would appear to be unlimited, inasmuch as it is difficult to know up to when the exercise of it may be necessary in consequence of an unjust and violent aggression on the part of another who has only himself to blame if any injury is caused to him by the person lawfully defending himself. **The right of self-defence is inherent in the individual**; it is derived from the law of nature which imposes the duty of self- preservation. Therefore, it is only in exceptional cases – and only where there is *culpa*, indeed where, more than *culpa*, there is a certain degree of *dolus* – that a departure can be made from the said principle. Now if the person exercising the right of self-defence was in such a state of mind as to be incapable of calmly judging up to where his resistance should go and of fixing the precise point beyond which his defence would cease to be permissible, in any such case there is clearly neither '*dolus'* nor '*culpa'*: and where there is neither one nor the other, there cannot be any criminal responsibility and liability to punishment."

With respect to **Art. 50 of the Italian Code**, **Maino** purports that "Art. 50 requires that the limits imposed by the law, by the authority or by necessity, shall have been exceeded. **But not every time that there is disproportion between the act committed and that which has given occasion to it, the justification disappears to make way for the mere excuse of excess**.

Everything depends on the state of mind of the agent. If this was such, in spite of the peril, as to permit to him the free movement of his body and the free exercise of his mental powers, then it will be a case of **mere excuse** or **extenuation**: otherwise the material disproportion of the act does not exclude the justification. And let it be repeated: **those who have to judge must not let themselves be guided by the calm wisdom after the event**, based on a two minute assessment of the record of evidence – but should judge according to the psychological condition of the agent at the time of the fact and according to what the impression caused on him by the imminent danger permitted him to discern and to do. Otherwise, by requiring an exact and mathematical proportion between the causative fact of the psychological state and the material consequence of the defensive reaction, a crime is artificially created where a criminal does not exist, and a punishment is applied where there is no reason, either juridical or moral, which shows it to be necessary".

CASE LAW: ***Il-Pulizija v. Maria Agius*** – Excessive Self-Defence

Excessive self-defence necessarily presupposes the existence of self-defence. Hence for this defence to subsist, **the accused CANNOT be the one who acted firs**t.

L-eccess tal-legittima difiza tippostula tabilfors l-istat tal-legittima difiza, u kwindi ma tistghax tigi nvokata din id-difiza meta min jinvokaha kien huwa li aggredixxa l-ewwel; u l-aggressur ma tantx jista' jitlob l-istat ta' legittima difiza; u lanqas, kwindi, l-eccess tad-difiza li tezigi appuntu dak l-istat.

Jekk fil-fatt kienx hemm cirkustanzi ta' biza u twerwir li jgibu ghall-impunita, jiddependi mill-gudizzju tal-gudikant skond il-fattispecje tal-kaz.

CASE LAW: ***Il-Pulizija v. Peter Roy Seed*** – Excessive Self-Defence

This case sheds a light on being taken unawares. The Court held that "**Not everyone acting in self-defence may invoke Art. 223**. The wording of the law is clear: 'actual necessity either in lawful self-defence or in the lawful defence of another person. According to doctrine and jurisprudence, it is well established that in order to successfully invoke the plea of self-defence, the sustained aggression must be unjust, grave and inevitable. The element of inevitability is missing when instead of avoiding trouble or a fight (given that such an element can actually be reasonably avoided), one actually confronts another without a valid reason, thereby precipitating the actual, physical confrontation. It is not the law that a person threatened must take to his heels and run in the dramatic way suggested, but **what is necessary is that he should demonstrate by his own actions that he does not want a fight**. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal and that that is necessary as a feature of the justification of self-defence is true in our opinion, whether the charge is one of homicide or a less serious one."

''The evidence shows however that the accused's actions of instinctively protecting his face by raising his arm clutching onto his glass, rather than throwing it away, tends to show that he exceeded the limits of self-defence, but that this was due to him being taken unawares or to fear or fright, and this in terms of Art. 227 (d) made applicable to the case of wilful bodily harm by virtue of Art. 230. The Court therefore finds that the accused had indeed cause grievous bodily harm on James Hannan, that the accused acted in self-defence when doing so, that he exceeded the limits of self-defence but that the **said excess was a result of the accused being taken unawares or through fear or fright**; and this in terms of Art. 218 (1b), 230, 223 and the proviso of Art. 227 (d). Therefore, the **Court acquits the accused**.''

Accidental Affray

Accidental affray refers to a situation where a **public disturbance** or fight breaks out **unintentionally**, typically due to a sudden and unexpected series of events. In the context of criminal law, an affray involves the **use** or **threat of unlawful violence** by **one or more persons**, causing others to **fear for their safety**. What distinguishes accidental affray is that the participants **did not intend or plan for the confrontation**; it occurs **spontaneously** and **without premeditation**.

For instance, accidental affray might arise in a crowded public space where an unforeseen altercation occurs, leading to a sudden brawl involving multiple individuals. The key element is the lack of premeditated intent to engage in violent behavior; rather, the affray emerges as an unplanned consequence of the circumstance

Where in an accidental affray a homicide or bodily harm is committed and it is **not known who is the author thereof**, **each person who shall have taken an active part against the deceased or the person injured shal**l, on conviction, be liable –

(a) in the case of **homicide**, to imprisonment for a term not exceeding **3 years**;

(b) in the case of a **grievous bodily harm producing the effects mentioned in article 218**, to imprisonment for a term not exceeding **1 year**;

(c) in the case of a **grievous bodily harm *without* the effects mentioned in article 218**, to imprisonment for a term not exceeding **3 months**;

(d) in the case of a **slight bodily harm**, to the **punishments established for contraventions**:

Provided that, in the case of **homicide**, the person or persons who shall have inflicted on the party killed a bodily harm from which death might have ensued, shall, on conviction, be liable to imprisonment for a term from **5 to 12 years**.

Art. 237, *Criminal Code*

CASE LAW: ***Il-Pulizija v. Stefan Lekov*** – Defining Accidental Affray

Art. 237 does not explicitly delineate the concept of accidental affray. In situations where legal statutes lack a specific definition, recourse must be made to alternative sources such as **jurisprudence**, **case law**, **parliamentary debates**, and the **writings of legal scholars** to gain insights into the meaning and interpretation of the term.

CASE LAW: *Il-Pulizija v. Joseph Grech* – Elements of Accidental Affray

This case articulated that the essence of the concept of accidental affray (***offesa in rissa***) as outlined in Art. 237 revolves around the scenario where more than two individuals actively participate against the victim. The critical element in accidental affray involves the **absence of planned aggression**, indicating **no premeditation**, and the l**ack of a shared intention among the participants to cause homicide or bodily harm**.

The complexity arises when, amidst the affray, it becomes uncertain which of the active participants caused the resulting homicide or bodily harm to the victim. Consequently, **each person engaged in the affray becomes criminally liable**, albeit for an offence carrying a lesser punishment than the primary crimes of homicide or bodily harm.

The crucial condition for the application of this offence is the **active participation of at least two individuals against the victim**, making it indiscernible who inflicted the harm.

According to **Carrara**, if a conflict involves only two individuals — the victim and the other party — the **offence described in this article CANNOT exist**. The essence of this crime hinges on the **ambiguity** surrounding the identity of the perpetrator. This ambiguity dissipates when only one person, apart from the victim, engages in the altercation, as highlighted by Carrara's perspective.

In such circumstances, the **element of uncertainty regarding the identity of the assailant is deemed absent when there is a sole participant against the victim** – this is because the offence of accidental affray is contingent upon '***l'incertezza dell' autore***'.

CASE LAW: *Il-Pulizija v. Stefan Lekov* CONT'D – Elements of Accidental Affray

1. L-ezistenza ta' **glieda accidentali**;

2. Persuna li **tippartecipa attivament** f'din il-glieda;

3. **Nuqqas ta' gharfien dwar min attwalment huwa responsabbli** ghall-offizi gravi li jigu kkagunati, sew jekk l-offizi jkunu jwasslu ghall-konsegwenzi msemmijin fl-Art. 218 kif ukoll jekk ma jwasslux ghal dawn il-konsegwenzi; u

4. Il-***mens rea*** **li jikkommetti r-reat**.

CASE LAW: *Ir-Repubblika ta' Malta v. Omar Caruana* – Elements of Accidental Affray

This case quoted **Crivellari**, who holds that a fundamental rule which dictates the crime of accidental affray is that **it cannot be charged if the author of the homicide is known**. This judgement further held that one of the requirements of the crime of accidental affray is that there is a **lack of premeditation**.

CASE LAW: *Ir-Repubblika ta' Malta v. Brandon Callus* – Elements of Accidental Affray
In order to meet the criteria outlined in Art. 237, it is n**ecessary for at least two additional individuals to actively participate in the affray alongside the victim in a manner that conceals the identity of the primary offender**.

Concealment of Dead Bodies

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

In his notes, **Prof. Mamo** omits any mention of **Art. 239**, proceeding instead to delve into the topic of abortion after examining justifications for homicide and bodily harm. Consequently, it becomes apparent that the **legislative intent was to establish concealing a body as a separate offence distinct from intentional homicide**, rather than an alternative charge.

Jurors, depending on the circumstances, may convict the defendant of intentional homicide while acquitting them of concealing the body, or vice versa. The determination **hinges on the evidence presented**, as both charges represent distinct crimes. Thus, jurors retain the option to find guilt on both counts.

CASE LAW: ***Ir-Repubblika ta' Malta v. Piero di Bartoli***

The Court here rejected the defence's interpretation regarding Art. 239. The Court emphasised that these interpretations must be considered in the context of the law's title. Once the law concludes discussion under the title '**Of Excuses for the Crimes Referred to in the Foregoing Sub-titles of this Title**,' it directly addresses Art. 239. Consequently, **Art. 239 should be understood within the framework of the crimes outlined in its title**.

In contrast, **Italian law places its equivalent of our Art. 239 under a sub-title unrelated to homicide**.

