CRL1010 PRINCIPLES OF CRIMINAL LAW

elsa
The European Law Students' Association
MALTA

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Criminal law
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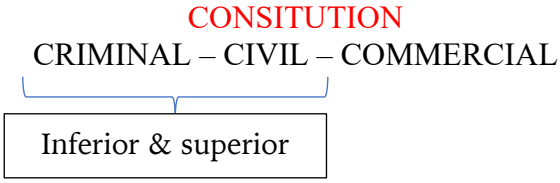
The Maltese criminal courts

The constitutional court is the highest court but there are others. These courts are divided into the superior courts and the inferior courts. Apart from this basic distinction, you also have the division of courts related to the area of the law – courts of criminal jurisdiction, courts of civil jurisdiction and the courts of commercial jurisdiction.
COMMERCIAL IS ALWAYS SUPERIOR.
Criminal and Civil cases can be treated either be in the inferior or the superior courts. With regards to civil matters, generally speaking, it is the amount of the claim that determines whether the case is treated by the superior or inferior courts.



D1: illustrating the Maltese criminal courts

CIVIL

In the case of civil instances, the inferior courts are subdivided into different courts: mainly the tribunals and the Courts of Magistrates.
Claims valued under €5000 are dealt by the Small Claims Tribunal.
Claims between €5000 & €15,000 are decided by the Courts of Magistrates.
Claims valued more than €15,000 will be heard by the first hall (Prim' Awla) of the civil courts.

CRIMINAL

Punishments of less than 12 years in prison are heard by the Courts of Magistrates (inferior)
Why are there not tribunals in criminal instances? In criminal instances, a small crime such as for example, an individual stealing someone else's pen are very minor 'crimes'.
The superior criminal court is the one in which trials by jury are held.

COMMERCIAL

Commercial instances are only dealt with by the superior court. Commercial instances are matters involving companies and partnerships.

The Courts of Magistrates

The Courts of Magistrates has both a civil jurisdiction (€5000 - €15,000) and also a criminal jurisdiction (0-12 years). Thus, this court gets both civil and criminal matters; the largest chunk. Therefore, the Courts of Magistrates further divide into civil and criminal sessions. Therefore, a magistrate is capable of hearing both civil & criminal cases, they do so in separate sessions.

The court of Appeal

a specific court with its purpose being to revise/re-examine judgements given by a previous court (court of first instance); A 'second layer'.

It is re-divided into criminal and civil. They both re-divide into superior & inferior. Therefore, there are 4 courts of appeal.
An individual is given one opportunity to appeal. And this is done when the induvial is unhappy with the judgement. The court of appeal can increase punishment only when the prosecutor appeals.
It simply reviews, and thus the same evidence is used.

Classifications

Parties to the criminal sector
The laws of procedure define the role of the numerous parties.

The Prosecution: The first party is the prosecution. It is that party which accuses a person before a court of law with a particular offence. In Malta, the Attorney General & the police take care of the prosecution. The police prosecute in the Inferior Courts while the Attorney General does so before the Superior Courts. The prosecution has the onus of producing the evidence in support of the charge/case.

The Defence Counsel: Essentially, each person charged before a court of law has the right to be represented and defended by an advocate and has the right to present evidence to challenge/rebut the evidence produced by the police. This is a right to every person who has been charged.

Other persons involved: The Magistrate/Judge and, at times, experts (the court may require that they are appointed in order for them to give their expertise on a particular issue. For example: photographer, forensic scientists etc…Moreover, they cannot favour the prosecution nor the defence). The judge/magistrate will give judgements in favour or against the accused and then both the prosecution and defence, if they want, may appeal the judgement. The right to appeal the judgement exist independently of one another. There isn't one appeal and either the defence or the prosecution can appeal. Both have a right to appeal, so much so that it can be the case where both choose to appeal.

Constitutional Law
Law is divided into numerous areas, one of them being Constitutional Law. The Constitution is the highest law of Malta. It the most basic fundamental law that establishes our country. Moreover, it exists to regulate the State. The Constitution regulates multiple areas such as the law courts. The laws in the Constitution can be changed. It is strong/rigid because certain fundamental principles may be changed only by a 2/3rds majority.

Commercial Law
Commercial Law is another area of law. This regulates the business transactions carried out in Malta.

Civil Law
Civil Law regulates the relationships between private individuals. For example, my neighbour starts throwing waste in my garden. In this case, we both are private individuals.

Procedural Law

Procedural law is that area of law which stipulates procedures which are to be followed in order for a person to obtain a desired result. Essentially, if my neighbour opens a window in my kitchen, that person has caused me a wrong and has breached my property rights. The law prescribes a certain procedure I should follow. It gives us the way forward onto what and how a person can bring an action. It gives us the time periods within which a person may bring an action and also gives us a way in which a case is presented and adds certainty to all parties to a case because even the court is bound with that procedure. Therefore, the law of procedure binds both parties and binds the judges. Essentially, procedural laws are those that set out the way in which the process is to be carried out.

Procedural laws divide the court into their particular competencies and divisions. Each State has its own different structure.

Substantive law

That type of law which establishes the norms that are to be followed by society. Substantive law tells us what to do and what not to do. It is the law which defines whether a particular conduct is acceptable or not. It is, therefore, the substance of the law. It prescribes elements such as what behaviour is unacceptable, what rights does a person have and also what consequences are likely to follow a particular action.

Distinction Between Criminal Offences and Civil Wrongs

Criminal offences belong to the much wider class of legal wrongs. A legal wrong is an act which is contrary to the rule of legal justice and a violation of the law. it is an act which is authoritatively determined to be wrong by a rule of law and is, therefore, treated as wrong in, and for the purpose of, the administration of justice by the State.

The distinction between criminal and civil law

This distinction is reflected in different aspects.

1. the parties to a case,
2. the consequences of a case,
3. the degree of proof.

1. The parties

In criminal law the parties to a case are the 4 mentioned above. Essentially, in Criminal Law you have the State against an alleged perpetrator (the state refers to the whole mechanism that supports the Republic of Malta – parliament, the laws, the courts etc…On the other hand, the Government drives the State. Using an example of a car, the State as a car and the government as the driver). The state is represented by the prosecution in criminal proceedings. In Civil law, on the other hand, the parties are persons against each other. Therefore, no State is involved. One of the main differences with regards to the parties in a case is that in criminal matters you have the prosecution representing the State against the accused. On the other hand, in civil matters, you have a private person who brought a case against another private person/company. In criminal law, the State has the duty to ensure a healthy and safe society and therefore it has the authority to charge a person in Court for a breach of the criminal code. Breaching the criminal code is seen as a breach towards society and the State has a duty to ensure a safe and healthy society. In civil matters, it is the private individual who is seeking redress to protect his/her rights. Therefore, when distinguishing between the two, note public versus private interests.

2. The consequences

A very important distinction between civil and criminal law is the consequence that will follow following a breach of civil or criminal law. In applying a sanction of the rules of Right, the courts of the State may either enforce rights or punish wrongs. In other words, they may either compel a man to perform the duty which he owes, or they may punish him for having failed to perform it. In civil law, if a person brings an action against another person (or more) and the court finds that such person has breached a provision of the civil court, then the court will order the enforcement of the right breached by the party. In a civil proceeding, the plaintiff claims a right, and the Court secures it for him by putting pressure upon the defendant to that end. Therefore, the consequence is the enforcement of a breached right meaning that a person may not go to prison. For a person to go to prison, that person must have breached the criminal law.

In criminal law, if a court finds that a person has effectively breached a provision of the criminal code, then the consequence in that case will be that the court will award punishment. Punishment takes many forms such as fines, imprisonment and so on. In criminal proceedings, the prosecutor claims no right, but accuses the defendant of a wrong: The Court makes no attempt, as a rule, to constrain the defendant to perform any duty already disregarded and or to pay compensation for the right already violated as when he is hanged for murder or imprisoned for theft.

The law itself decides whether a given act is a criminal or a civil breach. A wrong regarded as the subject matter of civil proceedings is a civil wrong; when regarded as the subject matter of criminal proceedings, it is a criminal wrong or a criminal offence.

3. The degree of proof required

Since the consequences of a criminal wrong are far more serious than those of a civil wrong, the level of proof required in order to find guilt in a person is also very different. In Maltese law it is a cardinal principle that a person alleging the fact must prove it: *allegazio incumbit ei qui dicit*. This counts both for the person in a civil suit and for criminal proceedings. In civil proceedings, the proof must be presented on a **balance of probabilities**. In criminal matters however, the level of proof required is **beyond reasonable doubt** whereby the Judge/Magistrate must look at the evidence and must be morally convinced that all arrows are pointing at the accused. In that form the evidence, there is no doubt that the accused has committed the particular offence. If there is doubt, then such a doubt must go in favour of the accused). An English opinion – **Miller v. Minister of pension in 1974** – in this case, the judge, Lord Denning, held that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt…the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proven beyond reasonable doubt. In civil matters, if it is probable then that is enough to decide a case. In criminal matters, the level is higher, but it is not absolute certainty. In absolute certainty, only the diviner knows exactly what happened).

The fact that there is this difference in the level of evidence does not mean that criminal law and civil law are mutually exclusive. In fact, the majority of criminal offences also have a civil law undertone, thus breaching civil law provisions as well. In the case of wilful damage to property, damaging property is a criminal offence but looking at it from the victim's point of view, the criminal act also caused the victim a liability, a civil wrong. Therefore, in this case the agent would have breached both the criminal and the civil code. The same counts with theft. In fact, Article 3 of the criminal code states that:

> **3.** (1) Every offence gives rise to a criminal action and a civil action.
>
> (2) The criminal action is prosecuted before the courts of criminal jurisdiction, and the punishment of the offender is thereby demanded.
>
> (3) The civil action is prosecuted before the courts of civil jurisdiction, and compensation for the damage caused by the offence is thereby demanded.

When an action breaches both the Criminal and the Civil Code, according to **Article 6** of the Criminal Code,

> **6.** The criminal action and the civil action are prosecuted independently of one another.

Police lead the prosecution in the lesser courts and the Attorney General's office leads the prosecution in the Superior Courts.

Article 26 of the Criminal code

> **26.** (1) Any sentence to a punishment established by law shall always be deemed to have been awarded without prejudice to the right of civil action.
>
> (2) A pardon commuting or remitting a punishment lawfully awarded shall not operate so as to bar the civil action.

The question remains: why does the State feel the need to punish a particular course of action through criminal sanctions?

In Mamo notes – the discussion as to try and establish whether there are any specific elements in set of action which renders that action a criminal action or a civil action.

Smith & Hogan – an attempt to legally define a crime immediately presents serious difficulties. If there had to be a true definition of a crime, then that should enable us to recognize conduct as being criminal or not by seeing whether it contains all the ingredients of the definition.

An examination of criminal law over time has proven very difficult to create a general definition of a criminal offence and the main reason being that criminal offences are created or removed (decriminalised). For example, the organisation of a meeting with a minor for the purposes of sexual encounters was not considered by our law to be a crime until 2010 – parliament has criminalised such actions.

Having a genetic definition would ensure all acts are criminal from the very first day they are committed.

Furthermore, parliament may also decriminalise – such as in the case of the offence of adultery.

If one had to create a general overarching definition one is bound to ask these questions – what changed and why. Making it impossible to find a prepared definition of what actions would constitute criminal offence or not. Although, there are some elements from various theories which are common. Prof. Mamo examined a number of common characteristics and examines a number of theories which in some form or another attempt at finding some kind of common ground with regards to finding a criminal offence.

The Definition of a Criminal Offence

Theories of Prof. Mamo (English aspect) of the definition of a criminal offence:

A wrong regarded as the subject matter of civil proceedings is a civil wrong; when regarded as the subject matter of criminal proceedings, it is a criminal wrong or a criminal offence. But this is only a formal distinction between the two classes of wrongs. Any description of criminal offences which centres either in procedure or in the fact of punishment amounts only to a formal, not to a material definition. This is not enough.

The problem is why is such wrong punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?

Many attempts have been made to answer these questions & to propound a general definition of a criminal offence:

In attempting to frame a definition of a criminal offence which shall separate the illegal acts which are criminal from those which must be treated in another branch of the law of wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

i. **Mala in Se theory**: in adopting this course, one way that most naturally suggests itself to a man's mind is the ordinary limitation of the idea of crime to those legal wrongs which offend our moral feelings. There is something more in the notion of most crimes than a mere breach of the legal rule. There is a strong element of morality in the wrongfulness. To convey this idea of inherent wrongfulness, the philosophers of the 17th and 18th centuries defined these crimes as 'mala in se'. Prof. Mamo bases this theory on philosophers of the 17th and 18th Century which define crimes as having something **intrinsically wrongful**. Their doctrine was that these wrongs were illegal because they were wrongful; they had been forbidden by a Divine Law which no human authority could possibly abrogate or abridge even if it desired to do so. They argued that there should be something so intrinsically wrong in an action that the State has an obligation to impose punishments for such an action. It is the potential of an act to offend our moral feelings that would classify such an action as a crime. And, indeed, throughout the criminal law of all the nations, there runs an unmistakable current if belief that certain kinds of conduct require direct repression by the state because they are evil in themselves. These philosophers argued that **there are actions that are generally acclaimed as being wrongs** notwithstanding the culture of the place where they are committed. This theory basis its foundations on **the potentiality of an act to offend the moral feelings of society**. This theory leads us to discuss a few words on the distinction between criminality and morality. There is a distinction between what constitutes a criminal wrong and what constitutes a moral wrong. For example, if a person had to be unkind to a weaker person, one might feel morally offended, yet such actions would not constitute a criminal offence, they are simply morally wrong. One must also make a distinction between religion and the State. The dos and don'ts of religion are not equal to what the State considers as dos and don'ts. For example, for Catholics one must attend mass every Sunday however our Criminal Code does not impose an offence for not attending Sunday mass. Similarly, parking on a double yellow line is a minor criminal offence but is not found in a religious environment. Moral wrongs relate to religious beliefs, criminal wrongs relate to the State. The doctrine of this theory is that if it is morally wrong, then those are elements that contribute towards the criminality of those particular actions. At the time of these philosophers, it was only the most outrages acts that were punished. Therefore, at the time this theory was seen as very plausible.

There is no doubt that intrinsic wrongfulness in the moral sense is a characteristic of most crimes: they are wrong according to average moral judgement. But, Kenny says, "this is only a rough test: it holds of 'grave' crimes in the mass…many crimes involve little or no ethical blame." Many breaches of statutory regulations and byelaws which, because they are punishable in criminal proceedings, must be classed as criminal offences, do not involve the slightest moral blame, such as failing to have a proper light on a bicycle. At the same time, an act that involves the greatest moral scandal may not be a criminal offence, such as incest. Likewise, many grossly wicked breaches of trust are mere civil wrongs.

ii. **The theory of the distinction between private and public wrongs**: This basis itself on the distinction between a private wrong and a public wrong. The English author Blackstone writes that wrongs are divisible into two sorts of species: private wrongs and public wrongs. The former is an "infringement or privation of the private civil rights belonging to individuals considered as individuals, and are, therefore, frequently termed as civil wrongs". The latter are "**a breach or violation of public rights and duties which affect the whole community considered as a community and** are distinguished by the harsh name of crimes and misdemeanours." Salmond observes: "this explanation is insufficient". In the first place, not all public wrongs are criminal. Conversely, and in the second place, all criminal offences are not public wrongs. Many offences are, according to law, prosecuted at the suit of a private person, yet the proceedings are undoubtedly criminal, nonetheless.

Kenny argued that "the idea which Blackstone attempted to embody is one of great importance and deserves a very close scrutiny". According to this idea, criminal offences are such breaches of the law which injure the community at large. There is this strong tendency of crimes of to injure the public. This theory therefore states that private wrongs are private because they attack the private civil rights belonging to the individuals, while actions which attack the rights of a community, should be deemed as being criminal offences. And Kenny highlights this public element by stating that such breeches of criminal law injure community at large whereas civil wrongs injure the individual. Blackstone created the distinction between the private wrong which he classified as a civil wrong and a public wrong – injures society at large. He classified these wrongs as being criminal wrongs.

What Blackstone has realised is that there is a public nature in criminal law. This concept isn't a new concept in fact, the Romans had already recognized the public injury of crimes and in fact roman jurists had noticed this strong tendency of crimes to injure the public sentiment. In fact, they had termed crimes as delicta publica. In view of this public nature of criminal law, a criminal case was considered as a public case and was therefore conducted in public in Roman times. Subsequently, the public hearing was abolished by roman law, but the public characteristic of criminal law has remained throughout the centuries. In fact, the roman times the public case was literally decided upon by the public attending the particular case. This public element has remained with us so much so that in trials by jury, the jurors are members of the public. Coupled with this, there is a further dimension to this concept – not only must a criminal offence injure the public, but the public feels the need to punish a wrong doer (this is the other dimension). The public that has been wronged by an act feels the obligation to punish the person who has wronged society. The English author Duff explains that "we should be held criminally responsible for wrongdoings which are public in the sense that they properly concern all members of society and merits a formal public response of condemnation."

Eventually Kenny had argued that this theory would be extremely valid if we require a general idea of what constitutes a criminal offence but is this theory sufficient to achieve the precise accuracy required for a universal definition of a criminal offence? Kenny goes on to say, "but can we accept as a sufficient foundation for the precise accuracy necessary in a formal definition?" Such a definition must give us the "whole thing and the sole thing", telling us something that shall be true if every criminal offence and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define by mere help of the vague fact that they usually "injure the community". For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Eventually, Kenny, realised that this theory is good at a generic level but then wondered whether it is precise enough. He said that essentially, although this theory might prima face appear to be correct, there are some actions that effect the community at large but are still considered as being civil wrongs & some civil wrongs are more grievous than some petty thefts. Therefore, we cannot even make the question one of degree and say that criminal offences are always more injurious to the community then civil wrongs are. Similarly, there are instances that offend the private individual only. Therefore, this theory is not detailed enough to cover all aspects of criminal offences. Harris even pointed out that an act which is of actual benefit to the public may be s criminal offence.

In conclusion, Kenny holds that to speak of crimes as forms of legal wrongs which are regarded by the law as being especially injurious to the public at large may be an instructive general description of them but remains an inaccurate definition.

iii. **The consequence of a harm**: other writers have maintained that a wrong is merely civil if the injury caused thereby can be remedied, whilst it is criminal if the damage cannot be remedied. This theory, therefore, is based on the permanence or revocability of the damage caused. If a damage can be remedied than it is a civil wrong, if on the other hand it may not be reversed then that damage should be considered as a criminal offence. This theory essentially is not one of the strongest theories that have been proposed in the theory of criminal offences. In fact, Prof. Mamo argues that this theory is clearly "fallacious". Although there are some crimes where the injury is permanent there are other crimes in which the harm may still be remedied yet is considered to be a criminal offence.

iv. **The theory of precaution**: similarly, some writers consider a wrong as being a civil wrong if the injury caused could have been avoided by taking the precautions which nature, common sense and the law provides to everyone. It is criminal if the harm cannot not be avoided except by the threat of punishment. If an action could have been avoided through common sense, then such actions should be considered as civil wrongs. On the other hand, if such actions and wrongs can only be avoided through the threat of punishment then they should be considered as being criminal wrongs. This theory bases itself on the test of the reasonable man. Prof. Mamo holds that this theory describes what sometimes happens, but it does not provide a complete picture since there may be wrongs of a civil nature which cannot be avoided, notwithstanding all the precautions taken, whilst there could be criminal offences or injuries which can be avoided with the minimum of precautions.

We have seen that until now, none of these theories have been proven to offer an adequate definition of a criminal offence.

v. **The theory of formal/extrinsic/proceedings test:** Harris says that nothing in the character of an act or omission enables us to determine whether it is a criminal offence: the only test is the nature of the liability which it entails. In other words, because of the impossibility being the intrinsic quality of conduct which renders it criminal, most writers and also the courts have been driven to define whether a conduct is criminal or not by referring to the nature of the legal proceedings which follow its commission. This leads us to the proceedings test. The English author Harris argued that "the essential characteristic of a criminal offence is that it entails liability to punishment". He states that "the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes and the only common feature they will be found to possess is that they are prohibited by the State and that those who commit them are punished". Harris further adds however that "the fact that an act or omission may entail liability to punishment is not sufficient to make it a criminal offence unless punishment is inflicted as a result of criminal proceedings". He is saying that not only must a person be punished for a particular act, but such punishment must be the result of criminal proceedings. The criminal quality of an act cannot be known by intuition nor can it be discovered by reference to any standard except the reply to the question: is the act prohibited with criminal legal consequence? In order to be considered a criminal offence, not only must that particular act be punished but the punishment must be the result of criminal procedure.

Prof. Mamo adds that while punishment is the object of all criminal proceedings it may sometimes be the object of civil proceedings too. There are instances for example where government imposes a penalty or a fine on a person through administrative proceedings. For example, if a person fails to submit the income tax return by a stipulated date, then the income tax department may and will impose a late filing fine. In this case, a person who failed to do an action is subject to a fine and the fine is imposed on him/her. In such cases, the punishment is merely a civil process to enforce obedience to the order of the Court and does not make the disobedience or contempt a criminal offence. The proceedings test is a theory which does not look at any consequence of an act – regardless of whether it is reparable or not, or if it could have been avoided based off of common sense. Harris tells us that in order to know whether a given set of actions is of a criminal nature or not, one should look at the kind of proceedings that such an action will attract. **Criminal actions attract punishment, but such punishment should be imposed through criminal procedure, therefore a result of a criminal case**.

The conclusion to be drawn from all this seems to be that no satisfactory 'a priori' test exists for deciding which acts must be considered as civil wrongs and which as criminal offences. The ultimate and sole real test is the law itself; regard being had to the nature of the sanction imposed and the mode of its enforcement.

Indeed, inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure. Section 3 of our Criminal Code lays down that "*Every offence gives rise to a criminal action and to a civil action.*" But of course, this cannot be the case with those offences which do not happen to injure any particular individual or where the course of an offence is checked before it has reached the point of doing any actual harm. However, in the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other men; and whenever this is so, the crime is also a civil injury.

Here, we have shifted the perspective of our theories. The intrinsic theories come from within; there is nothing in any particular action that renders it a criminal offence. So, authors like Harris asked themselves if there is nothing within, is there something which follows from a particular act which is outside the act that renders it a criminal offence? Harris said yes; any act which entails liability to punishment is a criminal offence. Essentially, what the intrinsic theories where doing was looking from the act inside. The extrinsic test, on the other hand, looks outside ex post facto (looking backwords – the action happened, and we are looking backwards once the action happened). Not all acts entail a liability to punishment, for example, getting married does not. But if one steals someone's property, for example, that action will expose the individual to the liability to have punishment. Eventually, Harris revised this theory. He said that **committing an act which is liable to punishment is a criminal offence, but that punishment should be imposed on the wrong doer as a result of criminal proceedings** (therefore punishment along isn't sufficient - in the form of a fine (ammenda) or fine (multa)). Harris is building on his own theory. A person might be liable to punishment, but such punishment could be the result of administrative proceedings and not criminal proceedings, for example and that would not render it a criminal act.
Therefore, are 4 theories from the intrinsic aspect and others are extrinsic.

Prof. Mamo holds that there seems to be no satisfactory a priori test (from before) for deciding which acts must be considered as civil wrongs and which as criminal offences. He argued that ultimately the sole, real test of whether an action is a criminal offence, or a civil wrong, is the law itself by essentially imposing a punishment on the action which is the result of criminal proceedings. Our Criminal Code itself states that actions give rise to criminal offences and civil wrongs. So really and truly, it is even more difficult to state that an action is purely criminal or exclusively criminal because the majority of criminal offences are criminal wrongs AND civil wrongs. In truth, an action that is both a criminal offence and a civil wrong will be classified either as a criminal offence or a civil wrong according to the perspective from where a person is looking at it.

Therefore, the difference between criminal offences and civil injuries does not consist in any intrinsic difference in the nature of the wrongful acts themselves. The ultimate test to decide whether a legal wrong is a criminal offence or merely a civil injury, is the nature of the liability which it entails and the proceedings which are taken upon it.

A criminal offence may, therefore, be defined as "a legal wrong which exposes the doer to a punishment to be inflicted upon criminal proceedings" this is of course a purely formal definition.

The Italian theorists

The 'public' aspect of crime, that is, that it injures the community as a whole is the dominant characteristic of Criminal Law in all modern societies. This aspect plays a prominent part in Blackstone's classification of legal wrongs.
All this does not mean that Criminal Law is not concerned with the rights of the individual. It clearly is. Indeed, the State exists, and all law is intended better to ensure the safety and promote the prosperity of the individual members. These objects the law seeks to achieve by the threat of punishment. But once the offence is committed and the harm is done, the duty which the law vindicates, in inflicting the punishment of the offender, is not the duty to restore the specific right of the victim of the offence – a restoration which, in the nature of things, is often impossible – but the duty not to behave in a certain manner which is prejudicial to order and peace and the well-being of the community.

Italian theorists also focus more on the public aspect of a crime. Their point of focus is the premise that an action should injure the community as a whole. It injures the community either because it attacks the person or the property of other individuals or because it attacks some or a vital part of the State's machinery. The Italian's point of focus does not mean that criminal law is not concerned with the rights of the individual. In fact, the Italian theorists argue that the State and its laws are intended to ensure the safety and promote the prosperity of the individual members of society. The law seeks to achieve these objects by using the threat of punishment but once the offence has been committed, and the harm done, the duty which the law seeks to enforce is for other members of society to refrain from repeating such actions by imposing a punishment on all members who commit such acts. It is not the duty of criminal law to restore a specific right which may have been breached by a particular action.

Perhaps the most prominent theory which defines a criminal offence is Carrara's definition of a crime and this theory is of particular importance to us because it is the theory adopted by our legal system. Criminal law is concerned with the protection of the wellbeing of society and in order to achieve this on a bigger scale it must ensure that there is wellbeing on the individual scale. The law traditionally tries to ensure the wellbeing of society with the threat of punishment; it threatens that if someone makes a particular scene of actions than that someone will be punished by the state for committing that act and therefore the threat of punishment should, for the majority of society, make a person refrain from committing the particular action. Traditionally, Criminal law is not bothered with restoring the right of the victim; if someone stole my money, traditionally speaking, criminal law is not bothered with replacing the funds. Which is why an action brings a civil action and a criminal action. This is not the case for every act such as in the case of homicide where one cannot bring back the dead individual. Not all criminal offences therefore may be reversed back to civil action. From the criminal aspect, the causing of a criminal action, therefore, is as the result of causing what Mamo classifies as an indirect mischief to society. This mischief has been categorised by Carrara as "*danno immediato*".

Criminal law essentially categorises those actions which when committed create an indirect mischief to society. In fact, Carrara states that "*Il fatto che danneggiasse un solo cittadino senza menomare neppure nell' opinione la sicurezza degli altri non potrebbe essere dichiarato delitto*." This means that a fact that causes damage to only one citizen without at least affecting the public opinion on security of the others may not be considered as being an offence. Essentially, Carrara in this phrase is highlighting the importance that a particular act causes at least fear in the other members of society; fear that their security is at risk to any degree. This fear is enough according to Carrara to satisfy this element of "*danno immediateo"*. This indirect mischief is therefore fundamental to Carrara's definition of a crime. Carrara's definition of a crime/offence is of particular importance to us Maltese lawyers because it is the definition that is adopted by our courts.

The definition is: *L'infrazione della legge dello Stato, promulgata per proteggere la sicurezza dei cittadini, risultate da un atto esterno dell'uomo, positivo o negativo, moralmente imputabile.* This means **the violation of the law of the State promulgated for the protection of the safety of the subjects by an external act of man, whether of omission or of commission, for which the agent is morally responsible**.

Essentially this definition contains certain fundamental notions which are consistent and existing throughout the whole studies of Criminal law. Until now, the English theorists use crime and criminal offence interchangeably because under English theory these words had one and the same meaning. The Maltese system follows the Italian system by which 'criminal

offence' is divided into crimes and contraventions. Therefore, under our system 'criminal offence' is a generic term. In fact, **article 7** of the criminal code distinguishes between the two. The consequences of a crime are more serious than those of a contravention. For crimes, we speak of imprisonment whilst for contraventions we speak of detention. With regards to fines, fines for a crime are known as 'multa' which is more serious than a fine ammenda. A multa is not kept at any maximum whilst an amenda is. Contraventions do not feature into Carrara's definition of a criminal offence. His definition focuses mostly on crimes not on contraventions. Therefore, 'crime' is appropriated to the more serious criminal wrongs. And it is in this restricted sense that the word crime is used in the translation of Carrara's definition. Venial offences in the nature of contraventions or breaches of 'Police' laws which are not in themselves morally reprehensible, do not enter into Carrara's theory of the Criminal Law.

Carrara's doctrine confirms the point that the dominant function of criminal justice is the repression of wrongs which are injurious to the community at large in such a manner that they cannot be effectually restrained otherwise than by infliction of penal sanctions.

Analysis of Definition

Violation of the law

The general concept of every criminal offence is that it is a violation of a rule of law: for not act of man can be charged against him unless it is prohibited by the law. In fact, an act becomes a criminal offence only if and when it goes counter to the written law. If that act is not forbidden by the law than it cannot be set up as a criminal offence against the perpetrator, however morally reprehensible or mischievous the act may be. There must be a breach of the law, *nullem crime sine lege.* If a law does not prohibit a particular act, there is no crime.

Of the State

This implies that it is not the infraction of every kind of law that constitutes a criminal offence. There must be a violation of the positive law enforced from time to time by the State in an organised system of society. It must be the law of the state. There must an infringement of the law and the law must be the law of the state. In other words, an authoritative law of the state. The laws of a State are applicable within the territory of that state. Therefore, if someone in Malta makes an action that would breach the Italian Criminal Code, for example, but in Malta those actions do not breach the Maltese criminal code than those actions in Malta would not amount to a criminal offence. Therefore, the written law of the State has its application in that particular State. Each State has its own jurisdiction. If a person commits an action which would be a criminal offence in England, for example, but committed in Malta and is not an offence in Malta than that person will not be charged with a criminal offence in Malta. This is seen in article 5 of the Criminal Code.

Promulgated

This means that the provision of a law must be promulgated by government meaning that the provision of the law should be made known and published in Malta. It would be unjust and absurd to require the subjects to conform to a law which has not been enacted and published in due form. The process of the adoption of a law normally starts with the presentation of a bill in Parliament. If a person infringes a provision of that bill, that person would not have committed a criminal offence as the bill would not have been promulgated yet. But once that bill is passed through Parliament, and therefore, the members of the House have approved it, and once the President of the Republic signs the bill, then that bill becomes promulgated and from that moment onwards it becomes law. Moreover, *Ignorantia iuris neminem excusat*

legis. Once the law is enacted and published, the law is presumed to be known by all those to whom it applies and, it does not avail the transgressor to say that he was not aware of it. The law, apart from being promulgated, must also be enforced. There are some actions that throughout the years have been decriminalised. For example, the decriminalisation of libel proceedings.

For the Protection of the Safety of the Subjects

Breeching a criminal law might create a sense of insecurity in the public and therefore, the particular criminal provision should be designed to protect the safety of the citizens. This is where the public element of criminal law ties in. This is the element on which Carrara bases the importance of the public aspect of the crime. This fourth element is in the whole theory of the public aspect. An act is a crime when it violates the law which is designed to ensure the safety of the subject. And the word 'subjects' is used precisely to convey that crime is punished by the State because it injures also the community at large.

By an External Act

This element necessitates the performance of an action by an agent. Mere desires or thoughts alone do not injure any person unless there is some form of external act manifesting those intentions. It is not necessary that the external acts complete the persons wishes but they must clearly divulge the persons intentions. So, internal thoughts without some form of external manifestation do not amount to a criminal offences. However, attempt, though the unsuccessful completion of a crime, is enough to be a criminal offence. Of course, one can only be held criminally responsible for attempt if the perpetrator if there is what is known as the commencement of the execution of the crime. An individual cannot be held accountable if his/her acts are merely preparatory acts.

Of Man

Essentially, only human beings can be guilty of violating the law. In the past, especially in the Medieval times, Criminal Law also applied to animals and other inanimate objects. Therefore, at the time, the animal/object could have been found criminally responsible for the actions it has caused. Up to a certain extent, the responsibility of animals or of objects has remained with us however only and limitedly with regards to civil actions. There is an increase in the responsibility for actions caused by animals. Historically, animals or objects in some jurisdictions were punished for causing some kind of criminal mischief. Today, the damages which the animal would have caused will still be constitute responsibility not of the animal, but of its owner. The responsibility has shifted from the animal onto the owner. Recently, there has been a return to the criminal liability of the owners of animals. The definition given by Carrara, at least on this point, needs a little bit of fine tuning in the sense that man can be held liable also for actions that have been inflicted by animals/objects criminally as well as on a civil level. The same argument counts for objects, e.g. I leave a sharp knife lying around and someone is injured as a result. I didn't cause the damages however since I left that knife lying around, I can be held liable for the actions cause by it. Although objects/animals are not held criminally liable, the owner may be held liable.

Of Commission or of Omission

A person may become guilty of a criminal offence either because he does what the law forbids or else, he fails to do what the law stipulates.

For which the Agent is Morally Responsible

Human beings are subject to laws of the State due to their capacity of will and understanding. Therefore, no person can be found guilty of a criminal action if that person does not will and want that action. A person must be physically and morally capable of committing the offence – *actus non facit reum nisi mens sit rea* – the action does not constitute an offence unless there is a guilty mind. Therefore, an action is not a crime unless the agent has the mental volition and capacity to commit such an act. A person must have the '*capacita' di intendere'* and the '*capacita' di volere'*, the capacity of understanding and will. There are instances where the law provides a justification/excuse to a criminal offence that has been committed, in particular if there is insanity of the mind, intoxication through alcohol or through substance abuse. There are very rare situations where if certain elements are proven, that person is not found guilty of the offence even though he/her would have committed it.

There are also what are known as involuntary offences. In these instances, the person committing the involuntary offence, does not will and want the result of his/her actions. Therefore, the law sees certain situations where you obtain the same result (death/injury) however, the agent would not have willed the to harm the victim, but rather has done so as a result of the negligence which is a lack of duty of the agent. What the law is punishing in the instance of involuntary homicide, for example, is the fact that a person has been killed due to the lack of responsibility of the agent. The *mens rea* was not to kill someone but, it was to show off, for example. Therefore, there is still some form of *mens rea*. The lack of direct *mens rea* to kill someone is also reflected in the reduced punishment which is a maximum of 4 years.

There is one exception which is vicarious liability (when a person is held liable for someone else's actions). This is extremely rare in our law, yet it exists in article 35(3) & (4). This happens where you have a minor who is under 14 years of age and that minor commits an offence and the parents are held liable for the minor's actions.

Under what circumstances is the State justified in issuing criminal prohibitions?

Before using threats of criminal penalties to suppress a noxious form of conduct, the legislator should satisfy himself upon no fewer than six points:

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct or indirect, which the infliction of criminal punishment involves.
2. It should admit of being defined with legal precision.
3. It should admit of being proved by cogent evidence.
4. This evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life.
5. The lawgiver should not prohibit the act unless he is ascertained to what extent it is reprobated by the current feelings of the community.

Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by the milder sanctions which civil courts can wield.

Penal laws

We have seen that criminal law had started off from the *male in se* theory. This idea developed with people realising that criminal law is a matter of positive law – what a legislator at a particular time considers as unacceptable behaviour. In fact, there are numerous provisions of criminal law that find no counter parts in natural law. Positive law which is essentially the written law, must have content and form. Each legal provision must have content and form. Although it is the content of a legal provision which gives it substance, and which conveys the prohibition intended by the legislator, the form of the legal provision serves to help us better understand the intention of the legislator. Criminal offences are found in provisions of the Criminal Code and each provision is divided into two sets: the content of the provision (what the legislator wants to prohibit) and the content must come in a form (the form helps us better understand/interpret the content).

We have seen that perhaps the most important function of the State is that which it discharges as the guardian of order, **preventing and punishing all injuries to itself and all disobedience to the rules which it has laid down for the common welfare**. In the discharge of these functions, the State proceeds by an enumeration of the acts which it considers injurious to the maintenance of order and the common welfare, coupled with an intimation of the penalty to which anyone committing such acts will be liable. Such enumeration and intimation form the contenta of the substantive penal laws of the State,

The form of a criminal provision

With regards to criminal laws, it is quite pointless having a prohibition without having a consequence for the breach of such a provision. Every penal provision, or the majority, have two elements: the description of the provision known as the 'precept', *perceptum legis,* and the 'sanction' imposed for the breach of the provision, *sanctio legis*. In the precept, the State prohibits or commands the doing of a certain act, while in the sanction, a punishment is threatened against the transgressor.

