

CRL2007 SUBSTANTIVE CRIMINAL LAW 2



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MALTA

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ACKNOWLEDGMENTS

ELSA Malta President: Timothy Mifsud

ELSA Malta Secretary General: Lucia Zammit
Lewis

Treasurer: Nirvana Thewma

Writer: Harry Thake

SUBSTANTIVE CRIMINAL LAW II

Second Year

Written by

HARRY THAKE

Bachelor of Laws (Honours)

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Sexual Offences: Article 198-209

These offences have *seen major changes* in the last few years primarily due to Malta's international obligations. For example;

Act 31 of 2007

This focuses on the protection of minors.

This Act introduced Art. **204A, 204B, and 204C**. 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 4 of 2014

This led to an **increase in punishment for offences against minors**.

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 13 of 2018

This **repealed the Domestic Violence Act**, introduced **the Gender Based Violence Act**, and completely **redefined rape**. Article 198 – **Abduction** – Article 199 – and **participation in sexual activities** – Article 204C. It also **introduced new offences, such as the sexual harassment** – Article 251A, it amended the offence of defilement of minors – Article 203. It increased penalties relating to sexual offences and the purpose of this Act essentially was to implement the council of Europe Convention on preventing and combatting violence against women and domestic violence which is commonly referred to as the Istanbul Convention.

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.

Act 64 of 2021.

Essentially, this act further redefined the offence of rape by clarifying and categorizing certain activities as falling under Article 198 (rape). It also introduced the concept of *rape by means of objects*, with the use of objects without consent being categorized as rape.

The Istanbul Convention.

As the name suggests, this convention is a Council of Europe Convention. It is an instrument implemented by the Council of Europe.

The Council of Europe is not the European Council. The Council of Europe is an international organization distinct from the European Union. In contrast, the European Council is an important organ within the European Union. The Council of Europe is a completely separate institution. Its main purpose is to **uphold and enforce the European Convention on Human Rights**.

The Istanbul Convention was signed in Istanbul on 11th May 2011. This convention essentially seeks to **protect women against all forms of violence** and to prevent, prosecute, and eliminate violence against women and domestic violence. It aims to design a comprehensive framework, policies, and measures for the *protection of and assistance to all victims of violence against women and domestic violence*. 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.

Additionally, it seeks to establish a specific **monitoring mechanism** to ensure the proper implementation and adoption of the standards and requisites outlined in the Istanbul Convention.

The Istanbul Convention Therefore Has Three Major Areas:

1. The most basic is to **protect women against all forms of violence** and to prevent, prosecute, prevent and eliminate such cases of violence.
2. Beyond protection, it also seeks to **design a comprehensive framework** that includes policies, standards, and procedural systems **to further prevent violence against women and domestic violence**.
3. It also aims to **establish monitoring mechanisms** for the proper implementation and adoption of the standards.

The Istanbul Convention does not just create offences; **it also establishes a framework within which these offences are avoided and prevented through specific measures**. Additionally, it introduces a monitoring mechanism.

As mentioned, one of the main pillars of the Istanbul Convention is the prevention of these acts from occurring. It is ineffective to merely create an offence and then wait for people to commit it before taking action.

How Does It Achieve This?

The convention (1) **enforces member states to regularly run awareness campaigns**. The aim is to *reduce such criminal offences*. Rather than being a strictly criminal matter, the focus is on preventing criminal offences from occurring in the first place.

The Istanbul Convention also imposes an obligation on member states (2) **to train professionals who are in close contact with victims**, particularly in the psychological field. This is crucial because a person who has suffered a single physical offence, such as rape, *may relive the trauma multiple times*.

In What Sense?

A victim who is deeply distressed and shocked by what happened to him/her, may experience the same emotions when recounting the incident in court. Even if years have passed, recalling the event can trigger those same feelings. Training professionals to help victims overcome these mental traumas is one way to address the psychological impact and trauma of such offences.

Additionally, the convention also (3) **focuses on sex offenders**. Some sexual offences may be committed by individuals who require **help**, such as those who were *intoxicated* at the time or those who were *abused when they were young*. The Istanbul Convention seeks to address this by working to reduce the problem among this specific group of offenders. It urges member states to **establish treatment programs** and offer support to sex offenders as part of a broader effort to prevent further crimes.

To monitor the implementation of the Istanbul Convention on an international level, the Council of Europe set up an institution within itself called **GREVIO**. Its main purpose is to evaluate, on the ground, how the Istanbul Convention is being implemented and to report its findings back to the member state.

How Does It Work?

GREVIO, as an institution within the Council of Europe, is responsible for ensuring the implementation of the Istanbul Convention. It does this by **sending members to the country under scrutiny and examination**. These members assess the laws in place and hold meetings with a variety of stakeholders, such as the police, prosecutors, Victim Support Units (e.g., Appoġġ), and NGOs. This approach ensures a comprehensive evaluation of the Istanbul Convention's implementation from multiple perspectives.

Once GREVIO compiles its report, it presents it to the Government of Malta. The government is then **politically obliged to make the amendments** suggested in the report. GREVIO issues its report once every three years.

Malta has signed this convention on the 21st May 2012, it ratified it on the 29th July 2014, and it was brought into force on the 14th May 2018 by Legal Notice 154 of 2018.

***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 consent 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.***

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 commencement, 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

That is the version of the offence of Rape following the major amendments of Act 13 of 2018. This is worthy to note because traditionally, thus **pre-2018, rape had to satisfy two elements**:

1. Violence
2. Carnal Knowledge.

Violence

Act 13 of 2018 replaced the element of violence with the element of **consent**.

The offence of rape has existed in the **Criminal Code** since its implementation, spanning hundreds of years. The concept of violence was therefore an **integral part of the definition of the offence of rape** from the very inception of the Criminal Code.

However, over the years, Maltese courts **expanded** the interpretation and concept of **violence** to also include the element of **consent**. Through various judgments, the courts began interpreting violence to cover situations where:

- The **victim had not consented** to the act,
- Consent was **obtained fraudulently**, or
- Consent was **vitiated** by other factors and elements.

The concepts of consent developed by case law are still applicable today where we have the lack of consent. The old version's interpretation of **violence** still applies **to a certain extent** in today's version, where the key element is now **lack of consent**.

The element of violence and therefore, of non-consent, could be **real** or **presumed**, it could be **physical** or **moral**.

Pulizija V. Mark Taljana decided by the Court of Magistrates 7th December 2001

The court quoted from the Italian jurist **Maino** where he stated: the characteristic examination of this offence (rape) essentially, is '*to determine whether the carnal connection happening **against the victim's will** and **against what the victim could have done given his/her moral capabilities.***'

This judgment also clarified an important **legal interpretation** regarding **carnal connection**:

- Where the law **intended to specify penetration**, it would have done so explicitly.
- **Carnal connection** implies a situation where **two bodies touch**.

From Maino's definition of rape we can extrapolate the following points:

1. such connection happened **against the victims will**
2. what the victim could have done **given his or her mental state**

Everything else boils down to the circumstances of each and every case in order to establish whether the offence of rape subsisted

The Traditional Element of Violence

Another key aspect of the traditional violence requirement was that violence had to be present at the commencement of the act—meaning at the very beginning of the offence.

If the act was initiated **voluntarily** by both parties but later developed into a violent act (e.g., due to the induction of some fetish), that **violence would not have satisfied** the element required for the offence of rape. Instead, it could have resulted in a **different offence**, such as **bodily harm**, meaning it would not go unpunished, but it would not be classified as rape.

This theory caused major problems in cases where the victim **initially consented to a certain level of activity**, but when the act escalated and the victim **no longer felt comfortable**, it became extremely difficult—if not impossible—to legally classify the act as rape.

Signs of violence on the victim, like internal scratching or bruising in the vaginal canal would subsequently be argued by the prosecution as happening at the beginning of the sexual act whilst the defence to extinguish the plea of rape would argue that they had in fact not happened at the start of the sexual act.

Determining **when** the violence occurred posed **serious difficulties** for the courts in establishing **what exactly happened** and whether the act constituted **rape** under the traditional legal framework.

M.C. vs Bulgaria (4th December 2003)

In this landmark case, the European Court of Human Rights (ECtHR) **harshly criticized** jurisdictions that considered **violence** as a **key element** in the offence of **rape**.

In Paragraph 166 of the judgment, the court ruled that:

When a legal system adopts a **rigid regime**, such as the **necessity of proving violence**, there is a **serious risk that certain acts** which **should be classified as rape** would be **left out** and may go **unpunished**.

It Was Stated: "In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".

Shift from Violence to Consent – The Impact of the Istanbul Convention

Following this decision, the **Istanbul Convention** played a pivotal role in changing how rape was legally defined.

As previously mentioned, the Maltese government completely **removed the element of violence** from the offence of rape and replaced it with consent—or, more precisely, **lack of consent**—as the determining factor.

Today's Legal Position:

The **lack of consent** is now a key element in the offence of rape. If we had examine **Art. 198** of the **Criminal Code** this states "*whosoever shall engage in non-consensual carnal connection...*".

N.B As a side note, our legislator is very precise with words. Each and every **word, comma, fullstop** in the article of the law is there for a purpose and **reason**.

Breaking Down the Key Terms in Article 198.

"Whosoever"

- This means that **anyone** can commit the offence.
- It applies to male or female, foreign or Maltese, fat or thin—there are **no restrictions** on **who** the offender can be.
- From the very first word, the law makes it clear that **any person** under the sun can be guilty of this offence against another individual.

"Shall Engage"

What does this denote?

- **It cannot be a crime of omission**—the person must take action.
- The crime must be **voluntary**—if you engage in something, you are actively participating in it and thus long to do it.

- The term **engage excludes negligence**—it requires **intentional** involvement.

The phrase also establishes a connection and a link between:

Mens rea (what I intend to do) and;

Actus reus (what I actually do).

“Carnal Connection”

- This phrase signifies that **some kind of physical connection** must exist **between the agent and the victim**.

All that needed to be determined now was whether there was consent or not. Determining whether violence happened at the beginning or end of rape was also done away with as a whether there was violence or not was rendered a secondary issue to the offence of rape.

It is possible that **violence occurred**, but if there was **consent throughout**, then **no offence** was committed—even if there are physical signs of violence, such as scratches in the vagina. Conversely, even if there is **no physical violence**, but **there was no consent**, then the act **still constitutes rape** as the element of lack of consent would be present.

The English Position at Law:

The English legal framework is **highly relevant** and pertinent to the Maltese legal position on sexual offences. Although the **Istanbul Convention** was only signed in **2011**, the element of **consent** within the offence of rape had already been a **long-standing requirement** in English law.

The ‘**English Sexual Offences Act of 1956**’ had already introduced offences where **lack of consent** from the victim was a **key element** in defining rape and other sexual crimes.

In **Malta**, the element of **lack of consent** was only formally introduced following the **Istanbul Convention**.

However, since English law had already incorporated lack of consent in 1956, **English courts** have developed **extensive jurisprudence** on this requirement. This is why the **English legal position** is significant when interpreting **Maltese law** today.

The English Sexual Offences Act of 2003 took this further by introducing a **statutory definition** of what constitutes ‘*consent*’.

Among the many amendments in the 2003 Act, the **legislator** went a step further by introducing words printed in law, **explicitly defining ‘consent’**. Under **Maltese law**, there is **no such statutory definition** of consent.

However, English law provides a clear legal definition in **Article 74** of the English Sexual Offences Act of 2003, which states: “*A person consents if he agrees, by choice, and has the freedom and capacity to make that choice.*” This definition introduces three elements and tests to determine whether valid consent was given:

1. **The person agrees by choice.** Meaning that consent is something that is *internally initiated*. If you are held at gunpoint for example there is no free choice.
2. **The person has the freedom to make that choice.** Therefore, **the choice must be made in an environment where it is ok to refuse.** And therefore, if the victim feels that with a negative choice with that refusal there might be serious negative consequences, therefore then that choice is not a free one.
3. **The person has the capacity to make that choice.** Here where there is the marriage of the **capacita di intendere** and **the capacita di volere**. 'Volere' is the capacity to will, and 'intendere' is to understand what is happening. Therefore, the capacity to make such a decision **should be free from elements that might influence it such as intoxication, drug abuse, mental illness.**

If someone suffers from any mental disease of the mind, meaning they lack the capacity to make a decision, comprehend what is happening or decide, then any so-called consent is invalid. This is so because the capacity to make a decision should be free.

Lack of Capacity can Arise From:

- **Mental illness** or **cognitive impairment**
- Severe **intoxication** (drugs or alcohol)
- Being in a state of **unconsciousness**
- Being under **undue influence**

English judgements on the capacity to consent:

R vs Benjamin Bree. Decided by the English Court of Appeal (Criminal Division) on the 13th of March 2007.

In this judgement, the English Court of Appeal examined the issue of capacity vis a vis intoxication.

- The court ruled that **intoxication alone** does **not automatically negate consent**.
- A person may be **drunk** but still **capable** of **understanding and giving consent**.
- However, if intoxication reaches a level where the **person loses the capacity to make a voluntary choice**, then consent is **invalid**.

The key question: **Was the person still able to understand and make a choice, or was their capacity impaired to the point of non-consent?**

B. (MA) [2013] EWCA Crim 3. Decided by the English Court of Appeal (Criminal Division) on the 10th of May 2012.

In this judgement, the English Court of Appeal examined **the issue of capacity vis a vis mental disorders**.

- The court analyzed the **legal tests** for determining whether a person with a **mental disorder** had the **capacity to consent**.
- The key issue: **Was the victim able to comprehend the nature of the act and make an informed decision?**
- The court reaffirmed that **mental disorders do not automatically negate consent**, but if a person lacks the cognitive ability to **understand the situation** and make a decision, then there is **no valid consent**.

Mens Rea of the Offender in English Law.

Under English law, the mens rea (mental element) of the offence of rape is established in **Article 1 of the UK Sexual Offences Act of 2003**, which states:

“A person (A) commits an offence if:

1. **He intentionally penetrates** the vagina, anus, or mouth of another person (B) with his penis.
2. **B does not consent** to the penetration.
3. **A does not reasonably believe** that B consents.”

For **rape** to be legally established, three elements must be present **cumulatively**, not **alternatively**.

The distinction between the Maltese position and the English position is as follows:

1. Under **Maltese** law, the **first word** in **Article 198** is **“whosoever”**, which implies that **any individual**—regardless of gender—can commit the offence.

Under **English** law, the definition of rape specifically requires that **the agent must have a penis** to commit the offence.

This means that, under English law, **only males** can be charged with rape (penetrative offence), while **females** can only be charged with **other sexual offences**

2. Furthermore, in the third element a subjective element is introduced where the agent has to **‘reasonably believe’** that the victim does not consent.

Blackstone criticised this element by saying that although the law introduces the reasonable belief it fails to introduce a test on what would the reasonable man do. That element is therefore **left in the hands of the jury** to establish from **the circumstances of the case**.

Under **Article 1(2) of the English Sexual Offences Act** whether a belief is reasonable must be determined **based on all the circumstances**, including any steps **A** has taken to ascertain whether **B** consents. To determine whether consent was given or not, English courts will examine the circumstances of each and every case to ascertain whether the **agent reasonably believed that the other party consented**

Discussing the Maltese Position on ‘Consent’:

Article 198(3) of the Criminal Code.

This provision contains a ‘**detailed checklist**’ that the court must go through, one by one, largely based and influenced by the English law, but with some additional points. The checklist is **cumulative** not alternative – meaning that if any one of the elements fail, then consent is not valid.

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

The additional elements in question are a result of the Istanbul Convention. Upon close inspection it is increasingly obvious that our 198(3) which deals with consent was derived from **36(2) of the Istanbul Convention** which states the following: “*Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances*”.

Consent is considered valid only if it is:

- Given **voluntarily**,
- A result of the **person’s free will**, and
- Assessed in the context of surrounding circumstances, taking into account that person’s emotional and psychological state

The court has to be guided in order to establish and assess the context and circumstances in which consent was given, considering:

- (1) The **state of the person** (including their emotional and psychological condition).
- (2) Any **other circumstances** that the court deems relevant.

The court has a **leeway**, meaning it is at court’s discretion to consider and focus on elements **not explicitly mentioned and included in the law but which may influence and have a bearing on the situation**.

Where Is the "Reasonable Belief" in Maltese Law? What About the Impression and Idea the Agent Had?

Unlike English law, **Maltese law does not explicitly include a subjective element** regarding the agent's perspective and belief about the victim’s consent.

- Under **English law**, Article 1(2) includes the “*reasonable belief*” of the accused, meaning the court must assess whether the **agent reasonably believed that consent was given**.
- Under **Maltese law**, the subjective perspective of the agent **is not a required element** in determining rape.
- However, the **Maltese courts** have **discretion** to focus or elicit on the agent’s subjective belief when examining the **surrounding circumstances** of the case.

If the court wishes to examine the agent's belief, it can do so indirectly by analyzing **whether a reasonable person would have acted in the same way** in that situation. Although this is not spelled out in our law, *it is in the court's ability if it deems it necessary to also examine that element.*

This means that, in Maltese law, a **simple declaration by the victim** that they gave consent **may not be enough** to exonerate or exculpate the accused because **the surrounding circumstances could indicate otherwise.** The court will still analyze the **circumstances** to determine whether **genuine consent** was present or if the context suggests otherwise.

For example, consider a situation where a person is drunk or emotionally distressed due to the passing of a close family member and, as a form of revenge, engages in a consensual sexual act. However, based on the **surrounding circumstances**, it may become evident that:

- The person was drunk and **unable to think clearly**, or
- The person was in a psychologically vulnerable state, and their **consent was vitiated** by external factors.

If, **based on the circumstances**, the court finds that a **reasonable person of normal intelligence** would deduce that consent was freely given, then the **accused would be acquitted**. This is why **the court must examine all circumstances carefully.** The higher the level of intoxication, the less likely it is that the agent could have reasonably assumed that consent was valid.

Pulizija vs Omissis. (Court of Magistrates, 24th February 2012 – Case no. 376/2007).

In this judgement, the court held that there **is a difference between consent and submission.** Every consent involves a submission, but it by no means follows that a mere submission involves consent.

The court in this case distinguished between **consent and submission**, emphasizing that while every act of consent involves submission, mere submission does not imply consent. This principle is crucial in sexual offense cases, where victims e.g., may comply and submit to the act due to **fear, coercion, or manipulation**, rather than exercising free will.

The case involved multiple sexual offences against minors, including **violent rape, sexual abuse, corruption of minors, and indecent material possession**. The accused, who was a family member of the victims, engaged in persistent and coercive sexual acts over several years, in various settings, including family trips. The court noted that the victims were psychologically manipulated and feared exposing the abuse, further reinforcing the **absence of genuine consent**. The court highlighted the **power imbalance**, as the accused was a **trusted family member (an uncle)** who exploited his authority. One victim, **Minuri B**, admitted to submitting out of fear, worried about exposure and ridicule. The court stressed that **lack of physical resistance does not imply consent**.

The accused was found guilty and sentenced to **10 years imprisonment**, with the court considering the gravity, frequency, and manipulative nature of the abuse. The judgment reinforced that submission under duress is not legally valid consent.

From a legal standpoint, this judgment aligns with *Article 198(3) of the Maltese Criminal Code*, which emphasizes that **consent must be given voluntarily, as a result of free will, and assessed in the surrounding circumstances**. The case also illustrates how the Maltese legal framework, influenced by the Istanbul Convention, prioritizes the validity of consent over mere submission.

Pulizija vs Tyson Grech (Court of Magistrates, 29th September 2021).

The judgment in this case provides a **detailed analysis of consent**, particularly in the context of sexual offenses. The court examined the distinction between voluntary consent and submission due to external factors such as coercion, manipulation, or incapacitation.

The case involved an allegation of **rape**, where the victim, a 19-year-old woman, claimed that after meeting the accused for the first time, she lost consciousness after drinking wine and later woke up in an unfamiliar place, partially undressed, experiencing pain. She alleged that the accused had **penetrated her against her expressed will**. The accused, on the other hand, insisted that all sexual acts were consensual.

The court emphasized that true consent must be given **voluntarily, with full capacity and without coercion**.

The court considered several key factors in reaching its decision. First, it examined the issue of **incapacity to consent**, noting that the victim testified to losing consciousness after consuming alcohol, rendering her **unable to provide valid consent**. It reaffirmed that a person who is unconscious or otherwise incapacitated cannot legally consent to sexual activity. Additionally, the court evaluated the element of **force and coercion**, as the victim described waking up to the accused forcing himself on her despite her physical resistance and verbal refusal. It emphasized that **submission due to fear or an inability to resist does not constitute consent**.

The **consistency of testimony** also played a crucial role in the court's assessment. While the victim's account remained stable and consistent throughout multiple testimonies, the accused's statements contained inconsistencies, particularly regarding the sequence of events and whether alcohol had impaired the victim's judgment. The court further relied on **legal precedent**, reaffirming the principle that consent must be **voluntary** and that **submission under duress, force, or incapacity** does not equate to genuine agreement. Lastly, the court considered the victim's **post-assault behaviour**, specifically her hesitation to report the incident immediately. Recognizing the well-documented psychological impact of trauma and fear in cases of sexual violence, the court acknowledged that delayed reporting does not undermine the credibility of the victim's claims.

Final Ruling on Consent

The court ultimately concluded that the accused could not rely on the defense of consent, as the evidence indicated that the victim was either incapacitated or unwilling at the time of the act. The ruling reinforced that **consent must be active, clear, and voluntary**, and that any sexual act occurring without clear and affirmative agreement constitutes sexual assault.

This case serves as a strong legal precedent affirming that **the absence of resistance does not imply consent** and that **a person's inability to give consent due to intoxication or unconsciousness renders any sexual act non-consensual**.

Pulizija vs David Xuereb (Court of Criminal Appeal, 28th September 2022).

The judgment provides a thorough examination of the concept of **consent**, particularly in cases involving sexual offenses. The court made a clear distinction between true consent, which must be given voluntarily and without pressure, and submission, which occurs when a person complies out of fear, manipulation, or coercion. It emphasized that **submission is not equivalent to consent**, reinforcing well-established legal principles that apply both in Maltese law and international jurisprudence.

A central issue in the case was the **use of threats and coercion** by the accused. The evidence showed that he repeatedly pressured and manipulated the victim, threatening to expose her private affairs if she refused to comply with his demands. The court held that **consent obtained through threats or emotional blackmail is not valid consent**. The accused even admitted that he was aware the victim no longer wanted to engage in sexual relations but persisted in forcing the relationship through intimidation.

The judgment also dismissed the notion that past consent justifies future acts. Even if the victim had initially agreed to a relationship, this did not mean that every subsequent sexual act was consensual. When she clearly expressed her refusal, but was **pressured, threatened, or emotionally manipulated into compliance, the act was no longer consensual**. The court reaffirmed that the absence of physical resistance does not imply consent, noting that fear, psychological dominance, or emotional blackmail can paralyze a victim's ability to fight back.

A significant part of the judgment relied on **messages and video evidence**. The victim's text messages explicitly stated that she felt forced into acts against her will. The accused's own words showed his awareness that she did not want to continue, as he wrote: "*Do not get me wrong ... imma I want you for the last time please ... I know you don't want ...*". Additionally, the video recordings, taken without the victim's knowledge, **corroborated her version of events**, showing clear moments where she resisted, cried, and **pleaded for him to stop**, further proving that her participation was involuntary.

The court also referenced international legal standards, including decisions from the Corte di Cassazione (Italian Supreme Court) and the European Convention on Human Rights, which establish that **sexual consent must be continuous and freely given**. It rejected the accused's argument that the victim's continued presence or past involvement implied ongoing consent.