Procuring Miscarriage

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

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

Art. 241, *Criminal Code*

Here, we delve into a comprehensive section of the law. While the term "**abortion**" is commonly used, the law itself employs the term "**miscarriage**." However, the method by which miscarriage is explained within the law effectively encompasses the **concept of abortion**, thereby indicating that the law is indeed addressing abortion.

Our legal **framework does NOT explicitly define the term** "abortion" or "miscarriage." Generally, abortion refers to **the deliberate termination of pregnancy through the expulsion of the foetus**.

Interestingly, our law categorises the crime of abortion under '***Crimes Against the Person***', rather than '***Crimes Affecting the Good Order of Families***'. This classification stems from the understanding that in abortion cases, the violated right **pertains to the foetus** — the **right to potential life**. The offender's intention is directed toward the destruction, if not of an existing life, at least of the potential for life. Consequently, the **violated right is that of life itself**.

In this scenario, **the crime can be committed by anyone other than the woman (mother) herself**. Surprisingly, the **consent of the woman to the abortion procedure is immaterial according to our law**. Unlike in other legal systems where a woman's consent may **mitigate punishment**, in the Maltese system, **her consent holds no weight**. Our law adopts the perspective that **the life of the foetus is NOT disposable by the woman**, and therefore, **her consent to the abortion should NOT influence the severity of punishment**.

The Criminal Interruption of Pregnancy

In our legal context, a pregnancy is defined as the normal **period extending from conception to the natural expulsion of the foetus**. Importantly, **abortion can occur at ANY stage of the pregnancy**.

Moreover, for the crime of abortion to occur, a **pregnancy must exist in reality**. Regardless of the beliefs or intentions of the individual, if no actual pregnancy exists, their actions cannot constitute the crime of abortion or any attempt thereof. And this is why the ingestion of a **morning-after pill** remains legal under our law.

It is notable that in **many legal systems**, the crime of abortion is ONLY recognised if **there is a criminal interruption of an actual pregnancy**.

The Awareness of the Pregnancy

For an individual, whether the woman herself or a third party, to be charged with the crime of abortion, **they must be aware of the existence of the pregnancy**. This knowledge is crucial as it forms the **specific malice** of the crime, which consists of the intention to cause the expulsion of the foetus.

It is commonly held that the offender's intention need not necessarily be focused on the death of the fetus. Rather, **if the death of the fetus is a foreseeable consequence of the expulsion, even if not actively desired, it must have been anticipated as probable**. However, the **intention of the offender should not extend beyond the death of the fetus**, such as when the person performing the abortion intends harm to the mother. This provision applies when the agent's intent is solely focused on causing the abortion.

If the agent deliberately **intends** to cause abortion and **successfully** does so, the maximum punishment is up to **3 years** imprisonment. However, if the agent's actions are driven solely by **hostility towards the woman** and result in abortion, the maximum punishment can be up to **10 years** imprisonment.

The possibility of a "**negligent**" or "**involuntary**" crime of abortion is often debated among theorists, with the consensus generally being in the **negative**. This stance aligns with our law, which **does not recognise such forms of abortion as involuntary**. However, if the miscarriage leads to the death of the woman or bodily harm, charges of involuntary homicide or bodily harm may apply if the necessary requirement of culpability is met.

The Actus Reus

The essential aspect of the crime lies in causing the miscarriage of a pregnant woman. This involves the **actual expulsion of the product of conception from the uterus**, which must be a **live foetus** at any stage of development. For the crime to be completed, the **death of the foetus is required**.

Therefore, if the foetus was already deceased at the time of the act, the crime is NOT committed. Some argue that **if the foetus survives** after expulsion, it would constitute an **attempted crime**, while others contend that the **crime is completed regardless**, as the law focuses on the miscarriage of the pregnant woman, regardless of the ultimate fate of the foetus.

Furthermore, abortion can be achieved by **any means whatsoever**. While the law specifies certain common methods (such as food, drink, medicines, and violence), it also includes the comprehensive term "*any other means whatsoever*" to encompass all possible intentional causes of abortion.

From a **medico-legal perspective**, methods of abortion may be split in 2:

1. Employment of **Drugs**
2. Employment of **Instruments**

When it comes to drugs, there exists no single drug or combination thereof that, when ingested orally, can cause a healthy uterus to empty itself without posing a risk to the woman's life.

Instrumental interference involves the use of various instruments to induce abortion. These instruments can be employed initially or as a backup when drugs fail to induce abortion.

In addition to instruments, other "mechanical" methods can be employed to induce miscarriage. These methods may include **blows** or **violent pressure** on the abdomen, as well as engaging in **severe exercise** or **physical exertion** that causes violent agitation of the body.

There has been ongoing debate for many years regarding the possibility of inducing abortion through **psychological** or **mental means**. However, proving the causal link in such cases would be exceedingly difficult.

The Disregard Towards the Woman's Consent

The majority of legal systems reject the inhumane doctrine that a pregnant woman's ability to terminate a foetus within her womb as a mere extension of her own bodily autonomy. Instead, from the moment of conception, a new existence is recognised by the law as possessing inherent rights, foremost among them being the **right to full physiological development**. No individual, including the mother, has the authority to deprive this new life of its rights.

Similarly, **our legal system has discarded the notion that a woman who consents to or procures her own abortion should receive more lenient treatment than any other offender**. This doctrine falsely assumes that women in such circumstances always act under the influence of intense emotions that mitigate their guilt. However, such an assumption is unfounded, and courts are equipped to consider genuine mitigating factors on a case-by-case basis within the legal framework provided.

Regarding the woman's role in the crime, the material element may involve either consenting to the use of means by others to induce miscarriage or procuring her own miscarriage. **It is essential to note that the woman's consent to induce her guilt must be freely given**, **voluntary**, and made with **full awareness of the criminal purpose** for which the means are used.

Death or GBH Caused by Means Used for Miscarriage

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

This is not merely an aggravation of the crime of abortion, but rather a **distinct form of criminality** in which liability is incurred, under appropriate circumstances, **regardless of whether the miscarriage has occurred or not**.

When the actions of an abortionist or would-be abortionist lead to the **death of the woman** or cause her **serious injury**, the **punishment should be more severe**. However, our law **does not equate this punishment with that prescribed for intentional homicide** or GBH, in the case of Art. 242, the **more severe consequences were NOT intended**; rather, they were brought about due to a **lack of skill** or **negligence**. In other words, they were "**involuntary**." If the perpetrator's actual intention was the death of the woman or her injury, the appropriate charge would be that of intentional homicide or bodily harm.

Nevertheless, there must be a causal link between the death/injury of the woman from the means employed. However, it unnecessary to determine whether these consequences were foreseeable – because **the possibility of such consequences is so common that the prosecution should not be required to prove that the offender could have foreseen them**.

Where a Physician or Anyone Else Prescribes or Administers Means for Causing Miscarriage

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

In this particular context, the law addresses the material elements involved in either **consenting to the use of means by others** to induce miscarriage or **personally perpetrating the crime.**

When a **woman herself perpetrates the crime**, the material element entails the woman procuring her own miscarriage. Alternatively, when others are involved, such as surgeons, who knowingly prescribe or administer the means to induce abortion, the crucial element focuses on **their knowing involvement in the process**.

Specifically, the law prohibits physicians or surgeons from knowingly prescribing or administering the means by which abortion is induced, whether it involves the use of drugs or instruments.

The elements involved in this scenario are as follows:

1. A **miscarriage must have occurred**.
2. The miscarriage must have been **induced using the means indicated or supplied by the physician, surgeon, etc**.
3. The physician, surgeon, etc., must have **knowingly prescribed or supplied such means**, meaning they were aware that these means were intended to induce a miscarriage. It is important to note that no guilt would be attached to a medical practitioner who prescribes or supplies a drug or instrument for a legitimate or innocent purpose, but unbeknownst to them, it is used to induce a miscarriage. However, there would be a strong presumption of guilty knowledge if the drugs or instruments prescribed or supplied are commonly known or used as abortifacients.

Ulteriorly, **abortion under our law is legal with sole regards given to situations wherein the doctor is compelled to destroy the life of the foetus in order to save the birthing mother**.

CASE LAW: The ***Andrea Prudente*** Case

Malta's stringent anti-abortion laws came under international scrutiny following Prudente's case, which highlighted the risks women faced due to the ban on abortion.

Prudente, an American citizen, **filed a lawsuit seeking to declare the relevant sections of the Criminal Code unconstitutional and in violation of human rights**. Prudente claimed that she had to have an abortion because her life was in danger due to the pregnancy; however, the Maltese doctors who treated her continuously denied the alleged claim that her life was in any danger whatsoever, thus refusing to carry out the abortion.

Consequently, Prudente had to seek medical treatment abroad due to the ban, risking complications such as sepsis. The traumatic experience led to ongoing suffering for Prudente, who argued that the lack of access to medical care breached her fundamental human rights, including discrimination based on gender and interference with her private life, citing various international agreements and Malta's Constitution to support their case.

Indirect Abortion

Indirect abortion refers to a situation where **abortion occurs as a secondary consequence of an action whose primary intention and effect are unrelated to abortion**. In such instances, if there exists a sufficiently serious and justifiable reason for the proposed course of action, whether it involves medical treatment or any other circumstance, then **the subsequent abortion may be permitted as long as it is neither intended nor directly caused**.

Attempted Abortion

Jurists often ponder whether the crime of abortion allows for punishable attempts. This inquiry arises particularly when adequate and sufficient means are employed, as the possibility of a criminal attempt hinges on whether the means used were indeed capable of inducing abortion.

If the means were found to be **absolutely inadequate** or **insufficient** for this purpose, the **concept of criminal attempt would be dismissed on grounds of impossibility**. However, if the means employed could **potentially induce abortion**, there is recognition among most jurists that **attempts can be prosecuted**, especially if the act is perpetrated by someone other than the woman herself. In such cases, the general principles of criminal attempt under **Art. 33** are readily applicable.