Perceptum legis: The first part of the penal provision establishes the parameters/elements within which a particular behaviour is considered acceptable or prohibited. It provides **the ingredients necessary to constitute an offence**. Essentially, it gives us what is prohibited; those elements of an action which are prohibited. It is very rare for a criminal provision to spell out/give us the linguistic name of the offence. For example, it is rare for the Criminal Code to provide criminal offence in the manner: 'whoever commits fraud shall be guilty of an offence'. This is because the meaning of 'fraud' could differ from person to person resulting in a number of interpretations. Therefore, the law many a times instead gives us the **elements** of what would consider, for example, fraud. In so doing the law is trying to be as **precise and clear as possible**. The marginal note helps us to know what we are talking about and is not part of the legal provision. The *perceptum legis* of a provision is considered as being the academic part of the particular offence, it is academic for the reason that it provides lawyers and adjudicators the opportunity to legally argue the interpretation of the offence. Many times, defence lawyers argue that the acts committed by their client are missing one or more of these ingredients. The prosecution, on the other hand, argues that the actions of the accused satisfy all the ingredients of the offence and the Judge/Magistrate will decide. So, for example, in the case of bribery, a defence lawyer may argue that the money his client received was a Christmas gift or his wages (any argument which tries to detach the actions of the client with these ingredients). The *perceptum legis* is that part of the provision which provides the bulk of the work of litigation lawyers. It is important to note that in criminal law, if you have, for example, 4 elements all those elements have to be satisfied. If there is an

element of the offence which is missing in the case, that person cannot be held guilty of that offence.

Sanctio legis: Once the elements of an offence are satisfied, or once the law lists those elements, then it moves on to the *sanctio legis*. This refers to **the consequence of breaching the provision**. The *sanctio legis* normally gives a significant **discretion to the adjudicator** for the purpose to try and be as just as possible with the facts of the case. It gives a range, a minimum and a maximum, within which the Judge or Magistrate will assign punishment. Moreover, it will give the Judge/Magistrate discretion to be just with the case and therefore, discretion to calibrate the punishment according to the circumstances of the accused. Typically, if you have a repeat offender, the likelihood is that the punishment will be towards the maximum of the range. A first-time offender, on the other hand, is likely to face the minimum punishment.
There are numerous elements to the offence, but the law does not say black on white in the actual article what the offence is per se. Article 198, for example, does not say whoever shall commit the act of rape but lists the elements that constitute it instead.

The principles of justice are not always clearly legible by the light of mere reason: and, therefore, for the sake of uniformity and certainty, it is now universally admitted that Moral Law has no claim to recognition as an independent source of Criminal Law, except in so far as its principles have been recognised as fit for compulsory enforcement by the State through the instrumentality of its laws.

Basic principles:

1. No act or omission can be considered as a criminal offence unless it has been so declared by the law of the State: *Nullum crimen sine lege – Nullum crimen sine praevia lege poenali.*
2. No punishment can be inflicted which is not prescribed by law: *Nulla poena sine lege:*
    a. The form of punishment imposed by the Court must be one of those which the law permits,
    b. The offence cannot attract a punishment which is higher than, or different from, that which the law expressly provides.

Enacted or statutory law is the only legal source of Criminal Law. Here, usages and customs have not, as in Civil matters, the force of a subsidiary law. Likewise, the universally accepted doctrine is that a law does not become inoperative through desuetude or obsolescence: nothing but repeal can disembarrass the law of any matter which has become obsolete.

MARTINA CAMILLERI

Criminal law
Dr Jason Azzopardi

OPERATION OF CRIMINAL LAW

Limitations by time & space

Positive law's force is limited by time (because human laws are altered from time to time), and by territory (because as a general rule it applies only in the country in and for which it is enacted). Moreover, certain exceptions are made to the principle of the equality of all men in the eyes of the law.

A law comes into being as soon as it is enacted in due form by the authority in which the function of legislation is vested. In Malta, any law enacted by Parliament comes into operation on the date which presidential assent is given unless another date is appointed for its commencement. In other words, in order for the law to be enforced, it has to be promulgated. When it is promulgated, it is applied to a **space** and from a **time**. A law comes into being as soon as it is enacted in due form. But natural justice requires that the law should not be enforced before it has been made known. This is why continental theory requires that every law passed by the legislature and declared a law in due form, must be ordered to be published before it comes into operation. Therefore, every law enacted thereunder is to be published in the Government Gazette.

Once having come into operation, the law is **presumed to be known to all those who owe obedience thereto** and it remains effectual until it either **expires** or its **repealed**. Moreover, modern doctrine does not recognise to custom any power to abrogate from a Statute in force: a Statute does not go into disuse by a posterior contrary custom or through obsolescence: **it cannot be set aside or modified except by another law which repeals of amends it**.
The repeal may be expressed or implied:
Implied: this takes place when the new law is inconsistent with the existing law: "lex posterior derogate priori".

From the rule that a law is binding when its existence is presumed to be know, there follow two principles:

1. Ignorance of the law is no excuse for breaking it: "ignorantia juris neminem excusat"
2. The law operates for the future and not retrospectively: "lex non habet oculos retro". In criminal law, when parliament enacts a law, it cannot be retroactive (unlike in civil law).

No retroactivity in criminal law as the Constitution prohibits it – ***lex non habet oculos retro.*** Moreover, in criminal law, there cannot be a crime without there being a law – ***nullum crimen sine lege***. Therefore, the corollary is no punishment without the law – ***nulla poena sine lege***. We live in a state of democracy, therefore, for there to be a crime, there has to be a law and this law states the punishment. Already, in Roman days, it was laid down that the laws provide for the future and not for the past, and with particular reference to criminal liability, Ulpian wrote that wrongs should not be subjected to the punishment imposed by the law in force at the time of the trial but to the **punishment prescribed by the law in force at the time of the commission of the wrong**. In fact, legislation by which the conduct of mankind is to be regulated ought to deal with **future acts** and not to change the character of acts done upon the faith of the existing law.

An **apparent exception** to the rule that a penal law cannot have retrospective effect occurs where a new law enacted **after the commission of the offence** is less severe or more advantageous to the offender than the law in force at the time the offence was committed.

(1) The law against which the offence was committed is subsequently **repealed**, so that the act is no longer criminal.
(2) The law against which the offence was committed is subsequently **amended** or **changed** so that, though the act is still criminal, the punishment or the conditions of liability and prosecution are varied.

CASE 1: REPEAL

A. Proceedings are still pending

If the law which the charge is framed is repealed without any qualification while the **proceedings are still pending**, such proceedings fall to the ground and **no sentence** against the accused can be pronounced. There is no longer any justification for inflicting punishment upon him. The action of the State, in repealing the former law which prohibited the act, clearly shows that the **public peace and order** and the public welfare are no longer endangered or harmed by such type of act, and that, therefore, the State has **no longer any interest in repressing it**, and, consequently, **no right to punish it**.

Two views:

(1) Older writers took the view that this principle constitutes an exception to the rule that penal laws should be exclusively prospective. Their doctrine was that the repealing law is **given retrospective application** to the matter of inquiry arising under the repealed law, by way of an indulgence to the accused.
(2) Modern writers do not accept this explanation. Their argument is that, rather than an exception to the rule of non-retroactivity with regard to the new law, the said principle is an affirmation with regard to the former law, of the other rule that **a law cannot operate after its repeal**. If it were not the case, it would be given an effect beyond its legal limit of operation. It is thus not by way of an equitable retrospective application of the new law but rather on the grounds that **the operation of the old law cannot extent beyond its repeal**.

If, on the date of repeal, an appeal from the sentence or conviction is still pending, then the principle above stated concerning the effect of repeal on pending proceedings, applies.

B. After the offender has already been tried and sentenced

Two views:

(1) Even in such cases the repeal should have the effect of cancelling the effects of the conviction and of remitting automatically any unexpired or outstanding portion of the sentence or penalty. It would be unjust to continue to punish the prisoner for his act at a time when the State does not consider it any longer necessary to attach any penal sanction to that kind of act.
(2) The repeal should have no legal effect on the result of a final and absolute judgement. this solution appears to be more acceptable and is more commonly adopted in modern systems of law. In Malta, the repeal of a law does not in any way affect, as of right, any judgement passed thereunder which has become a 'res judicata.' The only remedy the prisoner can have in such circumstances is the exercise in his favour of the Presidential Pardon.

CASE 2: AMENDED/CHANGED

This concerns the effect of a subsequent law (that is, a law enacted subsequently to the commission of the offence) which does **not cancel the criminal character** of the act but alters the law on which the charge is framed by varying the penalty or conditions of liability or prosecution in respect of that act.

The 'communis opinio' among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is **more favourable to him**. This means that if the law in force at the time of the trial is less favourable to the accused than the law in force at the time of the commission of the offence, it is the latter law that should be applied retrospectively to his prejudice. If, on the contrary, the new law is more favourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied; for, if the old law were to be applied, it would have, as to the excess of punishment or other aggravation, an effect beyond its limit of valid operation.

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

In practice, it is sometimes difficult to decide which of the two punishments is 'less severe'. In this connection regard must chiefly be had to the **nature or quality** of the two punishments, rather than to their duration. Every punishment causes a suffering and deprives the offender of some right: therefore, of two punishments, **that one is less severe which causes less suffering and deprives the sufferer of a less important right**. It is only when both punishments are of the same nature or quality that the longer or shorter terms thereof is a truly decisive factor in comparing their severity.

WHAT HAPPENS IF THE JUDGEMENT IS CONCLUDED?

If, when the new law reducing the punishment comes into force, proceedings in respect of the offence have already been definitely concluded, such new law **does not affect the sentence already awarded**: saving, of course, even in this case, the **Prerogative of Mercy**. If, however, when the new law comes into operation an **appeal from the sentence is still pending**, then the accused is entitled to the benefit of the less severe punishment.

The Police v. Agostino Bugeja (Vol. XXIV, P. IV, p. 941): it was there held that, although the said section contemplates only the case in which the punishment provided by the law in force at the time of the trial is different from that provided by the law at the time of the commission of the offence, and no express provision exists concerning the case in which, at the time of the trial, the act complained of ceased to be an offence, nevertheless 'arguendo a fortiori' from the section, it is clear that **the accused should go free from all punishment** in the latter case.

'Offence' is an umbrella term for **crime** (theft, forgery, money laundering…) & **contravention** (breach of the public peace – 338/9 of the criminal code). These have different punishments.

PRESUMPTION

This is a very important principle of time & space.

The law presumes that every day, EVERYONE reads the **government gazette**. For context, once the president signs the bill, it becomes law. **It is enforceable from the moment it is published in the government gazette**. It is not enforceable before this. Once the law comes

into operation, it is presumed to be known by all those who owe it obedience. Moreover, it will remain in effect until it is repealed.
There are two types of **presumption**:

1. A rebuttable (***uristantum* presumption**)
2. An irrebuttable (***deure* presumption**): the presumption that everyone knows the law; everyone knows what the government gazette says. **Ignorance of the law is NO excuse** – ***inioranza neminem excusat*** – mistake of law is **never** a defence and therefore, is irrebuttable.

NO PUNISHMENT WITHOUT LAW
As previously mentioned, criminal law cannot be retroactive. However, what if a law is enacted providing that today a different punishment to that obtaining under the law being amended, shall be imposed when that particular crime is committed? What is meant but this is that in this case, the law is not repealed but the punishment is amended, and this punishment can either increase or decrease.
Article 39 (8) of the Constitution: *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed*.
The above article is very similar to **Article 7 of the European Convention on Human Rights**: *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations*.

In any case, **the lesser punishment has to be applie*d*** and this is seen in **Article 27 of the Criminal Code:** *If the punishment provided by the law in force at the time of the trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded.*
When the law enacted after the commission of the offence is less severe or more advantageous to the offender than the law enforced at the time when the offence was committed. This is an exception of the first principle of time and space; no retroactivity.

Therefore, there are 2 scenarios:

i. **Scenario A:** If an individual is undergoing criminal proceedings (meaning still accused and NOT convicted yet) and during these proceedings' parliament repeals the law that that person was accused of (therefore, the law is amended), the case is dropped.
At the same time, the law does not necessarily need to be repealed but can simply be amended. Therefore, the punishment can increase or decrease**. The punishment to be applied is that which is more advantageous to the accused**. Meaning that if the punishment decreases than that will be given but if it increases, the punishment said to be given at the time the crime was committed will be applied.

ii. **Scenario B:** On the other hand, if the individual is in prison (therefore convicted) and is still serving time, officially, in Malta, if the law is amended to start the application

of a lesser punishment this does NOT affect any judgement passed under the law <u>if it has not been appealed</u> – ***resiudicata***. There is no doubt however that that person can file a case for the breach of fundamental human rights (a constitutional court case) to have his case annulled.
If the law has been repealed, there are two possibilities. The first is to file a constitutional court case OR you can apply for the **maħfra presidenzjali** (presidential pardon)
Police Vs Agostino Bugeja (Court of Criminal Appeal) (early 40s): this case refers to section 27 of the criminal code.

(The Interpretation Act (1975) Section 12)
(The Criminal Code articles 1-12)

12. (1) Where any Act passed after the commencement of this Act repeals any other law, then, unless the contrary intention appears, the repeal shall not -

(*a*) revive anything not in force or existing at the time at which the repeal takes effect;

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any law so repealed;

(*c*) affect any right, privilege or liability acquired or accrued or incurred under any law so repealed;

(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed, or any liability thereto;

(*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid,

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

(2) Where an Act, whether passed before or after the commencement of this Act, amends any other Act passed either before or after the commencement of this Act, or any provision of any such other Act, the Act or provision so amended, as well as anything done thereunder or by virtue thereof, shall, unless the contrary intention appears, continue to have full effect, and shall so continue to have effect as amended, and subject to the changes made, by the amending Act.

(3) For the purposes of sub-article (2) "amendment" means and includes any amendment, modification, change, alteration, addition or deletion, in whatsoever form or manner it is made and howsoever expressed, and includes also a provision whereby an Act or a provision thereof is substituted or replaced, or repealed and substituted, or repealed and a different provision made in place thereof.

Now the principle we stated, namely, that as between **the law in force at the time of the trial** and **the law in force at the time of the commission** of the offence, that which is the more favourable to the accused shall be applied, holds good also, according to the most generally accepted writers, **where the conflict is between more than two succeeding laws**. In other words, if between the law in force at the time of the commission of the offence and the law in force at the time of the trial, there has been another law dealing with the same offence, which was more favourable to the accused than either of the other two laws, then it is that intermediate law which must be applied.

So far, we have spoken about substantive law. There is a distinction between substantive and procedural. Mamo mentions this very important distinction. This raises the question, what happens when parliament amends procedural law?

In Police v. Ellul Sullivan, Ellul Sullivan was undergoing proceedings for having breeched customs law. The customs ordinance was amended whereby from now on the attorney general is being given a right of appeal. The criminal court of appeal said if the attorney general now has the right of appeal, the accused is being put in a worse position then he was at the beginning of the trial. Therefore, this new amendment could not be applied in Ellul Sullivan's case because **it prejudiced the accused**. The court also said that parliament did not specify that this amendment should have applied immediately therefore, **the court decided in favour of Ellul Sullivan**.

Corroboration means when a witness is corroborated by another witness - a piece of evidence strengthens another piece of evidence. Up till a few years ago, the law said that the evidence of the accomplice alone is not sufficient to convict the accused unless that evidence is corroborated by material evidence. The procedural law was amended, and an example is the dangerous drug ordinance where today **the evidence of an accomplice, if credible, can convict an accused**. Moreover, this amendment amended the procedural law and not the substantive as it did not touch the punishment/create a new offence.

Republic of Malta v. Ravi Ramani (Court of Criminal Appeal): The court held that this amendment was of a procedural nature and was applicable immediately because it concerned procedural law. Amendments to criminal procedural law take effect immediately the day they are published in the gazette whether they are more/less favourable to the accused.

Police v. Laurence Cuschieri (constitutional court) (21st of January 1998) & (6th August 1993) & (6th April 1995): The Constitutional Court said that the prohibition against the retroactive application of criminal law meant firstly, that no person is to be punished more severely than he would have been at the time of the commission of the offence and secondly, a person cannot be guilty of an offence which at the time did not constitute an offence.
Joseph Picko v. Avukat Ġenerali (Constitutional Court) (1991)
Police v. Stephen Bondin (Constitutional Court) (1984)

In conclusion
We have followed scenarios where the law is amended during proceedings where the substantive law is amended. Moreover, the law states that what is more favourable to the accused is applied. So, **for substantive matters, it does matter if the change if more or less favourable to the accused.**
When it comes to laws of a **procedural nature, they are deemed to apply immediately whether they are more or less favourable to the accused.**

Limitations by territory

Article 5 of the Criminal Code.

Law applies not to a given race but to a given territory. When we say that a system of law is enforced in, and belongs to, a defined territory it means that normally it applies to **all persons**, **all acts**, **all events** within that territory, and does not apply to persons, things, acts or events elsewhere. The general rule is that "***extra territorium jus dicenti impune non paretur***." With reference to Criminal Law, in particular, the above principle means that it normally applies to all offences committed within the territory and does not apply to offences committed elsewhere. To this general rule there are many exceptions: there are several offences with which the Courts of the State will deal and to which they will apply the law of that State although committed elsewhere. These exceptions, however, do not affect essentially the general principle that **Criminal Law is territorial in its nature and its application**.
Interestingly, many centuries ago, the territory of the state was till where the cannonball reached – ***Terrae potestas finitur ubi finitur armorum vis*** **– Antolisei**.

THEORIES (SCHOOLS OF THOUGHT)
The question as to which exceptions to the above principle should be admitted has been the subject of controversy and has been variously settled in practice.

i. **The Original theory** (Beccaria): Criminal Jurisprudence of each state should be absolutely and exclusively 'territorial', **without any exception**. The slogan of this school of thought, of which Beccaria was the chief exponent, is that the "**the place of punishment should be the place of the commission of the offence and no other**." Moreover, it denies the State any jurisdiction to deal with and punish offences committed outside its territory, under whatever circumstances. This was the thinking

of the 19th century. Please note that this is inadequate and uncompromising for today's reality of an interconnected world.

Three theories which supplement the deficiencies of the 'territorial' theory, all of which are find in **article 5 of the criminal code:**

ii. **The Cosmopolitan Justice theory**: this looks merely at the 'forum deprehensionis'. It prescribed to each State the right of punishing of any criminal who may come within its power. It is founded on the principle that **a criminal offence is a wrong everywhere**. Moreover, it wants to preserve universal law and order. The Italian author Carrara, a 19th century criminal law author who is still today used, quoted by our courts whenever they are dealing with dolus (criminal intent), and bodily offences (homicide), was an eminent exponent of this doctrine. Affirming the solidarity of all States in their **obligation of maintaining law and order** and the rules of right, Carrara observed that it is indifferent whether the sacred mission of vindicating such rules of right is carried out by this or by that State, as **all States are equally the instruments of Supreme Law of Order which requires the punishment of wrongdoing**.
According to Carrara, once it is a crime against humanity, any state can punish.
Moreover, this theory has long found favour with reference to pirates. Piracy is treated as the common enemy of mankind.
Mamo admits that this theory belongs to the ideal as opposed to the realistic world as there are practical difficulties. This is because the laws of different states differ and not each state gives the same importance to certain crimes.

iii. **The Personal Theory of Jurisdiction:** Each state has a right to the obedience of its own subjects wherever they may be. It follows that a subject may be tried on his return to his own country, or even in his absence, for an offence against its laws committed while within the territory of another state. This theory empowers local courts, say the Court in England, to exercise jurisdiction over their subjects, in this case English subjects, who commit certain specified offences even upon foreign soil. There may instances where there's concurrent jurisdiction.

iv. **The Theory of Self-Preservation/Protective/Quasi-Territorial**: this theory allows that the Courts of a State may punish offences committed not only outside its territory but also by persons who are not the subject of that state. This theory is usually used in connection with offences against the Safety of the State such as treason or against its public credit such as government debentures.
That criminal law is there to protect the state is the underlying notion. Usually, such a theory of jurisdiction is used in relation to offences against the security of the state, the integrity of the state, or the vital economic activity of the state.

The adoption by a state of one or another of these theories of jurisdiction or a combination of several of them, will determine not only the exercise of its own criminal jurisdiction with reference to a given set of acts, but also its recognition of the rightfulness of the exercise by other States of their jurisdiction with reference to the same set of acts.

DOUBLE JEOPARDY

Ne bis in idem: An offender cannot be tried twice for the same offence. *Ne bis in idem* – never mention *ne bis in idem* in the context of Civil Law or Civil Courts. IT APPLIES ONLY TO CRIMINAL LAW. Compare Article 39(9) of the Constitution with section 527 of the

Criminal Code as both deal with double jeopardy. The criminal code says 'fact' as opposed to 'offence' which gives more leeway.

TWELVE NAUTICAL MILES
Laws of Malta Chapter 226 (Territorial Waters and Contiguous Zone Act) Section 3(1):

3. (1) Save as hereinafter provided, the breadth of the territorial waters of Malta shall be twelve nautical miles measured from baselines determined using the method of straight baselines joining appropriate points on the low-water line, defined by the coordinates in the Schedule.

DISSECTING ARTICLE 5(1) OF THE CRIMINAL CODE
5. (1) Saving any other special provision of this Code or of any other law conferring jurisdiction upon the courts in Malta to try offences, a criminal action may be prosecuted in Malta –

a) against any person **who commits an offence in Malta**, or on the **sea** in any place within the **territorial jurisdiction of Malta**; Note that it makes no difference the victim is Maltese or not. In accordance with the principle of the territorial nature of Criminal Law, it is here provided that criminal proceedings can be instituted in these Islands, according to the laws thereof, against any person who commits an offence in these Islands or upon the sea in any place within the territorial jurisdiction of these Islands. This provision implies, therefore, that within these Islands there is no place which is not subject to the operation of our Criminal Law and to the jurisdiction of our Criminal Courts and that no person within these Islands, saving some exceptions, is exempt from the operation of our Criminal Law and from the Jurisdiction of our Courts by reason of his occupation, or profession, and so on. Moreover, foreigners, whether domiciled in those Islands or resident therein or merely in transit, are amendable to the Criminal Law and Jurisdiction of these Islands, in respect of offences committed within these Islands or the territorial water thereof in the same manner and to the like extent as a natural-born or naturalised Maltese. Also, it makes no difference whether the person injured or aggrieved by the offence be a Maltese, or an alien. Lastly, where the offence is committed at sea **within the territorial waters of these Islands**, no distinction is made as to the nationality or port of registration of the ship.
b) against any person who commits an offence on the sea beyond such limits **on board any ship or vessel belonging to Malta**; So long as the vessel is registered in Malta, the courts of Malta have jurisdiction. Under this paragraph, our Courts have jurisdiction to try and punish, in accordance with our law, **any person** who commits an offence against our Criminal Law beyond the limits of the territorial jurisdiction of these Islands on board a vessel or ship belonging to these Islands.
c) against any person who commits an offence **on board any aircraft while it is within the air space of Malta or on board any aircraft belonging to Malta** wherever it may be; So long as the aircraft or vessel is in the territory of Malta, the Maltese courts have jurisdiction and the same applies in the case when the vessel or aircraft is registered in Malta. Therefore, **victims are irrelevant.**

For the purposes of this paragraph the expression "air space" means the air space above the land areas and territorial waters of Malta;

d) Without prejudice to the preceding paragraphs of this subarticle, (who?) **against any citizen of Malta or permanent resident in Malta** who in (where?) **any place** or **on board any ship or vessel or on board any aircraft wherever it may be** (regardless of whether it is registered in Malta or not) shall have become guilty of the (what?) **offences mentioned in article 54A** or of **an offence against the safety of the Government**[1] (you will find crimes against the safety of government in sections 55 (high treason), 56 (sedition), 57 (conspiracy to commit sedition), 58, 59 (instigation), 60) or of **the offences mentioned in articles 133**[2] (breach of official secrets)**, 139A** (torture), or of **the offences mentioned in articles 311**(explosion) **to 318 and in article 320** when these are committed or are directed against or on a **state or government facility**, **an infrastructure facility**, a **public place** or a **place accessible to the public**, a **public transportation system**, or of **forgery of any of the Government debentures**[3] referred to in article 166 or of any of the documents referred to in article 167 (forgery), or of the offence mentioned in article 196[4] (bigamy), or of any other offence against the person **of a citizen of Malta or of any permanent resident in Malta**;

To summarize so far: The person has to be a Maltese citizen/permanent resident, has to commit one of these crimes, against or on a state or government facility and so on and this applies for the crimes in articles 311-318 (explosion or arson). Also, always use the example of two Maltese fighting in Oxford, London which would fall under 5(1)(d), last sentence.
By this paragraph, the operation of our law and the jurisdiction of our Courts are extended to certain offences committed abroad by a person who is a citizen of Malta or a permanent resident in Malta, provided such person shall not have been tried for the same out of these Islands. We have already pointed out that if the principle of the territorial nature of Criminal Law and Criminal Jurisprudence were absolute, the consequence would have been that a State could never try and punish any person who, outside the limits of its territorial jurisdiction, became guilty of any offence against its criminal law. But, as it has already been remarked, there are cases in which the State is justified in taking punitive action **in respect of such offences**. Here, we are not referring to any punitive action carried out by the State concerned outside its own territory. That would be a violation of the territory and sovereignty of such other State.
This right of each State to prosecute offences committed on foreign soil in certain well-defines circumstances, is nowadays commonly recognised, but in determining those circumstances, the various systems of positive law and text-writers differ considerably:
Schools of thought:

i. The question whether an offence committed abroad should or should not be punished by the State in which the offender is found, depends on whether the State in which it was committed would or would not, in like circumstances, have punished the same if it had been committed in the former state. The basis of this doctrine is **reciprocity**.
ii. This theory seeks to apply by analogy the maxim of civil law: '**ubi te invenio, ibi te conveni**o'. These writers argue that if a person can sue everywhere for a civil debt, he should 'a fortiori' be able to prosecute for a criminal offence.
iii. This theory relies on **the nationality of the person injured** by the offence. The foreigner who injured a subject abroad is not entitled to any exemption in the State of such subject.
iv. This theory considers criminal law as part of the **personal Statute** of the offender. The subject remains, wherever he goes, amendable to the law of his country.

v. There are those who found the right of the State to punish offences committed abroad on **the nature and gravity of the offences themselves**.

Let us now examine our provision in some detail under the two following headings:

1. **Offences in respect of which Jurisdiction is exercisable**

- The first of the exceptions of the principle of the territorial nature of Criminal Law should be in respect of those offences which jeopardise the very political life of the State.[1] This has the right and the duty to defend itself against an attempt directed against it even outside its territory.
- Such rights appear even legitimate when it is considered that the State in which the offence was committed may either not have any interest at all in punishing the offence, or, worse still, may have a political interest in abetting or concealing it.
- In the offence under article 133[2], the exception is dictated by the paramount interest which the Government has that its official secrets should not be improperly divulged, especially outside these Islands.
- The offence of forgery of Government debentures[3] mentioned in Section 166 or of any documents mentioned in Section 167. These offences directly undermine the economic life of the State: they violate the public faith which is attributed by the government itself to those documents.
- The offence of bigamy[4] is a crime which involves an **outrage on public decency** and **morals** and **creates a public scandal** by the prostitution of a solemn ceremony which the law intended to be applied only to a legitimate union. Moreover, the offender might have gone outside these Islands precisely to be able with greater facility to commit the crime; and, in any case, it is within these Islands that the evil effects of the crime make themselves more directly felt.

2. **Essential Conditions for the Exercise thereof**

- The essential conditions for the institution of criminal proceedings in and according to the laws of these Islands in respect of the offences above-mentioned committed abroad are:
  a. That the offender is a citizen of Malta or permanent resident in Malta
  b. That he has not been tried for the same offences outside of these Islands.
- Many States hold the view that a State may not try foreigners for offences committed outside its territorial jurisdiction. But International Law leaves to the States an unlimited right to punish their own subjects.
- Such right is justified not only by the fact that the State is fully authorised to require that **its subjects shall respect its laws wherever they may** be and, especially, such laws as it deems most essential to its **safety and to the public good**, but also by the fact that, if the subject abroad, were to be left unpunished, **such impunity would be in itself a threat to the public peace and a scandal**.
- The taking of proceedings in these Islands is rightly made dependant on the condition that the **offender shall not have already been tried for the offence** outside these Islands. This is a proper concession to the general principle of the territorial nature of Criminal Law and Criminal Jurisdiction, in as much as the State in whose territory the offence was committed has **a prior claim to deal with the offender if it so chooses**.
- If such offender has already been tried once, whether he was acquitted or, if convicted, whether or not he has served his sentence, no further proceedings can be taken against him in these Islands.

- Rather than an application of the rule 'ne bis in idem', this is **an affirmation of the said principles of the prevalence of the territorial jurisdiction**, as against which the jurisdiction of our Courts is merely subordinate and supplementary.

IT IS CLEAR THAT UNDER THESE PROVISIONS, OUR COURTS HAVE NO JURSIDCITON TO TRY FOREIGNERS FOR OFFENCES COMMITTED ABROAD

(*e*) **against any person who being in Malta** –

i. shall have become guilty of any offence under article 87(2) (the unlawful assumption by private persons of powers belonging to public authority) or articles 198, 199 (sexual offences), 211 (wilful homicide), 214 to 218, 220 (bodily harm), 249 to 251 threats, private violence & harassment), 311, 312 (explosion), 314A (discharge etc of lethal device), 314B (nuclear material), 314C (possession of lethal devices for unlawful object or for purpose of proliferation), 316 or 317 (arson) when **committed or directed on or against the person of a protected person** or to **the prejudice or injury of such person** or **likely to endanger the life or to cause serious injury to the property, life or health of such a person** (the protected person), or in connection with an attack on **any relevant premises** or on **any vehicle ordinarily used** by a protected person or **when a protected person is on or in the premises or vehicle**;
Offences
1. A. protected person or
2. B. Relevant premises

OR

iii. shall have committed any act which if committed in Malta would constitute an offence and such act involved the use of a bomb, grenade, rocket, automatic firearm, letter bomb or parcel bomb which endangered persons,

although the offences referred to in this paragraph shall have been committed outside Malta: it is immaterial for this whether or not the offender or the victim is Maltese. The person has to be in Malta.

Provided that for the purposes of sub-paragraph (i) of this paragraph it shall be immaterial whether the offender knew that the person was a protected person;

(f) against any person who -

i. commits any offence in premises or in a building outside Malta having diplomatic immunity due to the fact that it is being used as an embassy, a residence or for such other purpose connected with the diplomatic service of Malta; or
ii. commits an offence in a place outside Malta when such person enjoys **diplomatic immunity** by virtue of such service;

Basically, any embassy is an extension of the Maltese territory.

(g) against any person who **being in Malta, shall be a principal or an accomplice** in any of the crimes referred to in article 87(2) (illegal arrest, detention or confinement), or in articles 139A (torture, and other cruel, inhuman or degrading treatment or punishment), 198 (rape or carnal knowledge of violence), 199 (abduction), 211 (wilful homicide), 214 to 218 (bodily harm), 220 (grievous bodily harm from which death ensues), 249 to 251 (threats, private violence and harassment), 298 (commercial or industrial fraud), or in articles 311 to 318

(explosion & arson) or in article 320 (destruction by the springing of a mine) when these are committed in the circumstances mentioned in paragraph (d) or (e) of this sub article, or in a crime which is committed by any act as is mentioned in paragraph (e)(ii) of this sub article, or conspires with one or more persons for the purpose of committing any of the said crimes, **although the crimes shall have been committed outside Malta**;

(h) against any person in respect of whom an authority to proceed, or an order for his return, following a request by a country for his extradition from Malta, is not issued or made by the Minister responsible for justice on the ground that the said person is a Maltese citizen or that the offence for which his return was requested is subject to the death penalty in the country which made the request, even if there is no provision according to the laws of Malta other than the present provision in virtue of which the criminal action may be prosecuted in Malta against that person;

Extradition is regulated by international treaties but there are some principles which are common to almost all extradition treaties such as we will not extradite any person to face the death penalty in any other country. Another principle is ne bis in idem whereby Malta will not extradite any person to face trial twice for the same offence. Thirdly, political offences are no extraditable.

(i) against any person who commits an offence which, by express provision of law, **constitutes an offence even when committed outside Malta**:

WHO IS A PROTECTED PERSON?
ARTICLE 3
(3) For the purposes of subarticle (1)(e):

"a protected person" means, in relation to an alleged offence, any of the following:

a) a person who at the time of the alleged offence is a **Head of State**, **a member of a body which performs the functions of Head of State under the constitution** of the State, **a Head of Government** or **a Minister for Foreign Affairs** and is **outside the territory of the State in which he holds office**;
b) a person who at the time of the alleged offence is a **representative** or an **official** of a State or an **official or agent of an international organisation** of an inter-governmental character, is entitled under international law to special protection from attack on his person, freedom or dignity and does not fall within the preceding paragraph;
c) a person who at the time of the alleged offence is **a member of the family** of another person mentioned in either of the preceding paragraphs and –
    i. if the other person is mentioned in paragraph (a) above, is accompanying him,
    ii. if the other person is mentioned in paragraph (b) above, is a member of his household;

"relevant premises" means premises at which a protected person resides or is staying or which a protected person uses for the purpose of carrying out his functions as such a person; and

"vehicle" includes any means of conveyance;

and if in any proceedings a question arises as to whether a person is or was a protected person, a certificate issued by or under the authority of the Minister responsible for foreign affairs and stating any fact relating to the question shall be conclusive evidence of that fact.

Rules of Interpretation

Rules of **interpretation** if the law is not clear. The operation of enacted law is not automatic. It has to take effect through interpretation, for, in order that the appropriate legal rule may be applied, it is necessary that **the law shall be properly construed and interpreted**. The object of all interpretation is to determine the exact meaning of the legal rule. In other words, to determine what **intention** is conveyed by the language used.

Authors argue that there are 2 points of view for interpretation; the objective and the subjective. This being the essential object of interpretation, that is, to ascertain the true meaning of the law, it is clear that from an objective point of view, that is to say, considering it in itself – apart from the mean used and the results obtained, - there cannot be different kinds of interpretation. This can only be good or bad, true or false.

From a subjective point of view, that is, in relation to the interpreter, continental text-writers distinguish three kinds of interpretation which they describe as:

i. **Doctrinal**: nowadays, this has an indirect influence on the application of the law. In Roman days, on the contrary, the theoretical opinions of jurists were a direct and objective source of law; and in medieval times effect was given to them to supplement and integrate the rules of law. Certain definitions are not found in the criminal code and as a result, our courts have adopted definitions by authors such as those of Carrara. This form of interpretation refers to what authors and jurists have declared, written, with regards to a particular criminal law concept such as criminal liability, intent and so on. One must not confuse, however, this kind of interpretation derived from the writings or opinions of one or more jurists with those canons of construction which, though indeed collected in textbooks and treatises, have been constantly recognised and applied by the Courts and now constitute a **jus acceptum**, legal norms of binding effect.

ii. **Authentic**: that provided by the legislature itself as in what are called 'interpretation clauses' of an enactment, or in a comprehensive interpretation law. Section 2 of every law that is enacted, is an interpretation clause. We also have the Interpretation act which was enacted in 1975. Moreover, this kind of interpretation is binding on all: in fact, it is hardly, strictly speaking a form of interpretation. It is rather a rule of law, the imperative effect of which can completely override and exclude even the obvious and logical meaning of the words or expressions defined. Manzini: "In the light of this it is clear that it is vain to attempt to fix "a priori", as certain writers have tried to do, rules for this kind of interpretation, the only limits of which are the powers of the legislature."
A special characteristic of an "authentic" interpretation made by a subsequent law is that, in so far as it does not change pre-existing law, it has, unlike other laws generally, a retrospective effect even without any express declaration for the purpose by the legislature.

iii. **Judicial**: how our courts interpret, and not make, law. Here we are concerned especially with the interpretation to be given by the Courts in the application of the law to the particular cases coming before them. The Chief characteristic of enacted law is its embodiment in authoritative formulae. The very words in which it is expressed (*litera legis*) constitute an essential part of the law. Hence, it is that a process of interpretation is necessary in order that the Court

> may ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

Prof. Mamo distinguishes between **literal** (it assumed that no word in the law is meaningless; words must always be taken in that particular context) and **logical** interpretation. There cannot be various kinds of interpretation considered in itself. But having regard to means or method used in the process of interpretation, we may distinguish two kinds which continental writers described as literal or grammatical and logical.

