

**AN ANALYSIS INTO THE NEWLY AMENDED SEXUAL OFFENCES,
WITH SPECIFIC REGARD TO RAPE AND DEFILEMENT OF MINORS**

Joanne Attard

ABSTRACT

As portrayed through the Istanbul convention, an extensive number of women and girls fall victims to sexual violence in particular rape and defilement of minors. Aiming to increase the protection afforded to such victims of sexual offences, national out-dated provisions have been eliminated from the Criminal Code, Chapter 9 of the Laws of Malta and were replaced by new provisions which mirror today's reality more closely. Such amendments were triggered by the setting up of the Istanbul Convention. As a result of this international instrument, a local Gender-Based Violence and Domestic Violence Act was incorporated; this eventually led to the said amendments. These amendments encompassed most notably a revision of the prosecution procedures and punishments given for each sexual offence, while an emendation to the definitions of such crimes was also accomplished. Specific importance is drawn to gender based violence upon the recognition that women are affected disproportionately by such sexual violence.

KEYWORDS: RAPE - SEXUAL OFFENCES - MINORS-DEFILEMENT

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OFFENCES, WITH SPECIFIC REGARDS TO RAPE AND DEFILEMENT OF
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1. Introduction

This article will briefly discuss the Istanbul Convention² and then move on to discuss the amendments made to various legislations such as the Criminal Code, the Civil Code and the Police Act as well as the emergence of the Gender-Based Violence and Domestic Violence Act in 2018. Furthermore, this article will make particular reference to the changes made to the offences of rape and defilement of minors and the implications of such changes. The Council of Europe's Istanbul Convention factsheet of 2016 exposes the expansive occurrence of sexual offences in member states. It illustrates that one in twenty women are victims of rape and one in three women have been victims to sexual violence since the age of fifteen.³ As a result and in order to protect victims' human rights, international and national legislation emerged, developed or improved, as seen in the engagements by the Council of Europe in 2011 and in the local scenario where various action ensued from 2014 until the amending of legislation in 2018. While these amendments target the need to eradicate gender imbalance and inequality, since most victims of these types of offences are women and most offenders are males, they also pivot around the notion of pledging greater justice to victims while erasing or replacing any out-dated provisions which do not mirror today's reality and society.

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² The Council of Europe Convention on preventing and combating violence against women and domestic violence is based on the understanding that violence against women is a form of gender-based violence that is committed against women because they are women.

³ *Istanbul Convention: Combatting Violence Against Women, Fact Sheet* (European Commission 2016) <https://ec.europa.eu/info/sites/info/files/factsheet_istanbul_convention_web_en.pdf> accessed 5 March 2019, 1.

2. The Istanbul Convention and its Transposition into Maltese Law⁴

The amendments of sexual offence laws in Malta were triggered through the devising of the Istanbul Convention by the Council of Europe in 2011, which was ratified by Malta in May 2014. As the first legally binding European instrument targeting gender-based violence⁵, this convention is aimed to prevent and combat violence against women and domestic violence. In fact, its preamble italicises the recognition of women's and girls' exposure to grave forms of violence such as sexual harassment, rape and other types of violence, sexually, psychologically and physically, which lead to a gross violation of the individual's human rights as well as pressing on the existing inequality between men and women.⁶ Ergo, this convention formed due to the identification that such sexual offences widely affect women disproportionately and results in a major gender imbalance, arising especially through evidence showing a male predominance of offenders in such crimes.⁷

As a result, this convention is directed towards a harmonised approach in Member States to prevent this violence, protect victims and prosecute perpetrators of gender-based violence and domestic violence. Therefore the necessary amendments of the Criminal Code, Chapter 9 of the Laws of Malta emerged from the need to bring national legislation in line and compliant with the Convention.

In consequence, a local Inter Ministerial Committee was formed to single out the provisions that needed to be changed or improved. By 2015, a list of proposed amendments was presented to the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties who initiated a legislative process in 2016 by presenting a Bill labelled 'Gender-Based Violence and Domestic Violence Bill' which led to the amendments in various legislations such as the Criminal Code, the Civil Code and the Police Act as

⁴ *Istanbul Convention: Combatting Violence Against Women, Fact Sheet* (European Commission 2016) <https://ec.europa.eu/info/sites/info/files/factsheet_istanbul_convention_web_en.pdf> accessed 5 March 2019,1.