Some jurists express uncertainty regarding attempts made by the woman on herself. If the law does not expressly preclude attempts in such circumstances, **there seems to be no reason for justifiability when clear acts indicate the woman's determined intent to attempt miscarriage**.

As **Crivellari** asserts, the **difficulty of proof in specific cases should NOT serve as an obstacle, as it does not negate the possibility of prosecution**.

Negligent Abortion

Prof. Mamo insists that the notion of negligent abortion is whimsical. However, **Art. 243A**, introduced in 2002, begs to differ:

> Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the miscarriage of a woman with child, shall, on conviction, be liable to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37).
>
> **Art. 243A**, *Criminal Code*

The Administration or Supplying Of Substances Poisonous or Injurious To Health

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

Art. 244, *Criminal Code*

The elements of these crime are 4:

1. The **malicious administration** to or the **causing to be taken** by another person – ***Mens Rea***

The crucial aspect of this crime is indicated by the term "**maliciously**", suggesting a **intent to harm or injure.** This requirement reflects the ***animus nocendi***, the intention to cause harm, which is necessary even for cases involving bodily harm, as opposed to *animus necandi*.

Merely intending to administer a substance or cause it to be taken is insufficient without the knowledge of its poisonous or noxious nature and its potential to cause harm, coupled with a wrongful intent. Both the **deliberate action** and the **perpetrator's awareness of the substance's harmful nature are essential**. Therefore, the offence is only established if the offender acts with *dolus*, encompassing both **foresight** and **desire**.

2. In **ANY manner** – ***Actus Reus***

3. Of a **Poisonous** or **Noxious** substance

The substances addressed in this provision are characterised as **poisonous** or **noxious**, with the **capacity to cause harm or injury to health**. **Taylor** defines a poison as a substance that upon **ingestion**, **absorption into the blood**, or **contact with tissues**, can significantly **affect health** or even cause **death**. However, for the purposes of this legal provision, further definition of "poisonous substance" is not necessary beyond its capability to be harmful or injurious to health when administered or caused to be taken.

Prof. Mamo adds that while the substance itself may indeed be poisonous or noxious, the **crime will NOT be applicable if the quantity administered or caused to be taken is negligible or innocuous**.

4. Capable of **causing any harm** or **injury to health**

The discussed crime is considered complete **even if the victim has not suffered any harm**, as long as the substance maliciously administered or caused to be taken was **capable** of causing harm or injury to health. Moreover, the **perpetrator does not need to physically deliver the substance themselves**.

Punishment

According to the explicit terms of this article, the prescribed **punishment applies unless the offence committed constitutes homicide or grievous bodily harm**, in which case appropriate punishments for those offences would be applied instead.

This offence persists only if the actions of the offender do not amount to homicide. If the elements of homicide are present, the perpetrator will be prosecuted for that crime instead. Thus, the law specifies that this crime applies unless it results in death, leading to consequences other than death for the victim.

Additionally, it is worth noting that the **sale** and **supply** of poisons and dangerous drugs are **regulated by other laws**. These laws address issues related to substances, although they may not exclusively pertain to criminal matters. Despite stemming directly from the Criminal Code, other laws also carry criminal consequences related to substances.

The Transmission of Disease

(1) Any person who, knowing that he suffers from, or is afflicted by, any disease or condition as may be specified in accordance with sub-article (3), in any manner knowingly transmits, communicates or passes on such disease or condition to any other person not otherwise suffering from it or afflicted by it, shall, on conviction, be liable to imprisonment for a term from four year to nine years:

Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishment established in article 211(1).

(2) Where any such disease or condition as is referred to in sub-article (1) is transmitted, communicated or passed on through imprudence, carelessness or through non-observance of any regulation by the person who knew or should have known that he suffers there from or is afflicted thereby that person shall on conviction be liable to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37):

Provided that where the other person dies as a result of such disease or condition, the offender shall be liable to the punishments established in article 225.

(3) The Minister responsible for justice shall, by notice in the Gazette, specify diseases or conditions to which this article applies.

Art. 244A, *Criminal Code*

Art. 244A addresses the **transmission of communicable diseases**. Even if an accused confesses to the crime, the court still considers certain factors. Communicable diseases covered by this law are listed in **Art. 2 of the Communicable Diseases and Conditions Regulations (S.L 9.10 / Legal Notice 137 of 2005)** – namely **HIV**, **AIDS**, **Hepatitis B**, **Hepatitis C**, and **Tuberculosis**.

Art. 244A **applies exclusively to diseases listed in this legal notice**; it is thus an **exhaustive list**. It is also worth noting that **one disease can lead to another** (such as HIV developing into AIDS).

As with any other crime, the law specifies various elements that must be proven for conviction to occur.

CASE LAW: ***Il-Pulizija v. Stephan Maurice George Saurin***

The Court referenced LN 137 of 2005, listing the 5 communicable diseases abovementioned, and shedding emphasis on the lack of Maltese case law on the issue.

It defined the crime as '**the transmission or communication of a disease or condition specified by law, regardless of the means used, not limited to sexual encounters**.' The evidence in this case pertained to **alleged homosexual acts between the accused and others**, so the assessment focused on this mode of transmission.

"Infezzjoni tista' tiġi trasmessa kemm bil-konsapevolezza taż-żewġt partijiet għall-atti sesswali, jew ta' xi ħadd minnhom jew saħansitra mingħajr ma ż-żewġ persuni jkunu konsapevoli. L-infezzjoni tista' tiġi komunikata inkluż jekk ma jkunx hemm att sesswali ta' penetrazzjoni sħiħ. Biex il- Qorti tkun tista' ssib ħtija fl-imputat, il-Prosekuzzjoni tipprova lil hinn minn kull dubju dettat mir-raġuni, b'mod ċar, kemm il- mezz kif ukoll il-mod li bihom infezzjoni partikolari tkun ġiet mgħoddija mis-suġġett attiv lis-suġġett passiv tar-reat."

5 elementi:

1. l-**eżistenza ta' marda jew kundizzjoni speċifika** fil-persuna tas- suġġett attiv;
2. **attivita kontaġġjanti** (li tista' tkun ta' natura sesswali) bejn is- suġġett attiv u s-suġġett passiv;
3. it-**trasmissjoni tal-marda** jew kundizzjoni partikolari speċifikata, mis-suġġett attiv lis-suġġett passiv;
4. (fil-forma intenzjonali) is-**suġġett passiv**, qabel dik l-attivita kontaġġjanti partikolari **ma kienx afflitt minn din il-marda jew kundizzjoni speċifikata**;
5. l-**element psikoloġiku tar-reat konsistenti filli is-suġġett attiv** : -

I. **kien jaf** li huwa kien, fil-mument tal-attivita' **kontaġġjanti**, **afflitt mill-marda** jew kundizzjoni speċifikata li kien maħkum minnha u mogħni b'dan l-għarfien, **deliberatament u volutament jittrasmetti u jikkomunika**, ossija jikkontaġja b'din il- marda jew kundizzjoni lis- suġġett passiv, li ma kienx marid jew maħkum mill- kundizzjoni de quo; jew

II. meta **messu kien jaf li kien afflitt** minn dik il-marda jew kondizzjoni, jittrasmetti u jikkomunika ossija jikkontaġja lis-suġġett passiv b'dik l-istess marda jew kundizzjoni minħabba li s-suġġett attiv ikun aġixxa b'nuqqas ta' ħsieb, bi traskuraġni jew b'nuqqas ta' tħaris ta' xi regolamenti.

CASE LAW: ***Regina v. EB*** – Consent

This case highlighted that when one party partaking in a sexual activity is afflicted with a sexually transmissible disease, and does NOT disclose it to the other party, **any consent that may have been given to that activity by the other party is NOT thereby vitiated**. **The act remains a consensual act**.

Therefore, the elements of this crime are the following:

The Subsistence of the Disease of the Agent

To establish guilt, the prosecution must **scientifically** and **medically** prove the presence of the disease or condition in the perpetrator and its transmission to the victim, provided it's listed in LN 137 of 2005.

They must prove beyond reasonable doubt that the **victim was infected with the same disease or condition that the perpetrator had during the contagious activity**. This is crucial because the **perpetrator may have other diseases or conditions not transmitted during the activity**, or the **victim may have had a different disease or condition before**.

Courts must consider all scientific evidence and contextual circumstances to determine guilt. **The Court must be convinced that the disease was actually transmitted from the perpetrator to the victim and no one else**.

Mere admission of unprotected sexual intercourse or the victim's prior virginity is NOT enough to prove guilt. Without direct medical evidence, there is a risk of wrongful conviction. For example, if **both parties have HIV but different strains**, guilt may not be justified.

English and **Italian** case law impose a higher punishment on a perpetrator aware of their condition and acknowledge the **possibility of transmission through negligent acts**.

The Contagious Activity

This contagious activity **may or may not be of a sexual nature** between the agent and the victim. However, the activity itself MUST be proven to have happened – because it constitutes the ***nexus*** (causal link) between the agent and the victim.

The Transmission

Transmission can be affected by the characteristics of the disease and the method of transmission, even without full penetration. The prosecution must prove beyond reasonable doubt and with clarity both the **means** and the **manner of transmission**. The Court considers evidence from both ordinary witnesses and medical experts, expecting consistency between them.

The Mens Rea

The *mens rea* of this offence is **twofold**. First, there must be **the knowledge** in the agent's mind that, before the contagious activity took place, **the victim was NOT afflicted by the respective disease dwelling in the agent's organic system**.

Secondly, the agent must also bear **the knowledge** that, **at the time of the contagious activity**, **he was actively suffering from the pertinent contagious disease**, and **voluntarily transmitted this disease by virtue of the contagious activity**.

If circumstances will it that the agent **should have known that he was suffering from a particular contagious disease** AND that he **should have known that he was endangering the victim by partaking in a contagious activity with him/her**, then that would amount to **negligence** – which is frowned upon even more severely in other jurisdictions.