A. **Literal interpretation**

This regards exclusively the verbal expression of the law. It does not look beyond the *litera legis*. There is no doubt that the literal interpretation must precede every other, for it must be presumed that **the legislature has said what it meant and meant what it said**. This is the first principle of interpretation. In the process of grammatical interpretation, words are primarily to be construed in their **ordinary and popular sense** unless there should be strong indication that some other meaning was intended by the legislature. This is particularly applicable to Criminal Law which lays down rules of conduct for all which all must understand, and where, therefore, it is usual to use **ordinary language intelligible to all** rather than legal or technical language.
English judge: "In dealing with matters relating to the general public, laws are presumed to use words in their popular sense: *uti loquitur vulgus*."
Unwin v. Hansen (1981, 2 Q.B.p.119): Lord Esher observed: "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."
In general, it is to be assumed that **no word in the law is meaningless or superfluous**, unless this should appear absolutely evident. Also, unless the contrary intention appears, words importing the **masculine gender include females** and words in the **singular include the plural** and vice-versa.
Words are meaningless in isolation and their context must always be taken into account. Professor H.A. Smith: "…The practical work of the courts is very largely a matter of ascertaining the meaning of words, and their function, therefore, becomes the study of contexts." Words used with reference to one subject-matter or set of circumstances may convey a meaning quite different from that which the same words used with reference to another set of circumstances and another subject-matter would convey. Moreover, the provision to be interpreted must be examined as a whole, having regard to the other provisions of the law.
If upon the literal analysis of the provision according to the rules just outlined, the language is **not only plain but admits of but one meaning**, the task of the interpreter is clear. Such language **must be accepted** as to declaring the intention of the lawgiver. Whereby the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. **The duty of the Court is not to make the law but to expound it as it stands, according to its plain and unequivocal meaning.** Allen: "When the sense gathered from the actual words is plain and ambiguous, the words must be loyally accepted and the law applied accordingly, however inconvenient the consequences."

Police v. Vella (Cr. App. 27 xi. 1943): The Court said, "where the language of the enactment is clear, no interpretation is permissible which is inconsistent with the clear meaning of the expression: for the Court cannot substitute its own judgement for the will of the legislature."

B. **Logical Interpretation**

Language is rarely so perfect as to be absolutely "plain and unambiguous." To adhere to the literal and primary meaning of the words in all cases would be **to miss their real meaning in way**. The literal construction then, has, in general, but prima facie preference. There are cases in which the "litera legis" need **not be taken as conclusive** and in which **the true intention of the law may sought from other indications**. The law may be ambiguous, inconsistent, incomplete or it may also happen that the text leads to a result so unreasonable that it is self-evident that the legislature could not have meant what it has said. In all such cases it is obviously necessary to determine the true intention of the legislature.

To arrive at this, continental practice – which we generally follow in the matter – permits enquiry to be made into:

1. The **aim & object of the law** (*ratio legis*). This refers to the principles inspiring it and the mischief or defect for which it is intended to provide.
2. The **historical legal background**.
3. The **parliamentary history of the law**, that is, the projects or Bills and the expositions of their objects and reasons, the reports on such projects and Bills, and the debate in the Legislative Chambers.
4. The **study of comparative law**, that is, the study of those foreign laws which may have had a direct or indirect influence on the law to be interpreted, or deal with the same matter.

In general, when the true intention of the law has been duly ascertained, such **intention ought to prevail** over any inadequacy or imperfection of the letter of the law.

Rules Peculiar to Criminal Law

In the past, Beccaria wanted to proscribe every form of interpretation: he preferred the inconveniences arising out of a rigid and uncompromising adherence to the letter of the law to those arising out of a lax and variable application of it according to the personal judgement of the individual judge.
"If the letter of the law left any doubt whatsoever as to its true meaning, it was not for the Court – Beccaria said – but for the legislation to put the matter right."

But it is clear that to deny to the Courts the right and the power to properly interpret the abstract formula of the statute would amount in many cases to denying them the power and the duty of applying the law. The truth is merely that in criminal matters the freedom of interpretation should be more carefully regulated.

Modern doctrine and modern practice would seem to follow the rules hereunder.

i. **Interpretation in case of Doubt:** it may happen that the examination of the literal meaning of the word combined with the examination of the intention, leaves the matter in doubt. In such cases, it is commonly thought that the solution of the problem is provided by the principle **"in dubio pro reo"** (the benefit of doubt is given to the accused), so that a construction is to be applied which appears more favourable to the accused. Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, **the benefit of the doubt should be given to the subject** and against the legislature which has failed to express itself. this solution is founded on the excellent consideration that the liberty of the subject is the rule and the restrictions of such liberty represent exceptions to such rule: consequently, only such restrictions can be admitted as result without any doubt from the law.

ii. **"Declaratory" interpretation:** though the word of the law may be by itself indefinite or **capable of more than one meaning**, yet the canons of interpretation may establish that **one of such meanings**, rather than any of the others, **answers the intention of the legislature**. The resulting interpretation, in such cases, is described by Italian jurists as merely declaratory. Such an interpretation may be **narrow** or **wide** and, inasmuch as it arises exclusively out of the indefiniteness or ambiguity of the expression, it must not be confused with the "restrictive" or "extensive" interpretation. The expressions of a given provision are to be interpreted in a narrow or a wide sense according as to whether the law intended to use them in the one or the other, independently of the nature of the provision. Of course, the choice as between the wide and narrow meanings is possible only where both meanings fairly fit the expression. In other words, the Court ought not to do violence to the language to bring the case within it by attributing a meaning which the words do not have. But, conversely, if the wider of the two meanings of which the language is fairly capable better effects the clear purpose of the law, then the Court ought to adopt that wider meaning. While the rule remains that **no case must be held to fall within a penal provision which does not fall within the reasonable meaning of its language** as well as within **the scope and purpose of the enactment**, it by no means imposes that a restricted meaning should be imposed on the words to withdraw from the operation of the provision a case which falls both within its scope and the fair sense of the language. This would be to defeat,

not to promote, the object of the legislature, to **misread** the statute and **misunderstand its purpose**.
The sense to be adopted is that which best harmonises with the context and promotes in the fullest manner **the object and policy of the legislature**.

iii. **Extensive and restrictive Interpretation**: Whereas the former ('declaratory' interpretation) concerns language which, apart from the intention of the legislature, is **indefinite and capable of various meanings**, the latter concerns language which in itself conveys a definite idea and is capable of only one certain meaning, but which **does not faithfully represent the true intention of the legislature**. In other words, this interpretation has for its subject-matter words or expressions having a definite and precise meaning, but which do not exactly correspond to the intention of the legislature.
[in any such cases, **there is a divergence between what the law expresses and what it ended to have expressed**].
'Extensive': When the letter of the law is stretched, that is to say, given a wider than its natural signification in order to wholly cover what appears to have been the intention of the legislature. Extensive interpretation is not used in criminal law because the liberty of the person is at stake.
'Restrictive': When the full literal meaning is not given to the language of the law in order not to go beyond the intention of the legislature.
The rule commonly accepted is that an extensive interpretation is **not permissible in regard to penal provisions,** that is, any provisions creating liability or providing punishments. It is not allowable to extend the provision of any such law so as to bring within it any case which is not covered by the reasonable meaning of its language. The liberty of the subject should have no limits other than those fixed by the law, and, therefore, a provision of law which imposes any such restriction must not be extended beyond the cases which it **expressly** contemplates. In other words, if the legislature, though intending to cover the case in question, uses language which, in fact, leaves the case uncovered, the Court should refuse to correct the language or supply the defect.
It does not follow that the Interpretation must always be "restrictive" as is sometimes very wrongly said. The Court is not bound to, indeed must not, narrow down the natural and ordinary meaning of the words; but must, as general principle, **accept the meaning, which is consonant with the ordinary use of language**, having regard to the intention of the legislature. Should there, however, be sufficient indications that the words used are in their natural meaning wider than what the legislature intended, then, indeed, the interpretation must be restrictive. In other words, a penal enactment cannot be extended on the strength of the "spirit of the law" to cover cases which do not fall within the express language; but it must be narrowed down if this should appear to be in accordance with the spirit.
But the rule that an "extensive" interpretation is not permitted must not be understood as preventing the extension of a provision to other cases which, though not expressed therein, must 'a fortiori' be considered as comprised in the case expressly mentioned. Otherwise, the law would be brought to obviously illogical and absurd conclusions.

iv. **Analogy**. Over here, we cannot use an analogy to address a fact in the wording of the criminal law. CHECK HERE In civil law, this can be the case but in criminal it cannot. Criminal law deals with crimes – the consequence is the deprivation of liberty. Analogy presupposes that the case in front of the court is not covered by a legal provision. Strictly speaking, Prof. Mamo says analogy is not a form of interpretation.

Analogy is to fill the gap, to supply the lacuna. The analogy seeks the provide a rule to govern a case which has not been either expressly or implicitly dealt with by the law. it relates the case in front of it a similar situation which that similar situation is governed by another law and by analogy the court applies to the case in front of it the principle on which that legal rule is based.

In particular, a penal law cannot be applied by analogy.

Analogy presupposes that the case in hand is **not**, even impliedly, **covered by a legal provision**. Strictly speaking, analogy is not a form of interpretation at all.

In spite of the fact that legislative techniques suggest the use of the most general and comprehensive formulae and avoid casuistry, it is inevitable that certain cases which, indeed, require to be provided for, **remain in fact out of the contemplation of the legislature**. These omissions in the law are usually described as "lacunae" or "casus omissi." Now **analogy seeks to supply these omissions** and to provide a rule to govern a case which has **not** been either expressly or implicitly dealt with by the law, by **relating it to a similar case which is governed by a legal rule and applying to it the principle on which such legal rule is based**.

This method is generally accepted without question in civil matters whereby if a dispute cannot be decided with reference to a precise provision of the law governing the case…the dispute may be decided in accordance with the general principles of the law.

In Roman times analogy played a most important part in the formation even of Criminal Law, precisely because penal legislation remained for many centuries scant and rudimentary. In modern times, the application of penal laws by analogy is proscribed in all civilised systems of positive law. If the case before the Court has not occurred to the mind of the legislator and is not dealt with by the law, **the Court cannot supply the deficiency by invoking a rule of law laid down in respect of a similar case**. The reason for this is the principle that penal laws cannot be extended beyond the cases expressed therein, in consequence of the other fundamental principle: "nullum crimen sine lege", "nulla poena sine lege".

But, of course, not every provision contained in the Criminal Code or other law containing provisions of Criminal Law, is to be considered a "penal law" in respect of which analogy is prohibited. That expression in this connection refers only to those provisions of Criminal Law which **create offences or prescribe restrictions or punishments**.

Finally, it must be observed that the prohibition of analogy does not prevent the application of even penal provisions of old laws to new things which, for the excellent reason that they did not then exist, could not have been contemplated by the legislature, **but can yet be brought within the language of the old law**.

Manzini: "New social conditions of scientific discoveries may create new judicial requirements for which it is certainly permissible to provide by adapting the existing laws, **but not beyond the limits permitted by the text of those laws themselves**."

In such circumstances, although the particular case arising for decision was not, indeed could not have been, specifically included, yet it is possible to apply the law to it if it falls within its general indication.

Every criminal law has two aspects: **praeceptum legis** and **sanctus legim**. Originally, law was conceived as jus, it wasn't conceived as lex (the will of the state). This is because, originally, the function of the state was to enforce the law (moral law) and not to make the law. With time the legislative assemblies came about.

Nulla crimen sine lege & **nulla poena sine lege**. There cannot be a crime without the law saying so and the type of punishment is imposed by the court and has to be one which the law permits.

The only legal source of criminal law is enacted law, **statutory law**. In civil, custom has strength but in criminal this is not the case.

IMPORTANT LATIN MAXIMS

In dubio pro reo

The principle of *in dubio pro reo* (Latin for "in case of doubt, then for the accused") means that a defendant may not be convicted by the court when doubts about his or her guilt remain. The rule of lenity, also known as the rule of strict construction, is the doctrine that ambiguity should be resolved in favour of the more lenient punishment – it requires a court to apply any unclear or ambiguous law in the manner that is most favourable to the defendant. To resolve all doubts in favour of the accused is the consonance with the principle of presumption of innocence ('innocent until proven guilty).
Therefore, the legal principle *in dubio pro reo* is today regarded as a rule for deciding criminal cases, whereby the judge must interpret doubts in the assessment of the evidence (proof) in favour of the defendant, so that either a less serious offence is presumed, or an acquittal is granted. As a key principle of criminal proceedings according to the rule of law, the proverb is highly significant as the supreme principle of criminal law.

Nulla poena sine lege/Nullum crime sine lege

Latin for "no penalty without a law", *nulla poena sine lege* is a legal principle which states that one cannot be punished for doing something that is not prohibited by law. the principle is accepted and codified in modern democratic states as a basic requirement of the rule of law. it has been described as one of the most 'widely held value-judgements in the entire history of human thought'.
In other words, a person cannot or should not face criminal punishment except for an act that was criminalised by law before he/she performed the act.

Ignorantia legis neminem excusat

Latin for ignorance of the law excuses not/no one is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely by being unaware of its content.
The rationale of the doctrine is that if ignorance were an excuse, a person charged with criminal offences or subject of a civil lawsuit would merely claim that one was unaware of the law in question to avoid liability, even if that person really does know what the law in question is.
The doctrine assumes that the law in question has been properly promulgated – published and distributed, for example, by being published in the government gazette. **A secret law is no law at all**.

MARTINA CAMILLERI

Principles of Criminal Law
Dr Joe Giglio

THE THEORY OF CRIMINAL RESPONSIBILITY

Liability or responsibility is the bond of necessity that exists between the wrong-doer and the remedy of the wrong. A man's liability consists in those things which he **must** do or suffer, because he has already failed in doing what **he ought**.

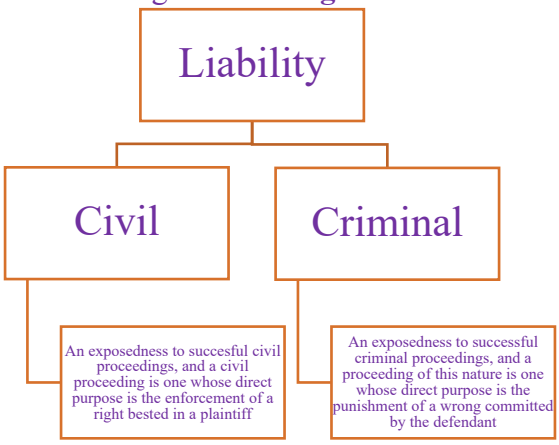


Fig. 1

In order to understand criminal law correctly, you necessarily have to understand what the theory of criminal liability is all about.
This theory is based on a Latin maxim: ***actus non facet reum, nisi mens sit rea*** (the act is not culpable unless the mind is guilty; the act alone does not amount to guilt).

For criminal liability to arise you must have two scenarios:

i. **Actus reus/The material condition of liability**: Any event which is subject to the control of the human will. In so far as the actus reus is concerned, criminal law exists to regulate our social behaviour/interaction with one another.
In the theory of criminal liability, the act could be either a **positive act** or a **negative act**. The positive act refers to all those acts of **commission**. The positive act is when **you do that which you ought not to do**. In the crime of grievous bodily harm for example, the act would be stabbing someone. So, for the purposes of criminal liability, this is the positive act. The actus reus, however, could be not only an act of commission but it could also be an act of omission. An act of omission is that act where **you do not do that which you ought to do**.
Both of them can be, for the purposes of criminal law, an actus reus. Both of them could relate to this first condition in order for criminal liability to arise. With that being said, they are not the same.
Acts are also either internal or external. Internal acts are acts of the mind (e.g., to think) whilst external acts are acts of the body (e.g., to speak). With that being said, criminal law is not concerned with merely internal acts as one cannot be held liable for a mere thought, some outward act has to be committed in order to constitute a crime. Therefore, the immaterialised thought of doing wrong is not punishable. The **will** is not to be taken for the deed unless there be some **external act** which shows that progress has been made in the direction or towards maturing and effecting it. At first sight it might appear that **the crime of conspiracy** is an exception to this principle, but the exception is only apparent. Kenny argues that it is true that the

conspiracy itself is **a purely mental state** – the mere agreement of two or more men's minds; but it would be impossible for two or more men to come to an agreement without communicating to each other their common intentions by speech or gesture; and thus, even in conspiracy, **a physical external act** is present.
A man is to be accounted responsible only for what he himself does.

Every act is made up of 3 different factors or constituent parts

1. Its Origin in some mental or bodily activity or passivity of the doer.
2. Circumstances
3. Consequences

Practical analysis
In practicing with a rifle, I shoot someone by accident.

1. Origin/primary stage – a series of muscular contractions, by which the rifle is raised, and the trigger pulled.
2. Circumstances – the facts that the rifle is loaded and in working order, and that the person killed is in the line of fire.
3. Consequences – the fall of the trigger, the explosion of the powder, the discharge of the bullet, the passage through the body of the man killed and the death.

Whatever act the law prohibits as being wrongful is so prohibited in respect of its origin, its circumstances, and its consequences. All acts are in respect of their origin indifferent. **No bodily motion is in itself unlawful**. To crook one's finger may be a crime if the finger is in contact with the trigger of a loaded pistol: but **in itself it is not a matter which the law is in any way concerned to take notice of.**

The harmful consequences of an act prohibited by the law **need not always, however, be actual: they may be merely anticipated.** An act may be mischievous in the eye of the law in two ways: either in its **actual results** or in **its tendencies**. Criminal wrongs commonly belong to the latter class, for the law punishes even an attempt. Criminal liability is usually sufficiently established by the proof of some act which the law deems **dangerous in its tendencies**, even though the issue is in fact harmless.

ii. **Mens rea/the formal condition of liability**: The Latin maxim means therefore that the actus reus on its own is not enough in order for criminal liability to arise because there is a second part (***nisi mens sit rea***). In other words, in order for criminal liability to arise, besides the act itself, it is also necessary that that act is accompanied by a guilty mind.
Before the law can justly punish the act, an enquiry must be made into the mental attitude of the doer. For although the act may have been materially if objectively wrongful, the mind and will of the doer may have been innocent. The material badness of an act depends on the actual nature, circumstances, and consequences of it. Its formal badness depends on the state of the mind or will of the actor.
The mens rea includes two distinct mental attitudes of the doer towards the deed. These are **intention** and **negligence**. Only in the case of those wrongful acts which the person does either wilfully or negligently is the actus reus accompanied with the mens rea. In this case only is punishment justifiable.

This can have two scenarios; there are 2 types of guilty minds: a guilty mind with **dolo/dolus** (wrongful intention) or you could have a guilty mind with what we refer to as **culpa** (culpable negligence) In other words, the offender may either have done the wrongful act **on purpose**, or may have done it **carelessly**, and in each case the mental attitude of the doer is such as to make **punishment effective**.
A person is considered to have acted with dolo/dolus when the wrongful act that he commits is done **purposely and because you actually intended to do that act**. On the other hand, culpa is the situation where the wrongful act done is caried out because **the doer lacked the sufficient care required to avoid that such a wrongful act takes place.** In order to distinguish which mens rea a person has, various theories have been put forward.

There may be exceptions in which the law sees fit to break through the rule as to 'mens rea'. it may hold a man responsible for his acts, independently altogether of any wrongful intention or culpable negligence. Salmond distinguishes wrong which are independent of mens rea as wrongs of **absolute liability.**

Before imposing punishment, the law must be satisfied of two things

1. That an act has been done which, by reason of its harmful tendencies or results, is fit to be repressed by way of penal discipline. (Material condition of liability).
2. The mental attitude of the doer towards his deed was such as to render punishment effective for the future and, therefore, just. (formal condition of liability).

Carrara's theory on the mens rea

The theory we constantly refer to and apply is the theory which **Carrara** has brought forward where he tries to analyse these various concepts and decides to make a distinction. He says that the distinction we can make, when it comes to intention, is between **direct intention** and **indirect intention**. Moreover, what truly constitutes the importance of such a distinction is the fact that they have a bearing on the extent of the criminal liability of a person. In other words, certain offences which are carried out with one type of intention, are punishable in a different way than offences which are carried out with a different type of intention. The intention with which an act if carried out usually deciphers the cruelty of the crime.

A practical example in our Criminal Code

> (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.

Section 211 of the criminal code, which deals with voluntary homicide:
Vs.
Section 225 of the criminal code, which deals with the crime of involuntary homicide:

> **225.** (1) Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine (*multa*) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).

The difference between the two lies in the **intention**. In the first case, the type of intention is dolo as both the foresight that certain consequences will follow from the act, and the wish for those consequences working as a motive which induces the act are present. On the other hand, in art. 225, the intent is culpa as these two above factors are missing. Moreover, one must note the difference in punishment with the maximum punishment of involuntary homicide being up to 4 years imprisonment as opposed to life imprisonment.

Therefore, up till now Carrara's theory has established:

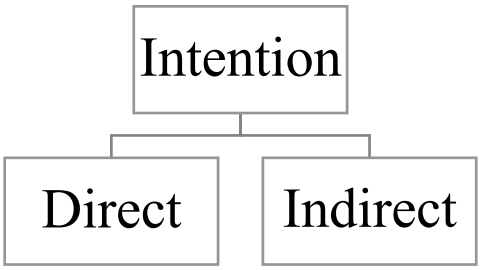


Fig. 2

But what are they?

Intention

Intention, in general, is the purpose or design with which an act is done. It is the **fore-knowledge** of the act, coupled with **the desire** of it, such fore-knowledge and desire being the cause of the act, in as much as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as, **it exists in idea before it exists in fact**.
Holmes: "intent will be found to resolve itself in two things: **foresight** that certain **consequences** will follow from an act, and the **wish for those consequences** working as a motive which induces the act."

Direct intention: DOLUS

According to Carrara's theory someone is said to have direct intention when the fore knowledge of the act is coupled with the desire of it. In other words, the effects of one's act are foreseen and desired and carried out in such a way in order to ensure that the desired consequence did in fact, ensue. Moreover, Carrara makes a very important point in saying that intention does not cease to be direct whenever the consequences of one's act is foreseen and desired, though the means used to bring about the consequence can only probably achieve the purpose. In other words, the intention would still be considered as direct even in those scenarios when the consequences of one's acts are foreseen and desired, but the means used can only possibly achieve that result. The reason for this is because intention does not involve an **expectation of certainty**.
For the sake of the argument, I could have a situation where I am planning to shoot someone and when I am planning to do so, I start to follow what he does, and I know that at a particular point in time he will be in a certain position and so I plan accordingly. In this way, there is no doubt that the effects of my act are foreseen and desired. In the case of say, me firing the rifle in the direction of the man a mile away, the probability is that I will hit him, but this is not absolute. Therefore, there is a possibility that I may not hit him. In this way, there is equally a direct intention on the part of someone who directly goes up to someone and shoots them as on the part of me in this scenario, who shot from afar even if there was less of a probability of me hitting him when compared to the former.
As Prof. A.J. Mamo puts it, in this case and similar cases the intention is always direct because the act done, although liable to miscarry, has been done with the direct purpose of

producing the desired effect. For intention does not always involve certainty of expectation. I may directly intend a result which I know to be improbable.
In other words, **direct intention is the foresight of a desired issue, however improbable, not the foresight of an undesired issue, however probable.**
Whenever the consequences of one's act are foreseen as certain or even as probable and desired, the intention is direct.

Indirect intention: POSITIVE (DOLUS) OR NEGATIVE (CULPA/CASUS)
An indirect intention, according to this theory, is a situation when the result of one's act was merely a possible consequence of that act, and this consequence was either not foreseen at all or foreseen but not desired.
Carrara made a further sub-division which is that according to him, the indirect intention can be either positive or negative. It is considered to be positive when the result of someone's act is foreseen and notwithstanding such foresight, the means used were desired even if the ensuing result was not desired. For Carrara, **an intention which is direct or positive indirect amount to dolo**. Although the ensuing event was not desired, one could have foreseen the effects and the means used relates to the consequence.

- **Positive indirect intention**
  If such an event was foreseen and notwithstanding such foresight the means were desired although the event itself ensuing upon the use of such means was not desired.
  - Dolus, i.e., criminal intent.
    Carrara: "the more or less perfect intention of doing an act which is known to be contrary to law."
    What is essential is that the agent knew of his doing a wrong; that his act was injurious to a right of others protected by the criminal law.
    Kenny: "in all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be illegal".
    Dolos requires:
    1. The power of volition
    2. Knowledge that what the offender is doing is wrong
    3. Foresight of such circumstances.

    Kenny continues to say that it might seem that prosecutors face much difficulty in obtaining evidence of the formal element of liability. In truth however, in most cases, the law regards **the criminal act itself** as sufficient **'prima facie' proof** of the **existence of criminal intent**. Moreover, the law treats as intentional all consequences which the actor foresees as the probable results of his wrongful act.

- **Negative indirect intention**
  The possible event was not only not desired, but not even foreseen.
  - Culpa, i.e., negligence.
    The presumption that **every man knows and intends the natural and probable consequences of his act** is a **rebuttable presumption**. The presumption is rebutted, and thus the person cannot be held to have intended that result (although such heedlessness will probably render him liable to charge of criminal negligence) if the accused can show that the consequence which has in fact resulted
    a. Was not an obvious result of his act

b. Or if he can show that the result which has happened was probable only when certain circumstances co-existed and that he was not aware of the existence of such circumstances.

BUT if he was aware that certain consequences **might follow** the act which he contemplated doing, and yet **deliberately proceeded** to do the act, he must be taken to have **intended those consequences** to follow, **even though he may have hoped that they may not** (positive indirect?)

This presumption will be rebutted by poof that the accused, at the time he committed the act, had not a mind capable of forming an intention ('dolo incapax'). Bearing this in mind, responsibility proceeds from the act which caused the event and therefore, one is held responsible if AT THE TIME HE COMMITTED THE ACT WHICH CAUSED THE EVENT the individual had that intention. This is what Carrara means when he says that it is not always necessary that the wrongful intent on the part of the agent should continue or persevere to the time of the actual completion of the crime.

- Casus, i.e., accident or misadventure.
  Pure accident and does not give rise to any type of criminal liability. Inevitable accident or mistake – the absence of both wrongful intention and of culpable negligence – is in general a sufficient ground of exemption from criminal responsibility.

Criminal intent is, therefore, an essential ingredient of every crime except where the liability arises from negligence or where it is an exceptional case of absolute liability.

Therefore, now we have:

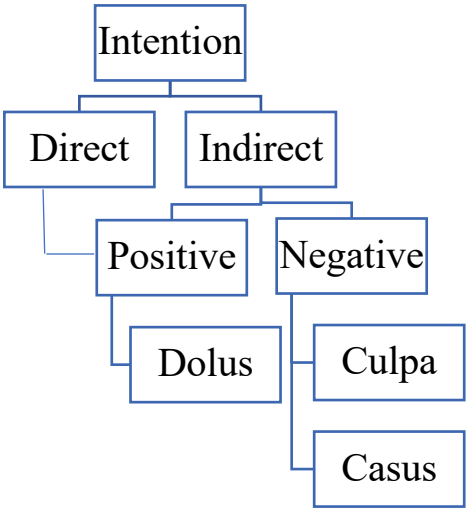


Fig. 3

A practical example in our Criminal Code
Article 211(2) on voluntary homicide:

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

This amounts to **direct intention** & **positive indirect intention**.
Direct intention – *with intent to kill*
Positive indirect intention – *to put the life of such other person in manifest jeopardy.*

In this way, this provision outlines Carrara's classification, arguing that one of these intentions must be present in order to constitute voluntary homicide.

Vs.

Article 225(1) on involuntary homicide:

> **225.** (1) Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine (*multa*) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87).

This amounts to **negative indirect intention**. This is culpa. Here, the extent of criminal liability is max. 4 years.

One must note that only some crimes have in their provision words such as "maliciously", "wilfully", "knowingly", "fraudulently" and so on. With that being said, one mustn't think that just because such words are not used, this element is dispensed with. Usually, such words merely alter the burden of proof with regard to it, their effect being to throw on the crown the obligation of proving the ordinary mens rea by further evidence than that mere inference from the actus reus which as we have already seen, may be ordinarily sufficient to prove it. Indeed, where the law does not make use in the definition of a crime of any such words as aforesaid, it is because of the fact itself "prima facie" bears on the face of it the stamp of **deliberate** wrongfulness: *"res ipsa in se dolum habet"*. In the case of such acts, Roberti argues that it is usually impossible that they could be committed except knowingly and wilfully. In the case of forgery, the false signature, the insertion of the names of fictitious persons and so on are all facts which by themselves manifest "prima facie" the criminal intent, the "dolus" and it is difficult to imagine that the person committing the crime could innocently and without wrongful intent affix a false signature and so on. Of course, falsification can take place as a result of an error, misunderstanding, or unskillfulness. In this case, the law expressly requires the ingredient of wrongful intent in order that the fact may constitute the crime of forgery whilst in the former case, it is sufficient for the prosecution to prove the material fact from which criminal intent can be inferred.

Motive

A wrongful act is seldom intended and desired for its own sake. The wrong doer has in view some ulterior object which he desires to obtain by means of it. The thief who appropriates another person's property or money, may have the ulterior intent to buy food with it to satisfy his hunger or to pay his debt. **This ulterior intent is called the motive of the act**. The why and not the how.

To a wrong doer, intention, if he has on, is his purpose to commit the wrong; his motive is his purpose in committing it.
How did he do the act? Intentionally or accidentally? – an enquiry into his intention.
If he did it intentionally, why did he do it? – connected with his motive.

Perhaps, the distinction between intention and motive is: "Intention is an operation of the will directing an overt act: motive is the feeling which prompts the operation of the will, the ulterior object of the person willing." So, in the case of homicide, the intent can either be

dolus, culpa or casus while the motive, if the homicide is voluntary, would be the object the person had in view such as seeing revenge.

In other words, a man's intention is his **determination to do to not to do a particular act**; his motive is his **reason for forming such determination**. His motive is what makes him intend to do that act – it is the spur which stimulates him to do action.

In criminal prosecutions, the prosecution, when trying to prove what type of intention there is, does not need to bring evidence of motive. It is the intention and not the motive which gives the character and quality of an act. The formal intention of liability is **NOT MOTIVE**. Intention and motive are two different things. Motive is the reason why some act has in actual fact occurred. If a man has done an act which is forbidden by the law, it will be no defence for him to urge that he had a laudable motive. No act otherwise unlawful is excused or justified because of the motives of the doer, however good (a theft is not less criminal because the ulterior motive of the thief may have been to obtain money for charitable purposes). Therefore, the prosecution needs to only prove what type of intention there was. With that being said, motive could be relevant and can make the case stronger, but they are not bound to prove motive.

Just as a good motive does not generally exonerate from responsibility, so likewise a bad motive is not as a rule of the essence of criminal intent. Carrara points out that it is clear that motive is not an essential and constant ingredient in criminal intent. This is why it is important not to confuse the notion of 'wrongful intent' (dolus) – 'malice' in its technical legal sense with 'malice' in its popular sense of ill-will, spite or malevolence.

Therefore, the general rule is that in a law, **a man's motives are irrelevant**. However, occasionally it is material to take the doer's motives into account. Sometimes, the law itself expressly has regard to the specific purpose or object of the doer committing the offence. It is only in very few particular offences that motive plays a bit of an issue, and that motive must also be proven. **These are the exception and not the rule**.

(1) **Kidnap**: There are some offences where motive comes into play such as article 86 which stipulates the crime of illegal arrest, detention, or confinement. In section 87, the law specifies that the extent of criminal liability for the offence of illegal arrest, detention or confinement can be increased if it is carried out with a particular intention. Therefore, in this offence you **could** have a situation where the motive is relevant. In this case, the *mens rea* is wanting to arrest someone against his will but there are certain instances where motive is relevant because it could have an impact on the extent of the criminal liability.

> (*f*) if the crime is committed for the purpose of forcing another person to do or to omit an act, which, if voluntarily done or omitted, would be a crime;

(2) The crime of **abduction** – article 199.

> **199.** (1) Whosoever shall, by violence, abduct any person, with intent to abuse or marry such person, shall, on conviction, be liable, in the first case, to imprisonment for a term from eighteen months to three years, with or without solitary confinement, and, in the second case, to imprisonment for a term from nine to eighteen months.

One must not mix up intention with motive. Intention is not necessarily the motive (why the offence is committed). Motive is one thing, intention is another. Obviously, if in a

prosecution the prosecution also has evidence of the motive as to why that offence was committed then it means that the prosecution has a stronger case as there is more evidence in support of the charge being put forward. However, they do not need to prove motive.
There are some offences, such as illegal arrest and abduction, where in those crimes it would appear from the very nature of the crime itself that motive has some relevance. In these cases, motive defines the offence.
This applies in the same way in-so-far pre-meditation is concerned. To prove that an offence has taken place, the prosecution must bring evidence of the act and that that act was carried out with the required criminal intent necessary in relation to that particular crime. They do not have to also bring evidence of pre-meditation of the planning that took place before. Pre-meditation is not a pre-requisite as it does not need to be present in the prosecution's case in order for them to proof intention. Therefore, they are not obliged to prove that an offence was pre-meditated.

Key distinctions:
Intention v. motive
Intention v. pre-meditation

Cases where the law spells out the intent, and cases where it does not
The principle, **actus *non facet reum nisi mens sit rea*** is applicable as a general rule even when the legislator does not specifically make reference to the intent when defining a crime. With that being said, there are some laws which outline such intent:

1. **Article 295:** the *mens rea* in this crime is clearly spelled out by the legislator *"with intent*…". In this case, the actus reus would be destroyed, dispersed or let deteriorate a thing which belongs to that individual, and which is covered by an insurance policy. So, for example, parking my car and not putting up the handbrake **on purpose** which constitutes insurance fraud. If my insurance company realises, I can be taken to court and my maximum imprisonment is 2 years. On the other hand, if I do manage to get the money out of the insurance, and therefore have succeeded in my intent, in that case the extent of my criminal liability is higher with the maximum being 3 years. This provision gives a clear example of a situation where the legislator has spelt out to us when defining the act, both the mens rea and the actus rea that is required.

2. **Article 166(1)**: it is obvious from the crime itself what the intention is. The intention is obviously **to forge** any Government debenture for sums advanced on loan to the Government. In this case, just because the legislator did not define the mens rea does not mean it is not needed.

Cases where the mens rea is not needed
There are some offences which are the exception and not the rule whereby there is no need for a *mens rea* to exist whereby the *actus reus* on its own suffices in order for criminal liability to arise. In the case of these offences in respect of which this exception applies, criminal liability arises irrespective of intention. These are referred to as offences of strict/absolute liability. These are simply, an exception to the rule that criminal liability rises and results when you have both an actus reus and a *mens rea*.
For example, in line with article 338, **contraventions** are situations where an offence exists, and criminal liability would arise by proof of the act itself.

Kinds of criminal intent (*mens rea)*

The formal condition of liability has also been the subject matter dealt with by various other authors and text writers, apart from Carrara. These have come up with other classifications of the formal condition of liability.

1. Generic intent vs a Specific intent.

Generic intent: a situation where the intention is simply **intending to do an act that is illegal**. So, you do not have the intent to do something illegal for the fun of breaking the law, but it is simply a situation where you have the intent to do something that is illegal. This consists simply in intending to do an act which is known to be illegal. True intention is the foresight of a desired issue: but we have seen to what extent intention in criminal law is of wider scope than intention in fact. This ordinary generic intent is the necessary and as a rule, sufficient psychological element for imputability in respect of wilful crime.
Specific intent: here you have **the intent to commit a particular offence**. In some cases, a specific or particular intent is required by the definition of certain crimes: this specific or particular intent is constituted by the special purpose which the doer actually had in committing the crime.

In our criminal law, the relevance of this distinction comes to the fore only and mostly in so-far as crimes against the person are concerned. Moreover, in our law crimes against the person could be the **crime of homicide** or the **crime of bodily harm**. What the legislator has done is that in the case of homicide, he has opted to require that **one has the specific intent to commit the crime of homicide**. On the other hand, in the case of bodily harm, the intent is considered as the generic intent to harm someone else.

Article 214: compare this with **article 211(2)**. In art. 211(2), we are seeing that 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 causes the death of such other person. In this case, the legislator is referring to a specific intent; that to kill or to put the life of somebody else in manifest jeopardy. On the other hand, in the case of bodily harm, it is the opposite. In this case, the intent is the generic intent to cause harm. This classification is one which for all intents and purposes in our Code has a relevance only to distinguish between the crime of homicide and the crime of bodily harm. In **article 216**, the legislator is telling us that if from the circumstances it results that there was a generic intent to cause harm, then your liability depends on the harm that you have caused. Therefore, the result of your act will establish the extent of your criminal liability. In the offence of bodily harm, you have to prove the generic intent to cause harm then once you have proved this, you are answerable, and your criminal liability is such depending on the harm you have caused.
There can be a number of scenarios that end up in the same situation, so, say, murder but it is intention that determines the extent of criminal lability. This can determine whether an individual is going to spend his entire life in prison or simply a few years.