⁵ Yanika Pisani, '*Redefining Rape: In Light Of The Istanbul Convention*' (Degree of Bachelor of Laws with Honours, University of Malta 2019), 30.

⁶ Istanbul Convention, Article 1.

⁷ Gender Equality Commission (GEC), '*Equal Access of Women to Justice*' (Feasible Study), 28 May 2013, Strasbourg, GEC (2013), page 12.

well as the emergence of the Gender-Based Violence and Domestic Violence Act in 2018.⁸

Determinatively, Article 22 of the aforementioned Act underlines that the convention has become part of the laws of Malta and is in fact reproduced and enforced through the Schedule to the Gender-Based Violence and Domestic Violence Act. In addition, it takes precedence in any inconsistency arising between the rights set out in the convention and those in the national ordinary laws, unless the latter provide more adequate protection and rights to the injured party.⁹

3. The Gender- Based Violence and Domestic Violence Act

This act pursued to revise the punishments inscribed in the Criminal Code for the relevant crimes including most notably the punishment of rape, defilement of minors, abduction and prostitution with violence. Additionally, it led to the review of the definitions of such *sui generis* crimes in order to adequately reflect the true realities of these offences. Furthermore, it introduces the power of the Police to institute the proceedings of sexual offences *ex officio* without the need of a complaint from the injured party as it was often being noted that the injured party refrained from instituting proceedings or retracted from proceedings after being instituted often out of fear and shame.¹⁰ Moreover, it led to the reinforcement of the issuing of Protection Orders which can be requested by any party in the proceedings to further protect the victim while a ‘multa’ would be given in cases of infringement of the order.¹¹

As noted by the then Minister for European Affairs and Equality, Helena Dalli at the presentation of the Annual Report of the Commission on Domestic Violence for 2017, this act fortified and created new provisions to further protect victims, prosecute perpetrators harsher and ultimately try to limit the occurrence of sexual offences. It was

⁸ Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, ‘Effective Laws Against All Forms Of Violence - Full Implementation Of The Istanbul Convention - Public Consultation’ (2016).

⁹ The Gender-Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta.

¹⁰ Istanbul Convention, Article 55.

¹¹ Vento, ‘Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com’ (*maltawinds.com*, 2017) <<http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading>> accessed 6 March 2019.

also enacted to strengthen existing mechanisms for the protection of victims while introducing new strategies.¹²

Conclusively, it is through the incorporation of this Act that further led to the national amendments of the sexual offence laws in the Criminal Code.

4. General Alterations

When discussions to amend the sexual offence laws commenced, the initial thinking was to double the term of punishment so that rape offenders can get up to twenty years imprisonment while persons involved in sexual activities with minors can get up to fifteen years of imprisonment, the terms of which can be increased if aggravated.¹³ This was however concluded to lead to unnecessary trauma to the victims as the case would have to be tried in court by a trial by jury since the imprisonment sentence would exceed ten years.¹⁴ Yet a general increase in punishment was still invoked in relation to all the sexual offence laws, where some of the terms of punishment were given double the period of imprisonment or even more.¹⁵

Moreover, the amendments led to the elimination of the solitary confinement tied to the punishments, which were seen as being contrary to the ideology of the rehabilitation of the offender and which in return results in no advantage to the victim, perpetrator or even society.¹⁶ Consequently, the above mentioned act connotes the institution of treatment programmes to support and teach sex-offenders and hence prevent any

¹² The Ministry of European Affairs and Equality, 'The Commission On Domestic Violence Assumes A Wider Remit Following The Enactment Of The New Gender-Based Violence And Domestic Violence Act' (2018) <https://meae.gov.mt/en/Pages/Media/Press_Releases/PR181010.aspx> accessed 6 March 2019.

¹³ Tim Diacono, 'Bill To Clamp Down On Domestic Violence, Rape Tabled In Parliament' *Malta Today* (2016) <https://www.maltatoday.com.mt/news/national/71885/bill_to_clamp_down_on_domestic_violence_rape_tabled_in_parliament_#.XH6s8i2ZNQJ> accessed 5 March 2019.