In **English law**, an agent who **anticipates the possibility of infecting** the victim with a disease or condition and engages in unprotected sexual activity despite this risk is deemed **reckless**. Once this foresight is established, the Court must assess the extent and severity of the risk assumed by the agent.

The reasonableness of the agent's actions hinges on several factors:

1. The **frequency of unprotected sexual encounters** between the agent and the victim. A higher frequency of such encounters indicates **greater imprudence** on the part of the agent.
2. The **risk of transmission** – which varies depending on the type of disease or condition involved. For **highly contagious diseases**, even a **single instance of unprotected intercourse may be deemed negligent by the agent**. Conversely, for less contagious diseases, a single instance may not necessarily be considered negligent. Nonetheless, engaging in unprotected sex, regardless of the disease's contagiousness, can still constitute negligence on the part of the agent due to the inherent risk associated with unprotected sexual activity.

The crucial factor lies in **whether the agent was aware of their affliction with a specific disease or condition *before* engaging in sexual activity with others**, or i**f they should have reasonably been aware of it at the time of intercourse**.

Thus, the **prosecution needs to establish 2 key points**:

1. That the transmission occurred **with the agent's knowledge**
2. That the transmission occurred **when the agent either knew or should have known about their condition**.

For instance, if the agent is aware of a diagnosis such as HIV, it does not necessarily mean that they know the full extent of the implications of such a diagnosis.

Thus, proving the agent's knowledge in cases of negligent transmission is **more challenging for the prosecution,** as they must demonstrate that the agent should have been aware of their condition.

The **court also considers who ought to be aware of their health condition**. While one might argue that this awareness is a basic expectation before engaging in sexual activity, the **agent must have some indication or symptom of their condition**. Moreover, the agent must be aware of the fact that he/she has an affinity for promiscuity, or that they are prone to partaking in unprotected sex (provided always that that would be the case). However, engaging in sexual activity with multiple partners, while risky, **does NOT inherently imply infection with a disease or condition**.

Engaging in high-risk behaviour does not automatically imply awareness of one's own condition. However, if the agent knew that their partners were already infected, the risk of transmission would be significantly higher, making it reasonable to expect them to be aware of the potential infection. Without concrete evidence that the agent knew their partners were infected, proving their awareness of their own condition becomes challenging for the prosecution.

Under Maltese law, **the victim's knowledge of the agent's disease or condition is NOT a factor constituting a defence**. Knowingly transmitting a disease requires proving that the victim was not already infected before the encounter. However, in cases of **negligent transmission** as per **244A (2)**, there is **no need to show that the victim acquired a new disease**.

The law seems to cover scenarios where the victim may have had a pre-existing infection unrelated to the agent. Nonetheless, **the prosecution must still prove that the victim contracted a specific disease due to the agent's negligence, even if the victim had a prior condition**.

Infanticide

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

Art. 245 was introduced by virtue of **Ordinance VI of 1947**, and is based upon the **Art. 1 of the 1938 English Infanticide Act**.

Infanticide is separate from wilful homicide, meaning that, albeit having been regarded as a strain of **aggravated homicide in the past**, it is nowadays a totally different crime altogether.

Some legal scholars have regarded infanticide as an excusable crime with due to the impact had on the mother. This is because infanticide refers to the killing of an infant by its mother. Historically, infanticide was quite prevalent, especially among illegitimate children when distinctions between legitimate and illegitimate offspring were more pronounced. The essence of this crime often lies in the **woman's perceived lack of agency**.

As mentioned, infanticide is legally restricted to cases where a mother is the perpetrator against her own child. This legal provision aims to grasp the **psychological condition of a woman facing particular circumstances**. Recognising that a woman's mental state might be severely disturbed or hysterical, the law acknowledges such distress as a mitigating factor. Therefore, testimonies from professionals and medical experts is crucial in understanding these aspects.

Central to this distinct form of criminality is the notion of the **mother's impaired mental state**, often **stemming from childbirth** and thus leading to particular psychological afflictions such as **post-natal depression** – which lessens her moral culpability for the crime.

The elements of the crime, which are to exist **cumulatively** are:

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

CASE LAW: ***Il-Pulizija v. Raymond Vella***

"…on account of certain circumstances for example a psychiatric condition of infanticide nature **the law considers that the wrong doer is less guilty for what he has done or failed to do** then in other circumstances where diminished responsibility was not present."

Here, a unique offense exists, centred around the concept of a **diminished punishment** when compared to the offence of wilful homicide, thus aimed at preventing convictions for wilful homicide.

Examining Art. 245 reveals that **culpability lies in infanticide rather than wilful homicide** when, at the time of the act, the mother's mental balance is disturbed due to the circumstances outlined therein. However, there is **no absolute presumption**; the disturbed mental state is merely one aspect considered by the law to ensure that **guilt pertains to infanticide rather than homicide**.

It is erroneous to assume that the law automatically presumes a mother who kills her less-than-one-year-old baby lacks full mental capacity due to pregnancy and childbirth. The legal stance accounts for this possibility, as evidenced in Art. 245, which addresses a disturbed mental state **distinct from the insanity plea in Art. 33**. In cases where such a mental disturbance is present, the offence committed by the mother would be categorised as infanticide – NOT wilful homicide.

Reference can also be made to the case of ***Aloysia (Giga) Camilleri***, who was convicted of having killed her son. However, it is clear that this case does NOT satisfy the second requisite abovementioned, and therefore, it was classified as wilful homicide, and NOT infanticide.

CASE LAW: The ***Ġużeppa Buttigieg*** Case

In 1856, Ġużeppa Buttigieg made history as the first woman convicted of infanticide since 1800. At the age of 21, she gave birth to a child at the Central Hospital of Floriana in 1856. After the birth, Marija Zammit cared for the child for some time.

Buttigieg claimed she could not afford to care for her child and requested its return from Zammit. Zammit handed over the child wrapped in a lace garment, which later played a crucial role in solving the crime. A few days later, the body of a baby was discovered in a well in Ħal Millieri.

Since the child could not be identified, the police displayed the lace garment at the Żurrieq police station, appealing to nearby villagers for assistance in solving the crime. Marija Zammit identified the garment, leading to Buttigieg being charged with her child's murder.

The trial took place on December of 1856, resulting in a unanimous guilty verdict and a death sentence for Buttigieg. However, the execution was postponed by the Governor upon learning of Buttigieg's pregnancy. Eventually, she received a reprieve and a life sentence. Interestingly, she never gave birth in prison, casting doubt on her pregnancy claim.

CASE LAW: The ***Anni Cardona*** Case

In a tragic case on June 28, 1939, 22-year-old Anni Cardona found herself accused of the murder of her new-born baby. Cardona confessed to suffocating her child out of fear of informing her father about the infant. Despite her admission, the jurors appealed for leniency, arguing that Cardona acted in a moment of **sudden passion** and lacked the capacity for reflection during the crime. Consequently, the court sentenced Cardona to six years' imprisonment. **Thus, Cardona was not convicted of infanticide, because the balance of her mind was NOT influenced by any post-natal repercussions**. Rather, the traditional mental excitement borne by sudden passion was that which was taken into account.

CASE LAW: The ***Mariton Pace*** Case

In Gozo's history, Mariton Pace's case stands as the sole recorded instance of infanticide. Pace tragically killed her baby in a war shelter. Convicted of willful homicide in 1943, she received a severe penalty of 20 years' imprisonment.

Similarly, in the following year, 19-year-old ***Vittorja Micallef*** faced a similar fate, receiving a death sentence for a comparable crime. However, her sentence was later commuted to life imprisonment, and she passed away three years later while still serving her prison term.

The **1947 amendment to the infanticide law** marked a significant shift in legal approach. This law effectively **abolished the death penalty for women who intentionally killed their new-borns while suffering from a disturbed mental state due to childbirth**.

The 1947 amendment of the Criminal Code stated that:

"Where a woman by any wilful act or omission causes the death of her child under the age of 12 months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth to the child or by reason of the effects of the lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to wilful homicide, shall be guilty of infanticide and **shall be liable to the punishment of imprisonment for a term not exceeding 20 years**."

The first woman indicted under the 1947 amendments was a 36-year-old unmarried woman from Valletta. After birthing the child, the woman abandoned the baby behind **Lintorn Barracks in Floriana**. The discovery was made a couple of days later and the woman was charged with infanticide through **abandonment** and **exposure** of the baby.

Abandonment

Whosoever shall be guilty of **abandoning** or **exposing** any child **under the age of 7** years shall be liable to imprisonment for a term from 7 months to 1 year.

Art. 246, *Criminal Code*

Thus, Art. 246 speaks of the abandonment, exposure, and ill-treatment of children **under the age of 7 years**.

There are numerous scenarios that can lead to the criminal act of child abandonment, as the **law does not precisely delineate how and under what circumstances abandonment occurs**.

However, if one was to offer a general definition, abandonment can be understood as the **voluntary and permanent relinquishment of parental or guardian control over children**. This may involve leaving them in a certain location, selling them, or legally transferring care and control to another person. Thus, abandonment occurs when the child's **health**, **safety**, and **welfare** are **no longer prioritised by those who have a duty of care**.

Can abandonment be solely **emotional** in nature? Such situations would fall under **neglect** and other forms of **mistreatment**. For an act to constitute abandonment, it must jeopardise the child's safety and well-being, ultimately being determined by the impact on the child.

CASE LAW: *Il-Pulizija v. Sabrina Albrecht*

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

The law also addresses the concept of "**exposure**," albeit without providing a specific definition. Like abandonment, exposure is condemned within the Criminal Code. **Exposure can be seen as a form of abandonment**, but it typically occurs within the **first weeks of a child's life**, often **before the child has become fully integrated into their family**. It involves actions or omissions that result in the removal, offering, or separation of the child, sharing similarities with abandonment.

The absence of a strict definition offers **judicial discretion**, allowing judges to interpret cases based on their specific circumstances. This flexibility extends to prosecutors, who may bring charges even when an act or omission does not neatly fit into a predefined crime, potentially allowing the court to determine the appropriate course of action.