2. Determinate and indeterminate

Determinate: when the issue falls completely within the boundaries of the intent: in other words, when the idea and the fact, the will and the deed, the design and the issue, are completely co-incident. The crime corresponds precisely to the crime intended. A wants to kill, and not merely to hurt B, and actually kills him.
Indeterminate: on the contrary, when the agent wrongfully intended and desired to produce one result but had present before his mind the possibility of producing a more serious result,

without, however, positively wishing to produce such graver result, then if such graver result in fact ensues, the intent of the agent with reference to the event is said to be indeterminate.

In bodily harm, we apply the principle ***dolus indeterminatus determinator ab exictur*** (the generic intent is punishable with the outcome that it caused). The punishment that you will receive will depend on the outcome, on the harm that you have caused. If the harm that you have caused fits within art. 216 it is one thing, but if it fits in one of the harms mentioned in art. 218 it will be another and so on. So, if it resulted in death, it would be different to if you caused bodily harm.

3. Good Faith

The reasonable belief of the lawfulness of the event which is voluntarily caused. A man is said to have acted in good faith if he has done an act which is materially or objectively contrary to criminal law, not only without any intention of violating such law but also without any intention of committing a wrongful act at all.

Culpa – involuntary offences

Key words:
Foreseeable to the reasonable man.
Lack of standard of care.
Involuntary.
Negative indirect.
Bonus paterfamilias.

Negligence under our Criminal Code

This is the part of the theory of criminal liability which deals with those offences where the intention, according to theory of Carrara, is **negative indirect intent**. Where the criminal intent in a criminal offence is culpa, we are in the realm of **involuntary offences**. In other words, offences which are accompanied with a mens rea. In truth, involuntary offences are very easily distinguishable in the criminal code because they always tend to start in the same way.

225. (1) Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be

Our Criminal Code refrains from giving any definition of negligence in the general provisions, and of creating liability by reason of negligence, not in respect of all crimes but only in respect of certain particular crimes expressly specified.

Most of the time, responsibility for the crime is incurred on account of "imprudence, carelessness, unskillfulness in an art or a profession or non-observance of regulations." These words are not defined but it is clear that by them the law means generally the absence of such care and precautions as it was the duty of the defendant to take in the circumstances. 'Unskilfulness' and 'non-observance of regulations' is self-explanatory. **No negligence is criminally liable unless it manifests itself in one or another of these forms**.

Two classical examples of offences where in order for criminal liability to arise, the mens rea is culpa, generally referred to as negligence:
Art. 225: includes words such as imprudence, carelessness, unskillfulness and so on. These words in legislation immediately indicate that here the criminal intent required for criminal liability to arise is culpa.
Art. 328: the legislator is creating another offence where the required mens rea is also culpa, with the difference that here he is dealing with involuntary damage.

Culpa exists when a wrongful act is done because you acted without **the sufficient care required from you to avoid that such an act takes place**. Whatever the form the negligence takes, if the ensuing harm was not only unforeseen but also unforeseeable, there cannot be any question of criminal liability in respect of such harm. When we say that the event was unforeseeable, we do not mean that it was unforeseeable absolutely: we mean only that it was unforeseeable by the standard of care which the law requires every man to use in his actions.

What is this standard?
Since culpa is a breach of the basic elementary standard of care that is required out of each and every one of us, *what is this level of care that is required from us? What measure of care does the legislator expect out of us?*
Negligence is not a ground of criminal responsibility except in the cases expressly laid down in the law. The reason for the exceptions which the law makes is that certain types of conduct which are particularly harmful require to be repressed. In these cases, the law is not satisfied with the mere absence of any intention to inflict injury or to cause harm but **demands the positive use of such care as is calculated** to avoid the possibility of such injury or harm. It is very relevant to point out that when we are determining the standard of care that is required from each and every one of us, one must keep in mind that the principle that we use is that of the ***bonus paterfamilias***. This is a principle which comes from Roman law whereby the standard of care required from us is **not the highest degree of care,** but it is the standard of care that would be required from what the Romans used to refer to as the bonus paterfamilias. The law demands not that which is conceivably possible but that which is reasonable. In other words, negligence is not a breach of the highest standard of care required in all circumstances, the criterion is that **a standard of care is reasonable and expected** from each and every one of us in the circumstances. Were men to act on any other principle but this, excess caution would paralyse the business of the world.
Where the harm could not have been foreseen and prevented, except by the use of extraordinary and uncommon precautions, there is no negligence at all, for, as we have seen, what the law requires is the use of reasonable care and no man is negligent merely because he does not show more care: negligence either exists or it does not: if it exists, it is always punishable. Therefore, no man is punishable because he has not used any degree of care higher than that which could be expected of a reasonable man in the same circumstances.

Carrara maintains that what amounts to reasonable care depends entirely on the circumstances of the particular case as known to the individual whose conduct is the subject of the inquiry. In other words, what amounts to reasonable standard of care depends entirely on the circumstances of the particular case as known to the individual who's conduct, we are questioning. Since **culpa is intensively tied up to the notion of foreseeability**, since whether you have acted reasonably is intrinsically tied up to whether you could have foreseen the consequences that ensued, in order for culpa to exist and in order for criminal liability to arise based on culpa, it is necessary that the harm caused **could have been foreseeable to the reasonable man**. We come to this answer because if we are going to use the test of whether

the reasonable man could have foreseen that the way that he was acting could have led to an accident, then **that lack of foresight is culpa**. **This is what distinguishes culpa and pure accident**. We are dealing with an attitude by a person who did not have the required foresight and therefore we are dealing with a state of mind where such foresight was not acquired because of carelessness.

Relevant cases

(1) **The Police v. Tarcisio Fenech** (1998 – court of criminal appeal): the judge simply explains that culpa would arise *jekk il-ħsara kien orevedibli u għalhekk evitabli bi ftit għaqal u ħsbieb*.

(2) **The Police v. Perit Louis Portelli** (4 Februaray 1961): over here, our courts were dealing with a case of involuntary homicide and this accident was that here was an architect who was being charged in court with the involuntary homicide that ensued.

Here we can see that culpa can take many forms.
Perit Louis Portelli tried to decipher each and every segment of culpa which the legislator is speaking about bit by bit.
Imprudence: For the court of criminal appeal, **imprudence**, can be defined as ***nuqqas ta ħsieb.***
Carelessness: Carelessness is for our courts, better described as ***negliġenza.***
Unskillfulness*:* The law continues by saying that culpa could also result when there is ***nuqqas ta' ħila fl-arti jew professjoni***. The unskillfulness in one's art or profession is referring to persons with a particular expertise but because of what is referred to as unskillfulness, they cause harm to others. For our courts this is described as ***impreiżija.***
Non-observance of regulations: Another way how culpa can manifest itself in our determination and deciphering of what culpa is, is specifically non-observance of regulations or ***non-osservanza ta' regulamenti***. This refers to the breach of all those regulations which are intended to safeguard others from being injured.

(3) **Police v. Saverina Sive Rini Borg** (1998): Saverina was a woman who was accused of selling drugs as a result, she was facing a charge of drug trafficking as well as involuntary homicide. In simple terms, someone went to buy heroine from her and this individual overdosed and died on such drugs. The prosecution contended that she should also be charged with involuntary homicide whilst the defence argued that this man who overdosed voluntarily went to buy drugs; and therefore, he was not compelled to do so. Therefore, the question put forward by the defence was *why should she also be held liable for his involuntary death? What is the culpa over here – could she have foreseen that by giving him heroine he would overdose?* The court of criminal appeal argued that when a limb of culpa is **non-observance of regulations**, since there are regulations which provide who, when and how medicines can be prescribed, the fact that somebody is giving out substances when he is not authorised to do so, when he is breaching regulations, those regulations are intended to safeguard us from harm, and therefore the breach of them would fall within this limb of culpa and consequently you could also have a scenario when culpa arises even in such a case. Over here, non-observance of regulations is a reference to **regulations which are intended to safeguard the community from harm**. This principle had also been established in another case, (4) **The Police v. Richard Grech** (21 March 1996).

Therefore, culpa can arise from the scenarios of

i. Imprudence,
ii. Carelessness,
iii. Unskillfulness or
iv. Non-observance of regulations.

(5) Another case: https://www.independent.com.mt/articles/2013-09-25/news/soldiers-acquitted-over-gunner-matthew-psailas-death-2716368897/.

Side note: Article 6 of the Criminal Code: remember when you have a situation of culpa and even dolus, you most almost always invariably have both a criminal action and a civil action. OJ Simpson is a typical case which brings out this distinction. He was found not guilty of the homicide, but the civil court found him guilty, and he was compelled to pay damages. You cannot charge a person for the same fact CRIMINALLY. This does not mean that you cannot file an action civilly.

Theories on Culpa

Culpa also requires that this conduct must lead to harm being caused, keeping in mind the criterion of foreseeability. This issue of foreseeability gives rise to a lot of discussion and in truth, two different theories have been brought forward:

i. **The Subjective theory:** This theory is a traditional theory, first propounded by Carmignani and then elaborated by Carrara. Here, negligence has a subjective character.
According to this theory, negligence is a subjective fact, or in other words, a particular state of mind. It consists in a failure to be alert, circumspect, or vigilant, whereby the true nature, circumstances, and consequences of a man's acts are prevented from being present in his consciousness. The wilful wrong-doer is he who knows his act is wrong; the negligent wrong-doer is he who does not know it but would have known it were it not for his mental indolence. Since negligence is a voluntary failure to take care in estimating the probable and foreseeable circumstances, we have to look at the subjective character that we are dealing with. In determining whether there was a breach in the standard of care, and therefore something which could have been foreseen was not, we have to ask how the person we are judging saw the situation.
So, Carrara defines negligence as the voluntary failure to take care in estimating the probable and foreseeable consequences of one's acts. In this definition, the essence of negligence is made to consist in the "possibility of foreseeing" the event which has not been foreseen. The agent who caused the event complained of **did not intend or desire it** but could have foreseen it as a consequence of his act if he only had minded: so, his negligence lies in his failure to foresee that which is foreseeable.
N.B. a man may (1) not foresee at all an actual result which subsequently ensues, or he may (2) foresee such a result as possible but hopes to avoid it. According to Carrara, there is mere negligence in both hypotheses', provided the act was done '*animo mocendi'* (innocent purpose). If the act was done with an innocent purpose, there is mere negligence in respect of the effect produced because not to foresee that a thing may happen and to foresee that it will not happen amounts to the same thing.

Two scenarios:

A. I fried my gun at a wild beast in the thick of the forest: in the background there was a man and I killed him. I had not foreseen at all the man was there, but if I could have foreseen it then I am guilty of negligence.
B. I fired at the beast: at a great distance from it there was a man: I saw him: I made an estimate of the changes and if foresaw that, in view of the distance between the man and my target, the shot would not hit him: it did hit him. I made a mistaken of the chances and here lies my negligence because it was possible for me – had I taken greater care to ascertain to have foreseen what actually happened. It would be erroneous to object that I foresaw the possibility of hitting him and that, therefore, I acted with wrongful intent (dolus): for what I foresaw was that I WOULD NOT HAVE HIT HIM.
It would be wrong to identify the foresight of not hitting with the foresight of hitting.

Let's say I fire at a man intending to hurt him but he dies but I foresee as clearly possible that my shot may kill him: I am not liable for mere negligence because my act was done with the criminal purpose of causing harm. A man who acts with such purpose can never be guilty of mere negligence.

This theory raises the question however, *if we are arguing that we have to keep in mind the standard of the reasonable man, why are we going to be using a subjective approach to determine there has actually been a breach in the standard of care?*

ii. **The Objective theory**: According to this theory, negligence is not a subjective, but an objective fact. It is not a particular state of mind, but a particular kind of conduct. It is a breach of the duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from the unreasonably dangerous kinds of conduct. Therefore, there is no need to put ourselves in the mind of the accused. According to this theory, culpa is not a particular state of mind but a particular state of conduct. What is being determined upon over here is not the particular state of mind of the accused but rather **an examination of the particular state of conduct that he employed**. For example, someone who drove after drinking and ran-over someone. That individual cannot use the fact that he is heavy-weight and therefore, was in truth not under the influence and therefore, alcohol did not result in the accident as a defence because **each and every one of us is expected not to drink and drive in order to safeguard the safety of others**. The breach of that regulation would be tantamount to conduct.

Since **culpa is a breach of the duty to take care**, to take precautions when acting, to ensure that we act in a way that is not harmful to others, to avoid acting in a way that is unreasonably dangerous, the objective theory maintains that what we should be examining is an objective state of conduct. For this theory, whether the event could or could not have been foreseen **by the offender** is irrelevant. Say, for example, if subjectively a man believes that he cannot harm anyone after he drank because he is heavy weight is irrelevant. What is essential is determining whether the accused has fallen short of the standard of care which each and every one of us is expected to use is an objective analysis of the conducting question. **In order for culpa to arise it is necessary that the breach in the standard of care expected out of us and the harm that ensued are intrinsically related to one another.**

There has to be a direct causal direction between the lack of care and ensuing harm in culpa. In fact, unless you see a direct causal connection, *how are you going to distinguish between culpa and casus?*

In this theory, the question whether the event complained of could or could not have been foreseen and avoided is irrelevant: what is essential & sufficient is that defendant

a. Has been responsible for conduct falling short of the standard of care which every man living in society is expected to use in his actions,
b. That such conduct has a direct and efficient causal connection with the ensuing harmful result.

If these two conditions are fulfilled, it is not further necessary to prove that the event was foreseeable.

The law punishes negligent crimes because the law, in making it an offence to be careless, imprudent, etc…, laid down specific rules of conduct the violation of which, in so far as harmful results ensure therefrom, constitutes in itself a criminal wrong.

If I cause harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence (even if to me, personally, it was impossible to foresee such danger!!!).

N.B there is another form of negligence. if I drive furious speed down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly expose them to danger. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted – writers say – not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligible. **Nothing that is not desired, however foreseen, can said to be truly intended**. For the purposes of criminal law, such forms of negligence is not, generally, treated as negligence at all. he who does a dangerous act, well knowing that he is exposing others to a serious risk of injury, and thereby actually causes an injury – will be dealt with as if he had intended the injury. There are some situations where the negligence is so grave that we are no longer in the realm of negative indirect but in the realm of positive indirect which is tantamount to dolus. Theories are put forward whereby the actions of a person are so manifestly careless that you cannot speak anymore of a negative indirect but rather you are speaking of a situation where your actions are tantamount to dolus. The principle is known as ***magna culpa dolus est*** (the criminal law treats as intentional all consequences due to that form of negligence which the actor foresees as the probable results of his wrongful acts). Such cases of recklessness were the consequences of one's act are foreseen, though not positively desired, come within the definition of 'Indeterminate Criminal Intent'.

CONCLUSION: LIABILITY BY MERE NEGLIGENCE ARISES NOT WHERE THE HARMFUL CONSEQUENCES OF ONE'S ACTS HAVE BEEN FORESEEN, BUT ONLY WHERE SUCH CONSEQUENCES HAVE NOT BEEN FORESEEN BUT COULD HAVE BEEN FORESEEN.

If such consequences were foreseen and desired, the offence is intentional (dolus); if they were not foreseen nor desired, but could have been foreseen, the offence is negligent (culpa); if they were not foreseen nor desired, nor could have been foreseen, them there is no offence but sheer accident (casus).

Contributary negligence

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

The **Clive Tanti** case: Here you had a situation where you could see a direct causal connection between the action of the accused and the injury that happened but there was clearly contributary negligence because they were both in breach of a regulation, that which relates to speed limits.

Contributary negligence does not exclude criminal liability. It is **relevant only for the purposes of punishment**. In other words, the court in its discretion that it has in imposing punishment, will exercise that discretion by keeping in mind whether there was contributary negligence. It is no defence that the mischief was caused by the negligence of other as well as of the defendant. If the mischief occurred by the negligent act or default of several persons, they are all guilty. The fact that other persons besides the defendant were also negligent does not avail him. Similarly, contributory negligence on the part of the victim is not a ground of defence.

If the negligence of the defendant would not have by itself caused the injury without the contributory negligence of the victim, then the defendant is not liable. This principle, however, proceeds only where the act or omission of the victim was deliberate and voluntary, and not necessitated or provoked by the original negligence of the defendant; or where it was the victim himself who gave the first cause to the injury suffered by him, by an unlawful conduct without which the injury to himself would not presumably have happened.
On the other hand, if the accident is attributable completely to the person who has been injured, then we are no longer speaking of contributary negligence but that the accused has no responsibility because he has been placed in what is referred to as a state of sudden emergency.

VICARIOUS LIABILITY AND CORPORATE CRIMINAL LIABILITY

Vicarious liability
In the case of vicarious liability, we are going to start discussing **the criminal responsibly of companies, associations, and so on. In other words, bodies of persons**. We are going to be **extending the concept of criminal liability** by seeing how it applies to an association of persons, be them **corporate** or **unincorporate**. Here we are referring to legal personalities. Examples of associations, organisations, companies: Għsl. A body of persons would commit a crime if, for example, Għsl starts to collect student's data without their knowledge. Therefore, in the case of vicarious liability we are prosecuting not the act of a man, but **the actions of the officials of a legal person**.

> **13.** Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence:
>
> Provided that, except in respect of offences under or against a provision contained in an Act in which a provision similar to that of this article occurs, the provisions of this article shall apply only to offences committed after the commencement of this Act.

'Any act': Offence in ANY ACT meaning it could be an offence which stems from any act and not necessarily the Criminal Code.
'Corporate or unincorporate': The body or association of persons can be corporate or unincorporate. According to principles of commercial law, **corporate entities** are those companies which are considered to be legal persons and therefore, have a **legal identity which is separate and distinct** from those of the individual members who formed that company. These can be limited liability companies or partnerships. **Unincorporate entities** are all those associations of persons which do not have a separate legal existence and are not considered as legal persons but still are associations, clubs, committees and so on. This would include Għsl, NGOs, band clubs and so on.

Because a company is a legal fiction, vicarious liability is attributing the offence committed by that entity to certain people and these people are ultimately punished if the offence is proven to have been committed by that entity. Therefore, who is held criminally responsible is not the entity itself but rather any person who **at the time of the commission of the offence**, was a director, manager, secretary, or other similar officer of such body or association. This counts for those who may not be officially designated, but the way in which that person acted was as if he/she had executive powers.

In other words, criminal liability is **strictly speaking attributable to the legal** (corporate) **or the moral** (unincorporate) **person**, however since that legal/moral person **cannot in practice be represented in criminal proceedings** and, eventually, be sent to prison if found guilty, through vicarious liability, criminal liability is extended to them. Therefore, vicarious liability

can be attributed to such associations. Therefore, these entities **can also be the subject of criminal liability** and can also, therefore, be charged and arraigned in court but since they are legal fiction, and since they do not really have an existence, they need representation. Someone, on behalf of them, is **representing them** & is **sanctionable for the actions**. These persons are every person who at the time of the commission of the offence, was a director and so on.

What is important is that it is a person who (1) **at the time of the commission of the offence** and secondly, (2) was **a person who had functions whereby he can decide, manage and so on**, he had a capacity to act within that association in a managerial fashion. Corporate entities, by law, are represented by directors while unincorporate entities don't have directors. The wording of the law is making it very clear that the persons who are sanctionable are those persons who have these types of powers within the association.

The first part is the association of persons has committed an offence, the second part is that all those persons who had executive functions, decision making powers will be the ones charged in court unless they prove two things: (1) that the offence was committed **without their knowledge** (2) That official who is charged in court because the association of which he forms part is accused of committing an offence must also prove that not only was the offence committed without his knowledge but that **he exercised all due diligence to prevent the commission of the offence**.

From a reading of section 13, one can understand that there is an exception to the rule that in criminal proceedings, an accused is presumed innocent, and he does not have to prove anything. Usually, in criminal proceedings, it is the prosecution that have to bring enough evidence in order to show that the accused did indeed commit the crime and therefore is criminally liable for the offence. In the case of vicarious liability, however, the prosecution needs to prove that an offence has been committed by a body of persons. In order for the persons who are charged, be them the representatives of it, not to be criminally liable, **there is a shift of the burden of proof onto the accused**. In other words, in vicarious liability, the prosecution must prove that an offence was committed and that it was committed by a body of persons but **from then onwards, there is a shift on the burden of proof**.

As we have said, the test in section 13 is a dual test because for the accused to exonerate him/herself from criminal liability he/she has to prove two things, on the basis of probability: (1) the offence was committed without his/her knowledge (2) he/she exercised all the necessary due diligence in order to ensure that the offence did not happen. Maltese case law has established that the criterion needed to be used for the latter is that of the **bonus paterfamilias**. Like in culpa, the same criterion is used. The difference being that in culpa we are seeing whether you acted as a bonus paterfamilias in respect of the action in which you are charged, while in vicarious liability, we are analysing **the conduct of the official within the company**.

In all law, be it criminal or civil proceedings, there are 4 levels of proof:

(1) **The level of possible**: This level of proof is insufficient in **any type of proceedings**. In other words, in all types of court proceedings, if you prove something only up to this level, you haven't proven anything.
(2) **The level of probable**: Probable means that when you weigh out the probability based on the evidence. This is the level of proof which is required in civil proceedings. Moreover, whenever in criminal proceedings, there is a shift of the onus

of proof onto the accused, the accused has to prove his point on the basis of probability.

(3) **Beyond reasonable doubt**: The beyond reasonable doubt criterion is the level of proof which the prosecution has to reach in order to prove their case in **criminal proceedings**.

(4) **Certainty**: this refers being 100% sure. In no proceedings is it necessary to reach the level of certainty when proving a point. It is considered to be a divine attribute – only God knows. Therefore, in no proceedings is it necessary.

Criminal liability is being imposed on two different types of persons, corporate entities (a legal fiction) or unincorporate entities (any other association of persons). The offence is committed by a legal person (corporate) or a moral (unincorporate) person but **because you cannot so-to-speak apply all the sanctions which criminal law provides for to an entity which is a fiction, the law targets the officers of that body of association.**

What the prosecution must prove

(1) The offence was committed **beyond reasonable doubt**

(2) It must also prove, beyond reasonable doubt that at the time of the commission of the offence, it has charged in court those persons who **at the time of the commission of the offence**, where either the directors, and so on of the company.

What the accused must prove

The moment this is proven, **there is a shift onto the accused** to prove

(1) on a basis of a balance of probability that the offence was committed **without his knowledge** and

(2) that he/she exercised all the necessary **due diligence** in order to ensure that the commission of the crime did not take place.

If the decision is that there was a criminal offence and that therefore, the accused did not manage to prove that the offence was committed without his knowledge and that he exercised everything with due diligence, it is **a personal punishment of the official**.

You could have more than one official who is charged in court, but then, the court has to carry out an analysis of the actions of each and every member of the committee who was brought into court. It could very well happen that the court comes to the conclusion that either **none of the officials are guilty**, **all are guilty** or that **one is and the other one is not**. The shift on the burden of proof is a shift which each and every official has to discharge. This is the relevance of the different roles.

Nowadays, it is a fact that our society is made up of corporate and unincorporate entities which is why vicarious liability is so important as it is constantly being put into practice. It is important to note that vicarious liability can result both in offences of culpa as well as in offences of dolus. In the case of dolus, for example you could have a company which is making a massive investment and while doing so, some of its high officials are bribing government officials to make sure that company takes the tender. Those officials who were not aware of this happening, need to prove so. Another case is when Plus One's stairs fell in Paceville whereby vicarious liability was being attributed to the directors if the company. As we can see, the company is considered to be liable however, **the ultimate sanction is imposed upon the officers of the company** if it is proven that **did not exercise the necessary due diligence as officers of the company**.

Because in vicarious liability there is shift of the onus of proof whereby the defendant has to prove his innocence, doesn't this go against the principle of **self-incrimination**? Our Constitutional Court have maintained that as long as this presumption is a **rebuttable presumption**, and as long as the defendant is given all his other basic elementary rights, this is not anti-constitutional. A typical situation stems from our legislation on **drugs**. There was a case involving a person who was found with a lot of drugs upon returning from a foreign country and this person claimed that he thought he was given diamonds as opposed to drugs. He was found not guilty. The legislator made an amendment that if you are found in possession of a drug, even if you believed that it was something else, it is irrelevant, and you are found guilty of being found with drugs. Here, the Constitutional Court established that pushing a burden of proof on the defendant to these limits, is pushing it too far. The presumption here was no longer a rebuttable presumption. This was the case in **Repubblika ta' Malta v. Gregory Robert Eyre & Susan Jayne Molyneaux**. The principle that everybody is presumed innocent is a human right and therefore, the law cannot presume the individual to be guilty as a point of fact straight away.

Another situation similar to vicarious liability where there is a shift of the onus of proof onto the defendant is in **money laundering legislation** where there is a provision which states that if your style of life is not equivalent to your income, then there is a presumption that your income is coming from an illicit activity, and you are guilty of money laundering **unless the individual proves that this is not the case**.

As we have already said, the issue of vicarious liability is **the theory criminal responsibility being shifted over to legal persons**, corporate or unincorporate, but it is the officials of that company who are brought to the courts, who are being prosecuted, for the actions of those legal persons. Criminal liability is not only being extended to physical persons but to fictional persons created by the law. Therefore, it is not the fictional legal person who is being sanctioned but rather it is the officers of that legal person. The concept of vicarious liability developed as our society started to develop. In the olden times, it was the Industrial revolution which started to introduce the concept of companies and legal persons. Consequently, there arose a need to also consider that criminal liability can extend to these legal persons. In fact, in Malta section 13 of the Interpretation Act was introduced in 1975 in our laws. Therefore, it is something which is relatively new. Before 1975, the issue of vicarious liability would only come about by the legislator if there was **specific legislation which specifically catered** for the possibility to take actions against not only the persons who have committed the offence, but also the entity in which it was committed. In 1975, we extended the concept of liability to apply to each and every type of legal person.

In time, and whilst this concept of vicarious liability continued to increase, various pieces of legislation would cater for vicarious liability specifically. Therefore, nowadays, there are various pieces of legislation which specifically cater for the concept of vicarious liability. These are all examples where criminal liability extends to persons who are not the actual physical persons who have committed the offence, but it is extending to physical persons because ad hoc legislation extends responsibility on them.

i. **Vat legislation**: Article 82, Chapter 406. Here you can see a clear situation where the legislator by an ad hoc provision, clearly shows us what happens when the offence against Vat legislation is committed by a body of persons. Also, the legislator is replicating what we see in section 13 of the Interpretation Act but clearly applying it for the purposes of Vat legislation. Here, the legislator is telling

us, without prejudice to any liability of the employee. Therefore, even the employee has a responsibility to give a vat receipt so, the provisions of this act will also apply to him. Here you have legislation reaffirming the concept of vicarious liability and giving it, however, its own particular structure by putting other criteria in order for the officer of the company to be able to defend themselves from the charge brought against them on breech of Vat legislation because they are officers of the company.

ii. **Health and Safety regulations**: By an ad hoc section within this legislation, offences are created in respect of which one can prosecute the officers vicariously.

iii. Legislation regarding **places of entertainment**: Legal notice 1 of 2006 (https://legislation.mt/eli/ln/2006/1/eng). This is a very typical example of a situation where responsibility is attached to the licensees of premises. Rather than the officials of a company, here we are identifying a place of entertainment, **the place in order to operate must have a license** and the license is issued to a licensee. This legislation, therefore, provides for situations where breaches within places of entertainment would be breaches for which **the licensee is responsible**. For example, places of entertainment are banned from allowing people within their establishment if they are under 17. If the licensee can prove, on a basis of probability, that he/she took the necessary steps in order to prevent this from happening, the licensee will not be held criminally responsible. Therefore, this is an example of when responsibility could extend to persons who might not even be present when the offence takes place.

The following examples are examples from our case law as to situations where the court was asked to examine whether the officers had satisfied the burden of proof imposed upon them.

i. **Police v. Pierre Massa** (Court of Criminal Appeal) (28 March 2012): an officer of a company can discharge the onus put upon him and to what extent he has to go to prove.

ii. **Police v. Michael J Zammit** (Court of Criminal Appeal) (15 February 2012): Michael Zammit was the company secretory of a gaming company which provided online gaming services. This particular company ended up facing financial difficulties and ended up not being in a position to pay its wages to its employees. Consequently, the directors of this company decided to just quit and left the island. In an attempt to get their wages paid to them, the employees went to a government department, specifically the DIER, which deals with issues regarding non-payment of wages. The DIER realised that the directors of this company left Malta and therefore, asked who they shall charge criminally with not having paid the wages of these employees. They decided that the only person left was the company secretary, who, ironically, was not being paid himself. The DIER sued the company secretary on the basis that he was the only representative of the company left in Malta. The company secretary managed to prove, on a balance of probabilities, that he ought not to be found guilty of this offence because the offence was committed **without his knowledge** and as far as he was concerned, **there was nothing he could have done in order to ensure that this offence did not take place**. The various responsibility of the company secretary

of this company did not result and he was acquitted on the basis of these considerations.

iii. **Police v. Gaetano Abdila et** (Court of Criminal Appeal) (28 July 2003): the facts of this case were that the company was being charged with having committed an offence, that of having operated a quarry without the necessary licenses. The planning authority had issued enforcement notices against the quarry and notwithstanding this, the company continued quarrying without the required permit to do so. Consequently, they were charged in court. Gaetano Abdila, one of the directors, had brought up the defence that they were two directors in this company and that they had decided to split their responsibilities whereby one of the directors had to look after all the administration of the quarry while he as the other director, had to look after the technical part. Therefore, he argued that the offence was committed without his knowledge because he used to leave these things in the other director's hands. The Court of Criminal Appeal came to the conclusion that by doing this, not only did he not satisfy the requirement of due diligence, reasonableness, of a bonus paterfamilias but he also did not take the steps necessary in order to ensure that the offence did not take place.

Corporate criminal liability

Let us move a step further. We are going to be dealing with corporate criminal liability. This is a situation where the notion of the subject of criminal proceedings is taken beyond what we have seen so far. We started the theory of criminal liability with the traditional theory which involves an accused physical person and the doctrine ***actus non facet reum, nisi mens sit rea.*** Then we saw the possibility of having a legal person being charged in court, but it was the officers of the company who were made responsible. Now we are going to go a step ahead.

Further improvements in our society led to the need for the *subjetum criminis* to also possibly be **a corporation**. So, here what we are saying is in the dock you actually have a company. Of course, the idea may at first appear a bit strange since a company cannot be sent to prison. Clearly, this notion of corporate criminal liability has taken the issue of liability a step further and has created a situation whereby one has to start thinking about **criminal responsibility being attributed to a corporate entity**. Corporate criminal liability was introduced in our code by means of Act III of 2002. The amendments included introducing a new section in the code which catered for corporate criminal liability. In truth, Malta had by that time, signed and ratified various conventions and international instruments which already catered for corporate criminal liability. Therefore, there was an additional need to include it into our legislation. This is **section 121D**. Examples of conventions to which Malta was a party and had ratified were the United Nations Convention against corruption. Another example is the Palermo convention against transnational crime. furthermore, in the year 2002 Malta was gearing up to become a member of the EU and there were various EU framework decisions which referred to the concept of corporate criminal liability and consequently, Act III of 2002 also had to cater for the fact that we were going to become an EU member and it introduced the concept of corporate liability.

The reason why corporate criminal liability has been introduced in legislation are two-fold: in our society, the presence of corporations and companies and their impact on our lives was increasing. Secondly, Malta was passing through a phase whereby we were ratifying various conventions and seeking to enter the EU were within them reference was made specifically to corporate criminal liability.

Article 121D

> **121D.** Where an offence under this title has been committed by a person who at the time of the said offence is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the said offence was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (*multa*) of not less than twenty thousand euro (€20,000) and not more than two million euro (€2,000,000), which fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure:
>
> Provided that where legal representation no longer vests in the said person, for purposes of this article, legal representation shall vest in the person occupying the office in his stead or in such person as is referred to in this article.

This section has been changed twice but the more relevant of changes is that of 2015. This section as originally introduced, provided for when you have a person who is found guilty of an offence. That person had to be one of those persons mentioned in that section: director, manager, secretary etc…that part in reality is transposing what we did in vicarious liability. In vicarious liability the officials are going to be held liable and not the company. Under article 121D, if the person who is found guilty of an offence under this title is the director, manager etc or a person having a power of representation or authority to exercise control, **both that person and the company itself will be held liable and punished**. Here, the wording of the law is clearly referring to a corporate entity.

The second difference between vicarious liability and corporate limited liability is that corporate criminal liabilities only deal with legal persons/corporate persons. In vicarious liability, we saw that section 13 could refer to a body, be it corporate or unincorporate. Corporate criminal liability, unlike vicarious liability, **applies only vis-à-vis a situation of a company that is a corporate entity** registered with the Malta financial services authority. Vicarious liability can extend to the officials in a corporate or unincorporate body while corporate liability applies only to legal persons, and these are companies or partnerships which are recognised by law as having a corporate existence.

The next element is that the offence that has been committed, of which one of those people mentioned before has been found guilty, is **an offence which was committed for the benefit of the company in whole, or in part**. In Malta we do not have the concept of trials in absentia. One of the fundamental principles of criminal law, of our Constitution, and of the rule of law, is that every person who is charged with an offence must be present in the Court room. Since we do not have trials in absentia, when we are dealing with Corporate Criminal Liability the presence of the company in the court proceedings is given to vested onto thrown onto the person who in actual fact is either the director, secretary manager and that person is also himself being charged with having committed a criminal offence. They are the presence of the company in the proceedings. **The presence of the company is vested within these persons**.

If the person concerned is no longer an official of that company, the proviso of section 121D comes into play. It states that should that person no longer be part of the company, then for the purposes of presence, corporate criminal liability, legal representation will be vested in the person who is occupying his position instead of him. Let's say a company is being

charged with pollution damage it committed ten years ago. The company is being charged in Court together with the directors who were responsible for the company at that time, i.e ten years ago. You can start proceedings against those persons but **also** charge the company itself and for the purposes of representation, and since somebody is present, **the person who is now vested with the legal representation of that company will instead appear on behalf of the company**. This is a consequence of the fact that trials in absentia cannot take place and that they need someone physically present who is appearing therefore, for the benefit of the company. In this case, that person is not being charged with any offence. He is not even suspected of having committed the offence, but his presence has to be there. It is relevant to understand that since the company is a legal person, the consequences, should criminal liability arise, can never be imprisonment. The law continues to lay down what the punishment would be should this happen. In the law, you can see that the punishment for corporate criminal liability would be of a fine of not less of 20,000€ and not more than 2M€. Besides, should criminal liability arise, the legislator has devised other sanctions which can be imposed upon the company. The other forms of punishment arise from section 121E. In Article 248E(4), the law provides for other types of punishments for example, not being able to tender for public contracts, suspension of licenses, possibly being put into liquidation and so on. Therefore, the legislator has managed to devise sanctions which are relevant within the context of corporate criminal liability. The sanctions take a different dimension. **These are monetary**, as well as the possibility of other punishments.

We are going to go back to the parliamentary debates which were taking place when this provision was being introduced. Since it was quite new, the legislator cautioned and in the second reading to this bill, the Minister passing this law had explain the need to be cautious and careful because in reality, the company could be made to suffer fines, criminal responsibility, not because it had a *mens rea* but rather because one of its officers has acted with a guilty mind. This is a fine line. Criminal liability for the physical person already exists but when you are extending criminal liability to someone who doesn't have a mind of his own, but who rather depends in order to exist upon the actions and intentions of its officers, consequently, you have to be very careful because we are giving a sanction, creating the possibility of sanctioning someone for the *actus reus* and the *mens rea* of somebody else. In corporate criminal liability, both the officers and the company itself get punished. The law presupposes the existence of an offence in respect of which a person has been found guilty.

In order for corporate criminal liability to arise, there must be 3 elements:

1. For corporate criminal liability to arise, the offence has to be one in respect of which the legislator has by an express provision of the law rendered corporate criminal lability applicable to those offences. In other words, the legislator by a specific provision of the law rendered that offence liable to also be prosecuted from a corporate perspective. When it was first introduced in 2002, the offences in respect of which corporate criminal liability was introduced, were corruption, fraud, and the crime of human trafficking. As time went by, various other offences by means of subsequent legislative enactments were introduced whereby in respect of them you could also have corporate criminal liability in crimes such as money laundering and drug trafficking. Therefore, you cannot have corporate criminal liability in all offences, such as homicide.

   An offence **under this title; corporate criminal liability is applicable ONLY to offences committed under title III** (The criminal code is sub-divided into title 1, 2, 3 and so on. in each title there are also sub-titles. When the legislator is saying 'title', we have to see which title section 121D falls under and conclude that corporate criminal

liability is possible in respect of all those offences which in the code itself, are included in that title. You will see that the title he is referring to is title III which refers to offence committed against **Administration of Justice and Public Administration**. In those case only, is it possible to perceive the concept of Corporate Criminal Liability).