¹⁴ 'Criminal Court' (*Judiciarymalta.gov.mt*) <<http://judiciarymalta.gov.mt/criminal-court>> accessed 6 March 2019.

¹⁵ Vento, 'Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com' (*maltawinds.com*, 2017) <<http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading/>> accessed 6 March 2019.

¹⁶ *ibid.*

relapse.¹⁷ Thus, one can note a shift from a punitive ideology to one of rehabilitation and recuperation.

5. Rape

5.1. Introduction

People's lives, especially those of women, are to-date shaped by the persistent threats of rape. Being a grossly under-reported crime bearing shameful and dehumanising undertones, legislators across various jurisdictions have spurred to improve rape laws by altering them or introducing new articles and provisions in relation to such offence and affording greater justice to rape victims. As a matter of fact, rape laws have been subject to debate and legislative alterations for many years, especially in Europe, where organisations have lobbied for a change in the definition and prosecution of such crime, especially upon the recognition that rape is the crux of sexual violence and gender-based violence across Europe.

5.2. Changes in the *Mens Rea* of the Offence

Prior to the 2018 amendments of the Criminal Code, Article 198 defined rape as carnal knowledge achieved through violence. In 2018, the amendments to the definition sought to give more importance to the notion of consent and carnal connection rather than violence and carnal knowledge. This has therefore led to a shift in the formal element of the offence referred to as the *mens rea* or the intention of the offender. Before the amendments, the intention relied on the nexus existing between the violence and carnal connection meaning that the agent must intend both violence and carnal connection and that the carnal connection is the result of violence. Such importance given to the element of violence was also removed from the basis of other sexual offences, such as abduction and violent incident assault, for the same following reasons. In fact the latter offence was renamed as 'non-consensual act of a sexual nature' to extinguish any links with the element of violence.

Through the amendments, the Criminal Code now holds that the crucial element of the *mens rea* is the lack of consent. This connotes the perpetrator's intention of penetrating the victim knowing that she does not consent or else is reckless in finding out whether she consents to the act. This was held by the Court of Appeal in *II-Pulizija vs. Joseph*

¹⁷ Istanbul Convention, Article 16(2).

Magro;¹⁸ *'Dan il-kongungiment karnali irid necessarjment isir minghajr il-kunsens tal-vittma'*¹⁹. Consequently, our law now reflects British common law, which emphasises that the essential element in rape is the lack of consent regardless if any real or presumed violence arises. In fact, according to Smith and Hogan the *mens rea* under English law consists either of the knowledge that the passive subject does not consent, or the awareness that there is a possibility that she does not consent.²⁰ This was also reflected by Lord Stewart in *Barbour v. H.M. Advocate* who noted that the lack of consent is critical and not the resistance of the victim due to the violence: 'The important matter is not the amount of resistance put up but whether the woman remained an unwilling party throughout. The significance of resistance is only as evidence of unwillingness'²¹. This perception can be summarised by Peter Western's words; 'Every consent involves a submission but it by no means follows that submission involves consent.'²²

The UK Sexual Offences Act of 2003 defines consent as the 'freedom and capacity to make that choice.'²³ This means that consent needs to be given by a conscious and mentally capable individual who is able to understand and evaluate the situation and consequences of giving his or her consent.²⁴ Additionally, Aristotle notes that voluntariness arises when someone chooses something consciously.²⁵ Determinatively, the new amendments also added a provision in Article 198 regarding this notion in relation to consent. Subsection 3 of Article 198 confirms that consent needs to be given voluntarily and as a result of the person's free will. Assessment of such is done by considering the circumstances the person is in and their emotional and psychological state. Hence, the importance of the element of consent pivots around the notion of a person's sexual liberty and autonomy.

¹⁸ Criminal Appeal (Inferior), 29th November 2018, Judge Dr Edwina Grima.

¹⁹ Carnal connection has to necessarily occur without the victim's consent.

²⁰ David Ormerod, *Smith And Hogan's Criminal Law* (13th edn, Oxford University Press 2011), page 716.

²¹ Elizabeth Borg, *'Lack Of Consent: A Constitutive Element Of The Offence Of Rape'* (Degree in Doctor of Laws, University of Malta 2010), 16.