The notion of acting "**in the best interests of the child**" is a recurring theme, although its interpretation may vary. What constitutes the best interests of the child can be subjective, particularly when considering their safety and well-being. The concepts of exposure and abandonment can be complex, as some parents may argue that their actions are intended to foster independence in the child. Therefore, it becomes crucial for the court to examine the perpetrator's intentions, determining whether their actions were intended to endanger the child's well-being.

When the Child Suffers Death or Injury

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

In toto, this provision treats cases wherein there is the **death or ill-treatment of children**, and the **abandoning** or **exposing** of children **without danger to life or limb**.

Ill-Treatment and Neglect of Children Under 16 Years

(1) Whosoever, having the responsibility of any child under sixteen years of age, by means of persistent acts of commission or omission ill-treats the child or causes or allows the ill-treatment by similar means of the child shall, unless the fact constitutes a more serious offence under any other provision of this Code, be liable on conviction to imprisonment for a term not exceeding two years.

(2) For the purposes of sub-article (1), ill-treatment includes neglecting the child's need for adequate nutrition, clothing, shelter, and protection from harm, persistently offending the child's dignity and self-esteem in a serious manner and persistently imposing upon the child age-inappropriate tasks or hard physical labour.

(3) The provisions of article 197(4) shall also apply in the case of an offence under this article, when the offence is committed by any ascendant or tutor.

Art. 247A, *Criminal Code*

Conversely, this article purports scenarios pertaining to the **ill-treatment** or **neglect** of **children under 16 years**.

This provision addresses persistent acts of commission or omission, indicating a systematic and illegal pattern of behaviour. Art. 247A (2) further mentions ill-treatment, indicating an **expansion in the law** to encompass additional circumstances related to this behaviour.

CASE LAW: *Il-Pulizija v. Johan Galea*

In this case, the defendant **admitted to the charges** of abandonment brought against him.

"**Abbanduna jew halla esposta tifla ta' eta` ta' anqas minn seba' snin** u cioe` lil Morgan Dougall…

[…]

Stante ammissjoni mill-imputat u l-konferma ta' tali ammissjoni wara li nghata z-zmien opportun sabiex ikun jista' jirregola ruhu, u wara li semghet ix-xhieda ta' omm il-minuri qed issib lill-imputat Johan Galea hati tal-akkuza kif dedotta kontrih u bl-applikazzjoni tal-Artikolu 22 tal-Kap 446 tal-Ligijiet ta' Malta, tilliberah bil-kundizzjoni li ma jwettaqx reat iehor fi zmien tliet (3) snin."

The Traffic of Persons

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

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

(b) slavery or practices similar to slavery; or

(c) servitude or forced labour; or

(d) activities associated with begging; or

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

shall, on conviction, be liable to the punishment of imprisonment from six to twelve years. For the purposes of this sub-article exploitation includes requiring a person to produce goods and provide services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety.

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

(a) violence or threats, including abduction;

(b) deceit or fraud;

(c) misuse of authority, influence or pressure;

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

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

Provided that in this paragraph "position of vulnerability" means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
(3) The consent of a victim of trafficking to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in sub-article (2) has been used.

Art. 248A, *Criminal Code*

This crime, although **primarily national in scope**, can possess a **transnational dimension** due to its potential for **planning**, **perpetration**, or **impact beyond borders**. It is commonly referred to as **modern-day slavery**, particularly concerning the prohibition of trafficking in persons.

The **2000 UN Convention Against Transnational Organized Crime** aims to compel states to establish legal frameworks to combat human trafficking and migrant smuggling. Human trafficking often involves criminal organisations and may thus have transnational aspects. While stemming from the **UN Convention Against Transnational Organized Crime (UNCTOC)**, the prohibition of trafficking is primarily delineated in the **Palermo Protocols**, focusing on the criminalisation of the act of trafficking individuals.

In our legal framework, which **draws heavily from recommendations** by the **Council of Europe and UN bodies**, emphasis is placed on the **element of control**. This control is characterised by the **victim's dependency on the perpetrator**, leaving them with **no choice but to comply with the agent's conditions or instructions**.

Art. 248E

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

The legislation defining trafficking of persons encompasses a wide array of methods through which this crime can be perpetrated. **Act XVIII of 2003** introduced significant amendments to the Criminal Code, aligning it with the **EU Directive on Preventing and Combatting Trafficking in Human Beings and Protecting its Victims**. These amendments aimed to **deter both the commission of trafficking offences** and the **utilisation of services provided by trafficked individuals**.

By disregarding the consent of the victim, these amendments establish a **potent legislative tool**, ensuring that **even if a victim consents to being trafficked**, **the crime persists**. This provision serves as a robust deterrent, sending a clear message that consent does not absolve perpetrators of trafficking crimes.

Furthermore, Act XVIII of 2003 introduced provisions criminalising **aiding**, **abetting**, and **instigating** this crime. Unlike result-based crimes, these offences do not hinge on a particular outcome and are categorised as **complicity**. Additionally, the crime of trafficking persons was classified as a **serious international offence**.

Human trafficking is widely recognised as a **violation of fundamental human rights**, such as the **Right to Liberty and Security (Art. 5 of the ECHR)** due to the element of control and coercion, and the **Prohibition of Inhuman and Degrading Treatment (Art. 3 of the ECHR)**.

CASE LAW: *Il-Pulizija v. Paul Ellul et*

"For trafficking to subsist, it is necessary that at **least just one act**, one mode of conduct listed within the abovementioned legal provision **is present**. From the evidence given by Tatiana Parisheva, this Court has not doubt that these two persons were recruited and that their residence in Malta was deliberately facilitated with the scope of exploiting such persons in prostitution.

In all this, the appellant was directly complicit and participated therein. Konak Bayeva testified that Elena Ellul, the appellant's wife, **had helped her to obtain the required documentation in order to enter Malta and had also told her that she would be able to find employment for her**, although she had not specified the type and kind of employment. Parisheva testified that she had come to Malta to work as a waitress. These two women effectively found themselves within the control of the appellants and of the other two co-accused **constrained to prostitute themselves**.

Additionally, **their air ticket and passport were confiscated** hence creating a state of affairs wherein **they were not free to choose and act voluntarily**.

[…]

Thus, **society needs the Court's protection also because these crimes are causing the breakdown of families** and thus require that he who is found guilty of having committed such crimes should be duly punished on the basis of the harm he has inflicted.

CASE LAW: *Il-Pulizija v. Dunkin Hall*

"The crime contemplated within the bill of inditement is in the Court's opinion **one of the most grave crimes within the Criminal Code**.

The crime of **THB for the purposes of prostitution is a form of cowardice of the most reprehensible levels one can ever contemplate**. The fact that a human being exercises total control over another human being who is divested of all liberty and dignity and all this for financial gain is very condemnable and extremely degrading. This is why the legislator catered for a **maximum penalty of 9 years imprisonment**."

CASE LAW: *Il-Pulizija v. Raymond Mifsud*

"In relation to the charge contemplated by Art. 248A(2)(a) and (b), these are crimes which fall within the parameters of sub-title (8 bis) of Chapter 9 of the Laws of Malta entitled 'Of the Traffic of Persons'. It is evident that 248A sub-articles (1) and (2) are not applicable.

In the current case since they deal with cases of trafficking of persons for the purposes of exploitation in the production of goods or in the provision of services and do not include *expressis verbis* (explicitly) sexual services but relate solely and exclusively to cheap labour.

Art. 248B deals with trafficking of persons for the purposes of prostitution. This being **sexual exploitation**...

The accused is also charged with a violation of 248B which falls within the parameters of the same legal provision. The first ingredient of the crime consists in the trafficking of minors, which crime must be consummated by means of any act [alternative not cumulative] emanating from 248A(2), i.e., with **either one of the following**: **violence** or **threats including abduction**; **deceit** or **fraud**; **misuse of authority**, **influence** or **pressure**, the **giving or receiving of payments or benefits to achieve the consent of the person having control of another person**."

The Traffic of Persons via Fraud

In cases involving **deceit** and **fraud**, a common scenario is **luring individuals to Malta under false pretences of employment opportunities**.

Deceit is evident as there is **premeditated malice**, strategically designed to facilitate the physical transfer of individuals from one location to another. The law specifies various methods employed in this deceitful scheme, all with the intent to control the victim within a criminal enterprise, typically for profit. Within this enterprise, individuals often lose personal belongings like passports, thereby becoming detached from the outside world and firmly under the perpetrator's control, creating a **coercive environment**.

Threats & Blackmail

Threats by Means of Writing

(1) Whosoever by means of any writing, whether anonymous or signed in his own or in a fictitious name, shall threaten the commission of any crime whatsoever, shall, on conviction, be liable to imprisonment for a term from six to twelve months or to a fine (multa) not exceeding five thousand euro (€5,000), or to both such imprisonment and fine: Provided that where the threat concerns the use of nuclear material to cause death or serious injury to any person or substantial damage to property or the commission of an offence of theft of nuclear material in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act the punishment for the offence shall be increased by three degrees; the expression "nuclear material" shall have the same meaning assigned to it by article 314B(4).

(2) Where the threat, be it even verbal, contains an order, or imposes a condition, the offender shall, on conviction, be liable to the punishment prescribed in sub-article (1), provided that such fine (multa) shall not exceed ten thousand euro (€10,000).

(3) Moreover, the offender shall be required to find a surety, or to enter into a recognizance as provided in articles 383, 384 and 385.

Art. 249, *Criminal Code*

The objective component of the offence pertains to **the act of making threats**. Art. 249 (1) underlines that threats must be communicated **in writing** and **explicitly indicate the offender's intention to commit a crime** against the victim. It is essential to note that the **threat must be directed specifically at the victim and CANNOT be a general threat of wrongdoing**. Verbal threats fall under this provision only if they contain a **command** or impose a **condition**.