In 121D we saw that it is limited to offences committed under title III of the law of the criminal code. Title III is, therefore, the part of the Criminal Code that is being referred to however, as time went by, we started including **express provisions of the law** in respect of crimes or sub-titles of the criminal code to which, by an express provision of the law, section 121D would apply. For example, article in 310A one can find an express provision of the law which is including other offences which could be prosecuted even within the parameters of corporate criminal liability. As you can see, section 310A was also introduced by Act III of 2002. Therefore, the offences within that title in which section 121D are possibly liable also in terms of corporate criminal liability and then, in various other areas of the law, the legislator started to create provisions whereby corporate criminal liability would also apply in respect of those other offences.

Examples of express provisions:

(a) Section 310A is contained in sub-title III of title 9 but the legislator is being very specific saying that the provisions of sections 121D will also apply to the provisions in this sub-title. This sub-title he is referring only to the offences within that sub-title where section 310 is found – FRAUD.
This first requisite of Corporate Criminal Liability implies that the offence with which the official is being charged must be an offence in respect of which the legislator has by an express provision of the law rendered it possible to also have corporate criminal liability and this he will do simply by introducing a provision identical to section 310A.
(b) Section 337H this is another provision of the law whereby the legislator has expressly laid down that the provisions will apply *mutatis mutandis* for every offence under this sub-title - OF COMPUTER MISUSE.
(c) Others: 82E, 121E, 188H, 208B, 257F.

The offence that is committed is one in which Corporate Criminal Liability is applicable. When it was introduced in 2002, there was a class of offences and now we start introducing other aspects of the law which are included.

2. Besides, it is **also necessary that the person who committed the offence is also found guilty**. In fact, the law makes it clear that it is also necessary that there is physical responsibility attributed to someone. The person found so guilty is a director, manager, secretary or other…Because he is considered to be the mind, the *mens rea*, and the *actus reus* of the company. It is necessary for the purposes of the Theory of Criminal Liability.

Identification principle/an offence is committed by a person who is a controlling officer:
When first introduced in 2002, corporate criminal liability applied **the identification principle**. The original wording of section 121D when first introduced was not as it is today. In fact, when introduced, corporate criminal liability started with "*where the person found guilty of an offence under this title*". In other words, it was made clear that **in order for corporate criminal liability to result, it is necessary that an offence is committed by a person and that person is one of the various officers written in**

section 121D. The point being made here is that since this was a very new concept, we introduced it with the identification principle which means that **the corporation will be criminally liable provided that we can identify a person who is one of those officers who has committed an offence** in the benefit of the company.
The actus reus and the mens rea of the director, manager etc must be a pre-requisite in order for criminal liability to pass on to the corporation. In other words, this so-called identification doctrine which we adopted means that **we are attributing direct criminal liability to a company as a result of the knowledge and of the acts of one of its officers**. **The natural persons must first and foremost be found guilty of an offence.** It is very clear, therefore, what the legislator had in mind when he introduced it. We overcame the principle of criminal liability, that *actus non facet reum nisi mens sit rea,* by implementing this identification principle. In other words, through the identification principle we haven't changed much from the theory of criminal liability in the sense that we still need the fulfilment of the two elements, the actus reus and the mens rea, but **they must be found within the officers of the company**. If this happens, provided that the other elements of corporate criminal liability result (it is done to the benefit of the company & and is an offence in which CCL can arise), then we have a case where the company can be fined.
In brief, **you cannot have corporate criminal liability unless the controlling officers of the company in the first place themselves have committed and are found guilty of a criminal offence**.

Who are controlling officers?
The wording of the law tries to include whoever has powers to make decisions upon the company, powers whereby the company is actually operated and managed.

Tesco supermarkets limited v. Nattrass (House of Lords) (1972): here, the House of Lords explained that the controlling officers who have to be found guilty of an offence, in order for this first requisite of corporate criminal liability to arise, must be persons who exercise some managerial discretion. Therefore, if on the other hand, you have officers of the company who have managerial discretion but that managerial discretion that they have falls under the direction of someone before/above them; of superior officers within the company, then in that case, you are not considered for the purposes of corporate criminal liability as a controlling officer. In this case, there was an accident which happened within one of the stores of Tesco supermarkets. The people who were charged were the store managers. The House of Lords concluded that although the store manager had managerial discretion, his discretion was limited to managing the stores. Therefore, the store managers had no managerial discretion beyond the stores. They did not have any discretion deciding on what the company should be investing in etc. In fact, the store managers were answerable to other managers who are higher up in the hierarchy of Tesco supermarkets. The House came to the conclusion that they cannot be considered as controlling officers who if they commit an offence and provided that there are the other requisites of corporate criminal liability, then the company can also suffer criminal sanctions.

When in the realm of corporate criminal liability, **we are speaking about a person being found guilty of an offence and that person occupying one of the roles found in 121D. As we have established however, that is not sufficient. It is also important that that person is a person who actually has some form of managerial discretion in running the company**. In order for the company itself to also be responsible criminally, and therefore

have a criminal sanction, it is necessary that the offence is committed by an officer who has far higher executive powers within shell in order to also punish shell.

Here, we are punishing a company. To punish a company one of the first elements is that the offence is committed by one of these officers, keeping in mind the identification principle as a result of not wanting to depart from the Theory of Criminal Liability, involving the mens rea and actus reus. In order for this, a person has to be identified. **To attach criminal liability to a corporation, as a first element, the legislator still requires that we attach a natural person who has a mens rea and actus reus**. When we originally introduced it, we wanted to emphasis what is referred to as the identification principle – we have to identify a person who is guilty of an offence. Where the persons who commit the offence although they have managerial discretion but notwithstanding they depend on others, then you cannot say that they are controlling officers within a corporation. The decisions that they take are subjected to being monitored by people who are higher up in the company. Here, what we are saying is that we are introducing another type of criminal responsibility – the company.

Police v. Daniela Debattista (Court of Criminal Appeal) (16 November 2016): the situation was that Ms Daniela Debattista was a director of a company. This company went into financial difficulties, and it had an enormous number of payments outstanding, and these car sellers claimed that there was fraud on the part of Ms Daniela. They did this because they found out that she was really a prestanome for someone else. She explained that she was in fact simply placed in the position of director because the running of the company was left in the hand of her brother who had various problems and so, wouldn't have been able to get a loan, etc. So, Ms Debattista was contending that the actus reus and mens rea were actually her brothers since he was the manager, and she was just there just to be a front for her brother. Clearly, the Court of Criminal Appeal came to the conclusion that as a director she failed vicariously because although she managed to prove that the offence was committed without her knowledge, she did not manage to prove that she exercised all the due diligence to prevent the offence from happening. Therefore, the defence that although I am a director, I do not have any managerial powers, in this case, was not accepted. In this case she qualified as a controlling officer because she was the sole director of the company.

Transco PLC v. Her Majesty's Advocate (2005): Transco was in charge of the gas supply. A gas explosion occurred which killed 4 people. It resulted that this explosion occurred because the pipes through which the gas used to pass had corroded very badly. As already mentioned, Transco was the company in charge of the gas supply and Transco pleaded that they had sub-contracted the safe transportation of gas. While it is true that they had been given a tender by the government to ensure that there is a gas supply, and therefore they had to do maintenance to the pipes and make sure everything is in check, what Transco did was that they had sub-contracted this tender to another person. This had taken place 13 years before this explosion. The prosecution maintained that they ought to still be responsible and consequently, there could be corporate criminal liability. However, the Scottish court argued that the Transco directors were not the controlling mind of the company responsible for the upkeep of the pipes. Consequently, in this case corporate criminal liability did not arise in respect of Transco.

The wording of section 121D, today, however, is not as clear as it was when it was first introduced. When first introduced it was evident that we are using is the identification principle and we have to have a person who is the officer of the company who is found guilty of an offence. In 2015, the Council of Europe questioned the identification principle, saying

that the corporate criminal liability should not be dependent on an officer being found guilty of an offence. Here, it started saying that we have introduced corporate criminal liabitliy not as it should be. Therefore, the law was amended. In truth, however, we have changed absolutely nothing from the identification principle. While when first introduced the provision of the law started with the words '*where a person who commits an offence*', it was changed to *'where an offence is committed by a person'*. Therefore, evidently, we have changed nothing. A reading of Article 121D as it stands today changes nothing from the identification principle discussed before. It was also in 2015 that the fine for corporate criminal liability was increased.

3. **The offence of which the person was found guilty was committed for the benefit in whole or in part of the body corporate**. Otherwise, there is no justification in imposing a sanction over a corporate body for the offences which could have been committed by the officers. Naturally, that offence resulted in some benefit, monetary benefit, to the company whether in whole or in part. By 'benefit', what is being referred to is having something which you could actually give a monetary value to. It cannot have a moral meaning because otherwise, the whole concept of Corporate Criminal Liability falls through. The benefit has to be something which is reduced to money-value. Benefit must necessarily be something monetary.

Corporate criminal liability in reality, is not really used. But there are some cases. In **Police v. Daniela Debattista** (Court of Criminal Appeal) (16 November 2016), the Judge passed this comment, and it also highlighted that one of the distinguishing features between vicarious liability and corporate criminal liability is that in the former, ultimately, although the offence is committed by the body corporate or unincorporate, the punishment is imposed on the official, a physical person. On the other hand, in corporate criminal liability, the punishment is ultimately inflicted on the company itself.

The last part of section 121D deals with the monetary sanction. As we saw, the monetary sanction to which the corporation can be found guilty is a fine not less than 20,000€ and not more than 2M€. The law continues to provide that this fine can be recovered by the State as if it were a civil debt. Why is the sanction against the corporation recoverable as a civil debt? It is the only way that it can be recovered. On the other hand, should a fine be imposed on a physical person, and should that person not pay the fine then it is converted into imprisonment: 35€ not paid = one day in prison. Should the company not pay the fine, then the State can take actions against the company, in the same way that any person who owes a civil debt. The monetary punishment is one of the possible sanctions that the legislator has created in the eventuality that there is corporate criminal liability. This is the part relating to the monetary fine, which is recoverable as a civil debt.

Employees

Finally, we have to also go to section 248E. (4)

> (4) Where the person found guilty of any of the offences under this sub-title -
>
> (*a*) was at the time of the commission of the offence an employee or otherwise in the service of a body corporate, and
>
> (*b*) the commission of the offence was for the benefit, in part or in whole, of that body corporate, and
>
> (*c*) the commission of the offence was rendered possible because of the lack of supervision or control by a person referred to in article 121D,
>
> the person found guilty as aforesaid shall be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (*multa*) of not less than ten thousand euro (€10,000) and not exceeding two million euro (€2,000,000).

Analysis of Article 248E (4)

(a) Here we are speaking about an offence which is committed not by one of the controlling officers of the company but by one of its employees. It starts clearly with the identification principle. All the offences in this sub-title in which there is Article 248 (trafficking of person) was at the time of the commission of the offence an employee or otherwise in the service of a body corporate.

(b) Moreover, '*the commission of the offence was for the benefit, in part or in whole, of that body corporate'*. He has committed an offence out of which offence the company has benefitted in some way and the commission of the offence was rendered possible.

(c) The commission of the offence was rendered possible because of the lack of supervision or control by a person referred to in article 121D. The persons mentioned in article 121D are the controlling officers. So, in this case we are adding also as another element that the employee managed to commit this offence because of the lack of supervision of one of the controlling officers mentioned in Article 121D. The person found guilty - the employee - if all these elements are satisfied, shall be deemed to be vested with the representation of the body corporate. Here we are extending corporate criminal liability to the acts of employees of that company if the offence is committed because of the lack of supervision by one of the controlling officers.

Till now, section 248E applies only to offences under the sub-title. There are no provisions which state that for the offences in this title sections 248E(4) apply, therefore, you can never have the offence of harassment, for example, which can be the subject of corporate criminal liability.

Finally, keep in mind that besides the fine, the sanctions in respect of corporate criminal liability could also have other forms and these are listed in section 248E(4a).

(4A) Whenever the offence is committed for the benefit, in part or in whole, of a body corporate by a person who has the power of representation of the body corporate, authority to take decisions on behalf of the body corporate, or authority to exercise control of the body corporate, the legal person may be subject to:

(i) exclusion from entitlement to public benefits or aid;

(ii) the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;

(iii) placing under judicial supervision;

(iv) the compulsory winding up of the body corporate; or

(v) the temporary or permanent closure of any establishment which may have been used for the commission of the offence.

Therefore, we have established that:

1. A person who is an employee is found guilty of an offence under this sub-title (human trafficking)
2. That employee who has committed this offence has committed an offence out of which the company has befitted.
3. The commission of the offence was rendered possible because of the lack of supervision or control by a person referred to in article 121D.

MARTINA CAMILLERI

Criminal Law
Dr Stefano Filletti

1. Insanity - A person insane does not commit a criminal offence. Insanity is a defence to a charge however our law does not define insanity. It is the jury that determines who is insane and who is not. Having a psychologist helps however, they are not the ones who decide. There is a difference between legal insanity and psychiatric insanity.
2. Intoxication in general is not an excuse why a person should not be charged however there are circumstances where if you are accidently intoxicated you can plead a defence.
3. Young age
4. Self-defence – powered by threat perception.
5. A crime of passion – anger.
6. Criminal attempts – even when failing to commit an offence, you are guilty for the attempt.
7. Accomplices – a person who is found given of an offence together with a principle.

Actus non facit reum, nisi mens rea
When is a person capable to be found guilty of an offence?
Actions alone cannot alone be considered a crime unless the action is accompanied with criminal intent.
In order to intend to do something you require two basic fundamental capacities: will & understanding – we distinguish these two capacities.
The capacity to understand means being capable of understanding what you are doing, your surroundings and the consequences of your acts.
Will refers to doing what you do because you want to do it; you have the mental capacity to say no.
Both of these capacities lead to a punishable criminal offence as the individual as the capacity to form a criminal intent.
Under our legal system one can form two types of intent

1. **Generic** intent to cause harm (knowledge that you are doing something wrong/illegal) or a
2. **Specific** intent to cause harm (only required when the law requires it – example wilful homicide – require a higher degree of mental capacity and you must prove that that individual was specifically acting to kill)

Grievous bodily harm from which death ensues (generic intent) Vs wilful homicide (specific homicide).

Exemptions from Criminal Responsibility and General Grounds of Defence

(1) INSANITY

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

(*a*) was in a state of insanity; or

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

(Article 33(b) is a situation of threat)

Absence of the formal element of crime and, therefore of criminal responsibility may also arise, not from the natural and inevitable immaturity of young age but from a diseased condition of the mind.
The world is full of 'warped' men and women, in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears that control the conduct of ordinary people. To place such persons beyond the reach of all fear of criminal punishment would not only violate the logical consistency of our theory of crime; but would also be a cause of actual danger to the lives and property of all their neighbours.

In the past, in the UK, everyone was presumed to be insane, and the accused had to prove their sanity. The House of Lords came up with four rules (**McNaughton rules**) which help us interpret insanity. With that being said, these are not our law. We simply use them because they create legal guidelines for us to distinguish when we have insanity. Moreover, out of these four rules we only apply the first two. The McNaughton rules **generate the right or wrong test** – the only form of insanity which is accepted in the UK.

i) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime until the contrary to be proved to the satisfaction of a jury.

ii) To establish a defence on the ground of insanity, it must be 'clearly' shown that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or (if he did know this) not to know that what he was doing was wrong morally. As a result of the disease of the mind your volitional capacity is impaired.

as can be seen, the McNaughton rules base the test upon the presence or absence of the capacity to distinguish right from wrong in the crime committed.

It was felt that the legal definition of 'insanity' with reference to criminal responsibility and as given through the McNaughton rules, needed to be broader.
Rex v. Hay (1889): in this case, the Rt. Hon. Sir H. de Valliers, C.J. laid down as the law of the Cape, and as the tendency of legal opinion elsewhere, the following rules:

1. "Where the defence of insanity is interposed in a criminal trial, the capacity to distinguish between right & wrong is not the sole test of responsibility in all cases;
2. In the absence of legislation to the contrary, the Courts of law are bound to recognise the existence of a form of mental disease which **prevents the sufferer from**

controlling his conduct and choosing between right and wrong, though he may have the mental capacity to distinguish between right and wrong;

3. The defence of insanity is established if it is proved that the accused had, by reason of such mental disease, lost power of will to control his conduct in reference to the particular act charged as an offence;
4. The capacity of the accused to control his own conduct must be presumed till the contrary is proved."

Thus, according to the learned Chief of Justice of the Cape, the 'right and wrong test', as established by the McNaughton rules, is not the sole test of responsibility in all cases; it must be supplemented by the so called 'Irresistible Impulse' test: a person who knew he was committing an act which was morally wrong and prohibited by law may nevertheless be excused from responsibility if, **by reason of his mental disease**, he lacked the power of conscious volition and inhibition to resist the impulse to commit it.
All psychiatrists assert that there are cases in which mental unsoundness results in impulses which are sometimes quite uncontrollable. Some persons are assailed by most urgent desires, which they abominate, repel and resist, to do things which are criminal and which they abhor. They are constantly urged, by some internal compulsion, to steal, to injure themselves or other people, to set things on fire, and to do other criminal acts.

Therefore, there is an ever-growing tendency in modern countries to hold that disorders of the **volitional powers**, resulting in **irresistible impulsions to commit certain anti-social acts** constitute a defence to a criminal charge in the same manner as disorders of the **intellectual powers** resulting in the **inability to understand the ability to understand the wrongfulness of such acts.**

Therefore, by enlarge, we have two forms of insanity

(1) Insanity that affects the person's capacity to understand
(2) Insanity which affects the person's capacity of will, your volitional powers. Kleptomania is when you know what you are doing is wrong yet still do it. This is a recognised disease of the mind.

Maltese legislation

Section 33 of the Criminal Code lays down the fact that if a person, at the time of act or omission, was in a state of insanity they are exempt from criminal responsibility.
It will be observed at once that our law has not bound itself by any specific 'a priori' test of responsibility in insanity. It has refrained from any attempt to define the conditions under which a man can plead mental unsoundness as an excuse for wrong doing, wisely leaving each case to be decided in the light of its particular circumstances, usually with the assistance of medical experts.
The question, when it arises, is one of fact: it has, that is to say, to be decided whether the defendant had a rental disease and, if so, whether it was of such a character and degree, as to take away the capacity to know the nature of his act and to help doing it. there must be the constituent elements of legal responsibility in the commission of every crime:

(1) Capacity of intellectual discrimination;
(2) Freedom of will.

If it is true, as a matter of fact, that mental disease can so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and wrong, although he perceives it, a person so affected is not responsible criminally for an act done under the influence of such controlling disease.

Puliżija v. Nicholas Grech

'm'ghandnix definizzjoni legali tal-kuncett 'genn' pero fl-artikolu 33 tal-Kap 9 ghandha c-cirkostanzi ta' dak li jezenta lil hati mir-responsabblilita penali. Il- kodici penali taghna jiddistingwi bejn genn fil-mument tal- kommissjoni tar-reat u genn fil-mument tal-kumpilazzjoni'

'Il-genn li jirrizulta fil-mument tal-kommissjoni tar-reat jezenta lil hati minn kull responsabblita kriminali.'

'Ghalhekk il-ligi thares lejn il-hati li kien mignun fil-mument tal-kommissjoni tar-reat bhala tali li qatt ma kiser id- disposizzjoni tal-Kodici Penali u dan ghaliex l-element formali tar-reat huwa nieqes mill-hati li hu mignun.'

'L-intellet u volunta huma zewg pilastri li fuqu jistrieh il- kuncett ta' responsabblita kriminali. Jekk wiehed minn dawn iz-zewg pilastri huwa nieqes, il-kuncett jisfaxxa.'

'Ghalhekk ***il-Qorti, tiddikjara li ma ssibx lil imputat NICHOLAS GRECH hati tal-akkuzi kollha kif dedotti fil- konfront tieghu minhabba li kien fi stat ta' genn fiz- zmien tal-allegat reati*** *u wara li* ***rat l-artikolu 525(3)*** *u* ***623(1)*** *tal-Kap 9 Ligijiet ta' Malta, tordna li l-imputat jinzamm* ***taht kustodja fl-isptar Monte Carmeli*** *biex hemmhekk jibqa taht kustodja u mizmum skond d- disposizzjonijiet tat-Taqsima IV tal-Att dwar s-Sahha Mentali [Kap 262] jew kull disposizzjoini ohra tal-ligi jew legislazzjoni applikabbli ghal kaz.'*

> **623.** (1) Where, upon the allegation referred to in subarticle (1) of article 620, the accused is found to be insane, the court shall order the accused to be kept in custody in Mount Carmel Hospital there to remain in custody and detained according to the provisions of Part IV of the Mental Health Act, or any other provision of law or enactment applicable to the case, and those provisions shall apply to the accused accordingly.

"The nature or a crime involves two elements: first the knowledge of it being an act contrary to law, and, secondly, the will to do or to forbear doing it. There are insane persons who, having the former are deprived by their disease of the latter: **who may know an act to be unlawful but may be impelled to do it by a conviction of an impulse which they have not the will or the power to resist".** [1]

The time of the insanity must occur at the moment of which you are committing the act. Being insane at time of trial simply creates a lot of issues.

Our law, therefore, recognises insanity as an excuse not only when it deprives the victim of his power of distinguishing the physical and moral nature and quality of the act charged as an offence but also when it deprives him of his faculty of choice so as to exclude a free determination of his will in relation to that act.

Time when insanity must exist

So far as regards criminal responsibility, the question is always whether the accused was so insane as to come within the exemption accorded by the law**, at the time of the commission or omission of the act charged as an offence. THE QUESTION AT ISSUE IS ALWAYS HIS RESPONSIBILTY OR IRRESPONSABILITY AT THE TIME OF THE ACT.** This raises the question of the so-called 'lucid intervals.' In such intervals one must not speak of criminal responsibility since the disease is still there. Our law does not exclude temporary insanity (*at the time of the act or omission…)* but in applying the McNaughton rules, our courts do.

[1] Mandsley, 'Responsibility in Mental Disease' (4th edition), 110.

A secondary minor offence is when the will of a person is not directed to the action.

Intoxication
There is a link between intoxication and insanity. With that being said, intoxication cannot be a defence to a criminal charge unless the person charged was incapable of understanding or volition at the time the crime was committed. The first thing you must have is when a third party has intoxicated you, whereby the intoxication is accidental in the sense that it is involuntary. Therefore, one needs to fall under the definition of insanity. Therefore, **if you are not insane, for intoxication to apply it must not be self-induced**.

Crime of Passion
The Mamo notes argues that emotional impulses resulting from violent passion do not in themselves, i.e., unless they are the offspring of some mental infirmity, afford any defence. A person who is otherwise sane will NOT be excused from a crime he has committed while his reason is temporarily dethroned **not by disease, by anger, jealousy or other passion**. This rule is, of course, subject to those special provisions of law which expressly reduce the punishment ordinarily applicable to the offence, by reason of the fact that the accused committed the act in the first transport of a sudden passion or under the influence of mental agitation in consequence of which he was incapable of reflection.
When a man's intellectual faculties are sound, but his moral sense is affected or diseased, this does not exempt him from criminal liability. **A man will not be excused because he has become so morally depraved that his conscience ceases to control or influence his actions.**

(2) <u>YOUNG AGE</u>
The child acquires the notion of right and wrong only by the passage of his growing years and the reasoning faculty develops by gradual stages. In other words, **the child does not understand the same way an adult does.**
Our law creates categories of children
Art. 37(1): *The minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission* ***done without any mischievous discretion***.

i. **Children under 14 years of age**: there is a conclusive presumption that children so young are incapable of incurring responsibility for a criminal offence. Nothing, therefore, that they do can make them liable to be punished by a Criminal Court. And the same presumption cannot be rebutted by even the clearest evidence of a mischievous discretion or discernment, for under the age fourteen years, a child is incontrovertibly deemed to be incapable of being endowed with any discretion. Therefore, children under 14 years of age are considered to be <u>doli incapax</u>

ii. **Children between 14-16 years of age**: according to our law, art. 37(2), if a minor between the ages of 14 and 16 commits an act or omission with mischievous discretion, the penalty will be decreased by one or two degrees.
Even at this age a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequences of his acts; but this presumption is no longer conclusive: it may be rebutted by evidence: for the capacity to commit a crime and contract guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgement. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient 'prima facie' proof of a guilty mind. The presumption of innocence is so

strong that some clearer proof of the mental condition is necessary. A special proof of mischievous discretion or discernment must be made whereby **it must be shown that the minor had the consciousness of the wrongfulness of his act and of its consequences**. If this proof of discretion is not made, then the child cannot be subjected to any punishment. If it is made to appear that the child acted with mischievous discretion, then he is liable to punishment, but the punishment which would normally apply to the offence is very considerably mitigated.
The reason why the full rigour of the law is not applied against a minor at this stage, notwithstanding that he has acted with discretion, is that, although he has sufficient capacity to be responsible for his acts, yet his mental faculties are immature, and his inexperience makes him an easy prey to temptation and passion.
The question whether a child has acted with discretion is a question of fact about which no legal rules can be laid down. It depends upon a moral assessment of all the circumstances of each particular case, and it cannot be answered in the affirmative unless it appears clear that the minor has acted with the consciousness of the wrongful and unlawful character of his deed, or, in other words, with a guilty knowledge that he was doing wrong. The onus of providing this lies naturally on the prosecution, inasmuch as such guilty knowledge is an essential condition for attaching criminal responsibility to the agent.

iii. **Children between 16-18 years of age**: according to our law, art. 37(2), *"…in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees."*
At sixteen a minor comes under full criminal capacity, that is to say, he is presumed by the law to be 'doli capax', capable of distinguishing good from evil and is, therefore, with respect to his criminal actions, subject to the same rule of construction as others of more mature age. But for the purposes of punishment, the law still extends to minors who have not completed the age of eighteen years, a privileged treatment.

Responsibility Vs Punishment
Can a 13-year-old be found responsible for homicide? One must keep in mind that punishment and responsibility are two different things. When it comes to responsibility, the child cannot be taken to court irrespective of what he does. Moreover, whilst in the past the law used to divide minors in the categories of under 9, and 9-14, nowadays, the law says that at the age of 14 you absolutely cannot commit a crime.

Mischievous discretion Vs Intent
Another distinction one must make is between mischievous discretion and intent. Mischievous discretion is awareness that the child knows what is right and wrong and notwithstanding that the child has decided to exercise this discretion and do wrong. With that being said, we are not applying the traditional notions as this is a child. Therefore, this is not a fully blown criminal intent but a basic understanding of what is right and what is wrong.
Juris tantum presumption is a rebuttable presumption is that the child is *doli incapax*. This time the presumption has changed from irrebuttable to rebuttable – exempt from responsibility until proven that the child acted with a mischievous discretion and if this is proved the child will be held for his/her actions.
Mischievous discretion applies ONLY from 14-16 since it is lesser than a criminal intent.

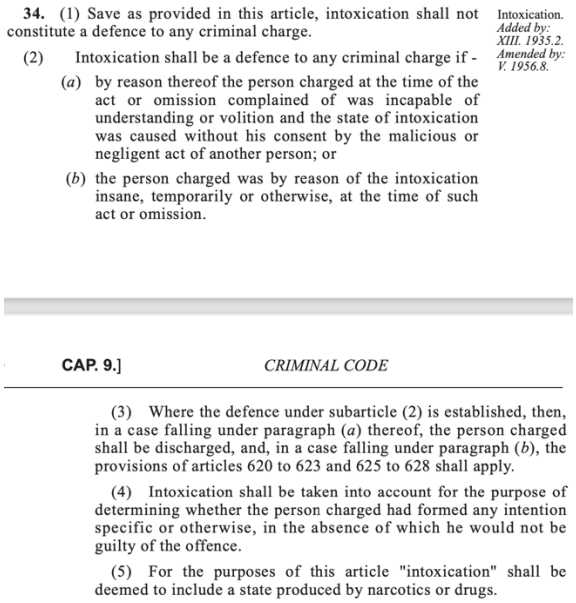
Between 16-18 there is an irrebuttable presumption that the child is now *doli capax* meaning that the child is fully capable of forming a criminal intent. In this way, there can be no question that you can form criminal intent and be held responsible for your actions. With that being said, one does get a reduction in punishment.

Mamo notes creates defences such as necessity which is not a defence in our legal system. Another defence is losing a lot of favour – defence of reverential fear – it used to apply in households (the concept of the head of the father who is obeyed out of fear) and hierarchy in a structure such as a general ordering a soldier to do an act that is criminal. Mistake of fact and mistake of law – these somehow still linger somewhere in our legal system. Mistake of law is when you don't know of the existence of the law. Now it should never be a defence in the sense that one of the fundamental principles is that ignorance of the law is no excuse. This is why every piece of law is published in the government gazette – an official notification to the general public that that law exists. Mamo gives one extreme example of when you could come with this as a defence which does not apply to us today due to technology.
Our law does not speak of old age.

(3) INTOXICATION

The abuse of alcohol by persons may bring them under certain circumstances within the category of insanity. In other words, insanity – perhaps of a temporary kind – may be induced by the direct effects of alcohol. Short of the condition of insanity, **drunkenness produces confusion of mind,** of various degrees according to the amount of alcohol taken and other circumstances.
Mr. Justice Harding points out "if it (drunkenness) produced frenzy or insanity (dementia affectata) then, semble, it could be pleaded under Section 34 which exempts a person from punishment if, at the time the act was committed, he was in a state of frenzy or madness."
The principles laid down in Continental Jurisprudence, distinguishing between accidental and voluntary intoxication, and, in the latter case between habitual and pre-ordained intoxication.

Article 34 of the Criminal Code



34. (1) Save as provided in this article, intoxication shall not constitute a defence to any criminal charge. Intoxication. *Added by: XIII. 1935.2. Amended by: V. 1956.8.*

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

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

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

(3) Where the defence under subarticle (2) is established, then, in a case falling under paragraph (*a*) thereof, the person charged shall be discharged, and, in a case falling under paragraph (*b*), the provisions of articles 620 to 623 and 625 to 628 shall apply.

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

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

These provisions follow the English Law of Criminal Responsibility in the case of drunkenness as authoritatively declared by the House of Lords in the case Director of Public Prosecution v. Beard whereby the judgement stated that "if actual insanity in fact supervenes even as a result of alcoholic excess, it furnishes a complete answer to a criminal charge as

insanity induced by any other case" and that "merely establishing that the mind of the accused was affected by drink, so that he more readily gave way to some violent passion, does **not rebut the presumption that a man intends the natural consequences of his acts**."
The judgement further points out that there is a distinction between the defence of insanity in its true sense produced by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, and the test of criminal responsibility, which is applied to the former, shall not be applied to the latter defence.

Maltese legislation

(1) Save as provided in this article, intoxication shall not constitute a defence to any criminal charge. The first rule is that ordinary intoxication does not excuse the commission of any criminal offence. An offender under the influence of intoxication derives no benefit from a disability voluntarily contracted and is regarded as **equally answerable to the law as if he had been sober at the time**. The justification for this rule is that law cannot allow any wrong act to be an excuse for another.
Kenny: "the gross negligence which has caused the fatal collision is punishable not only in a sober driver but also in a drunken one. And, if a man, when excited with liquor, stabs the old friend whom he never quarrelled with when sober, or steals the picture which never attracted him before, it is no defence to say that 'it was the drink that did it'.
Certain codes, such as the Italian Penal Code, impose an increase of punishment in respect of crimes committed in a state of drunkenness. Our law has not imposed any such aggravation.
The general rule remains that **intoxication is no excuse for crime**. This is subject to exceptions:

(2) Intoxication shall be a defence to any criminal charge if –
  (a) by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person; Intoxication does afford a complete defence when it is purely 'accidental' (caused without the consent of the accused by the malicious or negligent act of another person), provided that, by reason of such intoxication, the accused, at the time of the act or omission complained of, was incapable of understanding and volition. Therefore, if a man is, without his consent, made so drunk as to be incapable of distinguishing right from wrong to appreciate the nature and the quality of his act or to know what he is doing, he will not be liable to be punished for any offence committed by him under the influence of such intoxication.
  Therefore, 2 conditions must be satisfied in order to EXCLUDE responsibility: the intoxication must be (1) 'accidental' & (2) 'complete' (rendering the person for the time unconscious of his acts or incapable of understanding and volition). The latter is crucial for is notwithstanding that the agent was drunk and that drunkenness was accidental, he nevertheless was still capable of controlling his conduct, of knowing what he was doing and of knowing that what he was doing was wrong, the drunkenness will not afford him any defence. It may, at most, be taken into account in mitigation of punishment.
  (b) the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission. This exception is where at the time of committing the act or making the omission, the accused was, by reason of such intoxication

> insane, temporarily or otherwise, to such an extent as to be **incapable of knowing that such act or omission was wrong or of knowing what he was doing**. Therefore, it is only **mental derangement of the degree and intensity required by law** as is the case with any other form of insanity. Therefore, in this case, it is immaterial whether the drunkenness was voluntary or involuntary. A man is **not liable to be punished for any offence perpetrated by him under the influence of insanity** even when this is produced by frequent intoxication or drunk habits. A mad man is to be treated as such, although his madness is only temporary. Thus, 'delirium tremens' caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for an act committed by him while under its influence.
>
> The argument that the insanity has originated in voluntary misconduct and, therefore, should still call for penal repression, is clearly fallacious. Regard should properly be had to the time when the offence was committed. If at this time the agent was irresponsible by reason of his insanity, the original cause of such insanity is irrelevant for the purposes of criminal liability.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence. We have already seen that all wilful crime generally and, exceptionally, certain contraventions, require the concurrence of a wrongful intent and that some particular crimes require a specific intent. Now intoxication which so obscures the mind as to render the person incapable of forming the requisite specific or generic intent or which shows that he did not in fact form such intent, is a defence to the offence charged: it affords a defence for the 'actus reus' by being evidence that no guilty state of mind existed. Thus, intoxication which does not avail the defendant under the two exceptions already discussed, because it was not 'accidental' and did not result in insanity, may yet afford him an answer to the offence charge by negativing the existence of the requisite intent without which there cannot be that offence. In these cases of absence of the indispensable intent as aforesaid, intoxication excludes liability for the particular offence charged, of which such an intent is an essential ingredient: IT DOES NOT, HOWEVER, NECESSAIRLY EXEMPT THE DEFENDANT FROM ALL LIABILITY. Thus, a drunken man's inability to form the specific intent to kill or to put the life of another person in manifest jeopardy at the time of committing a homicide may, in appropriate circumstances, reduce his crime to the lesser offence of causing grievous bodily harm from which death ensues which offence does **not require a specific wrongful intent**, or the offence of involuntary homicide which **does not require any intent at all**.

Finally, the same applies to mental or bodily conditions caused by the drinking of narcotics or exciting drugs or their hypodermic injection.
Intoxication is a relative term & therefore, it is imperative when intoxication is pleaded as an excuse for a criminal offence, that the whole facts must be laid bare before the Court.

(4) SELF-DEFENCE

In a justification scenario, you do not commit a crime.

Section 224

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

For clarity, when is homicide or bodily harm is 'ordered or permitted by law', this refers to the death penalty, of course, when at a time when it was still permissible. Nowadays, capital punishment has been repealed.

The common-sense basis of this justification is obvious. Every person has a natural inherent right of personal security, consisting in the enjoyment of his life, his body and his limbs. Where the State cannot intervene to protect him, on account of the time or place in which the aggression takes place, every person is entitled to resist by force any wanton aggression. There repelling of aggression by force is a natural instinct; Hobbes says, "no human law can oblige a man to abandon his own preservation." It would not only be inhuman but also futile for the law to lay down any other rule save this: that it is the right of every person to use his strength for his own preservation (self-defence). Indeed, civilised laws have not only laid down this rule but have sanctioned the use of private force even in the defence of others from unjust aggression, and when we say 'others' this is anyone who needs one's protection.

Where the action is constrained by some external force or violence, the will of the agent, far from concurring with the deed, loathes and disagrees with what the agent is obliged to perform. Blackstone says: "As punishments are only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion."

Let us start by considering the state of necessity. The state of necessity may arise where owing to an accident or force majeure, a man finds himself in the necessity, in order to preserve himself, of injuring another person who is not guilty of any wrongful act towards him. The classic example of this would be 4 men find themselves, having survived a shipwreck, with no food or water for numerous days and one is killed in order for his debris to be fed off of. The justification of legitimate defence, on the other hand, arises where **a man repels by force the violence or aggression of another man against whom precisely the act**

of the agent is directed. Our Criminal Code expressly mentions this justification only in connection with homicide and bodily harms in section 223.

Article 223: The first element of self-defence is a threat. Section 223 of the criminal code states that no criminal offence is committed when you act lawfully, or act in the case of actual necessity in self-defence or the defence of someone else. Of central importance here is the phrase *'in cases of actual necessity'*.