²² *Ibid*, 33

²³ Sexual Offences Act 2003, Chapter 42 Laws of UK, Article 74.

²⁴ J. H. Bogart, *'Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,' The Yale Journal* 62 (December 1952), page 55-83.

²⁵ Elizabeth Borg, *'Lack Of Consent: A Constitutive Element Of The Offence Of Rape'* (Degree in Doctor of Laws, University of Malta 2010), page 34.

Nonetheless, the new amendments still acknowledge the notion of violence which is seen as a mode of undermining consent. While in the old law, where it was critical for such element to be present during the act for the offence of rape to arise, in the new law, the element was transferred from the definition of rape in subsection 1 and was introduced as a subsection of its own in subsection 2. This section underlines the elements of force, bribery, deceit, deprivation of liberty, improper pressure and threats. Such violence can lead the victim to engage in the sexual act against his own will and the act will therefore still be considered as non-consensual. Accordingly, violence can be used to vitiate consent. In fact, J. H. Bogart advocates that compulsion, threat, force, fear, coercion and other forms of violence lead to non-voluntary behaviour even if consent is given and hence going against Article 198(3) aforementioned.²⁶

Nevertheless, judgments are still to date making references and putting emphasises on the element of violence during the offence. This is seen in the latter mentioned case in the Court of Appeal and also in *ir-Repubblika ta' Malta vs Omissis*²⁷ where it was noted that '*Id-delitt ta' stupru taht l-artikolu 198 tal-Kodici Penali jikkonsisti essenzjalment f'kongungiment karnali bi vjolenza*'²⁸

5.3. Changes in the definition of the *Actus Reus* - Carnal Connection

In Maltese law, carnal connection is the *acts reus* which differentiates the offence of rape from the offence of violent indecent assault.²⁹ Prior to the 2018 amendments, the offence of rape arose in the event of carnal knowledge of a person. Such term is defined in the Black Law dictionary as 'The act of a man in having sexual bodily connection with a woman,' where the term 'carnal knowledge' and the term 'sexual intercourse' are equivalent expressions³⁰. This was also exhibited by the court in *Il-Pulizija vs. Rhys Fiteni*³¹ et where it was stated that carnal knowledge exists when there is the penetration

²⁶ J.H. Bogart, '*Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law*,' *Canadian Journal of Law and Jurisprudence*, Jan, 1995, Vol.8(1), page 162.

²⁷ Criminal Court, 11th January 2019, Judge Dr. Consuelo Scerri Herrera.

²⁸ The offence of rape under article 198 of the Criminal Code must essentially consist of carnal connection with violence.

²⁹ Criminal Code, Chapter 9 of the Laws of Malta, Article 207.

³⁰ Black's Law Dictionary – 'Free Online Legal Dictionary' (*The Law Dictionary*) <<https://thelawdictionary.org>> accessed 6 March 2019.

³¹ Court of Magistrates (Criminal Judicature), 10 April 2012, Magistrate Dr. Consuelo-Pilar Scerri Herrera.

of one's genital organ into another's genital organ. It was further reflected in *Il-Pulizija vs. Joseph Magro*³² where the court noted '*essenzjalment ir-reat ta' stupru jikkonsisti fil-kongungiment karnali cioe l-introduzzjoni jew il-penetrazzjoni ta' l-organu genitali ta' persuna fl-organu genitali ta' persuna oħra.*'³³ This means that under the old law, the offence of rape would only arise upon the occurrence of vaginal penetration through penial penetration and therefore penetration in any other body part, by any other body part by any other object would not amount to rape but would have resulted in violent indecent assault or defilement of minors in cases where the victims were under eighteen.

The idea of rape only arising from vaginal penetration was entrained by various authors such as Antolisei while others including Manzini wrote about the possibility of anal and oral penetration. However, Manzini still held that penetration has to be one by a genital organ and thus excluded all possibility of penetration by objects or other body parts³⁴. Subsequently, it was Manzini's ideology that was applied in the Maltese courts prior to 2018. The Maltese courts however, totally excluded the possibility of oral penetration amounting to carnal connection as seen in *Il-Pulizija vs. Douglas James sive Jack Sheddon et.*³⁵ Similarly, the accused in *Il-Pulizija vs. Yulian Vasilev Iliev*³⁶ was prosecuted for violent indecent assault³⁷ as it was proved that vaginal penetration only occurred by means of his finger and penile penetration occurred orally.