CASE LAW: ***Stella Bugeja v. Rosina Bugeja***

This case contended that there must be a **deliberate** and **conscious intent** behind the act of making threats. In Art. 249 (1), this intent is manifested through **writing**, while in Art. 249 (2), it is through **speech**. The courts have established that threats wherein the offender promises to carry out an action contingent upon a condition within the victim's control are deemed unlawful.

CASE LAW: ***Caterina Galea v. Carmelo Carabott***

The court here ruled that **threats directed towards a consequence beyond the victim's control do NOT constitute the offence of threats**.

Private Violence

(1) Whosoever shall use violence, including moral and, or, psychological violence, and, or coercion, in order to compel another person to do, suffer or omit anything or to diminish such other person's abilities or to isolate that person, or to restrict access to money, education or employment shall, on conviction, be liable to the punishment laid down in sub-article (1) of the last preceding article.

(2) Where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) of the last preceding article.

(3) Whosoever shall cause another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be liable to the punishments prescribed in sub-article (1) decreased by one to two degrees:
Provided that where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) decreased by one to two degrees.

Art. 251, *Criminal Code*

Violence, within the context of **compelling the passive subject to act in a specific manner**, encompasses various forms of conduct capable of achieving coercion.

CASE LAW: *Il-Pulizija v. Jean Claude Cassar*

This case underlined that private violence constitutes both physical acts of coercion, and moral acts as well – such as threats.

Regarding the ***mens rea*** in cases of private violence, the offence necessitates a **specific intent to achieve the desired outcome through unlawful means**. In other words, the perpetrator must knowingly and deliberately seek to attain their objective through coercive measures.

Blackmail

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

(2) Where by such threat the offender shall have attained his end, he shall be liable to imprisonment for a term from eighteen months to five years.

Art. 250, *Criminal Code*

This particular instance constitutes a distinct form of private violence as it involves using **coercion to compel the victim to undertake a specific action**. In this case, the coercion revolves around the **threat of accusing**, **defaming**, or **lodging a complaint against the passive subject**.

CASE LAW: *Il-Pulizija v. Jean Claude Cassar*

"The crime contemplated in Art. 250(2) is **instantaneous** not continuing or continuous but since its effects being the fear of the complaint **can and generally protrude at length**, it is **susceptible to be repeated and can partake of a continuing or continuous nature** since the extortion would not need to be consummated each and every time by means of an explicit and formal threat. This is because the victim of the crime, once influenced, i.e., once intimated, would be willing to concede to any request which would again be made by the agent provided that such subsequent requests be made with the same criminal intent."

CASE LAW: *R. v. Geraldu Cassar*

""*or to make any gain*" derives from the concept of "***o di fare altro lucro***". 'Lucro' is defined as '***guadanio***' which refers to gain. The word connotes **material aspects** and material matters. It **does NOT connote personal or moral satisfaction**.

CASE LAW: *Il-Pulizija v. Edgar Apap*

"The word "gain" refers to **something which has patrimonial value** and **NOT to any gain or pleasure or satisfaction which has no pecuniary value**. If the intent of the agent was **mere personal satisfaction**, the constitutive element of the crime would be **lacking**, yet the legal provision was amended by virtue of **Act III of 2002** by means of **which blackmail can be committed for any objective**, **scope**, or **end**, and *not only* patrimonial, pecuniary gain. Thus, the **criminal intent behind the blackmail or the threat is that the agent compels the victim to do something which he would otherwise not have done by means of threats to the effect that something will happen to the victim**.

CASE LAW: *Il-Pulizija v. Ashraf el Bakri*

"For the crime to subsist, it is **NOT necessary to prove that the agent wanted to make pecuniary (patrimonial) gain** because the crime subsist **irrespective of the end**, **scope** and **objective** which the agent wanted to achieve by means of his conduct. This is so, provided all the other elements of the crime be proved. To achieve such end or scope or objective, the **agent must have threatened the victim and the threat must be a threat to accuse or to make a complaint against or to defame such person or another person**."

Harassment

(1) A person who:

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

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

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

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

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

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

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

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

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

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

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

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

Art. 251A, *Criminal Code*

When viewing this article, one notices that **Art. 251A (3)** contains three **defences**.

CASE LAW: ***Il-Pulizija v. Giuseppe Axiaq***

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

CASE LAW: ***Il-Pulizija v. Joseph Micallef*** – Art. 251A (3)(c)

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

CASE LAW: ***Il-Pulizija v. Massimo Tivisini***

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

Although as submitted by the appellant, the term harassment was defined by **Black's Law Dictionary** as follows "***words, conduct or action (repeated or persistent) that being directed at a specific person annoy, alarm or cause substantial emotional distress in that person and serve no legitimate purpose***;" the repetition and persistence must not be considered in isolation and with reference only to the facts of this case but **must also be considered in the light of the previous behaviour of the appellan**t.

In fact, as stated by the COCA in '***Il-Pulizija v. Allan Carabez***', "**in such cases the background to every incident is vital for the Court to be able to pick out and extract the isolated incident from the habitual and repeated behaviour over a period of time**."

Within this context, the **criterion of persistence and repetition** is amply proven.

The Court considered that the crime of harassment was introduced for the first time within our Criminal Code by means of **Act XX of 2005**. Thus, Art. 215A creates the crime by means of which a person pursues a mode of conduct which amounts to harassment of another person which he knows or ought to know that such conduct amounts to harassment of another person. This crime was reflected within the fourth charge.

In Art. 215A (2), the law adds that for the purpose of this article, the person whose course of conduct is in question **ought to know that it amounts to harassment of another person if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other person**.

It is a **defence** for a person charged with an offence under this article to show that his course of conduct was pursued for the purpose of **preventing** or **detecting crime** or his course of conduct was pursued under any **enactment**, **regulation** or **rule** or to comply with any condition or requirement imposed by any person under any enactment, or else in the particular circumstances, the pursuit of the course of conduct was reasonable.

Art. 251C provides that references to harassing a person include **alarming the person or causing the person distress**. Besides Art. 251C's reference to alarming the person, or causing the person distress, **our law does not define the generic term 'harassment'**. Whereas the lack of a specific detailed and exhaustive definition permits the exercise of the judge's discretion as to what constitutes harassment, it could on the other hand, create doubts on the application of Criminal Law in relation to such crimes which emanate directly from complex and delicate interpersonal relations.

In foreign jurisdictions, it was established that one of the forms amounting to harassment is following or rather **stalking** [in our law, stalking is more associated with committing **harassment without disclosing your identity**].

There are also **intimacy seekers** who attempt to create an intimate and passion relationship with the victims. **Erotomaniac stalkers** believe that the victim loves them and interprets the victim's actions, words and behaviour as conducive to that love. Another type of stalker is the **incompetent suitor** who is unable to approach the victim socially, possibly as a result of being too shy or for fear of rejection but who anyway expects to have an intimate relationship with the victims. Finally, there are **predatory stalkers** who observe the victim's incessantly and plan a sexual attack.

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

CASE LAW: *Il-Pulizija v. Simon Azzopardi*

In this instance, the Court provided an **exhaustive definition of harassment** within the confines of the law. The Court clarified that **actions occurring within the context of a SINGLE incident cannot constitute the offence** outlined in Art. 251B. This offence is modelled after **Art. 4(1) of the 1997 UK Protection from Harassment Act**. The inclusion of the phrase "on each of those occasions" indicates that the **material act cannot occur in just one instance**; rather, there must be **at least two occasions**, mirroring the wording of English law with "*on at least two occasions*." Strangely, in the Court's view, the Maltese text omitted the crucial phrase "on at least two occasions" without apparent logical or common-sense reasoning.

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

CASE LAW: *Il-Pulizija v. Julian Cesare*

"According to the second sub-article of the legal provision which introduced the crime of harassment, the **Maltese legislator applied an objective test of the reasonable man whereby a person acting in a dubious manner should know whether his or her conduct amounts to harassment or otherwise**. If a reasonable man who possesses the same information considers such conduct as harassment, the crime would subsist. The objective test of the reasonable man is confirmed jurisprudentially."

Causing Others To Fear That Violence Will Be Used Against Them

(1) A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions, and shall be liable to the punishment of imprisonment for a term from one to two years or to a fine (multa) of not less than six thousand and five hundred euro (€6,500) and not more than fifteen thousand euro (€15,000), or to both such fine and imprisonment.

(2) For the purpose of this article, the person whose course of conduct is in question ought to know that it will cause another person to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

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

(a) his course of conduct was pursued in the circumstances mentioned in article 251A(3)(a) or (b); or

(b) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

Art. 251B, *Criminal Code*

Initially, the absence of the phrase "*on at least two occasions*" in the law might suggest that the legislator did not intend to require a course of conduct to prove the offence. However, the judgement below outlined the following:

CASE LAW: ***Il-Pulizija v. Brian Micallef***

The requirement for the causation of fear on each occasion contradicts the interpretation that 'the phrase "*on at least two occasions*" in the law might suggest that the legislator did not intend to require a course of conduct to prove the offence', thus indicating that **this offence also necessitates a course of conduct similar to that outlined in Art. 251A**.

CASE LAW: ***Il-Pulizija v. Horass Caruana***

This course of conduct must induce fear in the passive subject that violence will be used against **them**, their **property**, or **certain individuals** mentioned in Art. 222(1). Importantly, this fear must be **actual**, **NOT merely probable**.

Additionally, Art. 251B pertains to **fear of future violence**.

CASE LAW: ***Il-Pulizija v. Usef Imbarrek***
This case outlined taht if the threatened violence has already occurred, then the offence in question cannot apply.

Mens Rea

The *mens rea* for this offence resembles that of harassment, with the distinction that the **offender knows or should know that their conduct will induce the fear specified by the law**. The **reasonable man test**, an objective standard, is employed by the courts to assess this.

CASE LAW: ***Il-Pulizija v. David Caruana Smith***
The must be a **causal link between the offender's actions and the fear experienced** by the victim.