Cases of *actual necessity*:
Article 224 (a): in the case of having an intruder at night, that person's assessment of the situation is different as the level of apprehension is different. At night, one does not have the luxury of seeing what is going on, so the law treats the defence here as one of actual necessity.
Article 224(b): the reference to 'theft and plunder' here suggests a particularly violent conduct in one's premises. Of course, shooting an intruder simply because he is an intruder is not justified. The intruder's demeanour must be one of theft coupled with aggressiveness and plunder. Therefore, the defence is justified when the person is not only stealing but also creating a level of violence instilling a fear of one's life in the person being robbed.

Article 224(c): deals with all cases where on is acting in defence, either of oneself or of another, in the case of sexual assault.

But these 3 sub-articles raise the question, what establishes the threat? If one manages to prove that he acted due to self-defence, he will be **completely exempt** from criminal responsibility. In order to prove this defence, however, certain elements need to be proven: Action suffered by the person pleading self-defence/the evil threatened must be:

(1) **Unjust:** this requirement fails, for instance, when the evil threatened is lawful, that is commanded or permitted by the law, e.g. a man who resists by force the Police who, in the execution of their duties, proceed to his arrest.
(2) **Grave**: the act of defence must have been only in order to avoid consequences which, if they had followed, would have inflicted upon the person 'irreparable' evil (that evil **which threatens the life, the limbs, the body or the chastity of an individual**). Therefore, the threat we speak of in self-defence has to be serious. One can never claim self-defence when the threat against that person is frivolous. Moreover, mere interference with property will not usually justify a homicide or a bodily harm. Such an interference would have to be violent in order for such a justification to arise. The point being made here is that there has to be a reasonable apprehension of danger to life or personal safety. The 'gravity' of the aggression must be understood in relation to the defensive reaction and to the means at the disposal of the agent.
(3) **Inevitable** (could not flee): the accused must prove that the act was done by him to avoid an evil which could not otherwise be avoided. In other words, the danger must be:
    (a) sudden (not pre-warned): if the danger was anticipated with certainty, a man will not be justified who has rashly braved such danger and placed himself in the necessity of having either to suffer death or grievous injury or to inflict it.
    (b) actual: if it had already passed, it may, at best, amount to provocation or, at worst, to cold-blooded revenge, and not to legitimate defence. It if was merely apprehended, then other steps might have been taken to avoid it. This means that the person is being threatened actively at the moment in time the offence is

committed. Therefore, if the aggressor walks away and the agent acts when the aggressor is walking away, that does not constitute self-defence.

(c) absolute (could not be avoided at all costs): at the moment, it could not be averted by other means. There is always the implication to run away when possible.

If all elements are satisfied, the person pleading self defence would have a successful plea. In the absence of these, a plea of legitimate defence cannot be successful. If any of those elements are exceeded, e.g. person manages to prove that the actions were unjust, grave but does not show they were inevitable, rather than self-defence per se, excess of self-defence will exist.

Therefore, in deciding whether there was actual necessity of self-defence, the test should be 'subjective'. The danger against which the accused reacted should be viewed not necessarily as it was in truth and in fact, but rather as he saw it at the time. So, if a person believes honestly and upon reasonable grounds that either his life or that of someone else is in imminent peril and that his act is necessary for preservation, even though it wasn't, the act is justified.

However, he must also show that the action he rebutted is **proportional** to the action he suffered. This is what is known as the 'proportionality test'. In other words, in order to obtain full justification, the means adopted to ward off an apprehended danger must be proportionate. Thus, a person assaulted is not justified in using firearms against his assailant, unless the assault is so violent as to make him consider his life to be actually in danger. This has to be reasonable too. A man who shoots the person who punched him cannot argue that he thought his life was in danger. But there again regard must above all be had to the sate of mind of the victim of the aggression. It is not given to the general run of men to keep a calm and balance judgement in the face of a serious and imminent peril and, therefore, miscalculations and errors of judgement under such circumstances are inevitable.

In the case of self-defence, provided that all the above-mentioned elements are satisfied, the person is held to be criminally responsible but excused in terms of law and hence punishment would be greatly diminished in justifiable homicide or bodily harm whereby no offence is considered to have been committed. 'Justified', here, is not an English word but a legal term meaning that no offence is committed wherever you act in a justified manner and the justification is established in law as we have already seen in terms of articles 223 and 224. There is also notion of **excuse or excusibility**. In this situation, one does commit an offence and is held responsible, but the law believes the circumstances are such that you will get a reduction in punishment. In terms of excusability, a person is held responsible and found guilty, but **the punishment is reduced**. Excusability is dealt with in section 227 of the Criminal Code. Therefore, in all cases of excusability one **does** commit a criminal offence.

Self-defence is a justification for a crime. For justification, it is essential that the reaction that one takes is proportionate to the threat. When self-defence becomes disproportionate, then section 227 (d) might be of note. The moment in which you do overreact you stop having a justification, so you move away from section 223. The first few words of 223 are 'no offence is committed' so there is full justification, no criminal responsibility and no punishment when you are acting when the homicide or bodily harm is imposed by law or accepted by law. The moment one overreacts, we move away from article 223 and there is no more justification.

Paragraph (d) of section 227 creates a safety net of 223 as when overreact you are granted an excuse at law, meaning that there is a reduction in punishment.

Issues of proportionality
Article 223 doesn't speak about proportionality, but it is an unwritten rule in self-defence and the fact that there is Article 227 shows this. Therefore, your reaction has to be proportionate to the threat. With that being said, there are situations where you tend to overreact for various reasons. Disproportionality occurs when you have a big divide between the action and the threat for example fist fight v. gun. This all depends on the facts of the case.

Excuse versus Justification
In excuse, you are found guilty, but you get a reduction in punishment; circumstances are taken into consideration – Article 227. In justification, no offence is committed.

Proviso of Article 227(d): You are honestly acting in self-defence even if objectively your life was not in danger and can prove this to the jury – *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.*

227. Wilful homicide shall be excusable -

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

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

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

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

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

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

<u>Wilful homicide</u>
(a) & (b) = liable for imprisonment for a term not exceeding two years
(d) = liable to imprisonment for a term not exceeding twelve years

<u>Wilful bodily harm</u>
Depends on the extent of the gravity caused by the offence.

Explanation of each sub-article

(a) Loss of self-control as a result of provocation. Ordinarily, one would not act in the same way as he/she does upon being provoked. Provocation results in self-control due to strong emotions, namely anger. In order to claim provocation, one must claim that a reasonable man would have acted in the same way if provoked.
(b) When repelling someone from gaining access to your property. The court/law expects that how you react is different during the daytime.
(c) You're not fully apprehending the consequences of your crime and not of your act. 'Ordinary temperament' – the reasonable man – embodies the average reasonable man in society.
(d) Where you act disproportionately to the threat – if you do so, you move away from Article 223 and fall under Article 227(d). If you can show that the overreaction was fear or fright or taken unaware than your excuse remains, but you will not be punished – remaining in Article 227 found guilty but not punished.

Incapability to reflect relates to the consequences to the crime. Notwithstanding the frame of mind you are in, you are acting in a way in order to achieve what you want. However, it is affecting your capability to reflect, but this must be in relation to something else, not to what you are doing.

(5) CRIME OF SUDDEN PASSION/PROVOCATION

Article 227(c) – Crime of Sudden Passion

> (*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;

Therefore, in order for a Crime of Sudden Passion to be excused it must satisfy:

1. **The person is acting under the first transport of a sudden passion or a mental excitement**: *'Acting under the first transport'* refers to the first time you feel this way. *'Passion'* can be understood as anger and *'mental excitement'* refers to agitation.

2. **As a consequence, whilst committing the crime he is incapable of reflecting as a result of heat of blood**: It is also imperative according to law that this transport of anger and agitation is of a certain level that it must **produce the effect of rendering you incapable of understanding the consequences of your actions**. This means that one loses his self-control to the extent that he fails to see the natural consequences of his actions. He would realise the action he is doing, but possibly his brain hasn't realised what the aftermath of his actions will be in that instantaneous moment when the person has been overcome by strong emotions.
3. **A person of ordinary temperament would have also been seized of the capability to reflect given the same circumstances**: 'Ordinary temperament' refers to the

> reasonable man. Whenever we speak of 'the reasonable man', we refer to the concept of the *bonus paterfamilias* who, under Roman Law, was the good, responsible head of the family. A person of ordinary temperament in the situation would have also lost his self-control in this situation of sudden passion.

Therefore, what the law is saying here is that the person acted with the intent to kill but the reason why he is acting in such a way is not the result of say, a premeditated plan to kill but simply because of the heat of blood. Therefore, a crime of sudden passion still falls under wilful homicide, but it shall be excusable if it satisfies the conditions laid down in section 227(3). Here, temporary insanity is excluded. Heat of blood is not the same as temporary insanity since here, the person **knows** what he is doing but is **incapable of reflecting** on the consequences of his actions. Therefore, here, his ability to reason comes missing. Moreover, in order for a crime of sudden passion to be excused and therefore, fall under article 227(c), any reasonable man, any man with ordinary temperament, would have too lost control in the given circumstances.

Must the victim provoke the accused for a crime of passion? In a case of cheating, for example, the partner would not want to provoke the accused as he would not want to be caught. The accused could be provoked by a situation, resulting in the heat of blood and the incapability of reflecting.

Mamo, when speaking of intoxication, argues that emotional impulses resulting from violent passion do not in themselves, i.e., unless they are the offspring of some mental infirmity, afford any defence. A person who is otherwise sane will NOT be excused from a crime he has committed while his reason is temporarily dethroned **not by disease, by anger, jealousy or other passion**. This rule is, of course, subject to those special provisions of law which expressly reduce the punishment ordinarily applicable to the offence, by reason of the fact that the accused committed the act in the first transport of a sudden passion or under the influence of mental agitation in consequence of which he was incapable of reflection. When a man's intellectual faculties are sound, but his moral sense is affected or diseased, this does not exempt him from criminal liability. **A man will not be excused because he has become so morally depraved that his conscience ceases to control or influence his actions.**

Attempt

What is an attempt?
When you **try & you fail**.

When speaking generally, two elements are essential to constitute a crime, i.e. the 'mens rea' and the 'actus reus'. Though the 'actus reus' is thus necessary, there may be a criminal offence even where the whole of the particular 'actus reus' that was intended has not been consummated. The law punishes acts that constitute only a commencement of the execution of a crime.

This is an important principle in our law because in virtue of this principle you can be held criminally responsible **even when you have not completed a crime**.
Therefore, in such cases, the individual tried & has failed. A crime was not committed but trying alone constitutes punishment. What is to be noted is that **you are not punished for committing the crime** and that **it is not any form of trying & failing** which will make you responsible & punished.

What is difficult, when it comes to attempt, is trying to distinguish the moment in time in which you start becoming responsible for your actions. Moreover, Article 41 of the Criminal code is very clear as to the moment in which you are found guilty of an attempt.

Article 41

41. (1) Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by a commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction -

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

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

(2) An attempt to commit a contravention is not liable to punishment, except in the cases expressly provided for by law.

An attempted offence occurs when one **manifests his/her intention by overt acts**. These acts would be preparatory acts, which are then to be followed by a commencement of the execution of the crime. This distinction between **preparatory acts** and **commencement of the execution of the crime** is found in the law. One is not punished if in the case of preparatory acts, as they remain innocent acts. Therefore, there has to be **COMMENCEMENT OF EXECUTION** in order for one to be held criminally liable for attempt.

Three elements are essential to constitute a criminal attempt:

A. An **overt act manifesting the intent to commit a crime**.
B. A **commencement of the execution** of the crime, and
C. The **non-completion of the crime** by reason of **accidental circumstance independent of the will** of the offender.

In this way, section 41 of the Criminal Code requires that **the individual has started committing the crime**.

A. And overt act manifesting to constitute a criminal attempt

- Every wilful crime has its first origin in the mind of the delinquent, but no man can be punished for his guilty purpose (the guilty mind by itself does not give rise to criminal liability), save in so far as they have manifested themselves in overt acts which proclaim his guilt.
- The guilty mind must be manifested in external conduct that liability may begin.
- There must be some external, overt act but at the same time, **such act must be done with intent to commit a crime**. The existence of this intent is of the very essence of the attempt.
- The act in itself, may be perfectly innocent, but is deemed to be criminal by reason of the **purpose** with which it is done.
- The act must manifest a clear, specific intent, to commit a determinate crime.
- Therefore, it is necessary to show that the agent had formed an intention to commit a specific crime, so that no doubt may remain as to the crime which he contemplated.

B. A commencement of the execution of the crime

- It is not every manifestation of this criminal intent by an overt act that makes a man guilty of a criminal attempt.
- The law requires that such an overt act **should be followed by a commencement of the execution** of the intended crime.
- Although every attempt is **an act done with intent to commit a crime**, the converse is thus not true; **every act done with this intent is not necessarily an attempt** for it may be too remote from the commission of the crime contemplated to give rise to criminal liability notwithstanding the criminal purpose of the doer.
- To intent to commit a crime is one thing; to get ready to commit it is another; to try to commit it is a third.
- Every intentional crime involves 4 distinct stages: intention, preparation, attempt, and completion.
- Action in pursuance of the intent is not commonly criminal if it does no more than manifest the 'mens rea', nor if it goes no further than the stage of preparation.
- This **distinction between acts of 'preparation' and acts of 'execution'** is of fundamental importance in the theory of criminal attempts. In practice, such distinction is often most difficult.
- Many argue that it is almost impossible to devise a general formula which could mark off with precision the dividing line between preparation and attempt.

The biggest problem we have in trying to establish what is a criminal intent is **how to distinguish preparatory acts from the commencement of the execution of a crime**. The question is when and how, what tool and guides do we use to distinguish these two. How then, are we to draw the line which separates immunity from guilt? What is the distinction between preparing to commit a crime and attempting to commit it? How far may a man go along the path of his criminal intent and yet be safe if the occasion fails him? This is where we require jurists to help us. To help us understand better, we look at the theories of Carrara. These theories try to objectively determine between preparatory acts and commencement of execution.

Carrara gave us 2 theories:

1. **The theory of ambiguity or unambiguity**: at first, this eminent jurist based the distinction on the 'ambiguous' and 'unambiguous' character of **the act itself**. In other words, his theory distinguished between preparatory acts and attempt on the basis of their ambiguous or unambiguity of the character of the act itself. His principal focus is at looking at how clear one's acts are to determine how innocent his/her acts are. An act which is in itself and on the face of it innocent, that is, not necessarily referable to a specific crime or to any crime at all, cannot be an act of execution, however much it can be an act of preparation. But preparatory acts may be either absolutely or conditionally preparatory. In the case of the former, your actions are innocent on the face of them. They are those acts from which the character of 'commencement of execution' is absolutely absent; they do not in themselves expose the right protected by the law to an 'actual danger'. Therefore, even if such act was directed to the commission of the crime, one cannot be punished for it. On the other hand, conditionally can still be preparatory but in certain cases they become a commencement of the execution of a crime. They are considered to be conditional when, with reference to the particular criminal intent of the agent, they represent a 'commencement of execution' of the crime and begin to expose the rights of others to an actual danger but must nevertheless be considered as merely preparatory in view of their ambiguous character and allowed to go unpunished because it is not certain that they were directed to the commission of a crime. This follows that if they are accompanied by such material circumstances as manifest their undoubted direction to the commission of a particular crime, they can rightly be punished as an attempt. The acts are themselves evidence of the criminal intent with which they are done; they bear the particular criminal intent with which they are done. So, the absolutely preparatory are **innocent acts that do not raise any suspicion**, whilst the conditionally preparatory can be of two - they are acts **raising some suspicion** but **remain ambiguous**. In the case of conditionally preparatory, there remains uncertainty as to whether your action is actually being done in furtherance of a crime because there are a lot of gaps. This theory is very **subjective** and **relies a lot on opinion**, **perspective**, **subjectivity**, which is a bad thing in court. You will end up in difficult arguments to no end. The theory was **inadequate** with regards to its practical application, and it created uncertainty.
   In short – he drew a distinction between preparatory acts and commencement of execution based on the ambiguity or otherwise of your actions to see whether they are separate and distinct from or in any way linkable to a particular offence. It makes sense because it is quite flexible, but in practice it will never work. Therefore, this theory was abandoned and was abandoned also by Carrara himself who gave us a second theory.

2. **The second theory**: Instead of using the ambiguity or unambiguity of one's actions, Carrara instead identified **4 things or persons**. On the basis of these, then he gave us his theory of attempts.
   The translation: preparatory acts are those acts which extinguish themselves or stop with, the primary active subject and the secondary active subject of the crime. In principle, he has distinguished 4 subjects whereby if it is within the first two you have acts of preparation, if you fall on the third or the fourth you will have an attempt or consummated crime.
   By way of illustrating his theory, Carrara takes the case of a man who, with the intent of committing the rape of a girl, has broken down the door of her house or gagged her maid. These acts, the writer says, constitute an attempt in as much as the offender has already thereby **committed a violation of the rights of others**.

He is distinguishing between these 4 following persons/things:

1. **Primary active subject** – the offenders
2. **Secondary active subject** – the instruments/means used by the offenders to commit the offence
3. **The passive subject of the attempt** – this represents all the persons and things against whom and against which violence is used or there is a violation of rights which violence or violation of rights do not constitute the consummated offence but, against whom or which this violence or violation had to occur in order to allow the offenders to commit the offence.
4. **The passive subject of the consummated offence** – the parsons or things against whom violence is exercised or there is a violation of rights which this time constitutes the consummated offence.

The first two are **preparatory** and the third constitutes **an attempt** and the fourth is the **consummated crime**. This still does not solve our problems.
All of it is saying that if your actions stop with the first and the second it is preparatory; you are preparing yourself; your actions have stopped with yourself. Therefore, if my actions stop there, I am still in the **preparatory stage**.

The third stage is saying is that I am attacking, violating, exercising violence against something or someone. A violation against something or someone, however, does not constitute my intended consummated crime because, my intent was not to shoot at the bank door but to rob the bank, for example. Therefore, I have committed a violent act that does not constitute my intended crime. This violence was simply necessary for me to commit my intended crime. Here we are speaking of an **attempt**.

The fourth is when I violate the law and that constitutes my intended crime. Therefore, I have exercised violence or a violation of the law against a person or something which now constitutes the intended crime. Here we are talking about the **consummated offence**.

What are your actions vis-a-vis what you intend to do?
This is an objective theory which creates identifiable persons or things and creates a structure which can be applied to practically every single offence. This theory sometimes, will fail. This is very rare. In which case you'll need to apply logic and common sense.

- Our law does not expressly mention 'preparatory' acts; by, requiring as it does that the 'intent' to commit a crime should be not merely "manifested by over acts" but further that such overt acts should be followed "by a commencement of the execution of the crime", it is **obvious that mere preparation does not constitute a punishable attempt**.
- Rossi: in all cases there is always an act or a series of acts which alone constitute the object which the agent wants to achieve, the criminal action which the intends to perform. All that which **precedes** such action may have a more or less proximate **connection with it**, but it **does not form part of it**, for it may well take place without those antecedents or with different antecedents. It is, therefore, **essential to distinguish this action from the acts which are not necessarily connected with it and do not form an integral part of it**, these are the preparatory acts which lead up

to, but do not initiate the criminal enterprise. Preparatory acts may raise a certain amount of apprehension, but **without as yet any actual danger**.

- Luigi Masucci: so long as an overt act, whether in itself or by reason of the circumstances surrounding it, **does not clearly show that it is directed to a criminal purpose**, then, it cannot be regarded as an act of execution of a crime, because no act which in itself and in appearance is or can be **innocent** can be considered to be a commencement of execution of another offence. When, however, it appears **clear that such act was directed to a criminal purpose**, then, in order to decide whether such act represents a commencement of the execution of the crime it must be seen **whether it forms part of that series of acts** which, in their natural completeness would **constitute the actual commission of the crime**. If the act forms an integral part of this series of acts which in their completeness would constitute the crime, that act is one of execution.
- Although mere preparatory acts cannot be punished as an attempt of the crime for the commission **of which they were intended**, yet some such acts may constitute in themselves an offence '**sui generis**'.

C. <u>Non-completion of the intended crime in consequence of accidental circumstances independent of the will of the offender.</u>

- So that a man can be held liable **only for an attempt** it is, of course, essential that the intended crime should not have been already 'completed' (a crime is completed or perfect when the offender has consummated the volition of the right protected by criminal law)
- A crime may remain incomplete either because (1) it is **interrupted** or **frustrated** by **accidental circumstances independent of the will of the offender**, or (2) because of the **voluntary determination** of the offender not to complete it. It is only in the former case that the **commencement of the execution** of the crime is punishable as an attempt.
- Do you draw a distinction between when an offender <u>decides</u> not to go through with the crime and when <u>something goes wrong</u> and does not go through with it? Under our law if you voluntarily resist committing the crime, you are not punished for the attempt. Where the offender has done everything in his power to complete his criminal purpose which was, however, frustrated by some accidental cause independent of his will, he is held criminally responsible, notwithstanding that the crime has not been completed.
- According to our law, the circumstances which prevent the completion of the crime, must be, at the same time, both **accidental** and **independent** of the will of the offender.
- The accidental and casual causes which prevent the commission of the crime, against the will of the offender may be either **physical** or **moral**. The latter by which act by way of psychological compulsion upon the will of the offender compelling him to desist, **<u>though he would have wished to go on</u>**. The influences on the offender of such moral causes are purely psychological.

Impossible Attempt

- Is the possibility of a successful issue a necessary element in an attempt? Can there be a punishable attempt when the act done with intent to commit a crime is of such nature that **the completion of the crime is impossible**?
- This refers to someone embarking on a mission to try and commit an offence which is impossible, notwithstanding his/her endeavours to try and commit the offence.

- For example, if you try to kill a Dodo, that would be impossible as they are distinct. Or for example, one tries to rob a bank using a toothbrush.
- The principle: in order that there may be an attempt, there must be a possibility of a successful issue.
- **Every crime must have the potentiality of fruition.**

SUBJECTIVE ELEMENT

This school of thought holds that every attempt is punishable even if the completion of the crime by the means used was **impossible**. A man who has not only **formed the settled intent** to commit a crime but has also **manifested such intent** by external acts and, indeed, has **commenced the execution of the crime**, by means, which he thought efficient and sufficient for the purpose, deserves to be punished even though, **without him knowing it**, such means were in fact inefficient and insufficient. The agent has done all that **which he thought** necessary to accomplish his criminal purpose.

OBJECTIVE/PHYSCIAL ELEMENT

All writers who regard as more important the objective element of attempt consider the **possibility of a successful issue** as an indispensable ingredient. They argue that acts which in their nature cannot result in any harm are not mischievous either in their tendency or in their results, and, therefore, should not be treated as crimes. In the case of attempts, the **law punishes not the intent but the action**, and such action cannot be punished except in so far as it has **exposed the rights of others to an actual danger**. But an effort to do that which is impossible to achieve by reason of the means used, is a futile effort and as such **cannot produce any actual danger** which is the sole **justification for imposing liability in respect of an attempt**.

- **The inefficiency of the means**, in order to exclude criminal liability, must be ABSOLUTE.

- Carrara makes this distinction:

RELATIVE INEFFICIENCY

When the means were not in themselves capable of completing the intended crime owing to the particular conditions of the person or things against whom or upon which the criminal action was directed, or owing to the exceptional circumstances surrounding the fact, but **could well have and could complete the crime** of they had been or were used against another person or upon another thing, or if they were accompanied by different circumstances.

ABSOLUTE INEFFICIENCY

When the means used could in **no circumstances** injure the right sought to be invaded whoever or whichever the person or thing against whom or upon which they were directed. In this case, criminal liability for the attempt does not arise; and **it does not make any difference that the agent may have firmly believed that he could carry out his designs by those means**. For, it is not the **intention,** however mischievous, that gives rise to liability, but the mischievous tendency of the **over act itself** done in pursuance of such intention.
The same principle of non-liability extends to all cases in which the completion of the crime is absolutely impossible, because:

1. **The object of the crime** (i.e. the person or thing against whom the action is directed) **is inexistent** (physical impossibility).

2. **A legal obstacle prevents the completion of the crime** (legal impossibility) – i.e. a man attempts to steal a thing which, though he did not know it, was his own.

- The notion of 'commencement of execution' **necessarily implies the possibility of completing** the intended crime in the manner proposed. It cannot be said that the execution is begun if the act performed cannot absolutely lead, if completed, to the actual commission of the crime.

Voluntary desistance

- There isn't necessarily a hard and fast rule on what this means. It can depend on your actions, but it must be voluntary; the decision **has to come from within** meaning you must be the one who decides not to continue.
- A man who voluntarily gives up the criminal enterprise **though he could accomplish it**.
- If a crime is not completed owing to the voluntary desistance of the offender, then he is not liable to punishment as for an attempt but is **only liable to punishment for the acts already committed by him** in so far as such acts are characterised by the law as a crime.
- There is a **juridical reason** as well as a reason of **public expediency** for the impunity of the attempt in such cases.
- The juridical reason is that the will to commit a crime, which is of the essence of every criminal attempt, is negatived by a contrary determination of the same will of the agent and this, at a time when no actual damage or injury has yet been caused.
- The reason for public expediency is that it is in the **general interest of the community** (and of the intended victim himself) that the would-be offender should be encouraged by the prospect of impunity to desist from the further commission of the crime.
- The law does not require that the desistance should be **absolutely spontaneous**, i.e. prompted solely by repentance or returning good feeling independently by another other motive. This **does not need to be a process entirely personal to you** and that decision may come as a result of convincing or being spoken to. **Spontaneity** refers to being on your own accord.
- The law is satisfied **if the desistance is voluntary**, or in other words, if the determination of the agent not to prosecute the commission of the crime is made freely by him and not imposed upon him by external agencies independent of his will.
- The concept of voluntary desistance includes both the forbearance of the agent from doing further acts of execution of the crime, as well as the counteraction of the agent directed to undo the acts already done or to prevent their effects.
- When on the contrary, the agent has done the act or the whole of the series of acts which could normally consummate the crime but the consummation of this has been prevented by an accidental cause independent of his will, one can no longer speak of desistance but only of non-repetition if the agent refrains from returning to the attack.
- Voluntary desistance has to be distinguished from a case where you are frustrated as here you do not have a change of heart. You would have continued in your course of action, but you could not. The courses which could impede you could be physical, but it could be emotional also in the sense that you decide not to continue because you are going to get caught. Meaning you did not have a change of heart, but you are motivated from the fact that you do not want to get caught.
- Therefore, one must make this distinction: voluntary desistance which involves a change of heart Vs instances of frustration which impede you from committing the crime but had things been equal, your intent would have remained the same to commit the crime.

- For it to be truly a frustrating cause, it has to be **extraneous to you** (accidental) and **independent of your will**. If its voluntary resistance, there is **a change of heart** (you abandon your plan to continue committing the crime).
- In the case of voluntary resistance, you have an attempted crime, but ***are you punished*?** Where you voluntarily resist, an attempt has happened, but our law requires that you are not punished (indulgence) because the law wants to give a price and an incentive for offenders to stop. Our law wants to make sure crimes are not committed.
- **In the case of you being frustrated, you will be punished for the attempt you have started**. Therefore, it is important to distinguish between the two.
- Voluntary desistance removes liability for punishment in respect of the attempt, but if the acts already done constitute in themselves a crime, then the agent is liable to punishment provided for such a crime.

The various classes of offences in relation to the notion of attempt

The provisions of section 41 of our Criminal Code applies to all 'crimes' with which the notion of criminal attempt is not incompatible.

(1) Involuntary or negligent crimes: according to all writers, an attempt is inconceivable in such cases. In fact, to attempt means to direct one's act to a pre-determined end. The essence of an involuntary or negligent crime is incompatible with the definition: "with intent to commit a crime". It is true that the cause of the injurious event in crime of negligence consists in a voluntary act or omission but, this is done or made without any intention or desire to produce the event. Negligence which has not produced any harm may be punishable as an offence 'per se', but never as an attempt to commit another offence.

(2) Crimes from sudden passion:

View A

the principle which requires for the existence of a criminal attempt, i.e. that the overt acts should represent in a clear and unmistakable manner a commencement of the execution of a well-defined design, has made some writers assert that the notion of attempt is not admissible in respect of crimes committed in the first transport of a sudden passion or under mental agitation. They urge that sudden passion so disturbs the balance of the mind and so agitates the emotions that a person, acting in those circumstances, cannot form a clear and definite intention to commit a particular crime. For a man to be convicted of an attempted murder, it must be shown that his intention was positively directed to causing death or to exposing the life of the victim to a manifest danger; but where the act is committed in the excitement of a sudden passion which makes the agent incapable of reflection, and by an accident not actual harm ensues, how can it be said with certainty that such act was directed to causing death rather than to causing merely bodily harm? Nor can the intent be in these cases inferred from the 'means' used, because the inference drawn from the means used presumes a calculation which a man in the grip of a sudden passion cannot make; he just takes hold of wah the finds. The only exception to this reasoning which Carrara admits arises where the act done could not lead but to one result: in this case it need be assumes that the agent, whatever his state of mind, intended the only effect which could ensue from his act.

View B

Other writers whose doctrine is more generally accepted consider this question not as one of 'principle' susceptible to an 'a priori' general and uniform solution, but rather as one of 'evidence' to be decided in each particular case regard being had to the special facts

forming the subject of inquiry. It is not doubt difficult but by no means impossible to establish a determinate intent in a person acting from sudden passion. So, if the special circumstances of the case lead to the conviction that the agent, notwithstanding the disturbed state of his feelings definitely aims, with suitable means, at a particular crime which was, however, accidentally frustrated, he can rightly be held guilty of an attempt to commit that crime. The judge cannot attribute to the agent any intention, which is not established beyond doubt by the evidence.

(3) Crimes consisting in Omissions: the principle that there cannot be a criminal attempt unless there has been a commencement of the execution of the crime, must not be understood as meaning that an act of omission cannot constitute an attempt. **For when the inaction is the means of accomplishing a criminal design, the person who maliciously abstains from doing those acts which alone can prevent the crime**. If by an accident independent of the will of the agent, the crime doesn't fall through, he/she is without a doubt guilty of attempt.

The notion of attempt is consistent only with those crimes the commission of which requires a series of facts. An attempt is, therefore, impossible in respect of simple crimes the process of execution of which is not susceptible of division. Such crimes are complete so soon as there is a commencement of their execution. Only material crimes can be attempted.

(4) Contraventions: section 42 of our Code expressly provides that attempts to commit a contravention is not liable to punishment, unless it is expressly provided for in the law.

Complicity

There are certain offences which, by their very nature, cannot be committed without the concurrence or participation of two or more persons, e.g. conspiracy, adultery. But quite apart from these offences it often happens that **an offence which could be committed by one single person**, is, in point of actual fact, the product of the joint activity of two or more persons (*concursus delinquentium*). Complicity is when you have a plurality of persons coming together to commit a crime and who do not all materially execute the crime together. It is important to note that the accomplice cannot be the one who materially executes the act because in that case, he would become the principle, or co-principal. In the theory of complicity, you are extending the responsibility from one's actions from the principle to the accomplice.
Moreover, it is not any form of assistance which will render you an accomplice. In other words, other elements have to come into play for you to be held an accomplice.

Principal versus Accomplice

Our Criminal Code recognises only two ways of taking part in an offence, that is, either as a principal or an accomplice. One needs to distinguish the person of the principal from the person of the accomplice.
Principal: The principal is the person who actually perpetrates the offence. In other words, the principal is the person who is the actual perpetrator of the act constituting the offence. Almost always he is the man by whom this act itself is committed, but occasionally it is not so. The act may have been committed by the hand of an innocent agent, e.g. a child under nine years, ignorance of the facts etc. In such a case, the man who employs such an innocent agent or the commission of the offence is the real offender. You can have a multidate of principles whereby they would become co-principles. These are 'co-principals' (co-autori), they all take part in the **act** which constitutes the crime.
Accomplice: All other person who are involved in the crime and in any manner have assisted in the commission the crime, but who have not materially executed the crime themselves, are accomplices. These are all the others who, without taking part in the actual perpetration of the act which constitutes the offence are nevertheless concerned in the commission of such offence, in any of the ways specified by law are 'accomplices.'

General rules applicable to all forms of participation in an offence

Speaking of the subject of a criminal offence, he is the person who is the physical as well as the moral cause of the act against the criminal law: he is the person who **willed** and **committed** the offence. The notion of participation in an offence implies that while one and same is the offence committed, the subject responsible therefore are several and, consequently, there must be fulfilled **in respect of each of them**, the conditions required to constitute the subject of an offence. The two or more persons concurring in the offence must be shown to have (1) intended one and the same offence and to have (2) done something towards committing it. When this is shown, the punishment is not divided for although there is objectively only one offence, yet this is subjectively multiple, in that it reproduces itself in respect of each of the parties. The whole concept of complicity is that given that there are separate and numerous individuals who can be involved in the commission of one crime, they all ought to be punished for their involvement. So, what the theory does is it **multiplies, and therefore does not divide,** the punishment by the number of people involved in the crime even though they would not have all materially involved themselves. Since the crime cannot be apportioned, for an individual to be found guilty of the offence, the two elements of the principle of complicity must be proven. This theory helps us to extend the effects of that particular offence to the position of the accomplice.

In principle, the principal and the accomplice are liable to the same identical punishment. However, given that the law has to apply with respect to each individual, each individual must answer for his or her own actions within the context of that offence. The punishment must, therefore, likewise reproduce itself in respect of each of them. But the degree of guilt of each of the parties may vary by reason of the circumstances of the offence and is to be determined independently of that of the others engaged in the same offence. In most cases, there is a discretion – a min and a max punishment – all things being equal, the law makes no distinction form a punishment perspective between the two, but this does not necessarily mean that they are punished equally. The law says that there is no reason that just because one is a principal, and one is an accomplice means they have to be punished differently. What creates a distinction in punishment is one's **level of participation in the crime**.

From this, we may draw the two following principles which form the basis of the whole doctrine of '*concursus delinquentium*' –

1. A man may be held responsible for an offence, even though he may not have done the act which constitutes that offence, if he had done some other act which
   a. has helped towards the commission of the offence and
   b. had done the act in pursuance of a common design to commit that offence.
2. Each of the parties to an offence is liable to punishment in respect of that offence but only in proportion to his individual guilt.

The next most fundamental point is what links accomplices and principles together Therefore, a man can be said to have concurred in an offence only in so far as he (1) willed and intended that offence and (2) has done something towards its commission. This leads to the following conclusion –

(i) There cannot be a *concursus delinquentium* without a **common design** to commit a specific offence. The general principle that a man is responsible for an offence only if the act was (1) voluntarily and (2) knowingly committed by him, applies to each of the parties to the offence.

What links the two is not only that you aided the crime, which is the most obvious element to fulfil – that you have had a positive impact on the principal for him to commit the crime. Having established this, what links the two together is **the common design**. Therefore, a merely physical participation in the act without a participation in the criminal design cannot be the ground of criminal liability. In other words, no matter how effectively the act of one person may have helped another in the commission of an offence, the former is not responsible as a co-principal or an accomplice, unless it can be shown that he did the act with the purpose of assisting the preparation of that offence. Thus, if a man does an innocent act of which another takes advantage to commit an offence, that man does not in any legal sense participate in the offence. The common design is the **common intent** which both principal and accomplice have in committing the crime and therefore there can be no doubt that when the accomplice is helping the principal in his commission of his crime, he is doing it knowingly. He has acted in furtherance of that common design to commit the crime which both intend to commit. It is only when the accomplice has facilitated morally or physically the principal in the commission of the crime, provided that he has acted in furtherance of the common design, that then the concept of complicity kicks in. You require assistance, and the unwritten rule that in assisting, the accomplice has acted with common design. This common design is essential even though it is not written in the law. It is the reason why we cannot have negative participation. Negative

participation is inconceivable, there has to be active cooperation between the parties. But this notion must not be confused with complicity by positive acts of omission.
There are acts which are not in themselves evidence to prove guilty knowledge on the part of the agent.

The requirement of a common design among the parties to an offence raises the question where there can be true criminal participation in respect of –

(a) Involuntary offences (negligent offences)
(b) Offences committed from sudden passion or under mental agitation.