Through the new amendments however, other forms of unwanted sexual contact and other forms of sexual assault were included in the definition of rape and the term 'carnal connection' now encompasses anal and oral penetration by other body parts or objects. This parallels with the UK Sexual Offences Act of 2003 which defines the *actus reus* of rape as penile penetration of the vagina, anus or mouth of another person without their consent.³⁸ Oral penetration in the UK was included as part of the offence of rape

³² Court of Magistrates (Criminal Judicature), 10 December 2012, Magistrate Dr. Doreen Clarke.

³³ Essentially, the offence of rape consists of carnal knowledge, that is, the introduction or the penetration of the genital organ of one person into the genital organ of the other.

³⁴ V. Manzini, 'Trattato di diritto penale italiano', VI, Milano-Torino-Roma, (1915), page 529.

³⁵ Criminal Appeal (Inferior Jurisdiction), 9th May 1959, Judge Dr W. Harding.

³⁶ Court of Magistrates (Criminal Judicature), 11 September 2013, Magistrate Dr. Doreen Clarke.

³⁷ Criminal Code, Chapter 9 of the Laws of Malta, Article 207.

³⁸ Sexual Offences Act 2003, Chapter 42 Laws of UK, Article 1.

on the basis that ‘... forced oral sex is as horrible, as demeaning and as traumatising as other forms of penile penetration.’³⁹

5.4. Change in Punishment

As evoked in the Istanbul convention, penalties for sexual offences had to be increased. As a result, through the amendments, punishment for this offence became harsher, with the minimum term of imprisonment being increased from three years to six years and the maximum term of imprisonment being increased from nine years to twelve years, if the offence is not aggravated.

The amendments also seek to provide greater justice to the rape victims as in subsection 4 of Article 198, the law holds that in addition to the aforementioned punishment, the offender is bound to restore to the victim any property stolen or obtained by fraud or unlawful gain as a result of the offence. The court may also order the perpetrator to pay the victim an amount equivalent to such loss or for any damages including moral and psychological harm caused by the offence. Such payments can be made in instalments as required by the Convention. The introduction of such damages is paramount as it compensates, partially and to a certain extent, for the torment the victims go through.

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5.5. Advantages of the Amendments

The change in the definition of carnal connection was a positive one, as it includes all the scenarios victims can be faced with and annihilates any doubts that might arise in court as to whether an act amounts to the offence of rape or not as it encapsulates all forms of intentional and sexual penetrations.

The alteration in the *mens rea* of the offence was also a favourable one. The reason for such change is due to the fact that victims in such situations react and behave differently and a ‘one size fits all’ approach is inappropriate in such crimes.⁴¹ Studies have shown that rape victims suffer rape-induced paralysis or tonic immobility as they undergo

³⁹ Elizabeth Borg, ‘Lack Of Consent: A Constitutive Element Of The Offence Of Rape’ (Degree in Doctor of Laws, University of Malta 2010), page 29

⁴⁰ Vento, ‘Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com’ (*maltawinds.com*, 2017) <<http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading/>> accessed 6 March 2019.

⁴¹ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), page 23, para 191.

great levels of shock and freeze as a response to the imminent threat and fear they face.⁴² Such studies were reinforced by Professor James W. Hopper, a psychology instructor in the Department of Psychiatry of Harvard Medical School, who stated that there is a scientific attribution accrediting to the reason why women show no reaction during such assault.⁴³ This arises due to a woman's vulnerability and embedded instincts of passivity and submissiveness.⁴⁴ This denotes that in such cases, violence would not be necessary for the offence to be perpetrated and that the violence requirement was outdated and contentious *in lieu* of reality and actual human behaviour. Additionally, a substantial number of rape crimes were being left unreported due the latter requirement of proof of violence. This is due to the fact that not all assaults leave physical proof or mark on the victim's body, even if violence was used during the execution of the offence.⁴⁵ Moreover, not all rape can result from violence especially when one bears in mind that a significant number of rape offences are consummated by acquaintances.⁴⁶ All in all, although the element of consent is harder to prove than the element of violence, this requisite is aimed at preventing or rather minimising the victim's trauma in proving that the assault occurred.