The judgment stated unequivocally that **forcing someone into a sexual act through threats, pressure, or abuse of power is rape**, even if the victim does not physically fight back. Ultimately, the court upheld the conviction, rejecting the accused's claims regarding consent. It concluded that true consent must be **clear, explicit, and free from coercion**, and that **submission due to fear or intimidation does not constitute legal consent**. The accused was sentenced to **eight years in prison**, with additional **restraining orders and psychological treatment requirements** imposed. In summarizing its position, the court noted:

"Il-fatt illi r-rapporti intimi u ta' natura sesswali kienu fl-istadju inizjali konsenswali ma jfissirx illi r-reat tal-istupru ma jissussistix fil-mument illi dak il-kunsens jiġi m'ahhad."

This statement reinforced the legal principle that **once consent is withdrawn, any further sexual activity becomes non-consensual**, regardless of prior agreements or past willingness.

These judgements give an overview of the concept of violence and what elements from the theory of violence we had retained to assist us with the new system of the concept of violence.

The Presumption of The Lack of Consent.

Our law creates presumption regarding the lack of consent.

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

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

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

Article 201 of the Criminal Code.

This article creates a general presumption of the lack of consent, with the difference this time that it is **an objective presumption**. On the other hand, **Art. 198(3) of the Criminal Code** is a **subjective presumption**.

First Limb: The first objective criterion is **Article 201(a) of the Criminal Code**. This provision denotes that **any kind of sexual activity committed on a person under the age of 12** is automatically considered a criminal offence *ex lege*, with an **irrebuttable presumption** (*iuris et de iure*) of non-consent.

The legislator's intent is to **protect the vulnerability of minors** under 12 years of age. This criterion is objective and straightforward to prove, as the only requirement for the prosecution is to present the birth certificate of the minor (victim). Once this is established, the law presumes there was no consent, and the accused is likely to be found guilty of the sexual act committed.

Second Limb: The second limb of this criteria is **Article 201 (b) of the Criminal Code**. This provision is more complex and a little bit more complicated than Article 201(a), requiring the court to conduct a deeper analysis to establish this presumption of lack of consent. Examining the elements of such second limb:

1. **"Infirmity".**

The person abused must have been unable to offer resistance owing to a **physical or mental infirmity**.

In the Maltese Version of this offence, the words used are "*marda tal-gisem, jew tal-mohh*", suggesting that the infirmity must be a **biological** one, *rather than a temporary cause*.

It must be **more than a short-term condition** (e.g., a physical sickness lasting weeks, months or even more). **Temporary intoxication** or is mentally infirm at that moment in time (a fleeting mental state) does not qualify—the infirmity must be **long-term** or **permanent**.

2. *“For any other cause independent of the act of the offender”.*

This refers to situations where the victim failed or is unable to resist **due to external circumstances**, not caused by the offender.

Example: If the offender administers a rape drug to the victim, the crime would fall under Article 198 (rape) rather than this provision, because the offender directly caused the victim's incapacity.

3. *“In consequence of any fraudulent device used by the offender”.*

This element is a bit different because in this scenario **the fraudulent device** could be any act or any other circumstance which elicits the consent of the victim, meaning where **the victim consents due to deception** created by the **offender**.

The fraudulent device can be **physical** (e.g., forged documents) or **mental** (e.g., creating a false reality). What matters and is of importance is that the victim gave his or her consent as **a direct result of the use of such fraudulent device**, and had it not been for the deception, the victim would not have consented to the act.

Ex-An agent fabricating a story about how rich and successful he is attracts his victim with his wealth and she engages in a sexual relationship under this false belief. Even though at that moment in time the consent was given freely, it is **vitiating by her belief that the agent has drawn a rich life**.

This mirrors the concept of **fraud (*mise-en-scène*)**—where the **deception was fundamental to obtaining consent** which would fall under this presumption as well.

The Carnal Connection

The aspect that sets this crime apart from that of ‘**indecent assault**’ is the occurrence of carnal knowledge – indicating a sexual connection. 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.

As the name suggests, this refers to the **physical connection** between two parties between the **agent and the victim**. We are discussing Article 198, the offence of rape. Note that the connection does not need to be complete for the offence to subsist. In fact, this crime (offence of rape) is deemed to be **complete by the commencement of the connection**. Therefore, this implies that **the prosecution does not need to prove any further acts once it proves that the connection has been commenced and has been started**.

This is provided for in the **Second Proviso of Article 198(1) of the Criminal Code**.

“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.”

This proves that once the connection starts, then the offence has been complete. Also, **Article 206 of the Criminal Code** states and repeats essentially the second proviso of Art. 198(1).

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

Article 198 relates **to the offence of rape**, but **Art. 206 refers to the crimes referred to under this title**. This therefore ensues that Art. 206 is wide enough to include all sexual offences included in the title, which also includes rape.

One of the consequences of these acts (*which includes the second proviso of Art. 198 and Art. 206*), is that if the action starts, there is the **commencement** of the action, and the agent voluntarily stops after the connection; then the **agent will not benefit from the decrease in punishment**. The fact that if there is a commencement of carnal connection and after the commencement the agent stops voluntarily, the agent will not benefit from the decrease in punishment stipulated in **Article 41(1)(b) of the Criminal Code**. This is because the offence is complete by the mere commencement of the connection.

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

The penetration does not have to be with a sexual organ of the agent because the law gives different options(**article 198 first proviso**) – it does not need to be in the **sexual organ** of the victim; it can be in the **anal** of the victim or in the **mouth** of the victim (**article 198(1)**)

Judgement on the point of commencement of the execution is in the name of;

Pulizija vs Omissis – Court of Appeal, 4th September 2003.

In this case, the court held that *“biex ikun hemm ir-reat ta stupru, mhux mehtieg li jkun hemm penetrazzjoni shiha u l-icken bidu ta’ konnessjoni karnali hija sufficjenti biex jissusissti r-reat”*. This means that for there to be the offence of rape, it is not necessary that there is full penetration, the smallest commencement of the carnal connection is enough for the offence to subsist.

Article 198(1) of the Criminal Code gives us three dimensions and situations which amount to carnal connection:

“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:”

1. Vaginal
2. Anal
3. Oral

This is the classical kind of rape where the agent is using his sexual organ to penetrate the sexual organ of the victim. It is that kind of situation of rape which attracts the highest punishment, from a minimum of 6 years to a maximum of 12 years’ imprisonment.

The **First Proviso Of Article 198(1)** provides for the situation where the carnal connection is carried out with any other bodily part **not** mentioned in sub-article 1.

“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:”

You can have a carnal connection with any other bodily part (which bodily part one chooses to use, is entirely up to the agent’s discretion). If it is a sexual organ, then the classical kind of rape is attracted, and higher punishment ensues. If carnal connection is **carried out using other parts of the bodies, then the punishment is decreased**, ranging from 3-9 years. The law is creating a distinction between:

1. Rape using the sexual organs and;
2. Rape using other parts of the body.

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.**

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

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 forced oral sex is equally traumatic and violating as other forms of penetration.

The Use of an Object

Article 198, Sub-Article 1A.

*(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:*

The act must involve a penetration and of a sexual nature with an object. Note that the law uses the word an “object”, meaning it does not have to be a sexual object such as a dildo, **but it can be any kind of object.** The punishment ranges from 3 years to 12 years’ imprisonment, with the minimum penalty applicable when penetration occurs with any other bodily part.

The penetration with an object is deemed to be **complete the moment it begins** and there is the commencement – there is no need for full insertion. Essentially therefore, the law does not demand completion of the entire act; the commencement alone is deemed sufficient, as also 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.

Of a sexual nature. The act must be of a sexual nature to fall under the offence of rape. Example: if a gynaecologist performs a medical examination on an unconscious person found in the middle of the road, penetrates and inserting an object to assess what happened within the internal part and injuries, this will not constitute rape, as it lacks a sexual purpose. Therefore, if the act involves penetration, it must still be sexually motivated to qualify as rape under the law.

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 desolute 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**.

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

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

R v R [1991] UKHL 12 — In this landmark case, the House of Lords (now the Supreme Court) ruled that **a husband can be guilty of raping his wife**, effectively abolishing the marital rape exemption. The court found that the common law principle no longer reflected modern views of marriage, consent, and individual autonomy.

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

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.

***Il-Pulizija vs Stephen Bonsfield(2006)* – 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.

Facilitating Rape

Article 198(2) of the Criminal Code. This sub-article creates the offence whereby a victim is coerced to engage in nonconsensual sexual activity, either with the agent, or, with third parties.

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

The elements of this offence are that the agent, through the use of force, bribery, deceit, or by threats of such conduct etc, causes the victim to engage in the acts mentioned above, which contains the:

1. Classical **three scenarios of rape** (mouth, anal, vaginal);
2. Rape with the **use of bodily part** or;
3. Rape with the **use of an object**,

either **with the agent himself**, or, **interestingly with third parties**.

Over here, we have a **triangulation** – agent causes victim B to undergo those acts with agent C, or else, with myself. Even in the case of triangulation, A being the agent has the same punishment as the actual agent. If someone organized through threats, deceit, lies, bribery etc a sexual encounter between two persons where there is rape (*where the victim is not consenting*), **the organiser has the same punishment as the actual agent who is penetrating**.

Return of Property and Compensation

Article 198(4) of the Criminal Code empowers the court to impose, in addition to the punishment of the offence, an order on the offender to return back to the victim any property or proceeds gained through the commission of the offence. They are also imposed to **pay damages**, including moral damages and psychological damages to the victim.

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

This sub-article does **not mention any minimum or maximum**.

The court may, if the offence of rape has resulted in any gains—for example, in a triangulation scenario where one person organizes the rape and, in return, the rapist pays them a sum of money, making a benefit from the connection—order the **restitution of that money to the victim, not the rapist**.

In addition, the court may also award **moral and psychological damages**, thereby **eliminating** the need for the victim to pursue a separate claim in the Civil Court to obtain compensation and be awarded damages.

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.

Aggravations of rape

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.

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*

Withdrawal of proceedings

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

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

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

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

Abduction

Article 199 of the Criminal Code

*“199. (1) Whosoever shall, abduct any person with the intent to harm such person, shall, on conviction, be liable to imprisonment for a term from six to twelve years.
(2) The punishment laid down in sub-article (1) shall be increased by one or two degrees where any person abducts, by fraud or seduction, any person under the age of eighteen years.”*

Much of what we said in regard to the general aspect of consent, **relate to the whole section of sexual offences**. The offence of abduction is contemplated in Art. 199 of the Criminal Code and was substantially amended in 2018.

The Material Conduct: Actus Reus

The material aspect of this offence as clearly emanates from the article is the **act of taking a person**. Therefore the actus reus of this offence consists of the forcible taking of someone against their own will.

In Maltese it is a bit clear, as the Maltese version says “*jisraq persuna*” – *to steal a person*. It further implies that there was a lack of will and consent from the victim.

Note that abduction does not necessitate the keeping of the person, meaning the arrest of the person. It simply focuses on the act of taking the person; stealing the person against their will (*the actus reus*).

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)

The law does not in any way describe a method or a way of taking such person. The actus reus may be carried out in any imaginative way of the agent, but not any kind of taking is enough to satisfy the elements of this offence. This is so because the taking has to be done with the **intention of harming** the victim.

e.g. If you take the victim to McDonalds to buy them a meal, although you are forcibly taking the person, you are not harming such person. The taking of the person must be with the intent of harming the person.

Mens Rea

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

Further on, apart from the law not specifying a way on how to abduct the person; it does not specify what harm is either. It can be **physical harm, psychological harm, emotional harm, moral harm** etc.

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.

With the notion and concept of “harm” the law leaves it entirely up to the victim to prove the suffering of such harm. **The harm is the element which distinguishes the offence of abduction from the offence of illegal arrest and detention** (as seen in **Article 86 of the Criminal Code**).

“86. Whosoever, without a lawful order from the competent authorities, and saving the cases where the law authorizes private individuals to apprehend offenders, arrests, detains or confines any person against the will of the same, or provides a place for carrying out such arrest, detention or confinement, shall, on conviction, be liable to imprisonment for a term from seven months to two years:

Provided that the court may, in minor cases, award imprisonment for a term from one to three months or a fine (multa).”

What Is the Difference Between The Two Offences (Abduction And Detention)?

Under Article 86, the only two elements that needs to be satisfied are:

1. The arrest or taking is done **without lawful authority**. E.g. *a police officer having apprehended a person in doing the actual offence is authorized by law to effect the arrest, but a normal ordinary person having a crush on his neighbour and decides to unlawfully take her away does not have the authority to do so.*
2. It does not fall under one of those cases where the **law allows the arrest by the private person** under Article 86. Such would be the case e.g. in the defence of your property or your body.

Article 199 is the **punishment for the forcibly taking away of a person with the intention to harm that person**. If the agent, apart from abducting the person, effectively detains the person, Article 86 or 87 would also be applicable in addition to the punishments of article 199. **ONE CAN BE CHARGED WITH BOTH OF THESE ARTICLES.**

A difference between the 2 articles can also come down to potential justification

-Article 86:

Some detentions may be legally justified (e.g. citizens’ arrest in certain cases).

→ *The offence only occurs when the detention is unauthorized.*

-Article 199:

There is no lawful justification for abduction as defined here. Even if someone believes they are protecting or helping, **if done with intent to harm**, it remains criminal.

The Law Pre-2018 Amendment:

*‘Whosoever shall, by **violence**, abduct **any** person, **with intent to abuse** or **marry** such person, shall on conviction, be liable, **in the first case** for a term from 18 months to 3 years, with or without solitary confinement, and, **in the second case**, to imprisonment for a term from 9 to 18 months.’*

In the previous version of abduction, there is the appearance of violence, and the law required the use of violence, and the intent had to be **specific**, either to **abuse** the person, or else to **marry**.

The previous version required violence, and **the specific intent was to abuse or marry**. This provision was dramatically **changed in 2018 such that the only intention required by the agent is to harm the person**.

Also, in the previous version, the law prescribed a **reduction in punishment if the agent voluntary restored and released the person within 24 hours**. When these scenarios would ensue, the punishment would be reduced. If the agent married the person, there would be no punishment at all; in which case the proceedings would halt and finish.

In the new version of the law, whether the abduction lasted for an hour or a week, the law makes no distinction.

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 irreparable 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.

Article 199(2) of the Criminal Code: Aggravation to The Offence of Fraudulent Abduction.

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

Primarily, the law does not distinguish whether the victim is a boy or a girl, or whatever gender the person attributes to himself. What is important is that the victim is **under the age of eighteen years**. This article ceases to apply on the eighteenth birthday of the person.

Coupled with **the age factor, the agent must also adopt fraudulent or seductive devices**.

With regard to the element of fraud under this article, **Maino** states: *"The fraud may consist of any artifice which induces the victim to submit without or against his will to the wishes of the agent"*.

Therefore, for this **aggravation to subsist** we need these **4 elements**:

1. **The abduction** – the physical taking away
2. **The animus of the agent** – the intention to cause harm
3. The fact that the victim is **younger than 18 years**
4. The abduction is **the result of fraud or seduction through the agent** and there must be link a link between the fraud adopted with the seduction adopted and the actual abduction carried out (ties up with the first element)

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.

This aggravation existed also in the previous version of the law, however, the victim had to be **under the authority of another person (either a parent or a tutor), or in an educational establishment**.

Pulizija vs Michael Bugeja – Court of Criminal Appeal, 13 September 2013. (480/2012)

In this judgement the court is quoting a previous and unpublished judgement in the names of

‘Pulizija vs Raymond McKay (14th March 1985)’. In the McKay case, the court held that the fact that this offence may be satisfied with the use of fraud or seduction, necessarily implies a **certain degree of co-operation** from the victim for it is through this co-operation that the minor accompanies the agent wherever he wants.

Therefore, this judgement is creating a **causal link between the action (seduction or fraudulent device) of the agent and the action of the victim accompanying the agent**. If the victim being a minor was still going to the same place independently of the will of the agent, then this aggravation would not subsist.

The court had this to say about the elements of fraud and seduction in this aggravation:

*“The decisive questions as to the guilt or otherwise of the accused, therefore, are whether it results that deceit or seduction was used by the perpetrator, and **whether there is a causal link between that deceit or seduction and the fact that the victim followed the perpetrator**.*

If the victim went with the perpetrator despite the deceit or seduction, then the offence in question does not exist—because the victim accompanied the perpetrator by a decision of her own free will, independently of the deceit or seduction.”

‘Il-Pulizija vs. Raymond McKay’ (14th March 1985), the Court said:

Our law seeks to **prevent abduction** itself, irrespective of how this is carried out. The important thing is that there is an abduction with the **specific intent and material conduct** as specified in the law.

What amounts to seduction and what convinced or made the minor abide by the agents wish will be determined by the court on a **case-by-case basis**.

N.B Remember that what we have been discussing relates to the *Aggravation of Abduction* (Art. 199(2) of the Criminal Code) – which implies that the punishment will be increased by one or two degrees.

Articles 201 and 202 of the Criminal Code

These two articles further supplement these two offences of rape and abduction.

Article 201 of the Criminal Code we have already seen this with consent – unlawful carnal knowledge is presumed to be non-consensual when the victim is under the age of twelve or if the person was unable to offer resistance due to physical or mental infirmity or any other cause independent from the offender or any consequence of any fraudulent device.

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

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

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

Article 202 of the Criminal Code provides a list of circumstances which, if present, will increase the punishment by one or two degrees. The list is **exhaustive**, and the purpose of such list is to ensure that no one abuses his dominant position vis a vis the victim. It provides a list of circumstances of situations where the offence of rape and abduction may be aggravated. (REFER TO ABOVE FOR LIST)

Sexual Offences and Minors

Due to their mental and physical vulnerability, minors have a special regime of protection, both internationally and locally.

The International Sphere of the Protection of Minors:

The first instrument is the **UN Convention on the Rights of the Child**. This convention has been proposed by the United Nations and has been declared to be the most widely ratified Human Rights Convention, globally. This convention has been adopted, open for signature, ratification and accession on the 20th of November 1989 and entered into force on the 2nd of September 1990. Malta signed and ratified this convention in **1990**.

The convention aims at providing a vast legal framework encompassing protection of various rights specific to children, amongst which there is the right not to be sexually abused or exploited. The convention defines ‘child’ under article 1 as being: *‘every human being below the age of 18 years, unless the law applicable to the child majority is attained earlier’*.

In Malta, the age is of eighteen years, so we are in line with such Convention. This Convention establishes four core principles:

1. The **Non-Discrimination**, found in Article 2 of the Convention. Member state who ratified such convention must apply this in their law.

“Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. ”

2. **Best Interest of the Child**, found in Article 3(1) of the Convention. It addresses the need to provide protection to the child at all stages of the legal process.

“Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

In all the activities, whether private or public institutions, such as court or the administration, the best interest of the child shall be placed at the forefront of that legal activity.

3. The **Right To Survival and Development**, found in Article 6(2) of the Convention. This principle is mostly directed at ensuring the children’s economic and social development.

“Article 6

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

4. The **Views of the Child**, found in Article 12(1) of the Convention. The convention therefore establishes the principle that in order to establish what is the best for the child, it is logical to listen to the child.

“Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

The Sexual Abuse Under The Convention:

When it comes to sexual acts with minors, the Convention obliges state parties (those states that signed and ratified the convention) **to provide against the sexual exploitation and abuse of minors, especially when a minor is induced or coerced to take part in illegal sexual activity.** The Convention imposes an obligation on the state parties to have laws in place that prohibit and prevent the sexual exploitation of such minors.

Article 34 of the Convention.

“Article 34

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

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

The Convention does not only impose an obligation on the State to focus internally on its laws, but also to actively engage in bilateral or multi-lateral agreements that prohibit these three forms of child abuse:

- (1) Engaging in unlawful sexual activity,
- (2) Child prostitution or sexual practices or
- (3) Child pornographic performances.

The Optional Protocols of the Convention on the Rights of the Child.

These protocols are an addition and the result of the success of the Convention on the Rights of the Child. In effect on the 25th of May 2020, the United Nations adopted two additional Protocols:

1. **The Optional Protocol on the Involvement of Children in Armed Conflict.**
2. **The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.**

Malta adopted and ratified the second protocol through Act 31 of 2007. The purpose of both protocols is to supplement the measures of the Convention in the respective areas.

One of the biggest problems of the Convention and these two Protocols, where in actual fact these protocols tried to further address are the **transborder issues**, example jurisdiction. E.g. if you have child pornography on the dark web (*you can have an activity being carried out in*

Malta and recorded, stored in a server in Brazil and viewed by someone in France) who has jurisdiction? These conventions address these issues as much as possible by enhancing mutual cooperation between member states (not just the EU, but member states who ratified such Convention).

The Lanzarote Convention.

The Convention on the Protection of child Against Sexual Exploitation and Sexual Abuse.

It is nicknamed as the '*Lanzarote Convention*' as it was signed in a small island called Lanzarote. It is an **instrument from the Council of Europe**. It was developed and signed in 2007. Malta signed this Convention in 2010, and it entered into force in Malta on the 1st of January 2012.

Until now we have seen the United Nations Convention on the Rights of the Child and subsequently there were two additional protocols. **This is a different Convention issued by the Council of Europe**, a different institution, in 2007.

This Convention does not replace the United Nation Convention on the Rights of the Child, but goes a step further by **defining what constitutes sexual abuse**. The UN Convention does not tell us what sexual abuse is and leaves it case-by-case basis, but on the contrary, the Lanzarote Convention defines what is to be understood with sexual abuse.

In fact, **Article 3, Paragraph B** of the Lanzarote Convention states that sexual exploitation and sexual abuse of children includes all forms of behaviour which are dealt with in Articles 18-23 of the same Convention.

“3(b) sexual exploitation and sexual abuse of children shall include the behaviour as referred to in Articles 18 to 23 of this Convention”

The definition refers us to **five separate articles** in the convention – each specific article defines a specific activity which should be classified as sexual exploitation. Therefore, they are the substantive provisions of what constitutes sexual exploitation.

Not only that, but the Lanzarote Convention establishes 4 pillars and standards that member states need to reach, where each state party must criminalize:

1. The **engaging of sexual activity with persons who are not of age**, or able to give their consent. It does not tell us what '*age*' is as each member state may have a different threshold of majority – the large number is of 18, but other also hold the age of 16.
2. The second act that needs to be criminalized by every state is **the engagement of sexual activities with the child** through the use of force, coercion or threats.
3. Where there is an **abuse by the agent of a dominant position**, or
4. Where such activity is being carried out through the **exploitation of the vulnerability** of the victim.

We are here discussing the local law, meaning the local law is inspired and in line with this Convention. The Convention imposes and obliges the member states to carry out **four major activities** to ensure a holistic protection of the minors.

- (1) The first one is to take various steps to ensure the prevention of abusive conduct such as screening and **training persons who come in close** and regular conduct with the minor.
- (2) The second obligation and activity is to provide for **support and rehabilitation programs** for children who have been victims of abuse, and also their families.
- (3) The third one is to criminalize any activity of a **sexual character** which may harm the minor.
- (4) Lastly, implement **child-friendly measures** throughout the judicial system and investigations.

The Lanzarote Convention is not just bothered with criminalizing prohibitory acts, it aims at creating a holistic approach where the first step is to prevent the actual carrying out of such offences. You prevent by screening and training those people who are at the forefront and have the opportunity to abuse those people (*trainers, teachers etc*).