CASE LAW: ***Il-Pulizija v. Nikola Farrugia***
The **attempted** form of this offence is viable **if the offender engages in conduct aimed at instilling fear of violence but fails to achieve this outcome**. In such cases, the attempted offense still applies.

Contraventions

Not all offences outlined in **Art. 338**, **339**, and **340** of the Criminal Code are adjudicated by the Courts of Magistrates in Malta or Gozo. A recent Amendment, **LN 82 of 2022**, has expanded the jurisdiction of the Commissioners for Justice under **Cap. 291**. Consequently, certain offences previously under the purview of the Courts of Magistrates are now within the jurisdiction of the **Commissioners for Justice**.

These offences, referred to as **Scheduled Offences** as per **Art. 2 of Cap. 291**, include specific sub-articles of Art. 338, 339, and 340. They are no longer tried by the Courts of Magistrates but are now heard and adjudicated by the Commissioners for Justice. Other offences, such as those related to the Litter Act and Education Act, are also within the remit of the Commissioners for Justice. Contraventions not listed in the schedule remain under the jurisdiction of the Courts of Magistrates.

Ultimately, this Amendment aims to **alleviate the workload of the Courts of Magistrates**, recognising that contraventions are minor offences. The specific **tribunal** outlined in the schedule annexed to Cap. 291 hears these contraventions.

Punishment

The penalties for contraventions tried by the Courts of Magistrates in Malta or Gozo as a court of criminal judicature differ from those tried by the Commissioner for Justice.

For contraventions tried by the Courts of Magistrates, **Art. 7(2) of the Criminal Code** dictates the applicable punishment. Conversely, for scheduled offenses heard and tried by the Commissioner for Justice, **Art. 10 (2) of Cap. 291** outlines the penalties. Notably, a **Commissioner for Justice is NOT authorised to impose a period of detention as a punishment**, as it would restrict personal liberty. Instead, they may impose a fine (*multa* or *ammenda*) with a penalty of **€11.65** if the fine is not paid **within 1 month from the final decision of the case**.

Prescription

According to **Art. 12 (1) of Cap. 291**, both contraventions heard and tried by the Commissioners for Justice and those heard and tried by the Courts of Magistrates have a **prescriptive period of 3 months**, as outlined in **Art. 688 (1)(f) of the Criminal Code**. This provision sets a 3-month time limit for the prosecution of contraventions.

However, there is one **exception** to this 3-month prescriptive period, which applies to the contravention specified in **Art. 338 (z) of the Criminal Code**, concerning **maintenance** or **alimony**. In this case, the criminal action is barred after **6 months** have elapsed.

The Forfeiture of the Corpus Delicti

According to **Art. 23 (2) of the Criminal Code**, forfeiture of the *corpus delicti* in contravention cases **only occurs in instances explicitly stated by law**. However, **Art. 10 (2) of Cap. 291** grants the **Commissioner the authority to order the forfeiture of any object utilised in the commission of the offence**.

> **It shall be lawful to seize and confiscate** –
>
> (b) the **ladders**, **iron bars**, **weapons** and **instruments mentioned in Art. 338 (p)**;
>
> (c) **any money found on any person committing an offence under Art. 338 (ii)**.
>
> **Art. 344**, *Criminal Code*

Furthermore, the **Registrar of the Tribunal** is mandated to promptly inform the authorities in writing of any forfeiture, revocation, or suspension of a license ordered by a Commissioner for Justice and to provide them with a certified copy of the judgment.

In cases of contraventions, whether under Cap. 291 or adjudicated by the Courts of Magistrates, **forfeiture of the *corpus delicti* is NOT automatic**. It is only applicable in circumstances explicitly prescribed by law. For instance, in cases involving armed robbery with the use of a firearm or drug-related offenses, the court may order the forfeiture of the relevant object. However, for contraventions, such as over speeding, the court is not likely to order the forfeiture of a vehicle. Therefore, in minor offense cases like contraventions, Art. 23 (2) is **only invoked when the law expressly provides for forfeiture**.

Concurrent Offences & Punishments

Art. 17 of the Criminal Code addresses how punishment is determined in cases of concurrent offenses. Specifically for contraventions, the relevant provisions are found in **Art. 17 (c) and (d)**, outlining the procedure for calculating the punishment. This aspect involves technical considerations to ensure appropriate sentencing in such cases.

Art. 338 – Of Contraventions Affecting Public Order

Some of these contraventions have been in existence for many years, dating back to the promulgation of the Criminal Code. However, certain contraventions, such as **Art. 338(a)**, are **rarely enforced** and remain on the books.

These contraventions can also intersect with other offences, as seen in sub-article (f), which pertains to school licensing under specific *ad hoc laws*. For instance, sub-article (g) outlines a scenario wherein refusing to provide identification or personal details to a public service warden entrusted with such responsibilities constitutes a contravention. These examples illustrate how **contraventions cover a range of behaviours and may intersect with other legal contexts**.

When so ordered by a court or so bound by contract fails to give to a person the sum fixed by that court or laid down in the contract as maintenance for that person, within fifteen days from the day on which, according to such order or contract, such sum should be paid:

Provided that, notwithstanding any other provision of this Code, the criminal action for an offence under this paragraph is barred by the lapse of six months:

Provided further that where the offender is a recidivist in a contravention under this paragraph the offender shall be liable to the punishment of detention not exceeding three months or a fine (multa) not exceeding two hundred euro (€200) or imprisonment for a term not exceeding two (2) months.

Art. 338 (z), *Criminal Code*

Sub-article (z) addresses an **instantaneous offence** related to **failure to pay a specified sum within a stipulated timeframe**. In practical terms, this offence occurs when the accused neglects to pay an amount determined by either a **court order** or a **contractual agreement** within **15 days of the due date**.

In the context of this provision, an order of the court refers either to a decree issued ***pendente lite***, or upon **final judgment**. Similarly, in the case of a contractual agreement between parties, the contract is validated by the court before being signed before a notary.

To establish a case under this provision, the **prosecution** must prove 2 key elements:

1. That a **court order** or **contractual agreement mandated the accused to pay maintenance** to their dependents.
2. That the **accused failed to make the payment within 15 days of the due date** specified in the order or contract.

It is essential to note that **the failure to pay maintenance must be voluntary**. The burden of proof falls on the accused to demonstrate, on a balance of probabilities, that the court order or contract was revoked, altered, or declared null and void, thereby relieving them of the obligation to pay maintenance.

CASE LAW: *Il-Pulizija v. Donald Gilford*

"Fil-kamp kriminali biex tirrizulta l-htija ta' natura kontravenzjonali taht l-imputazzjoni bhal dik dedotta kontra l-appellant bizzejjed li jigi pruvat il-fatt tal-ordni tal-Qorti kompetenti li tordna l-hlas tal- manteniment - u normalment dan isir bl-esebizzjoni ta'kopja legali tad- Digriet relattiv - u li l-akkuzat ikun naqas li jhallas l-ammont li jkun ordnat li jhallas mill-Qorti kompetenti fil-periodu imsemmi fil- komparixxi u - trattandosi ta' reat kontravvenzjonali - li dan ikun sar volontarjament . Mill-bqija konsiderazzjonijiet ohra jistghu biss u f ' certi kazijiet jittiehdu in konsiderazzjoini ghall-fini tal- applikazzjoni tal-piena , fejn il-Qorti ghandha diskrezzjoni li tapplika piena karcerarja ta' detenzjoni jew ammenda , jew addirittura, kif sar f' dan il-kaz , gie applikat l-art. 9 u 11 tal-Kap.152 , b' mod li l- appellant gie liberat taht provvediment li ma jaghmilx reat iehor fi zmien sitt xhur u ordnat ihallas il- manteniment minnu dovut fl-ammont ta' LM135 ghall-hames gimghat imsemmija fil-komparixxi."

CASE LAW: ***Il-Pulizija v. Publius Said***

The aim of Art. 338 (z) is to **put pressure on the persons who are reluctant to pay maintenance** due by them to their dependants.

Thus, **failure to pay maintenance constitutes a breach of the relevant court order**, as the offender fails to adhere to a directive from the court to provide maintenance. Moreover, this is attributed to the fact that this offence is deemed a **contravention against public order**.

CASE LAW: ***Il-Pulizija v. Carmel Pace***

The offence described in Art. 338 (z) is categorised as an **offence against public order**. It is noteworthy that criminal proceedings are initiated ***ex officio***.

The court also emphasised that it is the **responsibility of the individual obligated to provide maintenance to ensure timely payment to the other party**.

CASE LAW: ***Il-Pulizija v. Raymond Cutajar***

"Ordni għall-ħlas tal-manteniment kontenut f'digriet mogħti mis-Sekond Awla' jew f'kuntratt bonarju jibqa' validu għall-fini u effetti kollha tal-artikolu 338(z). Kemm il-darba ma jkunx jirrużulta li dak id-digriet jew kuntratt ġie espressament revokat jew altrumenti mibdul mis-Sekond Awla'. U salv il-prova tar-rikonċiljazzjoni jew ta' dikjarazzjoni ta' Qorti oħra kompetenti li dak id-digriet jew dan l- ordni kien null."

If the accused experiences changes in circumstances, such as **illness** or **financial difficulties**, this **does NOT absolve them from the obligation to pay maintenance**. Even if the accused loses their job, they are still required to fulfil their maintenance obligations. However, they can **petition the Family Court to modify the decree or contract** due to these changed circumstances. It is essential to note that the accused **cannot unilaterally decide to stop paying maintenance**; they must obtain authorisation from the court.