5.6. Disadvantages of the Amendment

The major problem with the notion of the lack of consent being the *mens rea* of such sexual offence is being able to establish when the consent has or has not actually been given. Ergo, proving lack of consent during rape is a tougher challenge than proving the presence of violence. This is especially so when the consent given by the victim is not genuine but vitiated by different types of violence as discussed above. There might also be other situations, for example when considering marital rape or date rape, where the parties would have previously participated in consensual sexual activities and hence consent is not asked for before the act as it is often taken for granted in such circumstances. This therefore suggests that the consent given for the performance of

⁴² Avigail Moor and others, 'Rape: A Trauma Of Paralyzing Dehumanization' (2013) 22 Journal of Aggression, Maltreatment & Trauma, page 1051-1069.

⁴³ Yanika Pisani, 'Redefining Rape: In Light Of The Istanbul Convention' (Degree of Bachelor of Laws with Honours, University of Malta 2019), page 33-34.

⁴⁴ Ann J. Cahill, *Rethinking Rape* (Cornell University Press, 2001), page 201.

⁴⁵ Krista Tabone, 'Kick her while she's down: an exploration of rape myth acceptance amongst the University of Malta student body' (B.PSY(Hons.), University of Malta 2010), CH 5.

⁴⁶ Yanika Pisani, 'Redefining Rape: In Light Of The Istanbul Convention' (Degree of Bachelor of Laws with Honours, University of Malta 2019), page 34.

sexual activities, or rather the lack of it, should be assessed on a case by case basis and such cases should not be treated in the same way.⁴⁷

6. Defilement of Minors

Children must be afforded the proper safeguards, care and legal protection as a result of their immaturity and vulnerability and this has been recognised both nationally and internationally through the enactment of conventions such as the United Nations Convention on the Rights of the Child, which oblige Member States to transpose such protection in their domestic laws. The Maltese Criminal Code holds a crucial role in such circumstances and therefore, lewd acts of a sexual nature committed on or in the presence of a minor have been continuously subject to amendments as it has nationally been recognised that the weak and vulnerable should be protected since, as Advocate Cerelli Vittori opined, they do not afford the capacity to protect themselves and oppose resistance against other's lustful needs.⁴⁸

Moreover, minors are considered to lack the maturity necessary to consent and participate in such acts. Consequently, they have been protected in this way in our Criminal Code since the first promulgation of the offence in 1885. The provision has over the years been amended mainly to alter its punishment.

6.1. Change in the Age

One of the prime changes detected in the amended laws relating to the defilement of minors is the shift in the definition of a minor from including persons under the age of eighteen to referring to persons under the age of sixteen.⁴⁹ This change of wording in Article 203 is a result of the lowering of the age of consent in Malta from eighteen years to sixteen years.

⁴⁷ Elizabeth Borg, 'Lack Of Consent: A Constitutive Element Of The Offence Of Rape' (Degree in Doctor of Laws, University of Malta 2010), page 62-63.

⁴⁸ Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 15.

⁴⁹ hereinafter referred to as 'minor'

As the word indicates in itself, the age of consent is the age when a person is considered at law to be mature and capable to assent to sexual acts. An array of transnational agreements and conventions, such as the United Nations Convention on the Rights of the Child in Article 1, the Lanzarote Convention in Article 3(b) of its preamble and Article 2 of the EU Directive on Combating the Sexual Exploitation of Children and Child Pornography, define minors as individuals who have not attained the age of eighteen but they also allow member states to determine this at their discretion.