Apart from preventing, it also imposes on each state the obligation to create a supportive and rehabilitative system. *How can we fix the trauma of the minor who was abused?* Third point is obvious to criminalize the acts contained in the Convention. The fourth and last one is an alternative take because the Convention also considers the fact that when you have a child passing through the judicial system (*e.g. police is talking to the minor, taking them to court, reliving the trauma etc*) that could also be a **second trauma of the minor**. The Convention aims at relieving that trauma and making it easier for the child.

European Union Directive on Combatting the Sexual Exploitation of Children and Child Pornography. Directive 2011/93/EU.

Being a directive each MS has an obligation to implement it in its laws. It is largely based on the Lanzarote convention, **but it adds penalty brackets for the substantive offences**. It attempts to harmonize the punishments across the European Union and aims to establish a minimum punishment applicable across the European Union.

The offences under this directive are those mirrored by Lanzarote and in our criminal code it has been transposed in articles 204A-204C.

Defilement of Minors

Article 203 of the Criminal Code.

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

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.

This article was substantially amended by **Act 13 of 2018**

Active Subject

As the article starts with the word “*whosoever*”, it means that such offence may be carried out by any person of any age, sexuality, gender etc – even minors between themselves. If the agent is a minor, then Articles 35 and 37 of the Criminal Code will be applied, **thus the minor is not excused from carrying out this offence**.

The qualities of the active subject (ex: the fact that the active subject is an ascendant of the minor) may be important when it comes to the punishment for this may constitute an aggravation in terms of Article 203 (1) (c), but such qualities **do not form part of the essential ingredients making up the offence**. These aggravations will be further discussed below.

The Passive Subject

The passive subject must necessarily be a minor below the age of 16. The minor may be male or female. The minor need not be known by the active subject and therefore it is possible for the agent to defile a minor whom s/he has never seen before.

It is also worth noting that these articles may not be extended by analogy to the defilement of mentally infirm persons who are subjected to lewd acts. Although there is no doubt that lewd acts committed in the presence or on the person of a mentally infirm person can well lead to the defilement of such person, the law expressly states that the passive subject may only be a minor and therefore, if the mentally infirm person is of age, **the agent cannot be charged with defilement of minors**.

Let us break the offence down into 3 elements. Those being the following:

1. The material element are **the lewd acts**.
2. The formal and mental element is the **will of the agent to perform these acts** which have the purpose of a sexual activity.
3. It must be proven that there was **effective defilement of the minor**.

It is immediately clear that this offence seeks to punish those lustful acts which though not consisting in carnal connection or the attempted carnal connection with violence, still have the effect of defiling a minor, whether male or female.

The Lewd Acts:

This element has remained intact since the promulgation of the Criminal Code. Our legislator has not reduced or removed such provision, meaning it has been there since the time of Sir Andrew Jameson.

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.

Professor Mamo in his notes, quoting from the debates of the legislation at the time, argues that the drafting of this element was purposely made to make it clear that the mere use of words or any picture, book or representation, obscene as it may be, does not satisfy this element of the offence. From the parliamentary debates of the time when this offence was introduced in the Criminal Code, held that the legislator chose these words specifically from showing the minor in any books, materials etc although obscene, there has to be the actual defilement – through the *‘Atti Di Libidine’* (lewd acts).

The acts moreover **need not satisfy the sexual appetite of the agent, but must be directed towards the appetite of the offender**. The offender need not when carrying out these offences, be satisfied, **the mere arousal of the agent of these acts is enough as long as the minor is defiled**.

Mamo also has this to say regarding lewd acts: “Besides carnal connection, **other lewd acts also of lesser gravity perpetrated on the person or in the presence of a minor would constitute the crime**, provided they are calculated to defile the minor by exciting sexual passion or desire.

It need hardly be said that although the law speaks of lewd acts (plural), **it must not be imagined that one single act, if calculated to defile, will not be sufficient**. The plural is used by the law merely to denote the species and not the number of acts.”

Pulizija vs John Gera – Court of Criminal Appeal, 14th November 2008.

The court stated *‘l-att libidinuż m’hemmx għalfajn jissodisfa lil min għamlu. Hu biżżejjed li jissodisfa l-ġibda sesswali ta’ min għamlu’*. The libidinize act does not need to satisfy the agent, but it is enough if it satisfied the sexual arousal of the agent.

The Court based itself on the theory of the Italian author, **Manzini**, that lewd acts include **all those acts made through contact and gestures which may excite the senses**, even if those acts do not satisfy the agent’s libidinize intent.

Through **Mamo**, we have seen that lewd acts exclude showing any pictures videos and material to the minor. **Manzini** goes a step further by saying that lewd acts necessitate and require a contact or gesture that may excite the senses of the agent.

Pulizija vs Thomas Wiffen – Court of Criminal Appeal, 8th January 1996.
(Volume LLXX, Part Four, Page 146).

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 are 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 Wiffen case, **participation in sexual activities with minors was not yet covered by law**, so the court had to rely on Article 203 to address the conduct. Today, the prosecution would charge under Article 204C, not Article 203.

Repubblika ta Malta vs Jason Mamo – Court of Criminal Appeal, 15th July 2013.

In this judgement, the Court confirmed that lewd acts may be carried out either on the minor, or in the presence of such minor and the main idea behind this offence is to protect the innocence of the minor.

The court is also pondering the idea that the act could also be directed towards the sexual interest of the minor. It is a novel concept, but it goes to show that it does not limit the sexual appetite only to the agent.

Pulizija vs Raymond McKay – Court of Criminal Appeal, 14 March, 1985.

The court held that although the law speaks of lewd acts, therefore applying a plurality of activities, the mere carrying out of one single act, would be enough to satisfy this offence as long as that act gratifies the sexuality of the agent and defiles the minor. This was also highlighted by Sir Anthony Mamo as explained above.

On this material element, for this offence to subsist there must not be any sexual contact with the minor because this contact is what **distinguishes this offence from other offences** such as rape, or participation in sexual activities with minors (Article 204C of the Criminal Code).

The court held that “*għalkemm il-ligi issemmi għemil żieni ossija lewd acts mhux neċessarju li jkun hemm ir-repetizzjoni tal-atti għax il-legislatur ried juri l-kwalita u speċi tal-atti u mhux in-numru*”

For this offence to subsist **there must not be any sexual contact with the minor** because this contact is what distinguishes this offence from other offences such as rape or participation in sexual activities with minors, article 204C. as already touched upon in the case of Thomas Wiffen such a law did not exist, so the court squeezed this case under this article. If such a case were to happen today and the offender was charged with 203 instead of 204C he would in all likelihood not be found guilty of such an offence.

The Second Element:

Will Of The Agent To Perform These Acts Which Have The Purpose Of A Sexual Activity.

Professor Mamo holds that there is no specific intent attached to this offence, **as long as it is proven that the offender intended to defile the minor** – *the generic intent to defile him* – how to what extent and where are irrelevant. It must be proven that there was defilement of the minor.

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 are inherently capable of this effect, it is impossible to maintain that the agent who willed the acts did not also will and intend the consequences inherent in their nature.**

The Third Element:

Effective Defilement of The Minor.

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 scholars 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

This was propounded in the following case:

Pulizija vs George Portelli

(Court of Criminal Appeal, 20th February 1975).

The court held that to establish the formal element, the court must depart from the extremist viewpoints and **focus more on a balanced approach**, such as the approach proposed by the author Maino. **Maino states that each case and therefore each minor, have to be examined on their own specific merits.**

This approach establishes the principle that not each minor is defiled with the same acts and up to the same level. This means that if an agent had to perform a set of acts in the presence of minor A, and subsequently the same acts are carried out in the presence of minor B, it is **most likely that the level of defilement is different.**

Minor A might have been raised in a very conservative environment and is thus immature in his or her sexual development and therefore seeing the agent's genitals can cause her a great catastrophe whereas Minor B is less prone to shock as she was raised in an environment where it is not uncommon to see genitals.

This brings and leads us to the concept of ***Corrupta non Corruptitur***.

In the George Portelli case, the court touched upon the principle of *corrupta non corruptitur* and held that *"This means that in every case, the judge must make his own assessment of the particular circumstances and weigh the nature of the act against the level of corruption already reached by the minor, in order to determine whether the act committed against the person or even merely in the presence of the minor actually succeeded in corrupting them. This does not mean that a person who is already partially corrupted cannot be further corrupted; it is a matter of balance."*

Thus, is a Minor Who Has Been Previously Defiled Susceptible to Re-Defilement Again?

This offence is directed towards the mental effect on the minor because the physical effect is **subject to a different offence**. The court touches upon the principle of *Corrupta non Corruptitur* – once the minor's psyche is corrupt with a previous set of experiences, can that minor be corrupted again subsequently? Literally, the term would translate once corrupt, it can't be corrupt anymore.

The Italian Corte Del Cassazione (*highest Italian court*) in a judgement dated 11th October 1906 held that the concept *corrupta non corruptitur* may only be applied in those cases where the passive subject has reached a level of corruption and deprivation that it is not possible to reach a further stage. Therefore, once a minor has reached a level of sexual activity, then according to this theory, that minor may not be defiled anymore. **Our courts are aware of this concept and have been reluctant to apply this concept in our system.** *'il concetto corrupta non corruptitur puo solo trovare applicazione di fronte ad un soggetto passivo giunto a tal grado di corruzione e di privazione da non esserne possibile un ulteriore stadio.'*

Thus, **our courts have consistently inclined to the doctrine that previous defilement, whatever its degree, does not exclude the crime**

Pulizija vs Lorenzo Baldacchino

(30th March 1963).

The court in this case held that a person who has been corrupted, has the right not to be corrupted further and no person has the right to push without impunity that person further into the road of corruption, or prohibit her from the possibility of rehabilitating herself.

“Il-persuna korrotta għandha dritt li ma tiġix ulterjalment korrotta u hadd m’għandu dritt li impunament jispingiha iktar fit-triq tal-korruzzjoni jew jimpedilha l-possibiltà ta’ rigenerazzjoni.”

The courts have understood the concept that a victim might have reached that level of corruption that cannot go beyond, but the courts have *also sustained the possibility for that person to rehabilitate himself or herself.*

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 għall-laxxivja u għall-pjaciri sesswali, ikun fi stat ta’ travjament morali tant komplet li diffiċli 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-possibiltà li jkun hemm korruzzjoni** għaliex 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 ġia parzjalment korrotta, ma tistax tigi korrotta izjed. Si tratta ta’ kwistjoni ta’ bilanc.”

Il-Pulizija vs Andrew Bonnici, coa, 23rd January 1998,

The court acknowledged that a 13-year-old minor could have already explored sexual elements or could have already been engaged in sexual activity **but there is a difference between engaging in sexual circumstances as part of the natural development of a person and exposed to sexual circumstances against the minor’s will.**

For the subsistence of the crime one should highlight that **it is not necessary that the defilement shall be immediate.** The very young age of the person with whom the lewd acts have been committed does not rule out the crime, **if the remembrance of such acts is calculated to cause the defilement.** Indeed, according to our law, if the victim is under twelve years of age, **that is a reason for aggravating the crime.**

The age of the minor

The law uses the words ‘*has not completed the age of 16 years*’ therefore as we have discussed before the prosecution need only submit the birth certificate of the victim in order

to satisfy this element. Note that the law uses ‘has not completed’ meaning that upon your 16th birthday this element drops. 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 13(XIII) of 2018**.

Article 203(1A) of the Criminal Code.

Act 64 of 2021 introduced a new sub-article to this article 203, which is sub-article 1A.

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

This sub-article addresses sexual activities between minors. We note here **that sexual activity between minors is still an offence**. However, there is a reduction in punishment if three elements are satisfied:

- 1. The act must be consensual (free, informed, etc).**
- 2. They must be close in age and development.**

What does this mean? The law does not define what is close in age and development and thus is left in the courts discretion. E.g. children aged 12 and 14 are considered to be two adolescents which could fall under this element.

- 3. The acts cannot involve any physical or emotional psychological abuse.**

The law speaks of peers who are close and therefore it does not limit the acts to two people. It does not mention the words between the couple. There can be group activities – e.g. 3 or 4 individuals. However, each of these three elements must be satisfied by each member of that group doing the activity.

Aggravations to Offence of Defilement of Minors

There are also aggravations to offence of defilement of minors and the proviso to sub-article 1 of article 203 lists the aggravations of this offence. It provides us with 4 situations which considerably increase the punishment of this offence. The main gist of these aggravations is the **breach of trusts which the victim has in the perpetrator**. Paragraph A of this proviso states that:

Provided that the offence shall be punishable with imprisonment for a term from six to twelve years, in each of the following cases:

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

The first aggravation is dependent on the victim whether the victim is less than 12 years (the police need to present the birth certificate of victim) or else the offence is committed with violence whether physical or psychological. These aren’t cumulative but alternative. Either the child is less than 12 or else is committed with violence. There’s a direct link between the

commission of the offence and the violence committed. It needn't necessarily be committed on the person of the victim. it could be committed in the presence or possession of the victim.

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

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 sixteen years;*

Regarding Art. 202 (c)(our now 203c), **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.

(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

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 jzommmhom ai termini tal-Art. 203 (1) (c) tal-Kap 9 tal-Ligijiet ta' Malta."

Proceedings-Article 203(3) of the Criminal Code.

“(3) Provided that where the injured party withdraws his complaint, the Court may decide and direct the continuation of proceedings against the alleged perpetrator, giving particular consideration to the best interests of the complainant, any person under the age of sixteen (16) involved, and any other relevant third parties, and shall cause such request and decision to be registered in the records of the case:

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

Article 203(3) states that although the injured party may withdraw the complaint, and therefore technically the proceedings should stop, the court may order the proceedings to continue.

There is this norm of *ubi lex voluit lex dixit* – wherever the law specifically mentions the withdrawal of the complaint, it is only for that offence that the withdrawal be worked out. The law is saying that the victim may choose to withdraw the complaint, but the court may ignore that fact and continue with the case.

Why is this so? The victim might be withdrawing the complaint out of fear or threats of the agent.

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.

The Instigation To The Defilement Of Minors

Article 203A of the Criminal Code.

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

Provided that the offence shall be punishable with imprisonment for a term from four to eight years in any of the cases referred to in the proviso to article 203(1):

Provided further that when the act is consensual between peers who are close in age and in the level of development and provided that the acts do not involve physical and, or psychological abuse, the punishment shall be decreased by one or two degrees.”

- What major element is missing in this sub-article?
- Under Article 203A, what lewd acts figure out somewhere?
- Is it one of the elements?
- Does Article 203A include lewd acts?

This article **does not include lewd acts**, so if a set of circumstances, such as sexual activities in the presence of a minor, and there is the intention and the lewd acts, then the offence that would cover the situation would be Article 203(1) of the Criminal Code.

If however, a person **instigates, encourages and facilitates** the defilement of a minor, then this article would come into play. Therefore, what the law is doing here is not just protecting the actual core offence of the defilement of a minors, but it is creating a secure parameter around the core offence of the defilement of a minor – **safeguarding against the possibility of that offence arising in the first place**. It is not just protecting the offence defilement but also all those acts that could lead to the defilement of a minor (*instigation, providing a place or property where it can happen, encouraging such act, etc*).

Pulizija vs Carmelo Sant

(Court of Criminal Appeal, 12th February 2009).

The court held that it is clear that the purpose of the legislator was to cover those acts which although not carried on the physical person of the minor could lead to the defilement of the minor.

The court held: “*jidher ċar li l-ghan tal-legislatur kien li bl-introduzzjoni ta’ dan l-artikolu ġdid jikkolpaxxi kull att li għalkemm ma jsirx fuq il-preżenza tal-minuri, jista’ jwassal biex din tiġi eċitata jew biex jgħin u jiffaċilita l-koruzzjoni tal-istess persuna taħt l-eta*”

Pulizija vs Omar M. Ammar Jolqham

(Court of Criminal Appeal, 12th February 2008).

In this case, the accused tried to seduce a young boy with words and had also touched him in various areas of his body. **The court held that those actions did not fall under Article 203(1), thus did not amount to defilement since the prosecution did not prove the element of the lewd acts (*actio di libidine*) however, the court found him guilty of Article 203A .**

Articles 203 and 203A are **alternative to one another** in the sense that one cannot be found guilty of both offences. Article 203A refers to all those actions that fall outside the scope of Article 203. If you have the lewd acts then the element of Article 203(1) is satisfied easily and if you do not have the lewd act then one is guilty of Article 203A.

If the facts of the case are such that the elements of Article 203 are satisfied, the person could potentially be liable to punishment under Article 203. If, however, those acts fall outside Article 203, that person would be liable under Article 203A.

Naturally, a person cannot be found guilty under both articles; it must be either one article or the other. Generally, the prosecution charges the person under both articles, and then—based on the facts of the case—the courts, after examining the circumstances and evidence, will find guilt under either Article 203 or Article 203A.

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, education, 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

Prostitution is often described as the world's oldest profession.

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. The agent **induces a person underage to practice prostitution**, or
2. **Instigates the defilement** of such person, or
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. It is also aggravated if a gain or benefit is derived from the course of conduct listed in 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.**

Pulizija vs D.C

(Court of Magistrates, 11th January 2013).

In this case, the accused was the mother of a minor of sixteen-years who had engaged in prostitution. The police had apprehended the minor in a car with an adult and the adult said that when he went to pick up the minor, she was in the presence of her mother. What happened was that this minor was practicing prostitution, the police apprehended the client and her mother and when he picked up the minor, her mother was present. The court held that although the minor was picked up in the presence of her mother, it does not necessarily mean that the mother induced the minor to practice prostitution. What the court is saying is that the act of inducing must be an active act and not a passive act. In this case, the mother knew that the minor was

going to practice prostitution. In fact, it resulted that the minor was induced in this circle of prostitution by her friends. Her mother knew that her daughter was going to prostitute herself, she did not stop her and said nothing, thus she was passive in this situation. Her passivity cannot be interpreted as therefore being an act of inducing.

2. Instigates The Defilement of Such Person.

Most of what we said to the first element applies here, with the difference that the law, instead of using the word “induces”, it uses the word “instigates” (*ječita*). Now, we are not just speaking of encouraging and inducing, but now we are instigating, **meaning bringing an action into existence**. 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**. What is important is that there is a **direct link with the sexual activity and the instigation**.

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**.

From Article 204 of the Criminal Code, the law tries as much as possible **to attack each and every stage of the sexual exploitation**. It attacks the person inducing the minor, the person instigating the defilement of the minor and the person encouraging facilitating the prostitution or defilement. It offers comprehensive protection against prostitution of the minor underage. This sub-article does not require a repetition of the offence. It does not require a financial benefit for the offence as is stipulated by paragraph (d) of the proviso to Article 204 which states “(d) if the offence is committed habitually or for gain.”. In such a case this would constitute an aggravation.

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.

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’ jikkellew 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 lust, 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:

The **engagement, recruitment, or causing of a minor**

1.To practice prostitution.

2.To participate in pornographic performances.

3.Or profits from or othwerwise exploits a person under age 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 the 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**.

Furtherore here the law provides for ‘participation’ which may entail less of an extent of involvement then is necessary in 204, thus providing even more protection protection to the minor.

The article is worded in a vast way, trying **to create a net to capture any type of activity that would involve a minor in prostitution or pornographic performances**. Punishment under this article is more severe than that under 204.

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**.

204B(2)(a)&(b) - The first 2 are straightforward - endangered life and violence or grievous bodily harm

204B(2)(c) - addresses those instances in which **we have a criminal organisation**, could be international or local organisation. Through this aggravation, if the child prostitution or pornography has a national/international basis, automatically there is an aggravation.

204B(2)(d) - person abusing a position of trust, authority etc...

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 underage. 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. **Due to the increased sense of trust, the punishment under this article is graver than that contemplated by article 204.** The relationship may arise either out of **consanguinity** (through blood line) 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.

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

The crime under Art. 197 may still subsist if the perpetrator 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

Article 205 is a residual offence. **A residual offence is one that applies where no other graver offence applies.** In fact, the wording of this article states “*where the act committed does not constitute a more serious offence*”. That phrase renders this article a residual offence, being that if there is a graver offence, that will be applicable. If the circumstances are such that no other graver offence is committed, then you can fall back on this article.

Elements of this offence: **1. Intent to gratify a third party,**
2. use of **violence** or **coercion** or **deceit** by the agent,
3. the inducement of **a person of age** for purposes of prostitution,
4. the actual act of **practicing prostitution**

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, threats, or deceit**. Here **the mere inducement is enough**, as long as the travel is made. Another element of article 3 is that the **agent causing the travel must be aware of the purposes of travel**.

(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 Malta for 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.

The age of 21 is a **historical remanent of the age of consent/maturity** when the Criminal Code was promulgated. In the late 19th century, the age of majority in Malta was 21, now it has been reduced to 18 and in some instances 16. It is likely that the legislator did not amend this age in order to ensure additional protection for those persons aged between 18 and 21.

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**. Thus not necessarily a **physical detention**. So physically a prostitute may be free to roam around but the moment **she decides to change employer there could be a contractual obligation/other factor which makes the change impossible**. 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 (1)withholds some property of the victim, or else**

(2) 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. With this sub-article the prostitutes have an **additional security of mind** that they can leave with what they are wearing and **not be faced with any consequences**.

(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 or exercised control, direction or influence over that person in a manner as to show that he is aiding, abetting or compelling the prostitution of that person.**

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

Pulizija V. Anthony Curmi - COCA - The offence of living in whole or in part on the earnings of prostitution, presupposes not one occasion with a low gain but a system of exploitation of the character of another person, even though such other person may consent to it. Therefore, the isolated fact that the person receives money for providing a person for prostitution does not constitute this offence.

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.

Of Crimes Against the Person

Book First, Part II, Title VIII

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.**

N.B The principles we adopt in our law such as willful homicide have been so for various decades. In this subtitle though we will also consider relatively new crimes such as harassment, stalking, trafficking, communication of diseases and others. You **will not find reference to these crimes in mammo notes.** As some have been introduced after the United nations protocol and are relatively recent insertions in our law.

Homicide

In simple terms homicide is an act whereby a person causes the death of another person. Carmignani defines homicide as '*hominis caedes ab homine iniuste patrata*', or rather killing of a man by another whose behaviour is intentional, negligent or without justifiable reason. In defining homicide in the UK, sir Edward Coke elaborated as follows;

"Murder is when a man of sound memory and of the age of discretion, unlawfully killing within any country of the realm any reasonable creature 'in rerum natura' under the king's peace with malice, afore thought, either expressed by the party or implied by law..."

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**".

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 intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person.

(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

Willful homicide, Elements of the crime ;

1. A human's life is taken away
2. From acts of omission or commission
3. The killing must be malicious
4. The act is accompanied by the intent to either kill or place the life of another in manifest jeopardy.

The prosecution has to prove cumulative evidence. If 2 out of 4 is proven then a different crime may arise but this crime will not be proven. The prosecution has to prove **4 out of 4**.

Our criminal code does not provide a definition for each and every term used, therefore in order to define certain terms it is important to refer to judgements in order to understand the law itself. We do not have the doctrine of binding precedence as it is in common law, however it is difficult to depart from the line of thinking adopted by a court of criminal appeal.

*Homicide can be **doluz** or **Kolpuż**. **Dolo** refers to the criminal foresight, the criminal intent. Whereas **culpa** refers to an element of negligence, the lack of foresight, but foreseeability, I do not foresee it but I should have foreseen it. **The bonus paterfamilias** is expected to exercise the basic diligence that the law expects of him. Therefore if an event was foreseeable to the bonus paterfamilias, therefore it could have been foreseen then that would be involuntary homicide.*

The fact that willful homicide carries the punishment of **life imprisonment** has consequences under our law.