(ii) What links the two is not only that you aided the crime, which is the most obvious element to fulfil – that you have had a positive impact on the principal for him to commit the crime. The mere manifestation of a criminal intent without some **active proceeding to cause it to be carried out**, does not amount to a criminal participation. A defendant charged as an accomplice must be proved to have **done something** in furtherance of a common purpose, i.e. he must procure, incite or, in some other way specified in the law, encourage or assist in the act done by the principal. In order that it may be said that a man has concurred in an offence committed by another, it is necessary that **he should have done some effort for the offence to be committed**, so that a **causal connection** can be traced between such an **effort and the commission of the offence**.
From this it follows that:

(a) 'negative' participation is inconceivable. In fact, the essence of participation lies in active co-operation between the parties so that they are all joint causes of the offence. But **no man can be the cause of anything which he did nothing to bring about**. The law cannot punish anyone for their inaction: in this case, the attitude towards the crime is purely 'negative' for the individual does nothing to aid or encourage it. The bare concealment of an offence contemplated by another or a tacit acquiescence does not make the person concealing or acquiescing a party to the offence.
It must, however, be noted that there are some cases in which 'to do nothing' to prevent the commission of an offence, is in itself treated as an offence by the law. But outside such cases in which the law expressly imposes a specific duty on all citizens generally or an individual or a class of individuals to help to prevent the commission of certain offences, mere 'inaction' cannot amount to participation in the offence.
But the notion of **'negative' complicity** must not be confused with that of **complicity by negative acts of omission** which create a state of things favouring or facilitating the commission of an offence (servant omits to close the door of his master's house to let people come in and steal).

(b) Concurrence **after the fact** is impossible. All that comes after the event cannot be the cause thereof…it is **extraneous to its happening** whatever its connection with it. Such acts cannot in themselves be considered as a participation in the respective crimes. All such actions may be made punishable by the law as offences 'sui generis', but it would absurd to regard them as forms of accession to the crime.

(iii) A third fundamental rule if that participation in an offence cannot be punished unless **an offence has in fact been committed**. It does not matter whether the

> offence has been completed or has merely reached the state of an attempt. But necessary it is that **the result of the common design and the joint effort should be something in itself criminal** and punishable **at least as an attempt**, in order that the several persons concerned may be held co-responsible.
> It is true that there are cases in which the instigation or incitement to commit an offence is made punishable even though no offence has been committed as a result thereof. But this is not a derogation to the principle above stated: for the law punishes the instigation or incitement as an offence in itself in view of the danger it involves to the safety of the State or to the public good order: and not as a form of complicity.

Can you have complicity of by positive acts of omission? Here, you have a positive act of complicity through an omission – you failed to do something which you had to do to help the crime.

If A instructs B to commit the crime and B does not commit the crime, can A be charged with something? You can't have complicity not in a crime. If the actions which have been done so far are not criminal actions, then you cannot have complicity. Complicity presupposes the completion for a crime.

Having established there is a common design, in what manner can you assist a principal in committing a crime? We distinguish between two mode of complicity: moral participation in a crime and physical participation in a crime. This is a distinction which is made by all continental writers who bring within the first group all those which execute, instigate, influence or encourage the determination of the principal to commit the offence: and within the second group all those acts which aid or facilitate the material execution of the offence.

> **42.** A person shall be deemed to be an accomplice in a crime if he -
>
> (*a*) commands another to commit the crime; or
>
> (*b*) instigates the commission of the crime by means of bribes, promises, threats, machinations, or culpable devices, or by abuse of authority or power, or gives instructions for the commission of the crime; or
>
> (*c*) procures the weapons, instruments or other means used in the commission of the crime, knowing that they are to be so used; or
>
> (*d*) not being one of the persons mentioned in paragraphs (*a*), (*b*) and (*c*), in any way whatsoever knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is prepared or completed; or
>
> (*e*) incites or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact.

These provisions which specify the several modes in which a person may become an accomplice in an offence committed by another, cannot be widened by any extensive interpretation or by analogy, and, therefore, any act which does not fall within the terms of those provisions cannot be considered as an act of complicity.

Moral participation as an accomplice

Consist in words or acts which create or encourage another person's intention and determination to commit an offence.

i. **Article 42(a)**: the first and most direct mode of becoming an accomplice in this way is by giving a command for the commission of an offence. In a command situation, you have to have a command and an acceptance. The law does not specify any gift. Of course, if you have a money element, it is easier to use as evidence. The intrinsic element to be proved is the offence which is accepted by the principal and the principal works on this offer. This is the procurement or hiring of another person – the principal – to commit the offence on behalf and in the interest of the procurer or hirer. This is termed a mandate (Mandatum).

The three elements of Mandatum:

a. The order, offer or proposal,
b. The acceptance,
c. The execution.

You must have an **offer, or a proposal and an acceptance** followed by an execution. It is immaterial whether the acceptance is gratuitous or for a reward. What is essential is that there should be a compact or agreement between the mandate (the accomplice) and the agent (the principal) for the perpetration of the offence.

If the order or proposal is not accepted no question of complicity can arise.

This relationship between offer and proposal must be continued; *can you withdraw a command at any point in time (counter-order)? Will the accomplice who gave the command remain responsible if the principal carries out the plan, nonetheless?*

Scenarios:

a. The person commanded refuses but commits the crime anyway without informing the person who gave the order: If, after a refusal, the person whom the order was given or the proposal made changes his mind and, without consulting the person who had given the order or made the proposal, commits the offence, he is solely responsible, for no connection as of **cause and effect** would exist in each case between the would-be procurer and the offence and, in the theory of complicity, such **causal connection is essential** to impose on the accomplice joint liability with the principal. If the principal is not acting under the command of the accomplice, he is acting alone.
b. The person commanded does not execute the offence: If, notwithstanding the acceptance, the order or proposal is no in fact executed and no offence is committed, the would-be procurer is not liable to any punishment as an accomplice, for the simple reason that **there cannot be any question of complicity where no offence has been in fact committed or, at least attempted**.
c. The person who gives the command counters that command: if the procurer repents and actually countermands his order and the principal notwithstanding commits the offence, the original contriver will not be an accomplice.

   Therefore, you can counter a command but in order to do so there are certain conditions. The withdrawal of the order requires two elements:

   1. Must be brought to the attention of principle. If, for any cause, even if any accidental, the principal remains unaware of the revocation of the order, the fact of such revocation **will not avail the procurer**.

2. Notice of the counter-manding of the order must reach the principal in good time for the principle to stop his actions. The original contriver remains responsible if such notice is given to the principal when it is too late, because he has already completed or attempted the offence.
   Another scenario would be if person giving the command physically manages to stop the crime by going to the scene and stopping it from happening.
   It may also happen that the person engaged to commit the offence, after accepting the proposal, is unable or unwilling to carry it out himself and engages a third party to do it. It is clear that by so doing the former becomes in his turn the mandant of the latter and, therefore, an accomplice.

ii. **Article 42(b)**: the second form of complicity by moral participation consists, according to our law, in instigating the act of the principal by means of **gifts**, **promises**, **threats**, **machinations** or **culpable devices**, or by **abuse of authority or power**. These are all means which, in the eye of the law, are calculated to foster in the person instigated the will to commit the offence and to supply the necessary impulse for so doing by overcoming the natural repugnance which everyone feels to wrong-doing and to the consequent punishment. Mere instigation, unaccompanied by any of these circumstances, is not sufficient to constitute this form of complicity. In instigating, you are introducing the topic and the law requires that this must be 'pushed' by bribes, promises, threats etc (keeping in mind that the accomplice has to help in the crime). The principal cannot be seen to have acted in his own steam. **The input of the accomplice has to be determinate**. In other words, for you to be an accomplice it has to be show that without your intervention, the principal wouldn't have acted or if he did, he would have acted alone. You must instigate, and by the term instigation we understand that **you have introduced the crime in the head of the principal** and then you reinforced that instigation by a drive with a promise. In each of this, **the bribe, the promise, must be efficient**, that is to say, such as are in fact calculated to determine the principal to commit the offence.
   The essential element here, is that the prosecution will need to prove that you introduced the subject to the principal, followed it up with one of these elements and that your participation was efficient and determinate (it was the reason why the principal committed the crime).
   Analysis of Instigations
   1. '*Promises*': it is generally taught that they must refer to something which the promisor himself engages to give or to do and, which **present, at least, the apparent possibility of fulfilment on the part of the promisor**. The promise of something which, on the very face of it, is incapable of fulfilment by the promisor could not constitute a 'promise'. In such cases, one must need to conclude that the offence is committed through the uninfluenced determination of the perpetrator himself who could not have been induced thereto by promises which he knew to be absolutely frivolous, and which could not raise in him any expectation of advantage.
   2. '*Threats'*: the apprehension of the evil threatened must be real: for if the threats are on the face of them vain in view of the absolute incapacity of the contriver to carry them out, it cannot be said that the perpetrator of the offence could have been influenced thereby.

Conversely, threats of personal violence, or of death, may constitute such moral coercion as to excuse the doer of the act from all liability.

3. *'Machinations or culpable devices'*: the same may be said for these which induce in the doer such a mistake of fact as effectually relieves him of all liability. The person practising the deceit would solely be responsible for the offence.
4. *"Abuse of authority or power'*: this generally takes the form of a "command" to commit the offence. There are other ways. The extent to which obedience to superior orders may afford a defence has already been considered.
5. *'Gives instructions'*: a third mode of concurring in an offence without actually taking part in the physical parts thereof, is by "giving instructions" for the commission of the offence. An advice in general terms unaccompanied by any instructions and not referable to a specific offence would not be sufficient to constitute this form of complicity. By 'instructions' the law means information as to the place, the time, the persons and other circumstances of the offence, and directions as to the means which may facilitate the offence.

iii. **Article 42(e)**: consists in inciting or strengthening the resolution of another to commit an offence, or in promising to give assistance, help or reward after the fact. The essential differentiation between (b) and (e): in (e), **the principal already had the intent to commit the crime**, but you strengthened his determination to commit it. **In inciting or strengthening the will you must be efficient**. There is a substantial difference between inducement to commit a crime and the incitement or the strengthening of the resolution of the offender. In the case of inducement, it is assumed that the idea to commit the crime is the effect of the inducement. In the case of the incitement or the strengthening of the offender's resolution it is assumed that the idea to commit the crime is already conceived in the offender's mind, but he lacks courage to carry it into effect, and somebody else strengthens his will.

It was you in insisting and strengthening his determination to commit the crime, that he actually committed it. In other words, without your strengthening of the will the principal WOULD HAVE NEVER COMITTED THE CRIME.

<u>Promise of help to be given after the fact</u>

It is a principle of criminal jurisprudence that no one can become an accomplice in a crime after the perpetration of that crime. BUT if before the fact a promise is made of some help to be given after the fact, then that promise becomes a form of complicity because it encourages the author to perpetrate the offence. In other words, I can become an accomplice even if I offer you assistance after the crime, but this assistance had to be promised prior to the commission of the crime. Probably without my promise of assistance, you would have been too scared to commit the crime making me **a determinate factor**. You can't become an accomplice after the crime, provided no promise was made prior to the execution of the crime, because there could not have been a common design if the crime is already committed.

In all the definitions of complicity so far considered, the law does not make use of any such words as 'knowingly', 'maliciously', etc to denote that the modes or moral participation must proceed from a wrongful intent on the part of the accomplice. Nor was the use of any such words necessary. The general principle that no one is liable for any offence unless he intended the same, applies also to accomplices. But above all you cannot conceivably order

or instigate or incite a man to commit an offence unless you have the intention that it shall be committed: you cannot strengthen the resolution which another man has to commit an offence or give instructions as to how best another should commit an offence unless you are aware that that offence is contemplated and you yourself desire that it be committed.

Physical participation as an accomplice

Consist in the performance of physical acts which materially assist in, or facilitate, the perpetration or execution or completion of the offence and are referable to its physical or material element.

The essential conditions common to these forms of complicity:

(a) That the accomplice should be **conscious** of the offence contemplated by the principal and have the **intention of assisting** him in committing it.
(b) That the accomplice should have done some **act in furtherance of the criminal design** which he shares with the principal.
(c) That the act of the accomplice should have in fact **helped in the commission of the offence**.

i. **Article 42(c)**: A person who procures to another the means with which to commit an offence clearly contributes materially to the carrying out of the criminal design. But the procurement of the means is not by itself alone sufficient to constitute complicity – two other conditions must occur:
   1. The means should have been procured with the knowledge that they were to be used for the commission of an offence. The act of a man who, unaware of the criminal purpose of another, provides him with means which the latter uses to commit an offence, does not make that man an accomplice in this offence. Guilty knowledge on the part of the person supplying the weapons, instruments or other means must be clearly proved.
   2. Such means have in fact been used. The fact that the weapon must be used is a key feature here.
      Scenarios:
      a. If I give A a gun to kill B but instead B kills him by stabbing him but keeps the gun in his pocket while executing the crime? In the case of the other scenario where I give you the weapon and you did not use it but instead you leave it in your pocket and use another weapon to commit the crime, the weapon can be safely assumed to have been used. **Efficient cannot be limited to the fact that a weapon produced the result directly**, a weapon can produce a result indirectly. The weapon is offering some use, maybe a plan B, and for this fact alone, it helps the perpetrator in committing the crime because he knows that if his actions fail, he can easily pull out the weapon to finish off the crime. If the weapon was on him just in case something went wrong makes you an accomplice. It is not absolutely essential that the means provided should have fully served the precise purpose for which they were supplied. If the principal has succeeded in committing the crime without making an actual use of the weapon, the accomplice is nevertheless liable if the weapon has in any way whatsoever been of use, as by intimidating the victim or even only by giving confidence to the thief. And, likewise, this is not essential that the thief should have consummated the theft, it being sufficient that he should have attempted it.

b. What if I give you the gun but gave you no bullets because I instructed you not to fire it and you go yourself to buy bullets and shoot, am I an accomplice? The accomplice is an accomplice. With regards to the second question, our courts have shown that insofar I have given you a weapon, notwithstanding that I have given you instruction not to fire the weapon, I should have known that it may have been misused. I can anticipate that notwithstanding that I told the perpetrator he should not fire the weapon; he could very well do it. If the perpetrator does fire the weapon, I become responsible for the crime. It was clearly evident that the weapon can be used. It was foreseeable.

c. If I give A a gun to kill B but A kills B by stabbing him, am I an accomplice to murder? Where no use has been made of the means procured, even though with a wrongful intent, in or for the commission of the offence, it cannot be said that they have in any way contributed to the violation of the law by the act of the principal without the use of those means. Just as participation is by instigation or incitement is not punishable unless it has in some degree influenced the will and determination of the perpetrator of the act, so likewise participation by physical acts does not constitute complicity when it has in fact had no influence whatsoever upon the happening of the criminal event.

The main points of this provision are:

1. that I procured you a weapon,
2. the common design between the accomplice procuring the weapon and
3. the perpetrator and the weapon is so used in the commission of the crime. **Whether it was used in the way agreed or not**, it produced in the way you wanted and therefore, you become an accomplice.

ii. **Article 42(d):** is a general umbrella provision which does not limit the accomplice's actions to a particular action; the assistance could be anything material. This paragraph is wide enough to ensure that all acts of complicity are included. It includes **any material assistance** provided by the accomplice **so far as it is efficient** and has an influence on the offence. This consists in knowingly aiding or assisting in any manner the principal or principals in the acts of preparation or consummation of offences.

1. Here again it is essential that the accomplice should have a acted "knowingly", that is, with the consciousness and intention of co-operating for the perpetration of the offence. There cannot be guilty participation without proof of a 'common design' between the parties for the commission of the offence. Therefore, it a man does an innocent act of which another takes advantage to commit an offence, that man is not guilty as an accomplice.

2. The act must also have 'in fact' helped the principal in the preparation or the consummation of the offence.

When, in this form of complicity, we speak of aid given in the preparation of the offence, **we assume of course, that such preparation is followed by, at least, a commencement of the execution of the offence on the part of the principal**: THERE CANNOT BE COMPLICITY UNLESS THERE HAS BEEN AT LEAST AN ATTEMPTED OFFENCE. And, when we speak of aid given in the acts of consummation of the offence, we assume that **the aider has no himself taken an**

active part in the very act that constitutes and consummates the offence; for in that case, he would be a co-principal and not an accomplice.
Mere 'presence' may be sufficient to constitute this kind of complicity (accomplice stands outside the house while his companies are inside committing a crime) & 'words' which assist directly the commission (victim by deceitful words is directed to the place where the principal lies in waiting).

Special questions
Can there be true complicity in respect of:

a. **Involuntary (negligent offences)**

In view of the fundamental rule that there cannot be true participation in an offence unless the parties have acted in pursuance of a common design – 'knowingly' aided or abetted or in some other way as aforesaid encouraged or incited the commission of the offences by the principal, so that **the mind and the will of both of them were directed to the same offence.** Complicity does not apply for involuntary offences since there is no common design. A negligent offence is when you're failing to foresee what is going to happen. Failing to foresee what is foreseeable. Negligence arises because you fail to foresee, and of course could never have intended it because had you foreseen it, you would have intended it. You should have presumed had your standard of care been better. You should have foreseen it because other people who are more diligent than you would have foreseen it. Insofar as you are speaking of the involuntary, a situation where you fail to foresee, you can never have complicity because in complicity you have a common design which involves wanting it, intending it to happen and work together so this happens. Negligence does not have this element of intent.

b. **A crime of sudden passion?**

Make a distinction between accomplice and co-principal.
Some writers hold that complicity is impossible in respect of offences which are unpremeditated and committed in the transport of a sudden passion. This argument is that the state of mind and the feelings of the persons acting in such circumstances rules out the possibility by the existence of a common design between them. Since the time window is very small, it is not easy to become an accomplice in a crime of sudden passion. It does not mean that it cannot be the case. The opinion prevails that – as with regard to attempts – the question is not one of law but one of fact and evidence and cannot be determined by a general and abstract rule. It is not impossible that two or more persons may have formed an instantaneous common intention to commit one and the same offence, although both agitated by sudden passion. It is not necessarily a pre-concerted plan or calculated premeditation: a common purpose formed on the spur of the moment is sufficient. For example, my friend is heated in the moment and I give him the weapon.

Can there be attempted complicity?
The answer is no. We have already seen that there cannot be any question of complicity unless the offence which it was sought, to instigate, encourage or assist has in face been committed or, at least, attempted. From this, it follows that there cannot be such a thing as punishable attempted complicity. We either fulfil all the requirements of law and there is at least a punishable attempt, or we do not fulfil all the requirements of law in which you cannot be charged for attempted complicity. For example, you cannot be held liable for trying to come to an agreement or if no crime is committed. When a crime is never attempted or committed there is no complicity. When they have tried and failed to come to an agreement, you cannot be found guilty of it. You either are a complicit or you aren't. The instigation, etc., may be punishable as an offence in itself but not as an attempted complicity.

And even where the offence which it was intended to incite or abet has been actually committed, there would still be a merely attempted complicity **not liable to punishment** if **the act of the accomplice has not in fact had any influence whatsoever in regard to the commission of the offence** (remember the condition of efficiency). This does not constitute any guilt, it amounts to an attempt on the part of the person instigating etc, which does not in any way avail the principal.
(see Carrara's examples)

Complicity in an attempted offence?
Is complicity in an offence which has not been completed but has been attempted liable to punishment?
Yes, this is possible because here you have fulfilled all the requirements of complicity and the perpetrator has attempted.
A criminal attempt is punishable as an offence though it is but an incomplete or inchoate offence, and if objectively there is an offence, responsibility thereof is contracted by all those who have concurred in it. The accomplice who has effectually contributed to an event which is made punishable by law, necessarily shares the liability in respect thereof. The fortuitous event which prevents the consummation of the offence, naturally avails the accomplice as it avails the principal, in the sense of reducing his liability but not in the sense of excluding it completely.
In dealing with the subject of criminal attempts we have seen that the offender may be exempt from punishment even after committing acts which amount to an attempt, if the offence is not completed owing to his voluntary desistance. Does the voluntary desistance which so avails the principal offender benefit also his associates?
There is, of course, no doubt that if the person instigated, incited, aided or abetted, repents and gives up the criminal enterprise **before** there is any commencement of the execution of the offence, his repentance benefits also the instigator, contriver, aider or abettor. In such cases, as there would not offence committed, there cannot be any guilty complicity.
What happens when the principal offender repents and turns back but **after** he has already committed acts which objectively constitute an attempt? Opinion among the writers is divided.
Some think that even in such cases the desistance of the principal offender should avail not only himself but also his associates. Carrara, on the other hand, thinks that the attempted offence objectively subsists, and this is enough to give rise to the liability of the accomplice. The principal offender who desists in time, escapes punishment because the non-prosecution of the criminal action, is, in this respect, due to a voluntary cause…But as regards the instigator, aider or abettor, the desistance of the principal offender is an accidental cause independent of his will and, therefore, they will not escape punishment. This view appears to be the more consistent with our law.

How the desistance of repentance of the accomplice affects his own liability.
A man commanded another to commit an offence but then countermanded his order – if the agent became aware in time of the offence, he only is accountable for it. But if the person who gave the order did not make his change of mind known to the agent in time, he remains co-responsible for the offence.
Carrara (Pg 137): if that act of complicity consisted in aiding the perpetration of the offence, the effects of such conspiracy continue to subsist notwithstanding the repentance or change of mind of the accomplice.
Other writers do not concur in the view that an accomplice who have given counsel or instructions to the principal for the commission of the offence can save himself from

punishment by anything he might do to prevent the offence, unless he has, in fact, succeeded in preventing such an offence.

Is complicity in a criminal attempt punishable?

The punishment of an accomplice is similar to that of the principal. **One is punished according to one's involvement in the crime**. We have examined the rules of complicity. We have said that accomplices are punished the same way however, accomplices will ultimately be punished on their involvement in that particular crime. Granted that if the involvement of the principal and the accomplice is the same, they will get the same punishment. The punishment of each of the several persons concerned in an offence should be proportionate to the more or less important share taken by him in the commission of the offence. Moreover, accession after the fact is not a form of complicity recognised by our law. The trial and punishment of an accomplice is independent of that of the principal. So that an accomplice may be proceeded against and punished it is absolutely essential that the material existence of the offence has been established. It must be proved that an offence against the criminal law has objectively been committed (completed or attempted).

Under our law, **accomplices are liable to the same punishment as the principal offender** (this does not follow that the accomplice must necessarily in every case be sentenced to or awarded the same amount of punishment as the principal offender).

Provided that there is evidence to show that that person took a sufficient part in the offence to qualify them as accomplices.

The communicability of circumstances

If the principal is a police officer and being a police officer committing a crime, that constitutes an aggravation in punishment, does that aggravation apply to all the persons involved? What if one of you, not advising the rest carries with him a weapon. Therefore, aggravating the offence. Would the fact that one of you carries a weapon, aggravate the offence for all of you? We speak of communicability of circumstances.

> **44.** Where two or more persons take part in the commission of a crime, the circumstances which refer solely to the person of any one of them individually, whether he be a principal or an accomplice, and which may exclude, aggravate, or mitigate the punishment in regard to him, shall not operate either in favour of, or against the other persons concerned in the same crime. — Personal circumstances not communicable.
>
> **45.** Where two or more persons take part in the commission of a crime, any act committed by any of such persons, whether he be a principal or an accomplice, which may aggravate the crime, shall only be imputable - — Real circumstances when communicable.
>
> (*a*) to the person who commits the act;
>
> (*b*) to the person with whose previous knowledge the act is committed; and
>
> (*c*) to the person who, being aware of the act at the moment of its commission, and having the power to prevent it, does not do so.

When are certain circumstance communicable to other parties in the crime and when are they not? The law distinguishes between **personal circumstances** and **material/real circumstances**. In the case of personal circumstances, these are not communicable to other parties in the crime and therefore, they affect only that particular person. Material circumstances committed by one individual, on the other hand, can be communicable to the other parties in the crime.

Personal circumstances: a personal circumstance applies with the identity of the particular person; it is a characteristic of the person such as being a minor child, a police officer and so on. That characteristic is not communicable to other parties in the crime, it is particular to that person as stipulated in article 44. Personal characteristics, which are inherent to that particular individual, do not apply in favour or against others involved in the commission of the crime, being principals or accomplices.

Material circumstances: material circumstances are circumstances which are an essential ingredient of a particular crime or an ingredient which tends to aggravate a crime. For instance, being a relative in the case of a sexual abuse case is an aggravation. The essential ingredient here is bodily harm on relatives. In other words, the fact that you are relatives is an essential ingredient of the crime. You must have material conditions which facilitate the commission of the crime, and they are an essential element of the crime itself. These circumstances revolve around the actual offence or an aggravation of the offence. In this particular case these circumstances which help or are essential to establish/aggravate the crime can be communicable to the other members in your criminal enterprise and this is dealt with in article 45.

Let's say you plan to rob a house with your friend, the owner walks in and without having previously agreed to, your friend gets a gun out, is about to shoot, and you run away instead of stopping him: In order to defend your position and not be held responsible, the prosecution has to show that you had the power to prevent it and did not do so say, by pulling his hand. You have to show that you were in **an impossibility to prevent it**. Only then would the circumstance not be communicable to you. If it is shown that instead of running, had you stopped him, provided that you could of, that would become communicable to you. Not giving your consent is not enough – you did not actively intervene to stop it.

Conspiracy

In conspiracy, you have an agreement between two or more persons to commit an offence.

48A. (1) Whosoever in Malta conspires with one or more persons in Malta or outside Malta for the purpose of committing any crime in Malta liable to the punishment of imprisonment, not being a crime in Malta under the Press Act, shall be guilty of the offence of conspiracy to commit that offence.

Conspiracy. *Added by: III. 2002.18.*

Cap. 248.

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

(3) Any person found guilty of conspiracy under this article

shall be liable to the punishment for the completed offence object of the conspiracy with a decrease of two or three degrees.

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

There is no universal consensus to say this is conspiracy and this isn't. We agree that conspiracy is agreement, but the question remains as to how detailed this plan must be, and what elements you want to see to say you are guilty of conspiracy. In other words, how is the line drawn between simply agreeing and planning?

As established in the Theory of Criminal Liability, for you to be held criminally responsible, you must always satisfy the *actus reus* and the *mens rea*. The mens rea of conspiracy is the **intent to agree to commit something illegal**. However, the actus reus remains a question mark. Perhaps to understand why this is so, one most firstly delve into the history behind conspiracy in Malta. The construction of the offence of conspiracy, under our law, will not fit perfectly into the theory of Carrara because it was not designed to do so since it originates from the British. Therefore, here we are importing a foreign concept into our concept trying to make it fit. This is precisely why one encounters difficulty when trying to find the *actus reus* in conspiracy.

It is important to note that conspiracy is a more recent crime in the sense that it became a general offence in 2002. By way of a notion, it has been with us for a long period of time but was reserved to certain offences and not all. Today, **conspiracy can be committed with respect to any crime**, provided the offence is an offence which **attracts imprisonment in excess of 2 years**. Therefore, the general offence of conspiracy now applies generally across the board.

Traditionally, this notion has always come to us from UK law. Our definition was slightly different to that of the UK, however, as seen in section 48A of the Criminal Code. The conspiracy in article 48A(2) states that the conspiracy is completed '*from the moment in which any mode of action whatsoever is planned or agreed upon between such persons'*. Therefore, our law in terms of article 48A adds an additional requirement to what you would

otherwise find in English common law, and this lies in the fact that persons involved must also agree on **the mode of action whatsoever that is**.

It is clear that for the purposes of conspiracy, you must show there is both:

(1) an agreement between two or more people AND
(2) that they have agreed on a mode of action (the manner in which that offence is going to be committed).

Conspiracy should also satisfy the *actus reus*, *mens rea* requirement otherwise you cannot find anybody guilty, but we also admitted that in establishing a conspiracy, it is hard to do so with the acts reus, mens rea principle. This stems from the fact that this notion has come from a legal system that does not endorse the concept of actus reus and mens rea the way we do.

Conspiracy is thought of as a principle and not as a substantive offence. It is true that **in itself it is an offence but is more than that**. The agreement of two persons is not necessarily an offence but becomes so because **they agree to commit a crime**. Conspiracy is intrinsically linked with another crime. Conspiracy extends your criminal responsibility to a moment in time which previously was not considered to be an act of criminal responsibility. In the case of attempt, there is the commencement of execution of a crime which is not completed. The moment this stage has been reached; your attempt has begun. Attempt has created an instance of responsibility at a moment in time prior to you committing the crime. But a commencement of execution in terms of our law is distinguished from preparatory acts. Conspiracy is being applied to pre-preparatory acts. In conspiracy, you don't even have an overt act yet, you just have an agreement. You haven't yet started preparing to commit. **If you are found guilty of having agreed to commit a crime and also an agreement on how you are going to commit it, you will be found guilty of conspiracy and punished**. The conspiracy of a crime is extending even further criminal responsibility at an earlier date than an attempt. You do not necessarily need a conspiracy to commit a crime. In other words, both for formal and for material offences, a conspiracy is not always required. For example, in crimes of sudden passion, you do not have conspiracy to commit a crime but that doesn't take away from the illegality of the act. Therefore, it has been established that conspiracy is not an essential requirement for an attempt, but if you have it, it starts extending to criminal responsibility. The law makers believe that the fact alone that you have two or more persons coming together and planning and agreeing in itself is dangerous and is dangerous enough that it must be punished and repressed. This is not wanted. This is why the legislator introduced conspiracy for all offences.

4 major points:

1. **The act of agreement**: the act of agreement could be anything but what is important is that this act of agreement is clearly sending a message of your adherence to the plan. It is the act by virtue of which you are sending your approval to this agreement. What is important is not if the act takes a particular form but whatever you do you send a clear message that you are agreeing to the conspiracy.
2. **The persons agreeing**: this raises the question do you have to know who your co-conspiracies are?
3. **The purpose agreed upon**
4. **The mens rea**

The *Carmelo Borg Pisani* case

The facts of the case: Mr Pisani lived before 2002 but as a principle, conspiracy already existed in our Criminal Code although it was reserved for certain offences only. This case puts forward a very interesting scenario for the purposes of conspiracy. In its simplicity, this was a case where Mr Pisani was recruited by a political group in Italy which had the ideology to subvert the British rule in Malta and instead, to install Italian fascist rule. This group engaged in a number of subversive activities. Moreover, subverting the British rule, at the time would have amounted to an offence against the State. Moving on, Mr Pisani was recruited by this group and, at some point in time, he was told his first mission was to come to Malta to report back on certain findings he may find. In his landing by sea, something went wrong, and he ended up not being able to come ashore. He ended up hiding in a cave waiting for the rough seas to subside because he got stuck. As he was shouting for help, some shepherd heard him. Mr Pisani was found wearing military uniform and was arrested and taken as a foreign military personal and to be treated as such. He required medical attention but being a military officer, he would not be sent to a civilian hospital but to a military one. On the day he was admitted there had to be a British medical officer in charge of the ward, but he was sick and replaced by a Maltese and in doing the rounds he saw this new arrival and recognised Mr Pisani who was, coincidently, his neighbour when they were young. He was quickly identified not only as being a person wearing a military unform but also that he was who he was, and it was found that he was a member of the group.

He ended up being charged with a number of offences including conspiracy to subvert the British rule in Malta. There were a number of defences raised, one of them being how can you prove the elements of conspiracy. **There was no formal act of agreement on a crime**, **no formal act of agreement on the mode of action** in which they have to commit a crime. In the absence of these elements, can you convict? Does being part of a group suffice to complicity?

As we have already established, **conspiracy consists of the agreement therefore, you do not need to commit an act in furtherance**. In the case of Mr Pisani, all we know is that he joined this group, which was confirmed by his uniform, and that he was sent to Malta to do some spying. You need to prove the **agreement to commit a crime** & the **mode of action agreed upon**. He was found guilty and hanged. The principles involved were that when Mr Pisani appended his signature in the membership book, he gave notice of his formal agreement to the ideologies of the group. The ideologies of the group were very focused and specific; they were to commit acts which by their nature were subversive towards the government of Malta. In singing up therefore, he agreed he is going to form part to commit these crimes, but the group also had an agreement as to how to commit these crimes.

The judges held that (1) inside the membership book he had formally given his consent to form part of the group, (2) by doing so, he made his own the aims of the group which were to commit specific offences and also the way in which these offences were to be carried out (3) there were more than two persons agreeing. Mr Pisani knew that there were other people involved, providing that it is not necessary for the purpose of conspiracy that you actually know the identity of your co-conspirators what is important is that you are **agreeing to commit a crime and on a mode of action**. Although he was not highly involved in the group, he agreed to join the group which had to commit the crimes specified in the statute of the book. It is not necessary that you actively contribute towards the agreement, or the determination of what crimes are to be committed and in what manner. **All you have to show is an agreement with others**. Therefore, in signing that membership book, he has satisfied all the elements of conspiracy. Conspiracy is a stand-alone, you do not need it to commit a

crime and vice-versa. In coming and receiving data you are not going to overthrow the government alone. Conspiracy to subvert the government is something else. They're different offences. The question was could they hold him guilty for CONSPIRACY to subvert the government. This judgement is interesting because if it is true that you do not need to know who your co-conspirators are, this can be applied to other scenarios. If you look at **organised crime**, it could give rise to conspiracy to commit crimes.

With all this in mind, it is true that to satisfy the requirement of conspiracy simply agreeing to commit a crime and upon the mode of action will suffice however, there has to be some form of criminal intent. In other words, this wouldn't apply to someone who is under the impression that he/she is signing one thing, but in truth is signing something completely different. With that being said, Mr Pisani may not have known all the details, but he knew the basics and was aware he was joining that group with that particular aim. Therefore, a degree of criminal intent was present.

Constitutive elements for the purposes of establishing a punishable conspiracy
The purpose agreed upon – One must agree to commit a crime punishable with imprisonment. You must intend to commit the crime, the formal element, so the act of agreement signifies your criminal intent to join a given conspiracy for the purpose of committing a crime and on the mode of action. The elements here are **the act of agreement**, **the persons agreeing**, **the purpose agreed upon** and the **intent** (mens rea). The law says you must have an agreement on the crime and article 48A(2) says that the parties must agree on a mode of action. The law does not speak of a mode of action but any mode of action whatsoever. *'Whatsoever'* raises the questions: how detailed must this plan be when the law says whatsoever? Do you need to know from where you're going to buy the weapon and when? Is that level of detail required? What sort of level of completeness do you require on the mode of action? Does it mean even incomplete modes of action? **This tends to be rather subjective.**

At what point in time do you have a compblete mode of action?
Pulizija v. Emanuel Briffa et (2016/17) (Appeal):
Summary: Dan kien kaz fejn kien hemm akkuza ta' assocjazzjoni f' xiri ta' players. Il-Qorti irrimarkat li r-reat ravvizat fl-artikolu 48A tal-Kodici Kriminali, dak tal-assocjazzjoni bl-ghan ta' kommissjoni ta' delitt, huwa differenti minn dak tal-attentant ta' reat ex artikolu 41 u tal-organizazzjoni kriminuza ex artikolu 83A tal-Kodici Kriminali u l-elementi li jikkostitwuhom. Ir-reat in dizamina, li huwa wiehed mill-atti preparatorji ghar-rejat konsmat jew l-attentat tieghu u li ghalhekk jista' jirrizulta indipendentement mir-reat jew l-attentat, jirrikjedi l-konkorrenza ta' tlett elementi: **il-ftehim bejn tnejn min nies jew aktar**; **l-intenzjoni li jsir ir-reat** (specifikat u mhux wiehed generiku li ghalih hemm il-piena ta' prigunerija); **u pjan ta' azzjoni miftiehem**. Is-sejbien ta' htija o meno jirraviza ezercizzju xejn facli li, in mankanza ta' xi forma diretta tal-ezistenza ta' ftehim, jirrikjediinterpretazzjoni ta' kull cirkostanza u partikolarita' li tista' twassal ghall-konkorrenza ta' dawnit-tlett elementi b'mod partikolari ghaliex ma hemmx dik il-presunzjoni feroci ghall-ezistenza tieghu bhala per ezempju fir-reat kontemplat fl-artikolu 287 tal-Kapitolu 9, dak tal-pussess mhux gustifikat ta' flus jew oggetti ohra minn persuna kkundannata ghal serq jew ricettazzjoni. Il-Qorti sabethtija wara li fliet il-provi fl-isfond tal-principji legali indikati.

The Court of Appeal found that there was conspiracy. Defence argued that say there was an agreement to fix the match, one particular element was missing, that of the mode of action which is an essential requirement in terms of conspiracy for guilt. The court said the plan of action need not be too specific; it was enough that they knew that they were going to lose a game. It was argued, however, that the three elements were needed including how much were they going to be paid to fix the match and so on. As the player, did he know exactly how much he had to get paid, exactly the score, exactly the minute in time he was going to lose? The answer in this case is clearly no. The defence argued then, if nobody today can answer these basic questions: by how much? when? how much am I going to be paid? granted that there might have been a plan, is there a mode of action? Because per definition, an agreed mode of action means **a mode of action is complete**, that **the next step is the commencement of the crime**. That is when the mode of action is complete, when all the elements are in place to the extent that there is no more planning to be had. In this particular case, can you say that there is a complete agreement on the mode of action even if they were trying to come to an agreement? The answer is no. There are still too many variables; those questions had to be answered. The Court disagreed, arguing that the completeness of the mode of action does not require specific details, and that all they needed to know is that they had to lose the match. From an academic point of view, one should think about whether this falls within what we have learned. Notwithstanding that the Court found this person guilty of conspiracy to commit a serious crime, the punishment was a discharge.