Many continental law jurisdictions pigeonhole any type of sexual offence as being committed against the individual's sexual liberty. This suggests that every person has a right to freely express his sexual inclinations as he deems fit. For this reason, the age of consent in these countries is lower than eighteen as minors of a certain age can be afforded with sexual freedom. Such reasoning was followed in Malta in 2018 when the parliament lowered the age of consent to sixteen.⁵⁰

Such change in the age of consent also resulted from the realisation of the incoherence in the civil and criminal laws. Firstly, Malta's legal age of marriage was sixteen years⁵¹ which begged the question: if an individual who attained the age of sixteen is capable of consenting to marriage, why cannot the same individual consent to perform in sexual relations, especially if sexual relations are crucial for the consummation of the marriage?⁵² Another instigator for the lowering of the age of consent was due to the inconsistency in relation to the age of criminal responsibility and the age of consent. Minors between the age of sixteen and eighteen are held to be criminally responsible for their illicit acts.⁵³ Therefore it is paradoxical to considered a minor of such age to be capable of intending a criminal offence but incapable of consenting to sexual acts.⁵⁴ Lastly, one can argue that since the voting age in Malta was lowered to sixteen years in 2018 and thus, such individuals are considered to hold the adequate reason to vote,

⁵⁰ Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 17.

⁵¹ Marriage Act, Chapter 255 of the Laws of Malta, Article 3.

⁵² Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 17

⁵³ Criminal Code, Chapter 9 of the Laws of Malta, Article 37(2).

⁵⁴ Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 118

it is inevitable that they also hold the appropriate capacity to consent to sexual acts. As a result of these, if an individual is capable of fully and validly consenting to participate in sexual relations, prosecution of the mature person would be irrational.

6.2. Punishment

Furthermore, amendments to the defilement of minors laws centre around a substantial increase to the term of imprisonment given to offenders. One can note that while solitary confinement was eliminated for reasons discussed above, offenders can now be awarded with double the sentence for their offences, or at times even more. For example, in the instance of the performance of lewd acts to defile a minor, the offender's punishment increased from a set maximum of three years to a term ranging from a minimum of four years to a maximum of eight years⁵⁵. Another change materialised in the punishment given to a person who aids and abets with the defilement of the minor which increased from a maximum of two years to a minimum of three years and a maximum of six years.⁵⁶

6.3. Instituting Proceedings *Ex Officio*

In Article 203 one finds a reflection of the notion of the institution of proceedings *ex officio* by the Police as emanated in The Gender-Based Violence and Domestic Violence Act. While the idea of the proceedings being instituted *ex officio* in cases where the offender is a parent or tutor already existed and continue to be reflected in the new code, Article 203(3) highlights the newly added idea of the continuation of proceedings even if the injured party withdraws their complaint which previously would have terminated the proceedings irrespective of the offender's guilt.⁵⁷ Significantly, it is only in such provision that such a conviction was introduced despite the fact that the aforementioned act seeks to include all the sexual offences. In fact, such provision is absent in Article 198.

6.4. Aggravating Circumstances

⁵⁵ Criminal Code, Chapter 9 of the Laws of Malta, Article 203(1).

⁵⁶ *ibid.*, Article 203A.

⁵⁷ *ibid.*, Article 203(3).

The amendments introduced the element of psychological violence perpetrated by the offender in Article 203 (1)(a), a notion absent in the previous Criminal Code. This emanates from Article 28 of the Lanzarote Convention, in which a list of aggravated circumstances is provided for the determination of the offender's punishment. If the offence damages the mental health of the victim, it would be considered as an aggravating circumstance in terms of Article 28(a) of the Lanzarote Convention and in terms of Article 203(1)(a) of the Maltese Criminal Code.

7. Conclusion

While it has often been argued that prior to local amendments of the Criminal Code, sexual offence laws were not conceived to protect victims adequately, but rather to hinder the perpetrator's punishment and exacerbate the inequality between male and females, one can contend that such gender imbalance and injustice have been successfully eliminated through the *prima facie* and technical portrayal of the law. However, whether such amendments have had an impact on judgments in the last few months since the amendments came into force is another debatable issue.

Nonetheless, through the amendments of the definitions of the respective sexual offences and of the punitive measures in our Criminal Code, the incorporation of the Istanbul Convention and the development of the Gender-Based Violence and Domestic Violence Act, there is no doubt that we have locally taken the first step towards a justice system which greatly favours sexual offence victims. Women and girls are now supposedly afforded greater protection against their male perpetrators who face serious punishments. While such punishments are more proportionate to the crime than what was set before, they are aimed at minimising the offences as offenders might be deterred by the longer term of imprisonment.