The elements of willful homicide emanating from the law;

The First element: Human life is taken away.

The simplest element, for there to be homicide there has to be a human life which preceded the homicide. If a person is dead before you start shooting him, though the intent is there there will still be no case of wilful homicide. This was hotly debated by jurists and on paper invokes the legal principle of the **impossible attempt**.

There exists the presumption that the **victim needs to be alive at the time of aggression**. **Manzini** states “*Non puo commettersu omicidio in relazione ad un cadavere che non e persona*”.

The difficulty of the prosecution to prove the death when there is no corpse is elevated, but although it is very hard for the prosecution to have direct evidence, they may prove their case with indirect evidence ; provi indizzjarji/circumstantial evidence. This evidence is an indirect piece of evidence but although indirect, when considered cumulatively together, if they point in the same direction, they can constitute proof of a fact. ***Il- provi indizzjarji iridu ikunu ; inkontrovertibbli u univoci*** (cannot be contradicted, they point in the same direction).

“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”.

The statement in the judgment of the New Zealand Court of Appeal in the case **Rex v. Horry (1952)**

I- 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 għall-prosekuzzjoni, li jwasslu għal konkluzjoni wahda u wahda biss.

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...

Mamo also delves into the discussion of when the classification of homicide applies to the death of a foetus. 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**).

How can a human life be taken away?

This can be done in many ways, the law does not provide an exhaustive list but this is considered case by case, provided naturally that the action leads to the death of the person.

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.

The Second element: An act of a person destroying life or an act of omission destroying life.

Mamo acknowledges that for many years, there was an understanding that the actus reus would be consummated by a positive act of the will but jurisprudence has led us to understand that just as much as a person can kill another by means of a deliberate action (commission) this could also be done by an omission, ***omissione di soccorso***, **a failure to do something which you ought or were obliged to do.**

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.**

As already mentioned 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.

In England, before **the law reform Act 1996**, to constitute murder, **death must have followed within a year and a day.** But in our law, when the intention was homicidal (contrast the section referring to bodily harm followed by death) **no time limit is fixed after**

the injury within which death must ensue in order to sustain a charge of wilful homicide. This is in accordance with the laws of the continent and also in accordance with Scottish law and other Criminal Codes in other countries.

Act of Commission

The offender here would have to **physically commit an act which causes death.** Like in *republic of malta vs Lawrence Abina*, where the offender caused death by strangling.

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.

What is known as **“killing by perjury”**, i.e., causing an innocent man to be sentenced to death by false evidence, is not, in English law, murder. Yet, in **“foro conscientiae”**, it is as much so as killing with a sword. Indeed it is, perhaps, the worst and most heinous form of wilful homicide, which manifests more deliberate malice and aggravated guilt. In 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.104 and 102.**

Act of Omission

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

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.

Proving an omission

It is undoubtedly a harder task for the prosecution to prove an omission as you are proving a negative. Here the prosecution must naturally prove that at the time of the omission the actus reus was accompanied by the mens rea. Significantly with regard to omissions it must also be proven that there existed **a duty of care** in the particular situation. The law does not tell us when there is a duty of care, how long it subsists and what the consequences of not following such duty are. However there are principles which lay the groundwork.

Some situations are a bit more complex then lets say a guard towards a prisoner, whose job it is to feed said prisoner. Where there is no employment relationship or a guardian-minor relationship, no particular relationship establishing some form of obligation there is the formation of what some might label grey areas.

For example, walking near the beach and seeing someone drowning. There is no legal obligation for you to help. However if you are a lifeguard there is this obligation, due to a provision of services relationship which triggers this obligation.

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.

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 ccacchad 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.

The third element-The Malice in the Killing

The taking of human life to constitute wilful homicide, according to the definition of our law, must be “malicious” (doloso). **This word here means no more than that the killing must be unlawful.** It is not, in the context, employed in its original (and popular) meaning of ‘ill-will’ or ‘enmity’, ‘spite’ and maliciousness to the person. In a man may be guilty of wilful homicide though, by mistake or accident, he may have killed a person whom he had no desire to harm at all: indeed, he may have been his own best friend. The word “maliciously” in the definition merely means an **evil design in general, the consciousness of doing a wrong thing**, and serves to mark off wilful homicide from other forms of homicide, which, though the intention be the same, i.e., to kill, are yet not criminal, being ordered or permitted by the law or by lawful authority or otherwise justifiable.

The fourth element- The mens rea

Mamo notes that it is the grand criterion which distinguishes one form of homicide from the other. It is crucial in determining the charges which will be undertaken against the individual. Largely the nature of the charge is very much dependent upon whether this **specific intent** subsisted or not. This specific intent presents itself either as the intent to kill **-animus necandi**, which is the direct intent or **the intent to place someone’s life in direct jeopardy**, which is the positive indirect intent. 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.

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.***

***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.

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. *-This will be discussed below-*

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

***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 bizzzejjed 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...”

Republic of Malta vs Ilija Vukadinovic (2004): The court held it was thus that at one point all you need is the subsistence of the actus reus and mens rea at a point in time. During this brief encounter, the accused, with the **specific positive and indirect intention of putting Joseph Drago’s life in manifest jeopardy** went about pouncing on the latter’s head.

How does one prove criminal intent?

You must prove this criminal intent **objectively with the evidence, cumulatively/holistically**. The jurors are guided by the judge on how to consider pieces of admissible evidence.

To a large extent the evidence depends on the objective facts brought before the jury and many a time you can decipher the existence of the criminal intent by various circumstances. These circumstances may include:

1. Was the shot directed to vital components of the human body for example?
2. What was said before or after?
3. Were there any preparatory acts which preceded the crime? (These acts can reflect an **element of premeditation.**)

4. How long did it take for the commencement of the crime to be triggered?

5. Possibly, what were the climactic conditions?

6. What happened after?

Certain facts after happening can help us place pieces of facts in a puzzle that lead one to determine that episode X before a crime happened for a reason and was not a coincidence and happened for a reason, even though often times they are not inherently punishable in themselves. **They shed light on the mens rea** which ultimately determines the crime that the person has committed and subsequently the weight of their punishment.

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.**

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**.

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**.

Republic of Malta vs Francis Casaletto – COCA – 8th November 1988 –

Thus, the intention to put the life of another in manifest jeopardy constitutes positive indirect intent. According to our law for wilful homicide to subsist the intention need not necessarily be that to kill, it is sufficient if the intention is to place the life of another in manifest jeopardy. In the case of the former (The animus necandi-the intent to kill), **the intention is direct**, in the case of the other (the intent to place the life of another in manifest jeopardy), the intent is **positive indirect**.

Premeditation

The presence of a specific intent, crucial in establishing willful homicide, **should NOT be equated solely with premeditation, 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 a sudden quarrel,

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.** Wilful homicide will still be committed though it should be noted that **this scenario may be excused under article 227(c).**

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.

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.

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.**

Motive vs criminal intent

Criminal intent is the **determination to commit the crime**. Carrara calls it the **dolo determinato**. The motive on the other hand is the **underlying factor which generates my determination**. The motive is the underlying reason to form that determination. The intent is **the foresight** and **the desire**.

Let us contemplate an example(don't use said example in exam): If the crime I am committing is theft and my intention is to fill my bank account with euros, that is the intent, but I can try to fill my bank account with money to feed starving relatives, it does not mean the intent does not exist. My motive becomes relevant, if at all, **should the judge deem so**. The motive is the underlying reason to form that determination.

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.

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.

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**.

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***.

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 article in our criminal code accounts for both scenarios.

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 accident 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**. Where a jury returns a unanimous guilty verdict, then the court is bound to award life imprisonment, where it is not unanimous the court has discretion to award life imprisonment or any other punishment which the court deems just in the circumstances.

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 punishment, as stipulated in **Art. 3 of the ECHR**, which has been incorporated into Maltese 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.

Kafkariz vs Cyprus

The ECHR is moving towards a **victim-oriented justice system**, but we need to promote restorative justice. Here we have an ECHR which is moving towards crystalizing restorative justice as the main objective of the criminal sanction but not imposing it as the ultimate objective of the punishment and states can focus on one objective through legislation like our restorative justice act.

Addressing the Jury

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**.

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.

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 shall, 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

Police vs James Farrugia, John Farrugia and Omar Caruana. 16th may 2014.

The court cited from an important judgement in this field which is that of;

Republic of Malta vs Carmen sive Charles Demicoli, 2nd September 2010:

The court held the following:

“There is no evidence at all within the acts of the proceedings which could indicate that the appellant caused the above-mentioned offences since there were many persons who participated in the fight, he can only be found guilty of the accidental affray”

In the ***James Farrugia et case*** the court held as follows:

It reiterated article 237. It does not feel that this legal provision can be applicable in this case. This is because in the aggression there was absolutely nothing which can be considered as accidental. **On the contrary, it was premeditated accompanied with the clear intent to attack the police and harm them in the process.**

The appellants arrived at the scene of the crime and were accompanied by other persons. They drove the car in an aggressive manner when they got closer to the police, they used excessive speed after which they pressed the car brakes instantly with a clear intent to intimidate. They opened the car doors and all of a sudden surrounded the police. There is nothing accidental in such conduct. The appellant and the people who accompanied were there specifically to harm the police. John Farrugia's statement clearly manifests such intent. This being the premeditated plan to cause harm to the police because of the office they occupy. **Thus, the appellants cannot benefit from any mitigation of punishment under 237.**

Police vs brandon callus, 20th September 2015

“For the application of 237 at least another two persons should have participated actively within the affray against the victim in such manner that the perpetrator of the crime could not be known. In a fight between just 2 persons the victim and the other person, this crime cannot subsist because as Carrara upheld it is entirely based on the uncertainty as to its perpetrator. There can be no uncertainty when against the victim only one person participated.”

Police vs Jan Erdogan et , 2022, com as a cocj

The court made an analysis of 237 and then quoted from **Antolisei** especially in the context of **homicidio in rissa** *“the identification of persons and the means employed thereto hence the method of identifying such persons belongs to the court and it is the exclusive and absolute discretion of the court to determine such”*

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 lack 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*'.

Il-Pulizija v. Stefan Lekov– Definition and elements of 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, parliamentary debates, and the writings of legal scholars to gain insights into the meaning and interpretation of the term).

1. L-ezistenza ta' **glieda accidentali**;
2. Persuna li **tippartecipa attivament** f'din il-glieda;
3. **Nuqqas ta' gharfien dwar min attwalment huwa responsabbli** għall-offizi gravi li jigu kkagunati, sew jekk l-offizi jkunu jwasslu għall-konsegwenzi msemminjin fl-Art. 218 kif ukoll jekk ma jwasslux għal dawn il-konsegwenzi; u
4. Il-***mens rea*** li jikkommetti r-reat.

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**.

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. *(THIS WILL BE ADDRESSED SHORTLY)*

- For this crime to subsist, you have to have the complete suicide, *you cannot have the attempt*
- When it comes to wilful homicide you have that homicidal intent but in 213 you do not have such intent.

Legal Distinction Between Wilful Homicide and Instigation to Suicide

- **Wilful homicide** involves the direct killing of a person.
- **Instigation to suicide** involves encouraging, pressuring, or facilitating the self-inflicted death of another.

Since these two offences exclude one another, they **cannot be charged together** in a single bill of indictment, as they represent two completely different legal scenarios. The ultimate **effect** of both **crimes differs**, making them **distinct** under Maltese law.

Principal Elements of Instigation to Commit Suicide.

The principal element of this offence is:

1. **Prevailing upon another to commit suicide** (*Igġieghel lil haddiehor jiddeċiedi li joqtol ruħu b'idejh*), or;
2. **Giving assistance to the suicide.**

These two elements are **alternative**—meaning that **either act can constitute the offence.**

Distinction in the 1889 Italian Criminal Code

A distinction was made between: (1) **Compelling or pressuring someone to commit suicide** (actively leading them to take their own life); (2) **Providing assistance to someone in committing suicide.**

If I, as a person, **constantly reinforce the idea of suicide**, lower the victim's self-esteem, and **compel them or assist them** to such an extent that they **feel pressured to take the fatal step**, then I may be guilty under **Article 213**. A **persistent and repeated course of conduct that pushes the person closer to suicide** falls within the scope of **instigation to suicide** under this law.

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 or encourages the idea**, 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" it. 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.

Although the law refers to "*instigation to commit suicide*," this is not mere incitement or encouragement. The law does not simply cover incitement, as instigation in this context involves a **stronger degree of influence**

Providing assistance

When the law speaks of assistance, here there is a very much similar concept to that of complicity in particular aiding and abetting.

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**. This was explicated by **Impallomeni**.

I-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

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. Bodily harm is punishable in terms of its effects in 218 it is punished as an **offisa gravissima** as opposed to **offisa gravi**.

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

A bodily harm may be either grievous or slight.

Art. 215, Criminal Code

Generally speaking, the offence consists of any bodily harm inflicted **without the intent to kill** and therefore with the generic intent to cause harm - the **animus nocendi**.

The law does not require **that the offender specifically intended to inflict the wound or bodily harm, which the victim suffers**. The bodily harm itself, caused with the intent to cause harm, is evidence of the intent of the offender. After all, everyone is responsible for the consequences of ones actions. This is the principle of **dolus indeterminatus determinatur ab exitum**.

A person may be guilty of an offence **even when he or she may have not had a direct intent to injure a person in particular, but still causes an injury**.

Pulizija v. Joseph Zahra;

A bus driver was accused of running over an enforcement officer with his bus and consequently causing him severe harm. The bus driver claimed that he was reversing slowly and although he had seen the officer behind him, **he had not expected that he would cause such harm to the bus driver**. The prosecution argued that he had deliberately hit the officer

and substantiated this claim by the fact that the bus driver had said more than once "I'm sorry, I was only joking."

The Court said that one had to look at the intent of the driver. **If the accused had an intent, no matter how slight it was, to hurt the officer, then the accused would be guilty of bodily harm, which owing to the injury sustained, would amount to grievous bodily harm. However, the Court was convinced that the accused had absolutely no intention of harming the victim.** It said that even if he had jokingly intended to hit the officer with a vehicle that was hardly moving, this was **not enough to establish an intent to harm (animus nocendi)** which is necessary for the offence of bodily harm (grievous or slight bodily harm).

This thus highlights that an animus nocendi is always needed for the crime of bodily harm to subsist.

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

There are various judgments that reference both bodily harm and homicide. This is because when the **court determines whether someone is guilty of wilful homicide or grievous bodily harm (GBH)**, it follows a **single test**.

Judicial Approach to Wilful Homicide vs. Grievous Bodily Harm (GBH)

In many judgments, courts **examine both** wilful homicide and grievous bodily harm since the **legal test** to determine the charge is the **same**. In a criminal court, we do not always know why a person was found guilty—this is decided by the jurors.

In the Maltese legal system, the judge provides the motivation of the verdict, but if someone is found guilty of **grievous bodily harm from which death ensued**, the **specific reasoning of the jurors is not disclosed**. The law, in examining wilful offences against the person, begins by eliminating homicidal intent, as outlined in **Section 214 of the Criminal Code**.

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

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**.

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).

Repubblika ta Malta vs Salvatore Sive Salvu Gauci. (Court of Criminal Appeal, 8th July 2004).

“Wilful homicide consists of the following elements:

(1) Direct Intent:

Either the accused foresaw death as a consequence of his acts and **desired** the death of the victim or else;

(2) Positive Indirect Intent

The accused foresaw death as a probable consequence of his act and although he did not desire the victim’s death, he still carried out and performed such acts, which **he knew would probably cause the victim’s death.**”

This definition summarizes criminal intent by focusing on the **knowledge of consequences and a reflection of the foresight.**

If **neither** of the two forms of **intent** (direct or positive indirect) is **present**, the judge should conclude that the accused only **intended to injure and hurt the victim**, who eventually died. In such a scenario, because the accused should be liable for the consequences of his actions, then he should be found **guilty of Grievous Bodily Harm** from which death ensues.

In order to determine the criminal intent, one must carefully analyse and examine the facts of the case.

The court outlined **key factors** to examine when assessing intent:

1. The **material act** which happened;
2. The prevailing **circumstances** surrounding such material act;
3. The **type of weapon** which was used to commit the crime;
4. How the weapon was used;
5. When and in **what manner** it was used;
6. The **location**, meaning which part of the human body the blow was directed to;
7. The **statements made before, during and after the event**, being the crime.”

The Court Of Criminal Appeal in actual fact **refused to accept** the principle adopted by the First Court which held that:

“Wherever the blow is directed to within the human body, there always exists the possibility that a vein or artery is punctured, and that the victim hence would lose blood. If the victim dies as a result of this, there will subsist the homicidal intent—possibly indirect.”

The Court Of Criminal Appeal found that the first court approach practically **excluded the crime of Grievous Bodily Harm from which death ensued**. Although it is the true that the intent must be deduced from the material acts and the prevailing circumstances (*during, before and after the act*), the intent will always remain a **subjective matter**—it is about what was in the accused’s mind when he committed the act. However, **intent is proved objectively**, meaning that courts must examine the evidence and circumstances to infer the accused’s intent.

The Damage incurred

Article 216(1)(a).

Article 216(1)(a). According to professor mammo even when the danger is probable this section of the law is triggered. The term ‘if it can give rise’, means that **there is no need for the actual danger to have arisen**. It is enough if the act committed by the offender was one which could have given rise to one of the consequences envisaged by law. Here there is the element of **probability of danger**.

In the field of bodily harm, **the prosecution would have to rely on medical certification and medical experts**.

Pulizija vs Pierre Balzan and Joseph sive Beppe Hili, 9th April 2014.

*“From the evidence produced since there was a small amount of blood around the lungs, Vella was being considered to be in danger of losing his life but the danger of losing one’s life in and of itself **does not transform the bodily harm into a GBH unless with such danger there is a permanent disability or permanent defect**”*

This judgement in largely contradicts the law we have today which views the consequence of potential loss of life as an alternate consequence for the crime to take place as opposed to them taking place concurrently as this judgement is propounding.

Article 216(1)(b).

This section gives rise to the most judgements and reads as follows:

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

The courts here tend to apply expert opinions and depart from said expert opinions when there are compelling reasons to do so. Since GBH mostly depends on the injury, a medical practitioner can inspect these effects. For example: how they heal, if they heal in a natural way or not, permanent disability, complications etc.

The medical expert is also important here due to **the best evidence rule** which not only applies here but applies as a rule in our law of procedure. So, if I want to argue that Mr X has suffered GBH my best evidence to attest to that fact is what a medical expert says not for example my mother.

Deformity is 'mankamanent', whereas disfigurement is 'sfregju'. **Mamo** says that to deform 'implies something more serious than to 'disfigure'. Any external injury which detracts from the appearance of the face, or of the neck or of either of the hands - the most conspicuous parts of the human body, provided it is not too trivial, will be a sufficient 'disfigurement' to make the bodily harm grievous.

Some of these concepts were explained in an old judgement which has been reiterated by our courts:

Pulizija vs Paul Spagnol, 12th September 1996.

Here the court held as follows: "*disfigurement as opposed to deformity is constituted by very harm to the features of the face. Its linear harmony and its aesthetics. Jurisprudence establishes that such feature must be visible from a normal distance, generally used by persons conversing with one another.*" This was further emphasised by **Antolisei** who stated that it must be '*visible stando di fronte alla persona*'.

Moreover, in this case the court further established *that tooth damages, loss of teeth and other damages to the face which can be remedied do not amount to grievous bodily harm.*

The court here seems to already be establishing certain thoughts, thoughts that are not visible in the words of the law.

Pulizija vs William Mercieca, 20th June 2014.

The judge adopted a literal approach and cited from **Macmillan English dictionary**: "*Deformity is a part of someone's body which is not the normal shape. This sheds a lot of light on the gravity of deformity. On the other hand, disfigurement means to spoil the appearance of someone or something.*"

Police vs James Farrugia, John Farrugia and Omar Caruana

Disfigurement in the face means every deterioration of the facial features which although it does not cause repulsion it produces '*un 'peggiornamento di spetto notevole o complessivo o per l'entità della alterazione stessa o per l'espressione d'assieme dell'voltò*'

The court said the teeth are not part of the face per se, but the court qualified this with an important caveat. To the effect that the loss of various teeth can lead both to disfigurement and deformity of the face because of the effects that such loss leaves on the face, especially the mouth.

The judge said here the rupture of an incisor can be a grievous injury which causes deformity or disfigurement of the face. The judge said it is immaterial that with modern technological innovation one can conceal the negative effects of broken teeth. **What is important is that the injury caused would not heal in a natural way, in which way the facial harmony**

would be permanently affected. The intention of the law is *to punish more severely the kind of harm which does not heal in a natural way.*

Does the harm have to be permanent?

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

An important principle was pronounced in the following case:

In Pulizija v. Jonathan Farrugia

The Court held that "*If the injury is more marked so as to give to any of these parts of the body affected, an unpleasant appearance as by causing a considerable alternation of the tissues, then the disfigurement becomes a deformity*".

This paragraph would apply to serious or permanent consequences. For instance, mutilation would aggravate the grievous nature of the bodily harm. **Permanence is not an essential criterion but if at all, a matter of aggravation.** this was echoed in the following judgement:

In Pulizia v. Francis Dingli

It was held that "*For Art.216(1)(b) it is not necessary that the deformity or disfigurement be permanent, or that it subsists for a number of hours, days, weeks or months. If the disfigurement is both serious and permanent, the offence would be very grievous (gravissima) as contemplated in Art.218(1)(b).*"

Pulizija vs Fortunato Sultana, 5th February 1998.

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

In Pulizija v. Reno Azzopardi,

The Court reiterated that our law draws a distinction between bodily harm, which is slight (sfregju semplici) and bodily harm which is grievous and permanent (sfregju gravi u permanenti). The Court also refers to **Mamo**, for he established that the crime would subsist anyway, **even if the actual disfigurement caused can be concealed by means of either a beard, hair, etc.**

Mamo also says that responsibility *does not abate* because the disfigurement or deformity **might have been eliminated or reduced by some special treatment like plastic surgery**

Medical expert reports persuasive but not decisive

Pulizija vs Joseph Azzopardi, 30th July 2014

Whether a bodily harm is slight or very slight, grievous or very grievous is a fact which has to be dealt with **by means of an exercise of discretion of the courts**. Clearly hence, it is not an issue which necessarily and exclusively depends on a medical opinion. Doctors and surgeons testify about what they came across. They can express an opinion on various matters including the cause and the manner of the infliction of the harm and the way it was sustained and also including on the compatibility or otherwise of symptoms which were clinically identified. But **ultimately it is up to the judge in the light of all the evidence produced including the testimony of medical experts to determine the nature of the bodily harm**. Medical experts' reports can be indicative and persuasive but not necessarily decisive because the courts have ample discretion.

216(1)(c)

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

The mere fact of the penetration of the wound without requiring that the wound shall have actually produced serious permanent harm is sufficient for a GBH to subsist. The spirit of the law is that *the mere possibility of such more serious effects arising from such wound because they are vital parts of the body has been considered sufficient by law to make the offence grievous*. The law wants to try as much as possible to serve as a deterrent to ensure that as much as possible no harm ensues to these vital parts. So, it prevents these situations by categorising this mere possibility within these vital organs of the body.

216(1)(d)

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

Antolisei holds that "*Per incapacita' di attendere alle ordinarie occupazioni si intende l'impossibilita di svolgere l'attivit  consueta* » In other words, the person must not be able to attend to his ordinary work, even if the person is not totally incapacitated.