This is another issue with conspiracy: **at what point in time do you have a complete mode of action?** The answer to this question is that **all the planning is done, and the next step is the execution of the crime. In other words, it must have all the elements in place.** This is not always easy to define when applied to certain facts. In the above case, this principle remained the same, what was not being agreed upon was when it came to interpreting the facts. The Court said the mode of action was complete because there was enough information for the players to execute the crime, the defence disagreed.

Therefore, as can be seen, conspiracy requires a level of subjectivity in trying to determine this offence; there is no right or wrong answer.

What happens if after agreeing to the mode of action, you back out?
In the case of conspiracy, you are still guilty of the offence because the moment that you agree, you have committed the offence and it is complete.

Once you are found guilty of conspiracy, you are punished for the offence you are conspiring about with a reduction in your punishment from two to three degrees.

MARTINA CAMILLERI

Criminal law – Extradition
Dr Lucio Sciriha

What is extradition?

In his book, '*Extradition and Interstate Rendition'*, J.B Moore looks to define extradition as ***the act by which one nation delivers up an individual accused or convicted of an offense outside of its own territory to another nation which demands him or her and which is competent to try and punish.***
Therefore, extradition is the delivery of either an accused or a convicted person by a state on whose territory this individual is currently there, and the delivery happens to another state who has the jurisdiction to try and eventually give a sentence to the same individual.

Extradition proceedings can be requested either for a person who is wanted to face trial and then if found guilty is given the necessary punishment or else for a person who is wanted by the state that has jurisdiction to effectively carry out the punishment that has been already awarded to him. In other words, extradition can be for a person who **still needs to be tried** or for an individual who has **already been found guilty**.

There is an international right and obligation of each and every state to suppress crime within its borders. When we speak of extradition, we think it is only there for a country to give justice for some sort of crime, but the extradition process is also there to **safeguard the rights of the fugitive** (the individual that is on the run; the wanted person). This is because if you look at other methods of rendition and apprehension of an individual, such as abduction or deportation, you will notice that these forms of rendition of a fugitive do not have that inbuilt framework and rights whereby an individual is extradited in a way that all his rights are protected.

When it comes to extradition, we speak of both the **requesting country** which makes the request and also the **requested country** which is the country that effectively receives the request. Whilst the requested state is the one where the individual currently is, the requesting state is that state that has the jurisdiction to try and punish the individual.

How does it work?

Extradition works through multi-latter and bi-latter agreements between states however such arrangements are then transposed into domestic legislation which is why we have chapter 276 of the Laws of Malta. Moreover, we say that extradition is an interest that is common to both the requesting and the requested state because whilst for the requesting state its ultimate goal and intention is to punish a crime that occurred on its territory, the requested state looks to secure the **principle of reciprocity** (what one state is doing for another state today, will receive eventually in likewise circumstances).

The main principles which guide extradition

i. **The notion of double criminality**: under the extradition act, we find reference to the principle of double criminality in two different sections: **51B** and **81B**.
51B relates to designated commonwealth countries whilst 81B applies to designated foreign countries. Through these two articles, the law makes it clear that for a conduct to constitute an extraditable offence, **the conduct should be punishable as a crime under both the law of the requesting state and under the law of the requested state**. If one is missing, then the principle of double criminality is not satisfised and therefore we cannot go forward with extradition.

The notion of double criminality is based on the principle ***nulla poena sine lege***. In order to exceed to such extradition requests, the conduct must be a crime in both countries. In the absence of such, a state would not be under the obligation to grant such extradition.

Puluzija v. Fatiha Khallouf 25/9/01, Court of Criminal Appeal: in this case, the accused was wanted for an offence, the offence of conspiracy, which at the time did not exist under Maltese law. In other words, in this case, the courts did not exceed to the request of extradition because at the time, you did not have conspiracy under Maltese law and therefore the notion of double criminality was not satisfied.

When it comes to double criminality, the problems crop up in the sense that you have certain crimes which under the laws of a particular state would carry a particular name whilst under another state the crime would carry a different name. Case in point is the offence of **theft** in Malta and the offence of **burglary** in the UK (therefore, under the different jurisdictions, they carry a different name). The law courts solved this dilemma by saying that **it is not a question of the name in order to determine if you have the same offence, but rather the focus should be on the ingredients of the offence and whether or not they are essentially the same.** In relation to this, **Puliżija v. Anthony Satariano 16/07/1997, Court of Criminal Appeal**: the court held that the offences of fraud by wire, bank fraud and so on which the accused was wanted for in the UK were essentially the same offences corresponding in the criminal code even though they were classified under different names in the Maltese law. Therefore, what the court looked to determine here was that the offence of fraud by wire, bank fraud etc for which the individual was wanted in the UK, even though they carried a different name under Maltese law, they were essentially the same corresponding offences. If the elements were essentially the same, then it was no longer a question of name.

The case of Bernard Moore: Moore was wanted by Australia for the offence of conspiracy to import drugs and since, at the time we did not have such a crime of conspiracy under Maltese law, extradition could not have been exceeded to. However, Moore was wanted by Australia not only to face proceedings for conspiracy but also for the effective importation of drugs. Therefore, whilst he could not have been extradited for the offence of conspiracy to import drugs, he could be extradited for the offence of importation of dangerous drugs. Moore was however, still extradited on the basis of the accusation of the importation of dangerous drugs.

ii. **The principle of double jeopardy (*ne bis in idem*)**: this principle is not only found in our criminal code, but it is also found in our Constitution and this comes to show the importance that is carries. When we speak of ***ne bis in idem***, what this principle means is that a person who has been either **convicted or acquitted** of an offence and you have **a definite conviction**, therefore it is not still subject to appeal, that same person may not be tried again for **the same facts** even if he is tried for a different offence arising out of the same facts. If, for the sake of the argument, I have been tried for a robbery that happened in 2015, and I was convicted or acquitted at the time, I cannot be **tried again** for that offence. However, not only can I not be re-tried for that same offence, but I can neither be tried for a different offence arising from those same set of facts. So, if during that robbery in 2015 I also drove recklessly, keeping in mind I was acquitted or

convicted regarding the theft, I cannot be charged with the crimes that I drove recklessly and so on later on because essentially you have the same facts so if you wanted to accuse me also of dangerous driving, you should have done so when you accused me of the robbery. In other words, it should have been one and the same.

So, you cannot try me again for the same offence OR for a different offence relating to the same facts.

Article 527, the Criminal Code

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

This does not refer to a conviction but to an acquittal when referring to this principal. However, the courts in **Il-Puliżija v. Anthony Zammit (10/01/2005)** have said that even though you so not have the word conviction together with acquittal, it is also to include conviction.

Article 10(2), the Extradition Act

> (2) A person accused of an offence shall not be returned under this Act to any country, or committed to or kept in custody for the purpose of such return, if it appears as aforesaid that if charged with that offence in Malta he would be entitled to be acquitted under any rule of law relating to previous acquittal or conviction.

Within the context of extradition, a state may refuse a request for extradition of an individual on the ground that he has already been acquitted or convicted wither by the requested state or by any other state for the same fact. In relation to this, **The Police v. Svetozar Abramovic 30/08/1993**: Abramovic was in Malta and he was wanted by Gibraltar to face proceedings there. The issue was however that Abramovic was facing proceedings in Gibraltar but however the court of Gibraltar decided to discharge him and therefore he did not stand trial. An acquittal is where you were tries and not found guilty, a conviction is where you were taken to trial and found guilty, and a discharge is where the court decided that there was not enough evidence to put you to trail. This does not mean that you have the conclusion of proceedings. If the prosecution comes up with new evidence, then you can be tried again. In the meantime, Abramovic came to Malta and was wanted again in Gibraltar because the prosecution found new evidence. The argument was that he already faced those proceedings, but it was not correct because since he was discharged, you did not have an acquittal or a conviction, therefore this principal was not satisfied and therefore extradition should have been exceeded to in this case. For other reasons, the extradition did not go through. So, if you have a discharge you do not have the ***ne bis in idem*** rule that is satisfied.

iii. **The rule of speciality**: the rule of speciality guides us to be that **any person who has been returned to the requesting country through the extradition process may only be tried in that country for the offences for which the extradition was exceeded to**. If I have an individual who is in Malta and was requested by the UK in relation to drug trafficking related offences and extradition by Malta for this individual was accepted in relation to such offences. once he is taken back to the UK, he cannot be tried also for an incident whereby he committed grievous injuries in the UK (we are speaking of acts which happened before his extradition). A person who is extradited can only be tried for those offences for which the extradition request was made.

Pulizija inspector Ivon Farrugia v. Richard Alexander Kroom: in this case, the individual was wanted by the Netherland sin relation to fraud with online related services. We had accepted that the extradition goes through, we reserved the rule of speciality. So even though we exceeded to the extradition of this individual, on his behalf, Mr Kroom once taken to the Netherlands will be tried for the offences which he actually was extradited for.

Article 10(3) of the Extradition Act: a process of extradition can be exceeded to directly by the Minister. The Minister has a prerogative under this act and decisions can be taken without giving any form of feedback on any such decision.

(3) A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, unless provision is made by the law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Malta, be dealt with in that country for or in respect of any offence committed before his return under this Act other than -

*For the applicability of this article to the Republic of Tunisia and the United States of America, vide Subsidiary Legislation S.L.276.06 and S.L.276.07 respectively.

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(*a*) the offence in respect of which his return under this Act is requested;

(*b*) any lesser offence proved by the facts proved before the court of committal; or

(*c*) any other offence being an extraditable offence in respect of which the Minister may consent to his being so dealt with.

The act holds that the extradition may only be tried for any lesser offence proved by the fact proved before the court. Here we have an instance whereby extradition is being fought by the individual and the police are bringing forward certain evidence. If from that evidence it is clear that there is another offence, always of a lesser nature, if it is proven then the court may exceed to the extradition not only for what he was requested but also for that offence which has come out through that evidence.

Luigi Paduano Case (1973): Mr Paduano was wanted by Italy to face several charges. Malta had exceeded to the extradition for one charge. Mr Paduano was returned to Italy and to his surprise, when he ended up in the Italian courts, he was tried for all the offences that Italy had requested him for. Malta put up a process and eventually, Italy exceeded to the request that the extradition process was exceeded to with regards to one particular offence and therefore Mr Paduano had to be tried only for the offence to which Malta exceeded to for the extradition.

What offences are considered to be extraditable or not

We have two methods:

i. **Enumerative method (the list method):** this is a method whereby you are given a list of offences which are extraditable and if the offence for which the person or the individual is requested for falls within that list then it is considered as an extraditable offence. We find this as a schedule in our extradition act. This method only applies as you will see from art. 5 (1a) in relation to commonwealth countries.

The problems: it is quite a rigid system because you either have an offence which falls within the list or it doesn't; it gives no leeway. In fact. Many states are trying to do away with this method because criminal law is constantly developing and

evolving, and this method is proving to be insufficient. Another problem that we might have is what we had mentioned in double criminality – the fact that names may differ depending on the state. This shouldn't be the case because the court should look at the ingredients of the crime, but this creates an avenue of doubt, nonetheless.

ii. **The eliminative method (non-list method):** this is much more straight forward. An offence is considered as extraditable or not purely on the fact if t carries a minimum punishment of **12 months in the requesting state**. It is not based on the nature of the offence but rather on the punishment associated to the offence by which the person is accused, and the extradition has been requested by. This has advantage that it avoids the uncertainty and incompleteness that the other method has.

In our law, we have both methods. Whilst the enumerative method applies to the commonwealth countries, in relation to the eliminative method, this applies to the designated foreign countries. Under **article 5(1a)**, which features the enumerative method, the condition that is made is two-fold: that the offence falls under the schedule that we have and that it carries about a minimum punishment in the requesting state of 12 months. However, with regards to the eliminative method, **article 8(1a)** the only requirement is one: if the offence in the requesting state is of at least 12 months, then it is considered as an extraditable offence.

When we started speaking of extradition, we mentioned very important guiding principles. If we look at our law, in particular **art. 10 & art. 11**, we notice that there are possible scenarios whereby extradition may not be exceeded to or may be refused either by the Minister of Justice or the courts. One of these exceptions is the principle of *ne bis in idem*.

Exceptions:

i. **In the case of political offences or offences of a political character**: **article 10(1a)**

> **10.*** (1) A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, if it appears to the Minister or to the court of committal -
>
> (*a*) that the offence of which that person is accused or was convicted is an offence of a political character; or

This article is telling us that the Minister or the court may refuse for an offence which is of a political character. Not only do we find this under our extradition act, but we also have this restriction enshrined in our constitution, in article 43(2) providing that '*no person shall be extradited for an offence of a political character.'* With that being said, both the Constitution and the extradition act fail to give a definition of what an offence of a political nature is. It would be dangerous for the court to set down a definition of what this is so, essentially the court and the minister will decide according to the circumstances of the case that is brought before it.

If we look at what certain writers are saying, you have certain writers who say that an offence of political character is committed when you have a political motive/cause which is when you ask ***why was it done?*** Moreover, when you ask this, *do you find a political basis*? Other writers hold that this offence is committed for a political purpose. Whilst the former is why was it done; the latter asks the question ***what did one get out of it?*** In other words, the result of it. **Therefore, the purpose is more related to the final result whilst the motive is the reasoning behind such offence**. Other writers mention that you need both a

political purpose and a political motive in order to have an offence of political character. Others hold that an offence is considered of political nature purely in relation to those offences against the state.
An important distinction we have to make is between crimes which are known as **purely political** and **relative political** offences.

(a) Purely political offences are offences which are directed against a state, a political organ, a government and so on. Moreover, they are not the common offence, but they are particular offences which go against the security of the state. In brief, these are offences which are directed on a political entity, a government, a state and are not of common character. Therefore, with regards to purely political offences we are speaking of offences whereby in their very nature they are political.
(b) On the other hand, relative political offences are those offences whereby they depend on the circumstances in which they are committed. The guiding nature of them is the circumstance because they are offences of common character, and therefore an offence that is quite common, and they assume a political character because they are connected in some way to either a political act, political event etc. So, whilst in purely political offences you have offences which by their very nature are political, in this case, you have offence, which is common in character such as hitting people, which however assumes a political character because of the circumstances in which it is committed.

R v. Ex Parte Little John: **this case relates to the political element within extradition**. Ireland wanted the extradition from the UK of two brothers in order to face charges for a violent robbery. Moreover, the reason behind such violent robbery was to raise funds for the IRA which is a paramilitary movement in Northern Ireland which way back in the years, always fought for Independence form the UK. Whilst fighting extradition in the UK, defence council to these two brothers raised the plea that they are being extradited for a political offence. However, the UK courts decided that despite the motive behind the carrying out of that crime, there was not the sufficient connection in order for such an offence to be considered as political. The reasoning of the court was that in these cases, the political element must be so strong that **it predominates over the ordinary crime**. Therefore, in this particular case, the violent robbery was carried out, the fact that they did it to raise funds for the IRA gives the crime a political element however, the reason for raising funds was not so strong as the be predominant over the ordinary criminal offence. Because of this, the UK court exceeded to the extradition, so these two brothers were taken back to Ireland.

Article 10(5) of the extradition act: the law is making it clear that just because you have an attack on the head of state it is not to be considered necessarily as an offence of a political nature.

> (5) For the purposes of this section, an offence against the life or person of a head of state, or any related offence described in article 5(3), shall not necessarily be deemed to be an offence of a political character.

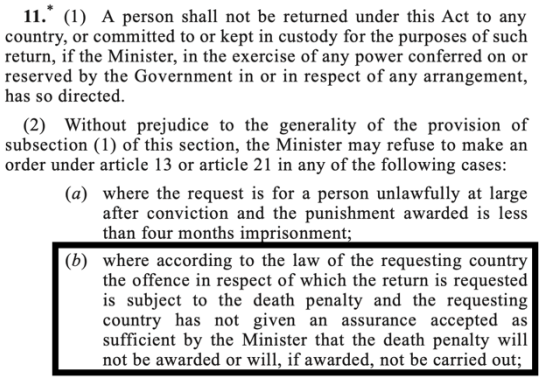
ii. The case of discrimination: Article 10(1)(b) and 10(1)(c)

> (*b*) that the request for his return (though purporting to be made on account of an extraditable offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, place of origin, nationality, political opinions, colour or creed; or
>
> (*c*) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, place of origin, nationality, political opinions, colour or creed.

The law is saying that the Minister or Court of Committal may refuse a request for extradition if such request is made for the purpose of punishing or trying an individual because of his race, place of origin, nationality, political opinion, colour or creed or else the extradition request may be refused because if such individual would have been extradited he would be prejudiced at his trial or else he would have been punished in a way, or illegally detained because of his race, place of origin etc.

Therefore, here we have a situation which is **two-fold** as it is divided over two sections in the law. You have the first instance under article 10(1)(b) whereby the request is refused because it is made for the purpose of prosecuting or punishing an individual because of his race, place of origin etc. in this instance, the refusal for such request of extradition is because that extradition request is made in order to prosecute the individual because of his race, colour, creed and so on. So, he is wanted to be tried and eventually punished because of these instances. The second part relating to discrimination in article 10(1)(c) is similar but different. In 10(1)(c) you have a situation whereby the requested state, therefore the state that has received the request, fears that if the individual is extradited to the requesting country he will be prejudiced at his trial or he will be punished or detained illegally because of his race, religion and so on. Here is the distinction one has to make between these two instances. Where in 10(1)(b) you have a situation whereby the request is made for the purpose to try the individual and prosecute him because of his race and so on, in the second instance, the fear of the requested state is that because of his race and so on he does not have fair trial, he is prejudiced at his trial, he is detained illegally or in some way he is punished due to his colour, religion and so on. The law uses the word 'might be prejudiced' but this does not mean that a mere suspicion is enough for the court of committal or the minister to give in to such request of a person not be extradited. There has to be reasonable grounds which show that if the individual is extradited from that country to the requesting state, he will suffer such prejudice. The law mentions prosecution or punishment, remember that extradition can apply in two instances: where an individual is requested so as to attend a trial and if he or she is then found guilty will be punished accordingly or else extradition can take place for an individual who has already been tried and is wanted in order to serve the punishment that was awarded to him.

iii. **Death penalty**: **Article 11 (2)(b)**



11.* (1) A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, if the Minister, in the exercise of any power conferred on or reserved by the Government in or in respect of any arrangement, has so directed.

(2) Without prejudice to the generality of the provision of subsection (1) of this section, the Minister may refuse to make an order under article 13 or article 21 in any of the following cases:

(*a*) where the request is for a person unlawfully at large after conviction and the punishment awarded is less than four months imprisonment;

(*b*) where according to the law of the requesting country the offence in respect of which the return is requested is subject to the death penalty and the requesting country has not given an assurance accepted as sufficient by the Minister that the death penalty will not be awarded or will, if awarded, not be carried out;

You have situations in extradition whereby a request for extradition may be granted openly (you are accepting to extradite an individual without any condition) however you also have instances whereby the requested state, in order to exceed to such request for extradition, might impose certain conditions.
Therefore, the extradition request will be granted but in order for this to be the case, there are certain conditions that the requesting state would need to abide by. The case in point is whereby you have a requesting state wanting someone to face proceedings or else has been already awarded the death penalty. Malta can set conditions that if it is to exceed to the extradition request, **it will need to have the necessary guarantees by the requesting state that if the individual is found guilty, he will not be awarded the death penalty**. In the case where the individual has already been awarded the death penalty, therefore, he is wanted in order for the death penalty to take its course, Malta would impose a condition that instead of the death penalty, he is awarded a different form of punishment. The situation here is that the requesting state would abide by the conditions set by the requested state, in this case Malta. Afterall, the ultimate interest is punishing the individual for the crime committed on the soil of the requesting state.
Article 11(2)(b) of the extradition act states that if you have a request by a state whereby the individual has **already been awarded the death penalty** and is wanted to face such death penalty, Malta will set conditions that if he is to be taken back to the requesting state, the death penalty will not go through and he will be awarded a different punishment. Otherwise, Malta will not extradite. The second case is the individual in Malta is wanted in the requesting state to face trial for **a crime that brings about the punishment of death penalty**. In this case Malta will only accept the extradition of such individual if it is given the necessary guarantees by the requesting state that if the person would be found guilty, he would not be awarded the death penalty as a punishment.

The European court of HR: **Soering v. The UK** (7/07/1989): At the time, Soering, a German individual, was found in the UK. He was located in the UK and the United States had requested the UK for the extradition of Soering in order to face proceedings for capital murder in the United States. For context, capital murder in certain states in the USA carry the punishment of the death penalty. Soering had taken the case to the ECHR and the argument was that of he would have been awarded the death penalty and subsequently, he would have been subject to the death row phenomenon (a situation whereby you have been awarded the death penalty and for months, if not years, you are kept on death row). Soering's argument was that if he would have been extradited to the USA and found guilty, he would have been put on death row and would be subject to the death row phenomena. In this case, article 6 of the European convention on Human Rights was invoked (article 6 deals with the right to a fair trial). What the ECHR said was that here you do not have a question of fair trial because the individual before the UK court, is not facing trial but what he is facing is extradition proceedings to see

whether the extradition process should go through or not. In this case, we do not have a criminal charge against Soering before the court in the UK, keeping in mind he has not yet been extradited to the USA. The ECHR said that at this point, we are still at proceedings level to determine if an individual should be extradited or not therefore, here you do not have a trial before this court. Therefore, it said that article 6 does not apply. However, the court argued that article 3 of the European convention is to apply, which states that no one shall be subjected to torture or inhumane or degrading punishment. What the ECHR considered in his case to be inhuman or degrading punishment was being put on death row and therefore, being subject to the death row phenomena. **The ECHR considered did not consider the death penalty to be inhuman and degrading but rather the fact that the individual would be subject to such death row phenomena**. This case was resolved as the state of Virginia had accepted that if he would have been extradited, and eventually tried and found guilty of capital punishment, he would not have been awarded the death penalty. In fact, he was awarded two consecutive life sentences. The importance of this case is that the USA exceeded to the request that it would not go through with the death penalty if Soering was found guilty. Therefore, it gave those necessary guarantees, and the extradition process took place.

iv. **Extradition in absentia: Article 11(2)(c)** of extradition act.

> (*c*) where the request is for the return of a person convicted of an offence in his absence and the requesting country has not given an assurance accepted as sufficient by the Minister that such person will be granted a new trial if he so requests;

We have another situation whereby extradition may be based or may only be exceeded to upon a condition. Similar to what we have to the death penalty, here we have a scenario whereby Malta will impose a condition that if the extradition is to be exceeded to, the requesting state has to abide by the conditions set by Malta. Conviction in absentia is a situation where a criminal judgement is passed, or an individual is tried and eventually punishment is awarded, **without the individual being present for such proceedings**. Therefore, you have a situation whereby the criminal case goes on and the punishment is awarded without the accused being present for these proceedings. If one looks at the Maltese criminal code, we have very restricted instances when this happens, that of if you have an appeal by the prosecution and the individual had not appealed. You have other countries where it is quite normal that you have proceedings in absentia and eventually a conviction. For instance, this was quite a big issue in the case of Amanda Knox whereby Knox was not even in Italy when judgement was being rewarded.
In **Article 11(2)(c)** we find that in cases where the requested person had been convicted in absentia in the requesting state, Malta may refuse the extradition if it is not given those sufficient guarantees and assurances that if such person would be extradited, he would be granted a new trial. Therefore, Malta MAY exceed to the request only if it is given the necessary guarantees buy the requesting state.

v. **Prescription**: **Article 11(2)(d)**

> (*d*) if prosecution for the offence in respect of which extradition is requested is barred by prescription either according to the law of Malta or according to the law of the requesting country;

The prescriptive term is the time limit set by law within which criminal action is to be prosecuted. Therefore, you have a situation whereby a criminal offence may be time barred. In our criminal code, one can find all the time limits within which criminal prosecution can take place. Moreover, this is divided depending on the punishment.
According to **article 11(2)(d),** the discretion is left to the Minister. The law speaks about the Minister having the discretion whether to exceed to the extradition request or not. Here, the law is very clear: if the offence for which the individual is wanted is time barred either in Malta or in the requesting state. So, it can be time barred in either state. The minister may not exceed to such extradition requests if this is time barred.

vi. **The return of own nationals**: **Article 11(2)(g)**
For example, Malta receives a request for a Maltese person to be extradited to Italy. There are certain civil law countries such as France and Germany who are prohibited by their constitution from extraditing their own national. In these cases, these countries would not exceed to an extradition request of their own national and you instead have the development of the principle of ***aut dedere aut judicare*** **(if you are not going to extradite, punish yourself)**. One must keep in mind that extradition is a process of **international collaboration** therefore countries have an interest in collaborating together in order to punish crime. Therefore, there was the development of this principle whereby in relation to these civil law countries if you are not going to extradite then you should punish yourself. One the other hand, in the case of common law countries like Malta, this is up to the discretion of the Minister. Article 11(2)(g) states that the Minister of justice may refuse to make an order of extradition if the person requested is a citizen of Malta. Therefore, it is up to the Minister to decide whether to accept or not to accept such extradition requests.

How the process of extradition takes place

When an individual is wanted by a country, there would be a request in writing by the government of the country that wants the individual. Moreover, the request must be either for someone who is **wanted to face proceedings** and, if found guilty, serve a punishment or else if an individual has been **already adjudicated and is wated to serve the punishment** imposed upon him. In this written request you would have details of the individual wanted whereby they would be establishing the individual's nationality and identity, a description of the facts for what the individual is being accused, a description of the crimes that the individual is wanted for and a copy of the same enactment of the laws, and finally prima facie evidence that would be considered sufficient, at least amounting to **reasonable suspicion** so that the court may have grounds to issue the warrant of arrest. You would also have special requirements depending on the nature of the request. Apart from those general requirements the special requirement would be depending on the case. If you have a request for an individual to still face trial and therefore, he has not yet been adjudicated, in that case the warrant of arrest in the requesting state needs to also be provided. To put it simply, if he is wanted to face proceedings, together with those general requirements you would need to

provide the warrant of arrest. In the case of an individual wanted to face punishment, the judgement of where he was found guilty needs to be given, and if he has already done some time, the country would need to inform the other country on the amount of time that he already done.

Following this request, the request is received in Malta by the Minister of Justice. Once this request is received; he will see whether to issue the **authority to proceed** which is the basis whereby the minister feels that there is a situation covered by law whereby such authority to issue a warrant of arrest has come into play. Practically, once the Minister receives the request, he will look at the request and determine if there is the legal basis (remember the Minister "may"). If the Minister does not issue the authority to proceed, then the matter stops there as the Minister did not exceed to the request. If, on the other hand, he sees that there is a legal basis to such request, then the Minister will issue the authority to proceed.

Once such authority to proceed is issued, this is brought before the Duty Magistrate who will issue a **warrant of arrest** for the individual. You can have situations whereby the authority to proceed has not been given as yet by the Minister, but however, the court would issue a warrant of arrest for an individual where there is information that such individual is either leaving or entering Malta. Here, there is enough information that the individual is leaving or entering the country, and the warrant of arrest is issued even if you do not have the authority to proceed just yet. The Magistrate will then decide whether to issue the authority to proceed or not. Therefore, the warrant of arrest may be issued either after the authority to proceed would have been issued or else if there is enough information that the induvial is either leaving or entering, such person is apprehended and then there is the request for the authority to proceed.

If the individual is going to exceed to the extradition, and therefore, is not going to fight it as he accepts that he is extradited to the country, the court will inform the individual that he will not be extradited before **the passage of at least 15 days**. You have quite a lot of cases whereby extradition is not fought because it would be better for the individual to face justice immediately. On the other hand, what if the individual would like to challenge such extradition proceedings? In this case, the court will start appointing sittings to hear the evidence to be brought forward to decide whether to extradite or not and, in the meantime, the court may either **remand the individual in custody** or else the court may give **bail**. In other words, until the proceedings of extradition are going on, the court may afford bail to the individual or he will be kept in custody. If the court decides not to go through with the extradition proceedings, the Attorney General has the right to appeal such decision within **3 days of him receiving the acts of such proceedings**. Alternatively, if the court has decided to go through with the extradition proceedings, it will inform such individual that he has a right to appeal, and such appeal has to be filed within **4 working days from the date of the decision**. In the case of no appeal, there will be those minimum 15 days before he will be returned to the country.
Note the difference here: From when the office of the AG receives the acts of the case VERSUS in the case of the individual, the term of appeal is 4 working days from the date of the decision.

If the individual is let go, and, therefore, the court has decided that there aren't ground for the extradition proceedings, if the individual was kept in custody, he/she will be kept in custody until the Attorney General informs the court that it does not wish to appeal or else in the case of no appeal being filed within such 3 working days. Therefore, pending what the Attorney

General is going to do, the individual will be kept in custody until the passage of time for the appeal has passed.

The European Arrest Warrant (EAW)

We have a lot of commonalities between extradition and the EAW however, there are differences. The EAW can be described as **a simplified cross boarder judicial surrender procedure for the purposes of prosecuting or executing a custodial sentence**. Once again, the EAW is used either for an individual who is wanted to face trial or for an individual who is wanted to serve a punishment already imposed upon him. With regards to the individual who is wanted to face proceedings, in the same way we had it for extradition, it must be with regards to an offence which brings about a **minimum punishment of at least 12 months**. With regards to executing a custodial sentence (wanted to serve punishment), if one looks at article **11(2)(a) of the Extradition Act**, if it is for the execution of punishment, the punishment awarded in extradition must be of at least **4 months imprisonment**. So, I cannot ask for the extradition of an individual if the punishment imposed on him was of 3 months. In the EAW it is still 4 months, but the law relates to the period that the individual still needs to make. So, whilst in the extradition the law speaks of the punishment awarded, therefore, independent of whether he already spent some time of it in or not, the punishment awarded must be of at least 4 months. In the case of the EAW, the **remainder of his punishment must be of at least 4 months**. An EAW is issued by the issuing country therefore, in a EAW rather than the requesting state and the requested state, we speak of **the issuing state** (the state making the request) and **the executing state** (the state which executes the EAW – the requested state).

The idea behind the EAW framework

The EWA framework was introduced through a decision in 2002, it kicked off and became effective in 2004 and by 2005 all countries were using such procedure. Obviously, other countries such as Bulgaria and Romania that exceeded into the European Union later on, upon their accession immediately had taken up the European Arrest Warrant procedure. The reasoning behind it was to avoid the lengthy procedures brought about by extradition. you can easily see that extradition proceedings are mainly guided by the political wing and the administrative wing of the government, with the Minister, a lot of request passing through governmental entities and so on, and this probably brought about the fact that extradition proceedings are quite lengthy.
What they wanted to do with the introduction of the EAW is to have a much quicker procedure and one that does not go through political or administrative channels; it is a procedure that is purely run by the judicial authorities. So, in an EAW, you have no intervention of the Minister. It is purely between a judicial authority of a country and another judicial authority of another country.

How the EAW differentiates form Extradition proceedings

	EXTRADITION	EAW
1.	In extradition, there is no specific time in which a final decision is needed.	EAW proceedings must be concluded, including the appeal, in no longer than 60 days from when the person has been apprehended/arrested. Within **60 days** all the proceedings have to be concluded whether it is the first instance or whether it keeps going to the appeal. Therefore, having **stricter time limits** than in Extradition.

2.	The individual will not be returned until the passage of at least 15 days.	The individual must be **returned** within 10 days from the final decision. Whether an individual exceeds to or whether it is fought out and you have a final decision, within 10 days from such decision, the individual has to be returned. This is where one sees that the procedure looks more at safeguarding the rights of the person that is arrested.
3.	In Extradition there is a **double criminality check** – an offence is a criminal offence both under the requesting state and under the requested state.	The EWA framework gives you a list of **32 categories of offences**. If the offence falls within one of those categories, then it is an offence that the individual may be brought to the country through the EAW. Therefore, you **do not have the double criminality check.** If the offence falls within the category of those 32 offences, then you do not have a double criminality check. The only important thing is that if it falls in such categories, the offence must bring about a punishment of **minimum 3 years imprisonment in the issuing country** (the requesting state). In other words, in the requesting state, in order for such double criminality rule not to kick in, it must eb one that falls under those categories and has a min. punishment in the issuing state of at least 3 years imprisonment. If the offence does not fall within one of these 32 categories, then the surrender of the individual is subject to the condition that the offence is an offence in the executing country as well. So, in that case you have a similar situation in extradition. Therefore, **if it doesn't fall under these categories, then you do have a 'double criminality check'** in the sense that the offence also has to be an offence in the issuing country.
4.	There are political entities, be it the Minister or a foreign department which is part of extradition.	There is no **political involvement**. The EAW procedure is purely run by judicial authorities.
5.	In the **surrender of own nationals** - In Malta, we have article 11(2)(g) of the Extradition Act whereby it is at the discretion of the Minister of Justice if to extradite a Maltese national.	In the EAW, this does not happen. In the EAW, even countries like France and Germany (whereby it is enshrined in the constitution that they cannot extradite individuals of their own country) would have to accept a EAW for own nationals. With that being said, the country may ask that if a prison sentence is imposed on the individual,

		such prison sentence is carried out in his own country. therefore, you may make a request subject to a condition. So, if prison is going to be imposed on the individual and he is a habitual residence of that country, he is brought back and carries out the prison sentence in that country.
6.	In extradition, the country would request that certain **guarantees** are given. We have a situation, for example, where we would say that the individual would be extradited only if he is not given the death penalty. Another example of a condition would be if there was a conviction in absentia.	In an EAW, a country may require certain guarantees and may make the surrender of an individual conditional. With regards to the EAW there are 2 scenarios whereby a request for certain guarantees can be made: (1) in the case where a person is going to be transferred to the other country and a life sentence is imposed upon him, the executing country may impose a guarantee that at least **after 20 years**, he has a right of **review** and a right of **parole**. (2) a country may make the release conditional that if the individual is either a national of the executing country (requested state), or else he is a habitual residence, in that case if a prison time is imposed upon him, he may serve the prison time in his country.
7.	Extradition – **political offences**.	In the EAW framework, political offences aren't mentioned. You do not have an issue of a political offence whereby you may refuse or not. It is **not found anywhere in the EAW framework.**
8.	A country or the Minister may refuse to extradite an individual if he will suffer **prejudice** because race, place of origin, nationality, political opinion, colour or creed, or else he will not be granted a fair trial.	There isn't something specific regarding this, however if we look at the EAW framework, even though article 3 of the framework (the list of the grounds whereby a country must refuse to exceed to such request) does not include things related to human rights, if one looks at the recitals, in particular 12 & 13, one notices that they are safeguarded there. **Recital 12:** *nothing in this framework decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said Arrest Warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race,*

		religion, ethnic origin, nationality, language, political opinions or sexual orientation or that the persons position may be prejudiced for any of these reasons. This framework decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of press and freedom of expression in other media. What we have in our extradition act is similar to this, but under the framework it is mentioned in the recitals and **not under the section whereby a country may refuse such EAW**. **Recital 13**: *no person should be removed, expelled, or extradited to a state where there is serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.* The question of the death penalty is included in recital 13. It is not one of the mandatory provisions or one of the optional provisions, however, since it is mentioned and it is very clear in the wording, the EAW will not go through. In these cases, since they are part of the recitals, it would be up to the court to decide.

Grounds whereby a country has to refuse an EAW vs Ground whereby the country may refuse the EAW

In an EAW you have **grounds where a country has to refuse the EAW** and also grounds which are optional where it may. This is what we had said in extradition – the Minister shall (mandatory grounds) and the Minister may (optional grounds). These mandatory grounds grounds for an EAW not to be exceeded to, therefore where the country has to refuse handing over the individual, are 3: **(1)** if the requested person is below the age of criminal responsibility in the executing state, therefore in the requested state the individual is considered below the age of criminal responsibility. This may vary between one country and another. **(2)** in the case of ne bis in idem where the individual has already been tried and either acquitted or found guilty, not only in that state but also in any other state for the same facts. You cannot be tries again for something that you have already been adjudicated, whether acquitted or found guilty. **(3)** this is similar to what we find in article 2(f) of the extradition act whereby the alleged offence under the jurisdiction of the executing state would be subject to an amnesty. Therefore, an amnesty has been given by the requesting state.

Grounds where the country may refuse the EAW; it is up to the country to decide. A number of these are similar to extradition such as **(1)** in the case of an issue of prescription (article 11(2)(d) whereby you have an offence which is time barred, **(2)** in the case of a conviction in absentia (article 11(2)(c),

The other instances are **(3)** where either you do not have double criminality, **(4)** whereby the individual is wanted by the country and is already facing trial in the executing state, **(5)** if you have an individual who is already facing proceedings in the executing state and is wanted by the other country but there is still judgement to be passed in the executing country first.

The rule of speciality
The rule of speciality also applies in the EAW. Therefore, one faces proceedings for what the request was made and not for other proceedings against him/her.

Exam
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