CASE LAW: ***Il-Pulizija v. Alfred Camilleri***

"Illi apparti din il-konsiderazzjoni ta' fatt , kif gie ritenut minn din l-Onorabbli Qorti diversament preseduta , (Appell Krim. Pul. vs. Anthony Saliba; 15.7.1998) il-fatt li persuna tisfa' bla xoghol ma jiskuzahiex mill-obbligu taghha li twettaq id-Digriet tas-Sekond' Awla tal-Qorti Civili , obbligu sancit bir-reat ta' natura kontravenzjonali li tahtu hu akkuzat l- appellant . Ir-rimedju li ghandu u li kellu l-appellant kien li jadixxi tempestivament u fi zmien utili lill-Qorti Civili kompetenti biex din , wara li tiehu konjizzjoni tal- provi , tipprovdi billi se mai timmodifika l-ordni dwar il-manteniment . U biss wara li jottjeni tali modifika , li jkun jista' jhallas inqas jekk ikun il-kaz. Sakemm dan isir , jibqa' marbut bl-obbligu tal-hlas skond l- ewwel Digriet ."

CASE LAW: *Il-Pulizija v. Jacqueline Zammit*

The Court emphasised that **any order issued by the court must be strictly adhered to**. **Failing to comply with the court's order would imply that the criminal court is acting as an appellate court**, attempting to modify the original decree issued by the civil court.

The Defence of Impossibility

CASE LAW: *Il-Pulizija v. Alfred Camilleri*

The defence of impossibility, such as losing one's job, **CANNOT generally absolve the accused of their obligation to pay maintenance or alimony**.

However, in practice, if the accused pays the maintenance owed**, the court may consider varying the punishment imposed**. It is important to note that for a variation in punishment to occur, **there must be a change in circumstances**, specifically the payment of maintenance or alimony by the accused. The aim of the legislator is to **incentivise compliance with maintenance obligations rather than imprisonment**.

CASE LAW: *Il-Pulizija v. Simon Desira*

Paying the owed amount, whether during an appeal or before the Court of Magistrates, **does not absolve the accused of criminal liability** but may result in a **more lenient punishment**. The focus of the legislator is for the accused to comply with the court's order or contractual obligation to pay maintenance, thereby achieving the legislative goal.

As per the **first proviso** to Art. 338 (z), **contraventions have a prescriptive period of 3 months**, **even under Cap. 291**. However, in the case of this particular article, there is an exception, extending the prescriptive period to 6 months. This **6-month period** begins **after the initial 15-day grace period has elapsed**, thus starting from the 16th day.

As per the **second proviso** to Art. 338 (z), the offender has to be a **recidivist in a contravention** under the provision under the microscope, meaning that this notion **pertains ONLY to maintenance**.

Art. 338 (dd)

"…in any manner not otherwise provided for in this Code, **wilfully disturbs the public good order or the public peace**."

Art. 338 (dd), *Criminal Code*

CASE LAW: *Il-Pulizija v. Paul Busuttil*

The Court established that this offence occurs **when there is a breach of the peace**, a concept akin to what **English law refers to as 'disturbing the peace'**. The essence of the offence lies in **causing alarm in the community**.

Alarm here does not necessarily imply personal fear but rather **a concern that allowing the behaviour to continue could disrupt social harmony**. Whether a specific act constitutes such a disturbance depends on the particular circumstances of the case and must be assessed on a case-by-case basis.

CASE LAW: *Il-Pulizija v. Joseph Spiteri*

The Court emphasised that to determine whether there has been a breach of public order, **one must assess whether the actions of the accused have created any psychological disturbance or agitation**. In the context of this contravention, it is essential to evaluate whether, given the prevailing circumstances, the actions of the accused, technically constituting a breach of the peace, were **unavoidable**.

CASE LAW: *Il-Pulizija v. Monica Polidano*

Here, it was delineated that **it is crucial to assess whether the actions of the accused were inevitable**. For instance, if a person is being assaulted and defends themselves, their actions, although technically constituting a breach of public peace, are deemed inevitable given the circumstances.

CASE LAW: *Il-Pulizija v. Maria Concetta Green*

The Court emphasised that **merely engaging in a verbal exchange**, even if the words exchanged are injurious, **does NOT necessarily constitute a breach of peace as required by Art. 338 (dd).** This assessment underscores the importance of evaluating the specific circumstances surrounding the alleged breach of peace in determining culpability.

Art. 338 (ee)

"…disobeys the lawful orders of any authority or of any person entrusted with a public service, or hinders or obstructs such person in the exercise of his duties, or otherwise unduly interferes with the exercise of such duties, either by preventing other persons from doing what they are lawfully enjoined or allowed to do, or frustrating or undoing what has been lawfully done by other persons, or in any other manner whatsoever, unless such disobedience or interference falls under any other provision of this Code or of any other law."

Art. 338 (ee), *Criminal Code*

Typically, this contravention is associated with Art. 95 and 96.

CASE LAW: *Il-Pulizija v. Mario Victoria sive Marvic Attard*

The Court established that **a lawful order issued by the police or any other authority must be promptly obeyed without delay**. An order is considered legitimate if it appears to be legally valid on its face, meaning its contents and form are *prima facie* legal.

However, if an individual initially refuses to comply with a lawful order but **subsequently obeys it**, this **does NOT constitute criminal liability under this article**.

Art. 338 (ll)

"…when ordered by a court or bound by contract to allow access to a child in his or her custody, refuses without just cause to give such access."

Art. 338 (ll), *Criminal Code*

This is the contravention dealing with **access** and **access visits**.

Access may be regulated:

1. By means of a **court judgement**.
2. By means of a **court decree** issued *pendente lite*.
3. By means of a **contract agreed between the parents of the child or children**.

CASE LAW: *Il-Pulizija v. Etienne Mizzi*

The Court clarified that Art. 338 (ll) addresses the **refusal**, ***without just cause***, **to grant access to the other party**, rather than the failure to observe a condition imposed in a court decree.

CASE LAW: ***Il-Pulizija v. Natasha Theuma***

The Court determined that the term "give access" imposes **a positive obligation on the party ordered by the court or contract to physically deliver the child to the other parent.** This obligation **remains even if the child expresses reluctance or resistance to the visit**.

CASE LAW: ***Il-Pulizija v. Carmen Tabone Reale***

The Court differentiated the term "just cause" from "proper cause," emphasising that **"just cause" encompasses broader considerations, including the interests of all parties involved**.

CASE LAW: ***Il-Pulizija v. AB [14/05/2008]***

The Court underscored that **unless a court order is formally varied through a decree or judgment, it must be strictly adhered to**. The obligation to comply with court orders is paramount, and the concept of "just cause" should be objectively assessed, considering the welfare of all parties concerned. It clarified that mere reluctance on the part of the child to attend access visits does not constitute "just cause" for non-compliance.

The obligation to grant access must be effectively fulfilled, requiring the parent responsible for providing access to take all necessary steps to ensure the child attends the visits. For instance, if the parent brings the child to the access visits and the child expresses reluctance, crying, and refusing to go, the parent must actively persuade the child to attend. Failure to do so can lead to culpability under this article of the law. Persuasive measures might involve explaining to the child the importance of attending the visits and even informing them of potential legal consequences, such as the parent facing charges and imprisonment if access is denied.

CASE LAW: ***Il-Pulizija v. Gertrude Zammit***

The Court emphasised that **merely sending the child to access visits does not constitute effective access if the child does not attend the visits**. The parent responsible for granting access must employ persuasive measures to ensure the child's attendance.

CASE LAW: ***Il-Pulizija v. Michael John Rees***

The accused was initially found guilty by the Court of Magistrates for failing to grant access to the other parent. However, upon appeal, it was revealed that **despite the accused's earnest efforts, the child adamantly refused to attend the visits**. Even the involvement of court officials and extensive persuasion proved ineffective. In light of these circumstances, the **Court of Appeal overturned the first judgment**, acknowledging that the **accused had diligently fulfilled his obligation to facilitate access as ordered by the Court**. The Court also recognised that the **failure of access was due to a just cause**, absolving the accused of guilt.

Art. 339 – Of Contraventions Against The Person

In the case of these sub-articles, one requires a formal complaint of the injured party for the institution of these proceedings (***kwerela***). Thus, proceedings are NOT instituted *ex officio* in this regard.

Art. 340 – Of Contraventions Against Property

Every person is guilty of a contravention against property who –

(d) commits any other violation of another person's property, to the prejudice of the owner or holder thereof, not specified in the preceding paragraphs of this article, nor otherwise provided for in this Code.

Art. 340 (d), *Criminal Code*

CASE LAW: *Il-Pulizija v. Carmelo Galea*

The Court clarified that **Art. 340 (d) does NOT pertain to situations where a spouse**, who is the **property owner**, **denies access to the matrimonial home**. Instead, it **encompasses scenarios involving the unauthorised entry into another person's property, thereby violating their privacy**.

CASE LAW: *Il-Pulizija v. Emmanuel Vella*

The Court emphasised that the harm or prejudice referred to in this article occurs **whenever the owner or holder of the property suffers any form of prejudice**, regardless of whether it can be quantified monetarily or involves physical damage.

It is also important to note that **this provision addresses behaviours not covered by other sections of the law**, as indicated by its language "*not specified in the preceding paragraphs of this article, nor otherwise provided for in this Code*."

CASE LAW: *Il-Pulizija v. Charles Gauci*

This case elucidated that **individuals found guilty under other provisions of the Criminal Code CANNOT simultaneously be found guilty under Art. 340 (d)**.

CASE LAW: *Il-Pulizija v. Michael Spiteri*

The Court held that the appellant was found **guilty of *ragion fattasi***. Therefore, the mentioned appellant **COULT NOT be found guilty in terms of Art. 340 (d)**.

Punishments for Contraventions

In any case in which the punishments established for contraventions are to be applied, **the court may**, according to circumstances, **apply such punishments**, either **severally** or **cumulatively**.

Art. 341, *Criminal Code*

In respect of the contravention under article 338(bb), where the act consists in uttering **blasphemous words** or **expressions**, the **minimum punishment** to be awarded shall in no case be less than a fine (ammenda) of eleven euro and sixty-five cents (**€11.65**) and the maximum punishment may be imprisonment for a term of 4 months - saving always the provisions of Title IV of Part II of Book First.

Art. 341, *Criminal Code*