When the law speaks of the occupation the law speaks about the ordinary **main, ordinary occupation of the victim**

Jurists have argued that allowing for a medical certification of the wound is more precise than simply using a time criterion, **arguing that the matter of a day or a few hours of difference decisive and productive of an enormous difference in punishment**. This having been said, the time criterion has appeared to the legislatures as an objective and practical criterion.

In ***Rex v. Anthony Micallef***, the infirmity brought about by the bodily harm had lasted for the requisite thirty days or more and hence the Court was satisfied that the infirmity had the requisite duration envisaged in the law.

Furthermore, as stated in ***Repubblika ta' Malta v. Joseph Vassallo***, the infirmity and incapacity **are not cumulative, but alternative**, that is we need not have both infirmity and incapacity.

216(1)(e)

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

218 is different to 216. 216 hasten delivery, 218 speaks of miscarriage. 218 is gravissima, 216 is grievous.

Mamo says in relation to 216(1)(e) that the prevailing position seems to be that in our law such knowledge of the pregnancy of the woman is not an ingredient of this offence. The prosecution does not need to prove that the perpetrator knew the woman was pregnant. This is not part of the mens rea, it is a generic intent to injure or harm.

Altavilla says, in the first case, there is **merely the acceleration of delivery or premature delivery consisting in the extrusion of a child in such an advanced stage as to be capable of living**; whereas in the second case, there is the extrusion of a foetus at a stage when it is **incapable of an independent life**.

216(2)

(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.

This means that even if a person recovered, the wound would still remain of a grievous nature, provide that there was a probabbiloty of any of the circumstances mentioned in the law.

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

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 **prison 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 before, 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**.

Il-Pulizija vs Joseph Azzopardi

"The question of whether an injury is slight, of minor importance, serious, or very serious is a matter of fact and therefore falls under the responsibility of the trier of fact (in the case of a jury, therefore, it is in the hands of the jurors...). It is not, therefore, a question that necessarily or exclusively depends on a 'medical opinion'. The doctor or doctors explain what they observed as fact; and, if the court permits them, they may offer their opinion about, among other things, how the injury could have been caused, or with what the symptoms that were clinically observed are compatible. It is then up to the trier of fact to determine the nature of the injury, in light not only of what the doctor testified but in light of all the evidence."

Proceedings for slight bodily harm are not to be commenced ex officio, but only on the complaint of the injured party. This was evidenced in *Il-Pulizija vs Clyde Bartolo* where **the victim withdrew his complaint and the court declared proceedings to be exhausted**.

Attempted Grievous Bodily Harm

Repubblika ta' Malta vs Domenic Briffa. Court of Criminal Appeal, 16th October 2003

Since 2003, this judgment has been **persistently followed** by Maltese courts when a charge of **attempted grievous bodily harm was brought and tendered against an individual**. The court acknowledged that:

“Jurists have disagreed as to whether attempted grievous bodily harm is possible or otherwise. **Maltese courts have always accepted the theory which allows for attempted grievous bodily harm**, provided that it is proved that the **accused had the specific intent to cause one of the consequences which characterise attempted grievous bodily harm.**”

The ruling established that:

- If a **person hits a pregnant woman** with the **specific intent to cause a miscarriage**,
- Since miscarriage is one of the **consequences of grievous bodily harm**,
- If the **miscarriage does not occur**, but all **elements** of the attempted crime are **present**,
- The accused would **still be guilty of attempted grievous bodily harm**.

These judgments all reflect and explain key legal concepts, particularly the concept of **attempted grievous bodily harm**, “*tentattiv ta’ offiża gravi fuq il-persuna*” as referred to by Maltese courts.

The court stated:

“The court agrees with the appellant to the effect that normally, whosoever uses a cutting or pointed instrument like a knife to hit another would have the intention to injure grievously, not merely to cause a superficial scratch. It is true that, in this case, the injury was caused in the inferior parts of the body, but it is a known fact that even in such parts, there exist blood vessels, including arteries, veins and nerves, as well as muscular systems, which, if ruptured or perforated, can easily lead to serious consequences.”

The First Court Civil Court was correct in holding that for attempted grievous bodily harm to subsist, **there must be a specific intent to cause a particular grievous injury**, and not merely a generic intent to injure.

Such specific intent can be **deduced from circumstances** of the case, including:

- The type of weapon used;
- The type of injury sustained by the victim.

Pulizija vs Daniel Victor. (Court of Magistrates as a Court of Criminal Jurisdiction, 10th March 2014). The court stated:

“If the intention of the perpetrator was to cause harm, no matter how slight such could be, **he must answer for the ensuing consequences which are directly caused by his own act**. In bodily harm cases, for the crime to subsist, it is sufficient that the intention of the agent, meaning of the perpetrator, is a generic one.”

There is disagreement between various legal scholars as to whether attempted grievous bodily harm is legally possible. Prof. **Mamo** highlights the principle that in bodily harm offences, the **effect of injury and damage (*dannu*) is crucial**. Mamo further explains by adding to the classification made at law that having regard **the means used by the offender and their mode of action** is crucial determine the intent to cause one type of harm rather than another.

In voluntary bodily harm, a generic intent to cause harm is sufficient. However, in **attempted grievous bodily harm**, the **prosecution must prove** that the **accused had the specific intent to cause a particular grievous harm** to the victim.

Pulizija vs Dolores Cutajar. (Court of Criminal Appeal, 24th January 2013).

The case of *Pulizija vs Dolores Cutajar* reinforces the principle that attempted grievous bodily harm cannot exist without fulfilling the essential legal elements of an attempted offence.

The accused was initially convicted of **attempted grievous bodily harm** after attacking her daughter with a metal rod, but the Court of Criminal Appeal **overturned the conviction**, ruling that the **accused voluntarily stopped her actions**, which **excluded the requirement that the crime was halted due to accidental or independent circumstances**.

This case aligns with *Pulizija vs Daniel Victor* (2014) and *Repubblika ta' Malta vs Domnic Briffa* (2003), emphasizing that **specific intent to cause grievous harm must be proven beyond reasonable doubt**. The ruling highlights that **voluntary desistance negates an attempted crime**, reinforcing the necessity of proving intent, means used, and inflicted injury to sustain a charge of attempted grievous bodily harm under Maltese law.

Pulizija vs George Farrugia (Court of Criminal Appeal, 17th October 2013).

This judgement cites another ***Pulizija vs Mariano Silvie Mario Camilleri*** (8th February 2002, an important case in Maltese jurisprudence.

The Court Stated:

“The fact that the ensuing result was a slight bodily harm **does not necessarily mean that there could not have been the specific intent to cause a grievous bodily harm**. Whether such intent subsisted or otherwise, is a matter of fact to be decided upon by the courts, which, among other things, must give significant weight to the nature of the instrument used and the part of the victim’s body the blows were directed towards to. These are crucial factors.”

While these factors are **not necessarily decisive**, they are **highly indicative** of intent.

Pulizija vs Mariano Sive Mario Camilleri concluded that the trend in Maltese jurisprudence is clear—**attempted grievous bodily harm can subsist under Maltese criminal law**, reinforcing the requirement to assess *specific intent, weapon used, and the area of injury* when determining criminal liability.

Grievous Bodily Harm from Which Death Ensues(art.220)

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

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

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

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

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

As had already stated, where death is caused with the intent to kill, the offence is one of wilful homicide. Where however, death is caused because the offender **intended and wilfully wanted to harm the victim, rather than kill**, but death ensues, then the offence under **article 220 of the Criminal code** will subsist.

Section 220 of the Criminal Code deals with **grievous bodily harm followed by death** (from which death ensues), aligning with what Carrara termed as “*l’omicidio praeter intentionem*”—meaning that while **death ensues**, there is **no intention to kill**.

The Main Principle: Mens Rea as the Grand Criterion

The mens rea (*mental element*) is what distinguishes grievous bodily harm from which death ensues from wilful homicide. **Mamo** refers to mens rea as the **grand criterion** in such cases.

The legal distinction is as follows:

1. If the perpetrator’s **intent**, wrongfully causing a bodily harm, **was to kill**, and **death ensues**, the charge would be **wilful homicide**.
2. If the intent was to **put the victim’s life in manifest jeopardy**, and death was a foreseeable consequence as a **probability** (*x’aktarx iva milli le*), the law treats the act as if it were intentional, leading to **wilful homicide**.

However, if the perpetrator’s intent **was solely to cause bodily harm**—even serious harm—but **not** to expose the victim to a manifest danger of loss of life and death ensues, then:

- The ensuing **death goes beyond their intention**, and
- The **law does not punish the act** as wilful homicide.

The Foreseeability Test → If death was obviously **foreseeable** (*because the nature of the injury itself exposed the victim to manifest danger*), from the fact that the intention of the agent was to **cause a bodily harm** of such a grievous nature as to expose the life of the victim to **manifest jeopardy**, then death falls within the accused’s responsibility, resulting in **wilful homicide** and not of grievous bodily harm.

However, if death was neither **desired, foreseen**, nor patently **foreseeable** as a likely consequence of the act, then **such act cannot be charged as wilful homicide**.

When Does Article 220 Apply?

For this form of criminality under Article 220 to apply and arise, it must be **proven that the perpetrator's intent was**:

1. Not to kill.
2. Not to expose the victim's life to manifest jeopardy.
3. **Solely to cause bodily harm**, regardless of its degree or extent, but not so severe makes the contemplation of that death as a foreseeable outcome.

Thus, Article 220 covers cases where **death is an unintended consequence of bodily harm**, distinguishing it from wilful homicide, where death was either intended or a foreseeable result.

Salvatore Sive Gauci Case (Court of Criminal Appeal, 8th July 2004).

This case solidifies the principle **distinguishing** wilful homicide from grievous bodily harm from which death ensues. Initially, the jury convicted the accused of wilful homicide, but this was later **reversed on appeal**.

The accused believed that **Anna Kok** was causing matrimonial problems between him and his wife, who was the victim's sister. In his statement *atempo vergine* (given immediately after arrest, before legal advice or manipulation), the accused admitted: "*Jiena ghal saqajha mort, ma ridtx noqtolha*" (I aimed at her leg; I did not want to kill her.)

This is why sometimes the prosecution would think that such important evidence, being something the accused said would avail the prosecution themselves.

The Importance of This Statement

The prosecution initially viewed this as **self-incriminating evidence**, arguing that the accused **admitted to the crime**. However, upon further analysis, the statement actually demonstrated a **lack of homicidal intent**.

The accused was **initially found guilty** of wilful homicide based on the prosecution's interpretation of his statement. However, on appeal, the court ruled that his **comment actually supported his lack of homicidal intent**. This led to his exoneration of wilful homicide, as his **intent was to harm, not kill**.

A judge must have the "**comfort of guilt**" before delivering a conviction. This case demonstrates how a guilty plea or a seemingly self-incriminating statement can sometimes serve as **exonerating evidence**, especially when intent is crucial in **distinguishing grievously bodily harm from which death ensues and wilful homicide**.

Additionally, a guilty plea can sometimes be used to protect loved ones, reinforcing the need for a court to **rely on clear evidence** and intent rather than just an admission of guilt.

In his statement, the accused admitted to possessing a knife, not with the intention to kill Anna Kok, but to **intimidate her** in the street. PS1404 Anthony Cutajar testified that the accused had

stated: *"I did not want to kill her; I aimed at her legs."* Before the appellate court, the accused pleaded that the prevailing circumstances **clearly lacked homicidal intent**, and that at worst, the resulting crime would be grievous bodily harm followed by death.

The **Court of Criminal Appeal examined the circumstances and fact**, which stated:

"The Court of Criminal Appeal refused to accept the principle accepted by the first Court, that wherever the blow is directed to within the human body, there always exists the possibility that a vein or artery is hit and punctured, and that the victim loses blood and that consequently, if a victim dies as a result of this, there would subsist the homicidal intent. The first Court was practically excluding the crime of GBH from which death ensues, when such an offence is such as to create a form of internal haemorrhage. **Although it is true that the intention must be deduced and established from the material acts and the prevailing circumstances, before, during and after the act, the intent will always be a subjective matter; this being what was in the accused's mind when he committed the act, and not simply an objective issue in relation to what the accused should have foreseen or what would have a person with normal intelligence foreseen.**"

"There is no doubt that the knife is such as to be able to cause death, and that the accused's intentions were not noble when he met and confronted Anna Kok in the street while carrying the knife. However, the blows on her body were **not directed at any vital part** or organ of the body (*such as cavities*), containing delegate organs, which are susceptible to haemorrhage, and which control vital body functions (e.g., heart, lungs and the brain). The blows were directed and endured in the right leg above the knee, as a result of which the victim bled to death."

The court reaffirmed that intent is subjective but must be **proved objectively**. The court explained recklessness under Scottish law, citing Gerald Gordon, which aligns with positive indirect intent. The **test of subjective recklessness** is based on *whether a reasonable person would have foreseen the risk*. If a **reasonable person would have foreseen the risk**, the court **assumes the accused foresaw it**, unless strong evidence suggests otherwise.

Final Court Ruling

The court posed the crucial question: *"Would a reasonable person have foreseen Anna Kok's death as a probable consequence of the stab wound to the leg?"*

The court's response was **negative**. Consequently, the verdict of guilty for wilful homicide was revoked and reversed to **guilt for grievous bodily harm from which death ensued**, emphasizing the *lack of homicidal intent*.

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 as responsible as he would be before those 40 days pass. The law then contemplates a lesser punishment if the death takes place between 40 days and 1 year.** 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.**

Related to this article 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 Persons)**. 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).

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 sopraggiunta*,' clarifies this meaning.

N.B 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.

In *Repubblika ta' Malta v. Casaletto*, it was postulated that the appellant should know that the concept of supervening accidental cause, can never apply to the crime of wilful homicide. The Judge who did the summing up to the jury in the First Court explained well that the defence counsel was incorrect when he alleged that supervening does not mean following. Supervening means "*li tissopraggiungi; cioe tigi wara*".

Hence, it does not precede, rather it follows something else. It is important to know that this section of the law was taken from the original Italian text which in fact used the words "*causa accidentale sopraggiunta*". For this reduction of punishment, it is essential that the contributory causes shall be both:

- Supervening, that is, **arising after the infliction of the harm by the offender**, and
- Accidental that is, **completely independent of the act of the offender**.

Thus, if the victim suffered from an **antecedent** disease, which may have contributed to make grievous any injury that would not have produced such a serious result in a healthy person, this will not avail the offender. Nor will any circumstance which, although supervening, is connected to the act of the defendant as a consequence thereof.

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 anyone 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

Carrara states that ‘l’omicidio puo essere doloso, colposo o praetorintenzionale’. In involuntary homicide there is no foresight **but there is foreseeability**. ‘Ma kienx prevedist imma preveddibli’. Here we have more cases than that of wilful homicide reflecting in a bit of an unfortunate trend that here we are in the realm of day-to-day life. The law does not expect us to exercise absolute total diligence but that of **the ordinary man** in that situation, that of the **bonus pater familias**, the diligence that should be exercised by a reasonable man. Only when there was no reasonable way to anticipate the harmful event would the accused be absolved of responsibility (*casus*).

The 4 classifications of negligence:

Imprudence and carelessness-These are situations whereby the test has to be adopted in a more humane manner. Here there is no yardstick of a standard established by law, there is no written rule or regulation.

Unskilfulness in one’s art or profession-there might be regulations here. You can also have unskilfulness without anything being stipulated.

Non-observance of regulations -here we are in the realm of **written rules**. There are some forms of norm which are written and which persons performing certain actions need to abide by.

Police vs Tarcisio Fenech, 26th March 1998

The court drew the intention of everyone that people habitually in their daily lives may act or omit from doing something which could lead to the assumption of criminal liability. The court distinguished between two distinct categories of acts that entail liability under 225.

It is the following

- 1.those deriving **from ordinary practice** and;
- 2.those **statutorily and expressly provided for within formalized rules or norms**

In order to fully understand the essence of negligence one must keep in mind that in our daily lives frequently situations are created wherein the activity one must undertake can give rise to harmful effects to the detriment of others. Experience teaches us that in such cases the necessary precautions must be adopted to avoid that the rights and interests of others be jeopardized. 225 refers to rules deriving from general past experiences in life by virtue of the use of the words “imprudence, carelessness and unskillfulness” whereas on the other hand those rules of a statutory nature are indicated by means of the words “non-observance of regulations”.

By means of the latter phrase the legislator is not merely referring to subsidiary leg. which comes into effect by virtue of the **promulgation of legal notices, government notifications and orders but also to every form of conduct statutorily prescribed** which can hence include internal regulations enacted by private companies for example regulations issued by owners of a factory to prevent harm to its employees or persons visiting the factory or even the highway code.

For this crime to subsist however, courts strive to ascertain the presence of what is deemed to be the **Tripod of Culpa**.

Il-Pulizija v. Mark Piscopo “.... t-treped tal-kolpa gie definit bhalta:

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-possibilita' ta' previzjoni ta' daww 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**).

Foreseeability in negligence

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

Pulizija vs Rodrick Azzopardi et 26th October 2017

The essence of culpa is explained to the court as followed.

1. A voluntary negligent conduct which is imprudent and careless
2. The link between the act/omission and harmful event
3. **Foreseeability**

Pulizija vs Saverina sive Rini Borg, 31st July 1998

According to 225 of the c.c for involuntary homicide to subsist there needs to be proved the voluntary negligent conduct generically consisting in imprudence, carelessness and unskillfulness or else specifically consisting in the non-observance of regulations which conduct is followed by means of a link of causation with an involuntary harmful event. This means that in the field of negligence there exists activity with a particular purpose which as a result of the failure to adopt certain precautions may violate or damage or prejudice the rights and interests of third parties. **The essential feature of negligence is the foreseeability, il-prevedibilita, of the harmful event which may be caused by one's voluntary conduct.**

There are various forms of negligent conduct resulting from imprudence, carelessness, or unskillfulness in one's art or profession, or else the non-observance of regulations. Imprudence arises from someone's behavior when such person does not apply the appropriate caution. Carelessness arises from the lack of attention and the lack of concentration of the agent. Unskillfulness is the specific form of professional negligence, that is as Manzini states ***inettitudine e insufficienza professionale generale e specifica nota alla agentedi cui egli non aver conto***:insuffient in carrying out one's functions

Negligence can also arise from the failure to obey and adhere to laws, regulations and orders as those many regulations stipulated by public authorities in relation to an identifiable activity with the purpose of avoiding harmful effects and damages to third parties. Such laws being the dangerous drugs ordinance.

"Under these forms of negligent conduct, be it imprudence, carelessness or unskillfulness or the n.o of regulations there exists an essential difference. **That of foreseeability.** This element remains essential under every form of negligent conduct however to a different extent and to 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. Whereas on the other hand **it is presumed** in relation to the non-observance of laws,

regulations and similar orders that are statutorily established. The court is therefore saying that any evidence the contrary is not possible it is inadmissible.”

The legal effect of the distinction is whilst the prosecution has to prove the foreseeability of the event in the first limb in the second it is presumed. If it is written the legislator is saying that if you do not follow this harm will ensure, you cannot then claim that it was not foreseeable by a reasonable man **as the law caters for this foreseeability by its own existence.** This is therefore an absolute presumption.”

The agent cannot say that the harmful event which was caused as a result of his non-observance of refutations was not foreseeable. This is because as acknowledged by various jurists. In such cases the legislator’s foreseeability substitutes the foreseeability of the agent. This is exactly why voluntary negligent conduct is defined as voluntary conduct which causes a harmful event not desired but foreseeable i.e that is an event which could have been avoided with the caution and attention exercised by a reasonable man. As is known by everyone the mental and physical harm and in some cases, death caused by the abusive taking of heroin is a foreseeable contingency. In such case the harm is obviously foreseeable although not desired and although not foreseen. **Had it been foreseen or desired such conduct would have been willful and not negligent, we would be in the realm of dolus and not culpa.**

Police vs Ruth Grech, 12th January 2017

Here the court wanted to explain what it means to have a proper look out very succinctly:

*“He who does not see **what is reasonably visible** means that he did not keep a proper look out.”*

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 court also held here that keeping a proper lookout means more than looking straight ahead, it includes awareness of what is happening in one’s immediate vicinity.

Pulizija vs Joseph Grech, 6th June 2003

The court said: “In relation to the matter on the foreseeability of the event when this is caused by imprudence or carelessness, **the criterion or rather the consideration of foreseeability is crucial**. There is no doubt that should one drive without keeping a proper look-out owing to fatigue, other thoughts, lack of concentration or any other reason, it is foreseeable that such person would not possess the necessary reflex action to be able to react when for example a pedestrian crosses the road or gets closer to the driver’s car. The fact that one keeps a proper look out whilst driving i.e that one does not simply look in front of him but becomes aware of the surrounding circumstances together with anyone who might be walking or running in the vicinity is a social norm intended to avoid harm and hence if someone does not keep a proper look out **and as a result thereof** harm ensues the driver is liable for the harm involuntarily caused.”

Pulizija vs Dorianne Camilleri, 15th February 2017.

“Foreseeability is not enough, the harm or the event must have been avoidable, i.e such that it could have been avoided in the particular case. For the lack of a proper look out to lead to criminal liability, the court must be satisfied that had it not been for the lack of such look out either **the harmful event would probably not have occurred or else it would not have occurred to the extent to which it ensued**.

If that harm in any case could not have been avoided, the link of causation between the lack of a proper look out and the harm caused would be missing.”

The Objective and Subjective Test of Negligence

II-Pulizija v. Paul Buttigieg – Negligence

The court cites from various jurists including **Antolisei** and **Carrara**: the essence of culpa lies in the possibility of foreseeing. i.e foreseeability and the court goes on to explain the test of bonus pater familias.

In continental doctrine and jurisprudence, there exist two particular theories regarding the concept of negligence: the so-called **objective theory** and the **subjective theory**.

The test for the objective theory is not aimed at establishing whether the person foresaw or could have foreseen the incident in the specific circumstances of the case, **but rather whether that person’s conduct falls short of the reasonable duty of care that every person in society is presumed to have in a particular situation**.

On the other hand, **the subjective theory emphasizes that one can speak of negligent conduct if there is a failure to be alert or vigilant in light of the person’s individual limitations in that specific case**.

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.

Police vs Troy Joseph Emanuel Caruana

3rd May 2019

Awturi ohra bhal **Mantovani u il-Padovani** jabbinaw din ir-regola ta' l-**Antolisei** mar-regoli tal- prevedibbilita u l-inevitabbilita' biex b'hekk il-culpa fil-fehma taghhom tinkwadra ruhha f'erba elementi:

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**.

Il-Pulizija v. Anthony Pace 3rd April 2017

Our Code is based on the Italian Code of 1889. In the commentary on the provisions relating to negligence in that Code, Italian authors have always held that the **subjective test** should be applied.

If one considers the terms used in our law, namely "**lack of thought and carelessness**", one can note that these are terms which directly refer to the **subjective attitude** of the person guilty of the offence. **It is therefore necessary to determine whether the particular circumstances of the case allowed the person involved to become aware of the consequences of their actions.**

The Link of Causation

The negligence da parti of the agent must be linked to the ultimate death of the victim.

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’”.

Police vs Carmel Micallef et

Such need for the chain of causation between the negligent act and the ensuing harm **is a requisite for responsibility**. The court here clarified that the requisite applies both for the first limb and the second limb.

Pulizija vs Fatih Pancar, 30th October 2017

For culpa to subsist the court must find that there exists a link between an act committed by and imputable to the accused and its outcome. The link has to be between the act causing the damages and the ensuing damages.

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.

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.**

***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

What is the general rule?

First of all, it is that the contributory negligence of the victim **precludes in no way the liability of the accused. There may be a mitigation of punishment, but contributory negligence cannot serve as a defence per se.** if my act or omission was negligent if and of itself irrespective of the contribution of the victim to his own death, I am **still responsible under criminal law.**

Police vs corporal Raymond thomas hoare, 1956

Contributory negligence does not avail the offender from c. liability. Hence it cannot constitute a defense at law if the driver used excessive speed which would of its own nature any way endanger the lives of pedestrians

Pulzija vs Pascal Saliba, coca 28th July 2017

The negligence of others does not exclude the negligence of the accused unless it is decisive i.e the guilt of the accused can only be excluded in the case where the responsibility of the victim **was the only and exclusive cause of the incident.** Otherwise, if the victim's

responsibility is only of a **contributory nature**, the criminal liability of the accused remains the same although it can be considered for the purposes of the punishment inflicted unto the convict.

Pulizija vs Manoel Xerri, coca, 28th February 1953.

A distinction would be drawn between he who performs the dangerous act by means of which another person is killed when such other person (the victim) never and at no stage whatsoever contributed towards placing himself in danger and the case on the other hand wherein by means of a dangerous act a person causes the death of another who voluntarily (fully aware of) freely placed himself in such danger being a mature adult who was not obliged as a result of employment or other reasons to place himself in such a dangerous situation. The act of the accused consisting in manufacturing fireworks is intrinsically dangerous and that in those surrounding conditions which aggravate the danger **such act was negligent and therefore criminal liability subsists.**

In this case the victim's negligence **was merely contributory** because the victim contributed materially to the event since he manufactured fireworks without taking any precautions. But there was not, from his side any act **which of itself caused his own death**. It does not result that there subsisted an act of his which was independent of the agent's negligence. If the fire resulted from the spontaneous combustion of materials and substances which were significantly humid the fact that it was not stored, coupled with the fact that nearby there were prepared fireworks **which were not placed elsewhere is a part of a whole picture manifesting the negligence of the accused**. If the fire was caused by the cigarette (a fact which was not excluded by the fire experts) it does not result that the cigarettes and matches were left on the windowsill of the victim always keeping in mind that the incident occurred that the fireworks were placed nearby, in close proximity without protection or precaution. When these are by their own very nature very easily flammable. **Had the accused abided by the law such flammable materials would have been stored elsewhere or rather placed into fireproof receptacles.** It may be shown that it was not the accused who left the cigarette on the windowsill and in fact this seems to be the case **but irrespective as to who placed the cigarettes on the windowsill the juridical situationship establishing negligence persists because the accused was negligent and such negligence was imputable to him.** Such fault is not negated by the victim's contributory negligence.

Pulizija vs Joseph Busuttil et – COCA – 26th November 1992

The danger that during nighttime a passerby does not see a trench and falls therein is obvious and easily foreseeable. The fact that end of the road there was a no entry sign does not benefit the accused. The contributory negligence of the victim does not benefit them but is only considered for the purposes of criminal punishment. The court refers to an obvious and clear danger. All appellants were responsible of the incident which was the death of Carabott as a result of their carelessness and in the case of Busuttil, as a result of his non-observance of regulations.

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.

Justifiability & Excusability

Justifiable Homicide/Bodily Harm

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

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**.

Police vs Augusto Augulario, 26th august 1998

Not all those who act to defend themselves can invoke 223 in their defence. **The law clearly refers to the actual necessity to defend oneself or others**. It is now a settled matter jurisprudentially that in order to plead self-defence successfully the aggression one suffers must be **unjust, grave and inevitable**. The latter element, i.e **inevitability lacks when one instead of avoiding a fight when this can reasonably be avoided affronts and confronts the aggressor without any valid reason**, hence directly participating in a physical confrontation.

Pulizija vs Joseph Psaila, 20th January 1995

To plead a self-defence successfully the law imposes certain pre-requisites. 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 **irreparable harm and also in order to avoid a danger which 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 the latter, i.e self-defence, the **evil threatened must be actual; NOT merely imminent**.

Police vs Carmelo Cutajar, 4th February 2003

The accused must have caused harm or in the case of an alleged wilful homicide he must **have killed to defend himself or to defend someone else from an evil which is unjust grave and inevitable**.

It is grave if it is directed towards **someone's personal safety**; that is if the accused who acted to defend himself or others perceives an evil directed against him or others from the aggressor.

The evil threatened must be inevitable. It must be **actual, of that moment in time. It must be spontaneous, not foreseen, and one which may not be reasonably avoided by any other means except by the act of the accused who caused the harm or death to the aggressor**. Moreover, it must be unjust, that is **not ordered or permitted by law or by a lawful authority**.

Finally, there must be an element of **proportionality between the danger perceived**. Here there is a **subjective test** between the danger perceived and the method used by the accused to defend himself from such danger. **In the absence of such proportionality there will be excess in self-defence in terms of 227(d) of the criminal code. Hence, we would move from 223 to 227, from justifiable onto excusable**.

Police vs Salvo Psaila 9th November 1963

The justification of self-defence implies that the evil repelled by the agent is unjust and that the aggressor's attack is both **unjust and illegitimate** hence he who commits an act before finding himself in danger does not deserve impunity.

The evil must be **actual, and it must be present throughout the reaction**. Which means that it must subsist throughout the entire fight, if at some point it ceases, and the act of self-defence continues after it has stopped then one cannot plead self-defence successfully.

The evil must be **inevitable**.

Repubblika ta malta vs Martina galea, 14th January 1986

An essential requisite to successfully plead a self-defence is inevitability, that is i.e the accused **cannot escape although he would with the consequence that self-defence cannot be pleaded successfully if the accused 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

The Principle of the establishment of Guilt

Because the law has a humane approach the law acknowledges that there are extraordinary circumstances whereby the act of a person is such as to enable the law and eventually the court itself to **adduce less responsibility, to infer less in terms of gravity and hence to inflict a lesser punishment.**

It is also worth noting that there are some judgements which postulate the existence of the excuse which makes the situation less blameworthy as opposed to situations like that of a **retaliation(gest ta' tbattija) which make render the situation more blameworthy as opposed to less blameworthy.** Here one cannot plead legitimate self-defence as there are no elements of self-defence in a situation of retaliation. And thus, since there are no elements of self-defence there can also be no plea of excess in self-defence because excess self-defence is going beyond the limits of self-defence.

We are still in the realm of guilt here but there are mitigating factors, factors that the law considers as less blameworthy on the offender **in terms of the extent to which the offender should be punished.**

They are alternative **not cumulative.** He who pleads it is he who has to prove it. **The accused has to prove it on a balance of probabilities unlike the prosecution beyond reasonable doubt.**

Repubblika ta' Malta vs Nazzareno sive Reno Mercieca et, coca, 15th may 1995.

The court distinguished between provocation and self-defence by stating the following: ***“provocation and self-defence are distinct both conceptually and empirically. In legitimate self-defence there is a threat of an actual danger of death. Provocation is different in that not each and every act which provokes another person can lead such other person to plead self-defence.”***

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.”***

Pulizija vs Saviour Sammut, 2014

“in order to have the situation inevitable the danger must be sudden, meaning that the accused did not know about such danger, because if the accused knew about such danger or was aware of it there would not be legitimate self-defence but provocation. It also considers absoluteness, then quotes judge Harding who said ‘the requisite of gravity necessitates proportionality between the danger threatened and the reaction’.

Therefore, the court whilst rejecting the plea of legitimate self-defence notes that **self-defence on one hand and provocation on the other are distinct defences**. Self-defence exonerates a person, provocation does not. They do not feed into each other. For legitimate self-defence the reaction of the accused has to be such as to rebel an immediate danger whereas in provocation the reaction is generally caused by anger which is more characterized by a sense of revenge rather than defence.”

The court goes on to quote Mamo who stresses on the importance of **the state of mind of the agent**, and he focuses predominantly on the **psychological impact on the surrounding acts on the state of mind of the agent**. The court also mentions Manzini here who in his *diritto penale* references “*a state of anger caused by an unjust act of another*”. In theory conceptually although in England, Wales and Scots criminal law there is not such a wide parameter to the excuses we gave in our criminal court, but it does not mean they do not admit to the defence of provocation. **Provocation is a partial defence, there is a mitigating factor and guilt**. In the common law system, there is a distinction between legitimate self-defence and provocation.

Even Hart in his book punishment and responsibility. He notes that “*provocation is a good enough reason for a diminutive punishment. This is because the perpetrator’s ability to control his actions is thought to have been impaired or at least weakened at that point in time as a result of which full conformity with the law becomes a matter of special difficulty.*” In fact even if we look at our section of the law the very first words which subsection a uses is ‘*where it is provoked by a GBH*’, thus acknowledging this element of provocation immediately and makes it clear that a provocation can lead to an excuse.

Provocation by GBH—227a

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**.

When it is committed in repelling during the daytime-227 b

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**.

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

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

Sudden Passion

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

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

Provided that a homicide shall not be excusable under this paragraph if it was committed in any of the circumstances mentioned in article 211A;

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**.

Jameson said the purported the following: “The excuse of instantaneous passion”, he wrote, “seems to be so dangerous among a Southern race and so contrary to the sound principles of criminal responsibility, that I cannot recommend it to be retained in the proposed Code, without great modification”. Jameson’s amendments have now made their way into our law.

When it comes to (c) we have a certain complexity also because the effect of section c the operative part and the proviso are quite different, in terms of what they portray and also different in terms of another crucial element, how they are proven. In section c the operative part of the law, the test is **subjective**. In the proviso which refers to something different, the test is **objective**. So, note the difference even in the approach of the law.

Words like “*would, in persons of ordinary temperament*” and “*commonly produce the effect*” show the extent of the test which should be adopted by the courts.

Repubblika ta’ Malta vs Martina galea

N.B THE COURT USES THE MENTAL STATE, PRETTY MUCH LIKE WHAT MAMO SAID, ‘*the state of mind of the agent*’

The mental state contemplated by 227c of the criminal code can come into effect both as a result of provocation **but for other reasons**, from an analysis of this legal provision the court concludes that for a wilful homicide to be excusable the person who commits it ‘*in the act of committing the crime*’ was **not in a state wherein he was capable of reflecting owing to the immediate influence**(this is the way our courts have understood ‘first transport of a sudden passion or mental excitement’).

The court says that the defence plea under 227c is not the plea of insanity. The court qualifies all this by means of this: ‘both in the case of sudden passion and in the case of 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 creating such mental state of affairs. This mental state of affairs could have been caused though not necessarily by provocation. (This court is using the words ‘could have been caused’ in order to clarify and specify that **this defence is not equivalent to the crime of infanticide.** Even before the introduction of infanticide in our law there were cases wherein others 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.)

To constitute a mitigating factor for the purposes of wilful homicide the sudden passion or 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.**

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.

Pulizija vs Mariano sive Mario Camilleri

Even if, in this case, it were a matter of the “**mental agitation**” contemplated in paragraph (c) of Article 227 of the Criminal Code — which certainly is **not** the case, since this paragraph grants the benefit of mitigation only when the provocation, that is, the provocative act, is such that it would commonly have the effect, in persons of ordinary temperament, of making them **unable to assess the consequences of the crime** — the law itself even contemplates in the aforementioned paragraph (c) the **coexistence of “mental agitation” with all the elements of voluntary homicide**, including, therefore, the element of specific intent.

The first court, therefore, said nothing contradictory; on the contrary, it appears that it was well aware of the second part of the said paragraph (c) and, **correctly, did not apply the mitigating factor in question**, as is evident from the legal articles quoted in its judgment.

II-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...”

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

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.**

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

Repubblika ta’ Malta vs Antonju sive Anthony Camilleri, coca-subjective and objective test, operative proviso

“For sudden passion and mental agitation (not caused by provocation) to subsist there must be evidence of sudden passion or else there must be so much evidence as might raise a reasonable doubt in the mind of the jury that the **behaviour of the victim in relation to the appellant created a state of mind which affected the appellant’s reflective capacities.**”

Repubblika ta Malta vs aimen sayid giali el baden, coca, 28th December 2004

“It is a settled matter that 227 c postulates 2 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 agitation or sudden passion is caused by the provocation of another person. It seems that the first court in its summing up the jury interpreted 227c as **one to be subjected to an objective test** when such a test was only and solely required in cases of provocation. Here the court felt a need to clarify the position at law but really and truly did not change so much as the outcome is concerned.

It stated the following and explained between provocation and self-defence:

Notwithstanding this the court declares that the jurors could have reasonably reached such verdict, and this the appellant was not wrongly convicted.

For self-defence to be proved and thus lead to justification and lack of blameworthiness all the constitutive elements which are considered as requisites must be satisfied cumulatively i.e **that the evil threatened by grave unjust and inevitable and the reaction be proportionate to the threat or aggression**. You test 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.”

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 excuse the homicide. Ultimately however, the

defence of provocation is **usually denied if the defendant initiated the provocation themselves.**

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 be admitted as an excuse requires also that the reaction shall be proportionate, whereas the defendant used a weapon.”

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.

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.”

In respect of **article 50 of the Italian Code**, **Maino** thus writes:

“Article 50 requires that the limits imposed by the law, by the authority or by necessity, shall have been exceeded. **But not every time that there is disproportion between the act committed and that which has given occasion to it, the justification disappears to make way for the mere excuse of excess.**

Everything depends on the state of mind of the agent. If this was such, in spite of the peril, as to permit to him the free movement of his body and the free exercise of his mental powers, then it will **be a case of mere excuse or extenuation**: otherwise, **the material disproportion of the act does not exclude the justification.**

And let it be repeated: those who have to judge must not let themselves be guided by the calm wisdom after the event, based on a 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”.

***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 first.**

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 aggreddixxa l-ewwel; u l-aggressor 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.

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 caused 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.**”

P vs Fortunato sultana, coca, 5th February 1998

Excess in self-defence, owed to lack of proportionality, necessarily presupposes the existence of self-defence and therefore for this defence to be pleaded the accused **cannot be the one who acted first.**

Pulizija vs Salvatore sive Salvu Gauci, 2004, -distinguishing between operative part and proviso.

The court clarified that premeditation can hardly be reconciled with mental agitation irrespective of whether such agitation was caused by provocation or otherwise. (**article 227(c)**)

In the proviso of 227(d) we see a very human approach of the law. The law tells us do not exceed the limits of self-defence. The law has to appreciate that if you plead self-defence, it is

possible that one exceeds in the limits of self-defence, your intention though is not to commit a crime but to defend yourself, **the court distinguishes between someone who commits a crime because of the positive act of the will and someone who does so in further to the reaction to the crime.**

The law is saying you committed a crime in excess of self-defence, your reaction was not proportional to the evil that was threatened but if your reaction is such that it is a direct result of the impact of the act of the victim in your regard. Here the law has a human approach towards person who acts by exceeding the limits of self-defence **but were taken unawares.** The law guarantees impunity and says you won't be punished but you have to prove it. **The existence of this defence presupposes the existence of a self-defence.**

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

Infanticide is separate and distinct from that of wilful homicide though **in the past it was considered aggravated homicide by many old codes.**

In Italy, by the time the Code of 1889 came to be enacted, it had become the unanimous opinion of criminal writers that under certain circumstances the destruction of the life of a newly-born child was in some degree excusable.

This was reflected in English law where at the time it was practically impossible to secure convictions for murder by mothers of young infants, largely because lay and professional opinions **were out of sympathy with the law which drew no distinction between these and other types of murder.** A ready method of avoiding it was discovered by taking advantage of **the difficulties of proving live-birth for the purposes of the law of homicide.** It was contended that the killing of a child by its mother did not create the same feeling of alarm in society as other forms of murder did, and public opinion consequently did not insist on the death sentence as a deterrent. Historically one should add that this crime was prevalent when distinctions between *legitimate and illegitimate children* were more pronounced.

The malice was considered generally less in this class of murder because also of the general **state of health and mind of the perpetrators of them.**

Hence in the **1938 English Infanticide Act** the words "newly-born" were **removed and a defined limit of one year** was put, such limit being considered sufficiently wide to cover the majority of cases of puerperal insanity.

Art. 245 was introduced by virtue of **Ordinance VI of 1947**, and is based upon the **Art. 1 of the 1938 English Infanticide Act.**

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.

Here we are speaking of crimes characterised by the **lack of reflective powers of a mother by the upset state of mind of the woman after childbirth**. Mamo uses the word '*hysterical state of mind*' and '*miserable condition of the woman*'. Because of this deranged state of mind that jurists term it, our law also considers this as **not a wilful homicide per se**. It is less blame worthy because of this state of mind which determines the inability to reflect. This **must not be confused with that inability to reflect in 227, as well as insanity found under article 33 in the criminal code.**

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

Rex vs Victoria Micallef, death penalty that was reduced to life imprisonment. The judge here also sought to highlight the **distinction between the crime under this article and excusable homicide due to sudden passion or mental agitation**. Though importantly through this case it became evident that **it was necessary to introduce appropriate legislation concerning infanticide, if only to avoid the "solemn mockery" of passing sentences of death.**

The ground of extenuation is not the often spurious motive to hide shame or to save a reputation which often is beyond saving from other causes, **but the deranged state of mind of the mother arising from the parturition which necessarily reduces the moral responsibility for the act.**

What are the constitutive elements of this crime?

1. Must be child of that mother
2. Under 12 months
3. **At time(VIP) of act or omission she 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.

It can also be mentioned that the law not only provides for acts of commission with regard to the death of the baby but also **that of omission**. This includes such instances as neglecting to tie the umbilical cord after severance and not feeding the baby.

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.

R vs Natalie Pisani, 1982 May.

The courts quote from this sentence frequently.

Section 245 which was introduced by virtue of ordinance VI of 1947 is based upon the first provision of the English infanticide act of 1938. There is here a **special offence based on the concept of diminished responsibility for the purpose of avoiding a conviction of murder**. In contrast to the continental doctrine herein the crime is founded upon considerations **pertaining to the honour of families**.

From the raising of 245 it is clear that guilt emerges in relation to infanticide not in relation to wilful homicide in the case where at the time of the act or omission the mother would have a **disturbed balance of mind** as a consequence of the circumstances referred to therein.

There is no absolute presumption, the disturbed balance of mind is just one of the considerations contemplated by law in order to ensure that guilt is related to infanticide not wilful homicide. It is not correct to conclude that the law presumes that a mother who kills their baby who is less than a year old would not be fully 'kompostmentus' i.e would not have full control of her mental faculties as a result of the effects of pregnancy and giving birth. The correct position of law is that the law itself caters for the possibility and therefore in cases where a **disturbed state of mind results in terms of article 245 which is obviously different to the insanity contemplated by article 33 the offence which the mother has rendered herself guilty of would be that of infanticide not of 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.

The ***Guzeppa Buttigieg*** Case

In 1856, Guzeppa 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 Hal Millieri.

Since the child could not be identified, the police displayed the lace garment at the Zurrieq 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.

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.

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.

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**.

Chaveau et Helie says the following: "The will alone is not sufficient to establish culpability: it is necessary that this will be characterized by the intention to cause harm."

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.

Archbold cites the following case in relation to this last point: So also where the defendant knowingly gave poison to A to administer as a medicine to B, but A neglecting to do so, it was accidentally given to B by a child, this was held to be an administering by the defendant, as much as if the defendant had given the poison to B by her own hands

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

Article 244A was created by legal notice 137 of 2005. it captures only a specific amount of diseases, capturing those diseases prevailing in subsidiary legislation **article 2 of 9.10 named ‘communicable diseases and conditions’ regulation-** namely HIV, AIDS, Hepatitis B, Hepatitis C, and Tuberculosis.

Before adequate legislation was implemented, assault with a dangerous or deadly weapon seems to be a charge with which a substantial number of HIV-infected defendants have been charged over the years. The case *US v Moore* was one of the first cases against an HIV-positive federal inmate in Minnesota who was found guilty of such charges for having bitten two correctional officers during a scuffle.

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.

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.

"An infection can be transmitted either with the knowledge of both parties involved in the sexual acts, or with the knowledge of just one of them, or even without either person being aware. **The infection can be communicated even in the absence of full penetrative sexual intercourse. For the Court to find the accused guilty, the Prosecution must prove beyond any reasonable doubt, clearly and rationally, both the means and the manner by which the specific infection was transmitted from the active subject to the passive subject of the offence.**" The prosecution has to prove the way it was transmitted from one to the other and for this purpose the court has to consider all ordinary witnesses, documentary evidence **but especially medical and scientific experts.**

Five elements:

1. The **existence of a disease or specific condition in the person of the active subject**;
2. A contagious activity (which may be of a sexual nature) between the *active subject* and the *passive subject*;
3. The transmission of the specified disease or condition from the *active subject* to the *passive subject*; (In the intentional form)
4. the *passive subject*, prior to the contagious activity in question, was not afflicted by the specified disease or condition;
5. The psychological element of the offence, consisting in that the *active subject*:

(I) knew that, at the time of the contagious activity, they were afflicted with the specified disease or condition, and with this knowledge, deliberately and voluntarily transmitted and communicated — that is, infected — the *passive subject*, who was not previously ill or afflicted with that condition; or

(II) when they *should* have known that they were afflicted with the disease or condition, transmitted and communicated — that is, infected — the *passive subject* with the same disease or condition because the *active subject* acted negligently, carelessly, or failed to observe certain regulations.

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 from 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.

Article 244A prohibits the wilful or negligent transmission of any disease or condition "**in any manner**". Sexually transmitted diseases are transmitted through sexual contact. However, AIDS, or rather, HIV is the only STD which can be transmitted in other ways. Indeed, it is held that, "HIV is only transmitted by three basic means; most commonly, **sexual transmission through penetrative intercourse, transmission by blood, either by transfusion of blood or blood products from HIV-infected people or, increasingly commonly, by injecting drugs using needles and syringes shared with HIV-infected people; transmission from an infected mother to her unborn child across the placenta and possibly through breast milk**.

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 court in the ***Stephen George Maurice Saurin case*** says the reasonableness or otherwise of the act of the agent depends on a multitude of factors. The court lays down 2 of such factors:

1. The **frequency of unprotected sexual encounters** between the agent and the victim. A small number of sexual encounters leads to a different situation, because a higher frequency of such encounters **indicates greater imprudence on the part of the agent**.

2. The **risk of transmission**. Magistrate Bugeja links the second point to the first. This also 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.

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**.

In the view of the court the knowledge of the agent in the case of transmission by negligence is **more difficult to prove for the prosecution because the prosecution must prove that the agent should have known that he was suffering from the disease**.

The court asked who should know that he is suffering from the disease. The court said that this should be expected of everyone before they engaged in a sexual activity however the **agent should have at least an indication that he is afflicted by such disease or condition**

or else that he is **particularly promiscuous** or else that he is **aware that he has undertaken unprotected sex with persons who the agent knew at the time that they suffered from such disease or condition.**

Engaging in high-risk behaviour(i.e undertaking a sexual activity with many people) 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.

***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.**

Defence under Maltese Law

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.**

Overseas, there seems to be an agreement that the plea of **contributory negligence** can be raised by a carrier of a STD who is sued for its transmission to another party. Indeed it is held that "*claims of this nature may be defeated in part at least by the defence of contributory negligence*".

Lord Brandon of Oakbrook, speaking extra-judicially, held that the plea of contributory negligence is successful **if the possible communication of AIDS is reasonably foreseeable to both parties and if both appreciate the risk.** He argues that if these two elements are satisfied, the claimant's failure to use a condom of his own motion amounted to contributory negligence, and therefore, for apportionment purposes, both parties share responsibility equally.

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.**

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.**

Now such right, in the crime of abortion, must be attributed to the foetus and it is the right it has to a "spes vitae"

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.

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.

Carrara says the following: "*In the absence of a pregnancy, it will also not be possible to charge attempted abortion, due to **the nonexistence of the victim of the offense.***"

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 does not align with our law which contemplates culpable miscarriage is 243A.

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**

Taylor says 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.

It is established medical experience that "*any physical shock sustained by the body may operate indirectly on the uterus*". Italian writers hold that the means of procuring abortion may be '**fisici o morali**', such as, as regards the latter, **the causing of fear or other violent emotions**.

The formal element

Mamo says the following:as to the formal element of the crime, commentators of codes similarly worded as ours, **require that the intention of the agent should be directed to causing the miscarriage**. If there is no such intention, the means used against the woman which should cause abortion, would constitute the crime of grievous bodily harm.

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.

(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.

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."** **The dolus of the agent was that of mere abortion.** 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.** It is not clear why our law only refers to said practitioners only. The corresponding Napoleonic code, from which this article was based on also includes midwives but also “*qualunque altro ufficiale di sanità*.”
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.

243B: Exceptions to articles 241(2) and 243.

Utteriorly, **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.**

The intention behind the law is to ensure as much as possible that the analysis and determination of the risk to life, which is found in 243B, **is obviously done by as wide of a range as possible of medical experts in various fields at the time of intervention.**

243B. No offence under sub-article (2) of article 241 or article 243 shall be committed when the cessation of a pregnancy or damage to the foetus results from a medical intervention carried out for the purpose of saving the life and protecting the health of a pregnant woman suffering from a medical complication which may put her life at immediate risk or her health in grave jeopardy which may lead to death:

Provided that the exemption from criminal responsibility by virtue of this article shall apply only when after having considered the medical practices current in Malta circumstances of necessity still subsist which dictate that the medical intervention be carried out and if the following conditions are fulfilled:

(a) in the case of a pregnant woman suffering from a medical complication which may put her life at immediate risk the medical intervention is done when in the reasonable opinion of the medical practitioner carrying out the intervention the foetus has not reached the period of viability; or

(b) in the case of a medical intervention carried out due to a medical complication which places the health of a pregnant woman in grave jeopardy which may lead to death:

(i) that in the reasonable opinion of the medical team the foetus has not reached the period of viability and cannot be delivered according to the standards of the medical profession; and

(ii) that the medical intervention is carried out only after the medical team has confirmed the necessity of the intervention; and

(iii) that the medical intervention is carried out in a licensed hospital having the facilities required for the necessary medical intervention to be carried out;

(c) for the purposes of this article:

"medical team" means three (3) medical practitioners registered as specialists with the Medical Council under the [Health Care Professions Act](#), two (2) of whom being obstetricians or gynaecologists, one (1) of whom being the obstetrician who carries out the intervention, and the third medical practitioner being a specialist in the condition from which the pregnant woman is suffering;

"period of viability" means the point in a pregnancy at which the foetus is capable of living outside the uterus according to current medical practices.

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 is that which follows as **a secondary result of an action the purpose and primary effect of which is other than abortion**. In such a case, if there is a justifiable reason sufficiently grave for the course of action proposed (whether it is a question of medical treatment or something else), then the abortion which follows 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

Malta is not the only state that penalises abortion and thus there is quite some foreign jurisprudence available.

Tysiac vs Poland.

There was a case in the ECHR from a woman who argued that her health is being jeopardised by laws in Poland punishing abortion because she had proven that if she had to give birth to the child she would go blind immediately. She then gave birth to the child and lost her sight and then filed the lawsuit before the ECHR.

A, b and c vs Ireland, 16th December 2010

Three women, known as A, B and C, recently challenged Ireland's restrictive abortion laws at the European Court of Human Rights. This case was lodged with the European Court of Human Rights in July 2005 and the challenge was heard at a full hearing before its Grand Chamber of 17 judges on December 9th, 2009. The applicants, supported by the Irish Family Planning Association, **argued that the criminalisation and inaccessibility of abortion in Ireland endangered their health, well- being and life in breach of their rights under the European Convention on Human Rights**. On December 16, 2010, the Grand Chamber of the Court **unanimously held that Ireland's failure to implement legislation on abortion constituted a violation of the Convention**.

Abandonment

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

Thus, **Art. 246** speaks of the abandonment and exposure 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**, and thus we look at jurisprudence, debates and even evolutionary history to clarify this.

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**.

Some argue that it may not only be physical but it can also be emotional. Such situations **would fall under neglect and other forms of mistreatment**. Though the law doesn't preclude it, it seems to refer to the physical understanding in this regard.

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.

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

This leads to death or sustaining a bodily injury. If it leads to the punishment will be that of their respective crimes, though the punishment shall be decreased by **one degree**.

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.

Ill-treatment according to article 247A(2) 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.

Il-Pulizija v. Johan Galea

In this case, the defendant admitted to the charges of abandonment brought against him.

**"He abandoned or left exposed a girl under the age of seven, namely Morgan Dougall...
[...]"**

Given the admission by the accused and the confirmation of such admission after being given the appropriate time to regularize himself, and after hearing the testimony of the minor's mother, the Court finds the accused, Johan Galea, guilty of the charge as brought against him. By application of Article 22 of Chapter 446 of the Laws of Malta, the Court discharges him on condition that he does not commit another offence within three (3) years."

Traffic of Persons

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

- (a) the production of goods or provision of services; or
- (b) slavery or practices similar to slavery; or
- (c) servitude or forced labour; or
- (d) activities associated with begging; or
- (e) any other unlawful activities not specifically provided for elsewhere under this Sub-title,

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

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

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

- (a) violence or threats, including abduction;
- (b) deceit or fraud;
- (c) misuse of authority, influence or pressure;
- (d) the giving or receiving of payments or benefits to achieve the consent of the person having control over another person;
- (e) abuse of power or of a position of vulnerability:

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

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

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 (UNCATOC)**, 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**, which reflects **coercion and signifies a lack of consent**. 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(18) 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 as we see in 248A(3), 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.

(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.

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)**.

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. (248B)

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.

Il-Pulizija v. Dunkin Hall

"The crime contemplated within the bill of indictment 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**."

Art.248E (6)

There are certain situations wherein a person is so attuned into the system the victim sometimes either out of intimidation as well or fear of retortion or reprisal against family members the victim is not only constrained to offered sexual services but also **to handle the operational management of the guest house**. Here certain states have developed theories, **by means of which they try to identify whether the person involved in the crime was somehow constrained to associate herself with the organisation**. This is obviously very difficult to determine as sometimes the victim does accrue some advantages from this, like even being spared from sexual services.

Various states have thus adopted a mechanism of non-liability for such situations. Predominantly in order to protect the victim him/herself in this regard.

The main section which our law caters for is section **248E (6)** which says:

(6) The offences committed under this Sub-title shall not be liable to punishment if the offender was compelled thereto by another person where the provisions of article 33(b) do not apply.

The Actus Reus

The law contemplates 5 methods on how this crime can be committed under **248A(2)**. This is where it results from.

248A.(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.

The person can be exploited to do the following. Sub article (e) **widens the scope of this article**, ensuring that its application subsists for any unlawful activity and not just those mentioned.

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

- (a) the production of goods or provision of services; or
- (b) slavery or practices similar to slavery; or
- (c) servitude or forced labour; or
- (d) activities associated with begging; or
- (e) any other unlawful activities not specifically provided for elsewhere under this Sub-title,

248B. Whosoever, by any means mentioned in article 248A(2), trafficks a person of age for the purpose of exploiting that person in prostitution or in pornographic performances or in the production of pornographic material or other forms of sexual exploitation shall, on conviction, be liable to the punishment laid down in article 248A(1).

248C. (1) Whosoever, by any means mentioned in article 248A(2), trafficks a person of age for the purpose of exploiting that person in the removal of any organ of the body shall on conviction be liable to the punishment of imprisonment for a term from six to twelve years.

(2) For purposes of this article, the removal of organs, tissues and cells shall include the conduct referred to in article 248CA(1).

The Traffic of Persons via Fraud

In cases involving **deceit and fraud(248A(2)(b))**, a common scenario is luring individuals to Malta under false pretences of employment opportunities.

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

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 court here distinguished between trafficking of human beings and migrant smuggling in the following way:

“The means specifically catered for distinguish this crime from the crime of human smuggling, punishable under chapter 217 of the laws of Malta. A crime whereby a person voluntarily submits himself to another in order to cross frontiers into another state illegally. In the facts emerging under these proceedings the girls were brought to Malta on false pretences i.e they were made to believe they would be working in a restaurant in Malta and hence accepted the offer which was made deceitfully and fraudulently. This is what is crucially important for the act of commission to fall within this section of the law.”

SUB-TITLE IX: Of Threats, Private Violence and Harassment

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.

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.

Blackmail: Article 250

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

(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.

Here there is a particular crime where a person blackmails. Generally, a person would have some kind of information over another person and threatens them. And the threatened person would have to do what the person with information tells them to do.

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

In ***Pulužija v. Ruth Frau*** (04/07/2017),
“the crime contemplated in 250(2) **is instantaneous not continuing or continuous but since its effects being the fear of the complaint can and generally protrude at length, it is susceptible to be repeated and can partake of a continuing or continuous nature since the extortion would not need to be consummated each and every time by means of an explicit and formal threat.** This is because the victim of the crime, once influenced, i.e., **once intimidated, 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.”

R. v. Geraldu Cassar

““or to make any gain” derives from the concept of “***o di fare altro lucro***”. ‘Lucro’ is defined as ‘***guadano***’ which refers to gain. The word connotes material aspects and material matters. It does NOT connote personal or moral satisfaction.

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.**

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.**”

Private Violence: Article 251

(1) Whosoever shall use violence, including moral and, or, psychological violence, and, or coercion, in order to compel another person to do, suffer or omit anything or to diminish such other person's abilities or to isolate that person, or to restrict access to money, education or employment shall, on conviction, be liable to the punishment laid down in sub-article (1) of the last preceding article.

(2) Where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) of the last preceding article.

(3) Whosoever shall cause another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be liable to the punishments prescribed in sub-article (1) decreased by one to two degrees:

Provided that where the offender shall have attained his end, he shall be liable to the punishment laid down in sub-article (2) decreased by one to two degrees.

Art. 251, Criminal Code

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

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

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

The words of the law are quite clear though **everything depends on a case-by-case assessment**. If I were to say the same thing, and tell someone else, they may react differently to it. What counts here is the knowledge, being **the ulterior knowledge to bother the person, cause him upheaval and a certain sense of anxiety in the person**. The law provides defences in certain situations where your action can be justified. The law later **specifies the defenses as follows**:

- (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**.

Il-Pulizija v. Giuseppe Axiaq- Art. 251A (3)(c)

“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.”

Police vs Joseph Micallef, 2013

In a normal day to day scenario, taking photos of a woman who is not fully dressed for example, it is a course of conduct. In a particular case the defendant pleaded that he is an administrator for the condominium and has to bring evidence of illegal activities within the flats and was claiming that this woman was constantly placing her garbage bags rather than another and this place was a hinderance and technically she was committing an illegal act. He wanted to prove to members of the condominium that this person is committing illegal activities which could lead to her prosecution.

He claimed that it **is true that he took photos for them to be used as evidence because he is the provisional administrator. It was very reasonable because it was his best evidence that she is placing the garbage there**. He claimed this and claimed that there is a defence whereby if the court deems that my course of conduct is reasonable in the circumstances, and as a provisional administrator, his defence was satisfactory. Whereby **the reasonableness on the course of conduct will depend on the circumstances**.

The complex part of the law was the phrase ‘**course of conduct**’. The phrase that has led to a lot of our jurisprudence. Jurisprudence shows that defendants claim many a time that **a course of conduct is something necessarily repeated a lot, nearly permanent**. As we shall see there is no hard and fast rule on the frequency. So, it could happen sporadically even over a protracted amount of time.

Can you harass someone through a course of conduct by doing something once a year? Probably yes. Though most cases surround someone bothering someone in an obsessive manner.

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 her**.

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 appellant.

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. 251A 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. 251A (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."

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. 251A. 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.***

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: Article 251B

251B. (1) A person whose course of conduct causes another to fear that violence will be used against him or his property or against the person or property of any of his ascendants, descendants, brothers or sisters or any person mentioned in article 222(1) shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions, and shall be liable to the punishment of imprisonment for a term from one to two years or to a fine (*multa*) of not less than six thousand and five hundred euro (€6,500) and not more than fifteen thousand euro (€15,000), or to both such fine and imprisonment.

(2) For the purpose of this article, the person whose course of conduct is in question ought to know that it will cause another person to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

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

(a) his course of conduct was pursued in the circumstances mentioned in article 251A(3)(a) or (b); or

(b) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

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

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

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

Mens Rea

The **mens rea** is similar to that of harassment with the difference that the **offender knows or ought to know that his conduct will cause the fear envisaged by the law** and the test employed by the Courts is that of the **reasonable man**. It is the objective test. This was confirmed in *Horass Caruana* and *Raymond Parnis*.

Needless to say, there has to be a causal nexus. So, the fear felt by the victim has to be due

to the acts of the offender. This is also confirmed *in Pulizija v. David Caruana Smith (19/05/2014)*.

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

Subtitle 3 of title 2 of part 2 book 1st: Crimes against the administration of justice.

The criminal code in deals with calumnious accusation, perjury and false swearing. These fall within the wide class of **Crimes against the administration of justice**.

Article 100 provides us with the interpretation which is to be given to the term ‘*criminal proceedings*’

100. In this Sub-title "criminal proceedings" includes the inquiry referred to in Sub-title II of Title II of Part I of Book Second of this Code and any proceedings under the [Malta Armed Forces Act](#).

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 **accuse such person before a competent authority** with an offence of which he knows such person to be innocent, shall, for the mere fact of having made the accusation, on conviction, be liable [...]

(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 inferences 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

1. The making of an accusation

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.

In the case of *Police vs Carmelo Mifsud*, according to the authorities, for the crime of calumnious accusation it is **not essential that the information or complaint or report or other notice given of the offence should satisfy all the requirements of form which the law of procedure prescribes**

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.

This was also reflected in the following case:

Police vs Joseph Seychell, 17th October 1997, court of criminal appeal:

The court states that for the offence of calumnious accusation to arise **certain formalities** which are normally required in order for an injured party to lodge a complaint **are not essential for the offence of calumnious accusation to arise.** The pertinent paragraph is:

“ma tirrekjedi ebda formalita in 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 Police v. N. Brincat – the Accusation

In this case, Judge Montanaro Gauci argued that, for this crime to subsist, 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 law simply requires that information shall be reduced to **writing** because the law itself rejects anonymous information. This is further tackled in **article 535(2). Action upon any anonymous report is taken by the police only in specific circumstances.**

2) Nevertheless, no action shall be taken by the Police upon any anonymous report or information, except in the case of a flagrant offence or where the report or information refers to some fact of a permanent nature. In any such case, it shall be lawful for the Police to proceed on such report or information, after ascertaining the flagrancy of the offence or the permanent fact.

What is self-calumny and does it amount to an offence? Does the law refer to a third party or an accuser?

So self-calumny is **not contemplated by our law**. The situation arises when the accuser informs the competent authority or authorities that he or himself is guilty of an offence and either the offence was not committed or not was not committed by him.

Thus, there must be a third party **accused** in front of a competent authority not himself. It is worth noting that the Italian criminal code provides for this situation in the strange offence of ‘**auto calunnia**’

2. The accusation must be made before a lawful authority

Police vs Joseph Seychell stated that a competent authority is the authority who **has the power to investigate particular individuals and to take action**,

The authority that has the power **to investigate a particular individual and to take court action**. Normally criminal proceedings are instituted by the **executive police** and the **attorney general**. Other examples include the *l-appogg* and the controller of customs. A tribunal is not, it has the power to decide on a particular case and not investigate.

In Raffaele Said V. Antonio Callus 08/01/1936).

The Court seemed to consider that there are other authorities that may be considered competent authorities for the offence of calumnious accusation. In this case, Callus was charged with having offended Said by falsely accusing him to an officer of the telephone department. The court rejected this as it said that the director of the telephone department did not have the authority required by Section 101 of the Criminal Code. However, the court also said that the situation would have been different had the report been made to, for example,

the Comptroller of Customs, as the latter did have the competent authority to ask the Commissioner of Police to institute criminal proceedings. It is worth noting that in this case, the Court said that even though the offence of calumnious accusation did not arise, Callus could still be found guilty of defamation.

3. The false accusation must have consisted in a criminal offence

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**.

Police vs Vincenzo Attard, decided on the 7th November 1949 decided by the court of criminal appeal:

*“F’sentenza mġhotija 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 perseguibbli quddiem il-qorti tal- ġustizzja kriminali.**”*

Keep in mind that this offence does not arise when the fact falsely imputed to the third party **is no longer punishable at law, on account of it being repealed by the legislator**. When the **offence is time barred** one is also unable to make the complaint *if* the time stipulated by the time bar had elapsed.

Prof Mamo is of the opinion that if the criminal action of an offence is extinguished, then the offence of calumnious accusation will not subsist. In the Giuseppe Portelli case this was marginally mentioned, and the court seemed to take the view that if the criminal action for the offence was extinguished, then the offence for **calumnious accusation would not arise**.

Antolisei holds a different view and purports that if a person is falsely accused of an offence the criminal action of which is extinguished, the offence of calumnious accusation would still arise and he justifies this by saying that the harm to the passive subject has already been made.

What happens if a person accuses another of an offence which did actually take place, yet adds on fake aggravations?

Antolisei gives a very good answer here. He says that this **depends on whether the aggravations constitute an offence in their own right or not**. Let us say that X has committed simple theft. Y, however, accuses X of theft aggravated by amount. This aggravation does not constitute an offence in its own right. If however, y accuses X of theft

aggravated by bodily harm, then, since bodily harm is in itself an offence, one concludes that there would be a calumnious accusation as bodily harm constitutes an offence in its own right.

2. The intent to harm the other person

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 unjustly punish the accuser who acted without malice and merely exercised a legitimate right**. Even Roman Law – which sternly addressed false accusations – purports that **the 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**, though **criminal proceedings NEED NOT actually be instituted**.

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.

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 distinction. He admits impunity for the calumny committed for the purpose of **saving oneself from a capital charge** but not in other minor cases.

The best solution, however, according to **Maino** is that given by **Mortara**, that "il diritto di difesa non si può spingere fino al punto di legittimare una lesione così grave della personalità altrui", and that therefore **the purpose of defending oneself does not exclude the crime of calumny.**

3. Knowledge on the part of the accuser of the innocence of the other person

This is the **specific intention** required for the offence.

In the **Mary Dark case**, the defendant was convinced that the person against whom she made the report was guilty of an offence. She maintained that she was only repeating what her son had told her, having no reason to believe that it was false, and she was thus acquitted on these grounds.

In **Rex v. Caterina Debono** (12/11/1919), the court explained that it is the specific intention that transforms a legitimate act into a criminal offence. This is because the intent to harm is not enough. A person may, with the intention to harm another person, accuse such other person of an offence which he has really committed. In this scenario, despite the former person's intention to harm, there is nothing illegitimate in his actions.

Antolisei explains that in case of doubt, the doubt must be transmitted to the competent authority and if the accuser fails to do so, then such person may still be found guilty of the offence.

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.

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.

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.

Can there be attempted calumnious accusation?

NO, since it is a **formal offence**, the offence is **completed as soon as the accuser lodges the report, information or complaint with the formal authority**.

However, **Antolisei** does give an example where it may be attempted. A gives the false information to B and asks B to pass it on to the police. B checks the information and finds out that it is false and refrains from passing it on to the police. According to Antolisei, A could be found guilty of attempted calumnious accusation. However, it is highly unlikely that such a scenario will ever arise under Maltese law.

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 11 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

Subornation is the instigation to commit any one of the crimes mentioned in this section. It is the procuring of a witness to make a false testimony or of a referee to make a false report, or of an interpreter to make a false interpretation, in each case in a civil or criminal cause.

It has NOT been considered by our legislator as comprised in the general class of cases of “*Concursus delinquentium*”, that is, in other words, **as a form of a criminal participation, as an accomplice or co-principal**, in the crime of false testimony, false reference or false interpretation; but has been created as a **distinct substantive offence**. It is, nevertheless, intimately connected with those crimes and, like them, it constitutes an **offence against the administration of justice**.

Article 377 of the Italian Criminal Code deals with subornation in a very different way than we deal with it. Subornation **under Italian law is only punished if it is instigated by an offer or promise of money or other benefits**. If it is instigated by **violence** or **threats**, it is a **completely difference offence**. More importantly, Italian law only deals with the attempted form of subornation not the complete offence.

To some extent our tradition was drafted on the Old Italian 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 the witnesses, referees etc. are acquitted by reason of defence the person who suborned him won't be exempt from criminal responsibility for the subornation. **If the falsity is objectively established the person that suborned will still be taken to court.**

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**.

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*

There has been a debate as to whether it is essential that at the time of the subornation, the witness, referee or interpreter should have already assumed their judicial character; i.e. is it necessary for the witness subpoenaed to give evidence? The prevailing view among authors is in the affirmative and they state that **it is necessary** that the witness, referee or interpreter assumed their judicial character. Originally, Italian case law was also of this opinion. Yet for some time the opposing view prevailed but now, the situation reverted back to the original one. Antolisei is of the opinion that for the offence of subornation to exist it is not necessary that the witness, referee or interpreter should have already assumed his judicial character.

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 document**, 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 or assembles, a false document for **civil or criminal proceedings**, and anyone who **knowingly presents such a document, even if they did not create it, 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 years**, the witness who shall have given false evidence against such person in the trial, or of whose evidence use shall have been made against such person in the trial, shall be liable to such **higher punishment**.

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. Although no definition exists in our code Black's Law dictionary defines perjury as *the act or an instance of a person's deliberately making material false or misleading statements whilst under oath*. It holds that is also termed fakse swearing, false oath and archaicly forswearing.

However, certain essential elements can be extrapolated from 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*.i.e the wilfulness of the falsity

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 prosecution.**

(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.

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.

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. Testimony, reference or interpretation in judicial proceedings

By the word ‘testimony’ it means any **statement** or **deposition**, or **declaration** made before a Court of Justice in judicial proceedings, according to law. Therefore, the word ‘testimony’ includes all kinds of statements which have a **probative value**.

Thus the testimony must be given in cause. **Prof. Mamo** defines a cause as “*any contentious proceedings which call for a decision.*” When it comes to article 104 as opposed to article 108 we are speaking about a situation of A vs B. Article 108 is different, there are no ‘contentious proceedings’ so to speak. It could concern a person committing perjury in a **magisterial inquiry**, they are different and carry different penalties.

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*. This was the case prior to the **2002 amendments** though now it has been extended **to also include false evidence given in the criminal inquiry stage.**

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**.

Who is the competent authority?

When it comes to perjury, we speak of a **Court, Tribunal or Disciplinary Board, empowered by law** to administer the oath.

Il-Pulizija v. Marzouki Bent Adbellatif:

"A person who gives false testimony during a court case is not considered by law to have merely committed 'false swearing', *sic et simpliciter*, but to have committed 'perjury', that is, false testimony; whereas a person who swears falsely in other situations that are not during a court case is committing false swearing, but is not committing the more serious offence of perjury

The oath must be taken personally by the person to be sworn in. In fact, article 577(3) COCP.

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

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*" **may not adequately convey the full legal obligation of the deponent**.

3 – The Actus Reus (The Falsity)

In dealing with false testimony our law simply speaks of 'giving false testimony' **without specifying further**. The oath is taken to speak the whole truth. Rauter holds that *the duty of the witness is to say the truth as far as he knows it*.

False testimony is basically when a person **either affirms what is false**, or else **denies what is true**. In fact, in the judgement in the names of;

Police vs Rose Borg Et – 10th October 2016 – COM Malta as a COCJ – the court held the following:

The falsity **has to be concrete and has to come out of the facts of the case**, it is not what the magistrate thinks, often the police and defence are looking at things from different angles, so it is not what a person thinks but has to come out of the facts of the case.

Improved Design Limited v. Antoine Grima:

"It hardly needs to be said that by 'false' one must understand here **'something that does not correspond with the truth'** and NOT simply 'something the other party disagrees with' or that someone else sees differently. In **other words, for it to be shown that something false was said under oath, it must be demonstrated that a fact contradicts what was said**. Such a fact must emerge from the acts (i.e., the evidence or record) and not merely be mentioned as an argument. If **this were not the case, and a differing opinion could be considered 'false'**, then it could truly be said that there is not a single case where something false is not said!"

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.

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

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.

For this offence to subsist it is necessary that the falsities are material to the cause, i.e., *it could have affected the decision in one way or another*. If the falsity happens in materials which are entirely irrelevant to the case and whether true or false **would not influence the result, then the crime would not arise because the possibility of injury would not exist.** What is not 'material' in that particular case depends upon the circumstances of that case and no a priori rules can be laid down.

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."

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.

Il-Pulizija v. Galea

In this case, Judge Montanaro Gauci declared that it 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 individual.** In criminal proceedings, the crime occurs whether **the false testimony is given even 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.

Il-Pulizija v. Ruth Mary Baldacchino

This judgement quoted Giuseppe 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.**

Is a person liable to the punishment of perjury when he takes a false deposition to save himself?

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.

Including also the parties to a civil action, the general rule is **that no person may be compelled to answer any question which might subject him or her to criminal prosecution.** Therefore, a witness to whom an incriminating question is put, may prevail him/herself of the right to remain silent but if said witness answers the questions being put forward, either by the prosecution or by the accused through his lawyer, and he/she replies on oath, **then said witness cannot alter the truth.** If he does, then he would be found guilty in terms of article 104.

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.**

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.**

Nevertheless, article 633(2) gives the discretion to the Court to excuse a witness from giving evidence. For example, against his close relatives or the person's mentioned in this sub-article, or because of the particular circumstances of the case. But if **the Court does not excuse said witness from testifying, then the witness is bound to testify and if he gives false evidence, and obviously all the other elements of this offence concur, then that witness will be guilty of the offence of false testimony.**

A domestic violence case is a practical example. Say the wife of an abusive husband files a report, making a domestic violence claim. There are certain cases whereby when this case is appointed before the magistrate, the accused, through her lawyer, will inform the magistrate that she does not wish to testify against her husband for reasons such as that they have children. The Court can agree to the submissions, or it may not.

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 contain any express provision on retraction. But the concept of retraction has been accepted in Maltese jurisprudence. This was even stated in the Following judgement:

Il-Pulizija v. Karl Carmel Azzopardi, 1st November 2013

“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.**”

When a person who has given false evidence, prevents its effects in time then one of the elements of this offence ceases to exist. This principle may also be inferred from **Article 602 of the COCP**. This article states that if the witness or interpreter at any time before the course is concluded, wishes to make an addition or correction the court shall allow and give weight according to the circumstances.

Police Vs Abdellatif Marsouki Hachemi Beya Bent – COCA – 22nd October 2001 – The court held that retraction is an incentive and opportunity given to the witness to correct his version or her version or deposition so that his wrongful deposition does not lead to and or cause any harm to the person accused. **The aim of retraction is to uncover and establish the truth** which after all is the aim of each and every criminal case. The effect of retraction is that the **possibility of creating an injustice is eliminated and that no irreversible harm is caused to others.**

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.

Retraction of any untruthful deposition or incorrect deposition has to be made –

- 1) **During ongoing proceedings as per article 602 COCP AND**
- 2) **Before criminal proceedings have been concluded and decided.**

It cannot be made afterwards. If retraction is made subsequently to the final decision, that is, when the case is considered as *res judicata*, then the witness will still be found guilty under this article.

The offence of perjury as per article 104 is **completed and consummated as soon as the criminal proceedings in which that particular witness testified are decided**. So, keep in mind that the consummation of the offence of perjury is not completed or consummated as soon as the witness testifies a falsehood, but it is completed and consummated as soon as those criminal proceedings are decided because during the ongoing criminal proceedings, that witness may retract any untruthful deposition.

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**.

Retraction **need not be absolutely spontaneous**. It is **sufficient if it is voluntary**. So, 'spontaneous' refers to when a person is testifying, and at a certain point he/she admits to having testified a falsehood. In practice, what normally happens is that either the defence lawyer or the prosecution and many a time the judge or magistrate, will call upon the witness and will tell him/her if you testify on oath a falsehood, you are committing a criminal offence. Then the judge will inform that particular witness that when it comes to article 4, that person may even go to prison and will inform him/her that if they want, they can retract any untruthful deposition. Obviously, if that person retracts any untruthful deposition, he/she cannot be found guilty of perjury. **Retraction must be explicit, unconditional and complete**.

Retraction of any untruthful depositions is applicable only with regards to **articles 104, 105 and 106 of the Criminal Code**. It is **not applicable with regards to article 108 of the Criminal Code**. This is because only articles 104, 105 and 106 of the Criminal Code speak about a person giving false evidence in criminal or civil proceedings and **retraction may be made whilst criminal or civil proceedings are still ongoing with the aim of avoiding damage**, or harm to a particular person. conversely, **article 108 does not speak about proceedings**. Therefore, since one of the essential elements for retraction to subsist is missing, meaning that retraction has to be made during ongoing proceedings and before proceedings have been concluded and decided, then retraction is not applicable to proceedings in terms of article 108 of the Criminal Code.

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 catered towards crimes with lower criminal punishments and 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**.

I-Pulizija v. Ruth Mary Baldacchino (continued):

"The criminal action for the offence of perjury, under Article 106 of the Criminal Code — that is, the offence known as judicial or legal perjury — presupposes the taking of a false oath in the course of a pending case before a court. Article 106 refers to perjury in civil cases and contemplates three instances of perjury in civil proceedings: **perjury by a witness, perjury by a person who is a party to the civil case, and a false affidavit**."

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.

When it comes to 107, the punishment is determined as follows, in a criminal case if a referee maliciously certifies false facts, gives a false opinion, or an interpret knowingly makes a false interpretation during any ongoing criminal proceedings, **for an offence liable to a punishment which is more than 2 years, then the person will be found guilty for the punishment between 2-5 years.**

B If it is done during ongoing criminal proceedings for an offence liable for punishment **of less than 2 years of imprisonment the person will be liable for a period of imprisonment between 9 months to 2 years.**

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).

For false swearing one must prove that;

1.a false statement

2.wilfully made

3.on oath

4.before a person authorised by law to administer oaths

1.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**.

2.Mens Rea

A person must have made a statement knowing to be false, thus the falsehood was **intentional**. Therefore, it is necessary that the **person making the statement should have**

the full consciousness of perverting the truth. If due to ignorance, forgetfulness or any other cause exclusive of malice, a statement has been made which is objectively false, then no criminal responsibility under this article of the law would arise.

3. Under Oath

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

4. 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**. This is pronounced by subarticle 2 of this article.

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

Il-Pulizija v Francis Vella 1993, Vella was accused of a number of offences, one of which was false swearing. He was found guilty and he filed an appeal in which he argued that although he had made a false statement, it was made before a person who was not authorised by law to make the oath. Since this was found to be true he was acquitted of the offence of false swearing.

2002 amendments

If you look at **Art.108** prior to the amendments of 2002 there is no mention of the judge. The law spoke of the magistrate and officer the law but did not contemplate false swearing before a judge prior to 2002.

In Repubblica ta Malta Vs Nikola Cutajar 1996,

Cutajar was accused of perjury and false swearing in bail proceedings but the counts perjury in the bill of indictment were annulled because of the terms "a criminal cause", which at the time did not include bail proceedings. **The judgment also went on to annul the count on false swearing because Cutajar had allegedly made a false statement on oath in bail proceedings before a judge. The Court of Criminal Appeal held that by no stretch of the imagination could it be argued that when the legislator spoke of "any other officer authorized by law to administer oaths" in Art.108; he was also referring to a judge.**

Soon after this judgement the legislator introduced the word judge before magistrate in 2002.

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.

Police vs. Pasquale Debono (2/12/1961).

In this case, Debono had made a false statement on oath to obtain the license for a vehicle from the Commissioner of Police. In his appeal, he did not contest the fact that he had made a false statement. He simply stated that since in this particular case, it was within the Commissioner of Police's discretion to require a sworn statement, it could not be said that the oath was required by law and therefore the punishment applicable was the one contemplated in paragraph (b) of section 108 and not (a). **The court held that the discretion afforded to the Commissioner of Police did NOT make an oath one which is not required by law and consequently, rejected Debono's appeal.**

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.

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.**

When a single witness is not sufficient-Article 639 (1)

For articles 101, 104 and 108 a person may be convicted on the strength of a single witness, provided that the evidence of this witness is **corroborated in some circumstance** which is material to establish the alleged crime. E.g., There would be Mary Borg, and her version of events is corroborated by means of a CCTV footage. Thus, for these articles, **there needs to be corroboration.**

639. (1) Notwithstanding the provisions of the last preceding article, a person may not be convicted of calumnious accusation, perjury or false swearing, solely upon the evidence of one witness contradicting the fact previously stated on oath by the person charged or accused; but such person charged or accused may be convicted on the evidence of a single witness, when such evidence is corroborated in some circumstance which is material to establish the alleged crime by any other proof duly adduced.

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 the punishment prescribed by means of article 101, 104, 105 and 106, and 108, if the accused is found guilty of the crime proffered against him then he/she will also be interdicted, in terms of article 109.

Sub-article (2)

With regards to article 108, in addition with the punishment prescribe **by means of article 108, when it comes to general interdiction, the term shall be from 5-10 years. on the other hand, when it comes to 101, 104, 105, 106 the general interdiction shall be for a term from 10-20 years.** keep in mind that if although the person is interdicted, he may still be called as a witness to testify during court proceedings; he may still tender his evidence notwithstanding having been interdicted by a court of law.

General interdiction is dealt with in **article 10 of the Criminal Code.**

Interdiction 10(1)

The person is only disqualified from **holding a public office or employment.** This type of interdiction is **different to that contemplated in the Civil Code.** If a person is found guilty of perjury, for example, he may still enter into contracts, vote and so on. So, when it comes to

general interdiction in criminal law, the interdicted **person is only precluded from holding a public office or employment.**

Moreover, although said person is interdicted, he **may still be called as a witness and testify in pending court cases**, be them civil or criminal.

In the case of general interdiction, the Court will order in passing judgement that the said judgement will be published in the **Government Gazette.**

This is why in the case of calumnious accusations, perjury, and false swearing, a person may be convicted on the strength of a single witness, provided that that particular testimony is corroborated by some evidence which is material to the cause (art. 639). **This is because the accused, if found guilty of one of the crimes mentioned, will be awarded a very hefty punishment (imprisonment + general interdiction).** This publication serves to inform government departments and the community about the interdiction of the individual specified in the judgment.

Fabrication of False evidence

Article 110(1)

(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**.

Article 110(1) of the Criminal Code is **another form of calumnious accusation**. This article speaks about **real or indirect calumnious accusation**. Basically, it consists of in the false fabrication of evidence of an offence against an innocent person with the intention to procure to such person to be unjustly charged in Court or convicted of that particular offence so fabricated.

On the other hand, when it comes to article 101, this speaks about **verbal or direct calumnious accusation**. Because when it comes to article 101 the false accusation is made either in writing or orally by any information, report or compliant. But when it comes to article 110(1) you have **real or indirect calumnious accusation**.

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.

Material element

When it comes to this offence, the material element consists in fabricating, that is, **falsely or fraudulently causing any fact or circumstance to exist or to appear to exist which may be used as evidence of a criminal offence against an innocent person**.

Formal element

On the other hand, the **intentional element** of this offence consists in the intent on the part of the agent to procure that that person be unjustly charged with or unjustly convicted of any offence.

Therefore, in the case of verbal or calumnious accusation as contemplated by means of article 101 of the Criminal Code, the crime is completed **by the mere presentation of the information, report, or complaint to the competent authority such as the Executive Police.**

On the other hand, in the case of real or indirect calumnious accusation as contemplated in article 110(1), the crime cannot be said to be completed **until the fact or circumstance of fact falsely or fraudulently caused to exist or to appear to exist becomes known to the competent authority. Antolisei and Mamo both concur** with this method of thinking as the legislator intends to protect the proper administration of justice which cannot be misled unless the false traces become known to the competent authorities.

It is also relevant that there is naturally **no need for the person against whom the false evidence was fabricated, to be convicted.**

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.

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 ġieġhel li jidger li hemm fatt jew ċirkostanza bliskop li dan il-fatt jew ċirkostanza tkun tista’ tingieb 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 issemplici kliem... iżda hu meħtieġ li jinholqu traċċi jew indizzji materjali bil-ħsieb li dawn ikunu jistgħu jintużaw kontra dik il-persuna.”

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.

In article 110(1), the subject matter is the **fabrication of evidence**, whereby the focus is the evidence which has been falsely or fraudulently created. But when it comes to sub-article (2) the focus is on **the offence which has been simulated**.

The simulation of an offence is considered as a crime because of the injury it causes to the administration of justice by actually misleading it. This offence as contemplated by means of article 110(2), differs from the offence of calumnious accusation as contemplated by article 101. When it comes to this particular offence, **simulation of an offence**, keep in mind that **there is no specific accusation against any determinate person**. But when it comes to article 101, we have specific accusation against a particular person

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 exist (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).

1) Verbal or direct simulation

4 important things to keep in mind –

a. This must consist of a **denunciation**, meaning a **report, information, or complaint regarding an offence to the Executive Police** knowing that such offence has not been committed. For example, a person denounces to the police that a robbery has taken place when in actual fact, said person actually knows that such offence has not been committed.

That is the difference between this article and article 101 – you do not specify the person. **Once you specify the person, you have article 101**, and not article 110(2). Therefore, when it comes to verbal or direct simulation, we have the creation of a fictitious offence which is being reported by a particular person to the police.

The crime is completed by the presentation of such information, report, or complaint to the police. The subsequent confession on the part of the agent that he was untruthful when lodging the information, report or complaint, does not exculpate said agent. Once you file that report or you give that particular information to the police, then if there is some sort of retraction, that won't exculpate the agent from this article.

b. As in the case of calumnious accusation, as per article 101, it is **not absolutely essential and necessary that the denunciation of the particular offence to the executive police should comply with all the requirements or the forms prescribed and laid down in the Criminal Code**, meaning that there is no need for the agent to comply with the requirements as stipulated in articles 537 exequatur of the Criminal Code which lay down the mode in which the information may be given to the police, or a complaint may be drafted and so on. When it comes to article 110(2), even when it comes to calumnious accusation as per article 101, the agent, the person filing that particular report or filing the information need not comply with the formalities laid down by means of article 537 exequatur of the Criminal Code.

In Pulizija v. Anthony Farrugia (02/04/2004), the COCA held that in the case of verbal or direct simulation, **there is no need to observe the formalities prescribed by means of article 537 *exequitur* of the Criminal Code**. It stated that the simulation of an offence may even be done verbally to the competent authority. In the case of article 110(2), the words “lay before” must be construed in the general sense and it means to bring to the attention of the executive police. So, this judgement defined the words “lay before”. It also held that article 110(2) is intended to avoid the competent authority from investigating a crime which in actual fact did not occur.

c. The denunciation must be made **without specifying the supposed offender**. Otherwise, the crime degenerates into calumnious agent as per article 101. In fact, this was stated in *Il-Pulizija v. Joseph Zahra* (COCA 22/09/2010), whereby the Court held that the accused specified the identity of the persons of whom he reported. Consequently, the offence in terms of article 110(2) did not subsist. **When it comes to this offence, the person filing the report, information, or complaint must not specify the identity of the supposed offender. The report or information or complaint must only be in relation to an offence and not to a particular person.**

Moreover, in *Il-Pulizija v. Eugen Galea* (COM Malta 22/02/2021), the Court reiterated that the accused had filed a report with the Executive Police whereby he reported two persons, JJ Vela and Godrick Marsdin. Consequently, since the accused specified the identity of these persons, then the crime in terms of article 110(2) did not subsist. In *Il-Pulizija v. Joseph Borg* (COM Malta 11/03/2019), the Court stated that **once the agent specifies the names or the name of a particular person, then the crime degenerates into calumnious accusation and that particular person may not be found guilty in terms of article 110(2)**

d. The denunciation, meaning by means of a report, information, or complaint to the Executive Police **may be of a crime or a contravention**.

In *il-Pulizija v. Vincenzo Attard* (COCA 07/11/1984), the Court held that for the crime of simulation of an offence to subsist, **the false report must be about a crime or a contravention which give rise to criminal proceedings before the courts of criminal jurisdiction**. In fact, it held that,

“f’sentenza mgħotija mill-qorti tal-appeall kriminali, ġie sostnut li biex ikun hemm ir-reat ta’ ‘falza denunzja’, hemm bżonn li id-denunzja falza tkun dwar delitt jew kontravvenzjoni li jagħti lok għall azzjoni kriminali perseguibbli quddiem il-qorti tal-ġustizzja kriminali.”

2) The real or indirect simulation

When does this happen? For example, a person who in order to make believe that he has suffered some sort of theft, breaks the locks, leaves a ladder against the wall and devises other traces to give an appearance of reality to the simulated crime in such a manner as to cause the Executive Police to proceed to the magisterial inquiry and to the discovery of the authority to the said crime. For example, insurance fraud.

In fact, article 110(2) states that the person “*shall falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such offence...*”

Even in real or indirect simulation, **the simulation may be of any offence, be it a crime or a contravention.** Moreover, it must be made in a manner as to make possible the initiation of criminal proceedings for the ascertainment of the supposed offence. It is not necessary for criminal proceedings to be initiated. There has to be the possibility of criminal proceedings, not that they be in actual fact initiated. **So, the possibility of initiation of criminal proceedings.**

l-Pulizija v. Mel Spiteri (COM Malta 10/09/2020) is about real or indirect simulation. The accused, Mr Spiteri, was involved in a traffic accident, as a result of which the victim died. At the time of the accident, the accused was driving a car bearing vehicle registration number FTO050. Subsequently, the accused came up with the idea to tell his father that his car was stolen at the time of the traffic accident. The came up with this idea that he would not be identified as the driver of the car at the time of the traffic accident and at the time he ran over the victim. The accused devised traces of an offence whereby he broke the driver's door window to give the impression that his vehicle was stolen at the time of the traffic accident. The Court found the accused guilty, amongst others, of article 110(2),

“Mill-provi jirrizulta illi sussegwentement għall-incident, l-imputat u siehbu Ryan Micallef ftiehm li jipparkjaw il-vettura FTO-050 x'imkien l-Iklin u jghidu lil missier l-imputat li l-vettura insterqet. Dan bil-hsieb evidenti li b'hekk, l-imputat ma jigix identifika b'hal s-sewwieq tal-vettura fil-hin li din investiet lil Elizabeth Tucknutt Whilems. Jirrizulta wkoll li l-imputat, sabiex iwettaq dan il- hsieb, holoq tracci ta' reat ta' serq billi kisser il-hgiega tal-bieba tax-xufier tal- vettura FTO-050 halli l-vettura tidher li giet misruqa...

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

Il-Pulizija v. Francine Cini – Verbal/Direct vs Real/Indirect Simulation

“The two offences are different. The first subsection contemplates the offence of real or indirect calumny, consisting in the fraudulent creation of a crime with the aim that it serves as evidence against another person. The second offence refers to the reporting of a crime by an agent who knows that the crime did not occur, and this is done without expressly indicating the person responsible for that non-existent crime.”

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

As Jameson pointed out:

“The administration of justice may also be obstructed and the interests of individuals injured by the suppression of evidence as well as by its fabrication.”

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.

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 meħtieġ a.”

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.

Il-Pulizija v. Alfred Attard CONT'D

*"From the wording of this provision, **the offence is considered to be consummated as soon as the other person is actually hindered or prevented — even if only temporarily, for a short period of time, or on a single particular occasion** (when they could have otherwise testified or given the information) — from giving the required information or evidence."*

"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."

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).**

“Għal darba oħra l-atti huma għal kollox saġma mill-provi li jissostanzjaw din l-imputazzjoni. Mhux talli hekk, talli kif ġia sottolineat l-istess Andreana Gellel in kontro-eżami tagħmilha cara li l-imputati fl-ebda hin ma influwenzawha biex tvarja, tbiddel jew taqleb xi konklużjoni milli hi kienet waslet għaliha. 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-konklużjonijiet fir-rapport tagħha ghax ma kienx fl-interess tat-tfal. Apparti minn hekk meta l-Appogg rceviet it-telefonata fis- sistema on call tagħha u din ingabet għall- konjizzjoni tal-istess Gellel, hija mill-ewwel infurmat lill-Imhalef bil-kontenut ta' din it- telefonata u anke talbet direzzjonijiet minghandu dwa rkif kellha timxi. Din il-Qorti għalhekk 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**.

Il-Pulizija v. Gordon Pickard – Personal Favouritism

“...bl-ahhar parti **allura tirreferi ghal provi materjali u mhux ghal xi dikjarazzjoni jew stqarrija invertjiera. Illi il-Codice Penale Taljan** illum qasam dawn ir-reati f'zewg disposizzjonijiet distinti, bl-**Art. 378** jitkellem dwar “**il favoreggiamento 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-*favoreggiamento personale* irid ifisser lli:

The crime of **personal favouritism (*favoreggiamento 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**.

Also, 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**.

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.**

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.

Contraventions

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.

Il-Pulizija v. Donald Gilford

"In the criminal sphere, for a conviction of a contraventional nature under a charge such as the one brought against the appellant, **it is sufficient to prove the fact of the order issued by the competent Court ordering the payment of maintenance — and this is normally done by exhibiting a legal copy of the relevant Decree — and that the accused failed to pay the amount he was ordered to pay by the competent Court within the period mentioned in the charge.** Since this involves a contraventional offence, it must also be shown that this failure occurred voluntarily. Other considerations may, in certain cases, only be taken into account for the purposes of sentencing, where the Court has the discretion to impose either a term of detention or a fine, or, as in this case, Article 9 and Article 11 of Chapter 152 were applied, whereby the appellant was released under a provision not to commit another offence within six months and was ordered to pay the maintenance due in the amount of LM135 for the five weeks mentioned in the charge."

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.

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.**

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.

Il-Pulizija v. Alfred Camilleri

"Apart from this factual consideration, as has been held by this Honourable Court differently presided (Criminal Appeal: Police vs. Anthony Saliba; 15.7.1998), **the fact that a person becomes unemployed does not excuse them from their obligation to comply with the Decree of the Second Hall of the Civil Court** — an obligation that is enforced through the contraventional offence under which the appellant is charged. The remedy available to the

appellant, and which he should have pursued, was to apply in a timely and appropriate manner to the competent Civil Court, so that the Court, after considering the evidence, could provide by possibly modifying the maintenance order. And only after obtaining such a modification would he be allowed to pay a lower amount, if applicable. Until such modification is obtained, he remains bound by the obligation to pay according to the original Decree."

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

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.**

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 (II)

“...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 (II), *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**.

Il-Pulizija v. Etienne Mizzi

The Court clarified that Art. 338 (II) 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.

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.**

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.**

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.

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.