

# Bill 84 of 2019: A Testimony to a year's worth of the Gender-Based Violence and Domestic Violence Act's evolution

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In this article, Jurgen Micallef examines the Gender-Based and Domestic Violence Act (Chapter 581 of the Laws of Malta) through the lens of Bill 84 of 2019, which proposed amendments to the law, as well as to the Criminal Code.

**TAGS:** Equality Law, Criminal Law, Gender-Based and Domestic Violence Act

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# 1. Introduction - The Istanbul Convention

The preamble to the Istanbul Convention tenders multiple pre-existing certainties which nonetheless denote the need for legislative intervention in regards to Gender-Based Violence & Domestic Violence (herein after referred to as “GBV&DV”), which the Istanbul Convention sought to advocate for — by means of imposing a positive obligation<sup>1</sup> to its parties to prevent such violence<sup>2</sup>. Amongst the facts stated in the preamble which are all inspired by atrocious realities, it most notably transpires that “*women and girls are exposed to a higher risk of gender-based violence than men*” and “*domestic violence affects women disproportionately, and that men may also be victims of domestic violence*”<sup>3</sup>. As a reaction to the aforementioned, the convention aspires “*to create a Europe free from violence against women and domestic violence*”<sup>4</sup>.

It is a well-established fact that GBV&DV have long been present amongst us, which inevitably explains the perceived elevated status of the convention as a result of its specific targeting. In this regard, the Convention boasts four pillars: prevention, protection, prosecution and integrated policies. In other words, it aims to: educate by raising awareness in overcoming gender stereotypes; render accessible support and services for victims experiencing such violence; ensure effective investigation and protection of offences; and ensure that the stakeholders work in a coordinated approach in carrying out risk assessments and devise an accurate safety plan for victims experiencing GBV&DV<sup>5</sup>. In ensuring the effectiveness of these four pillars, the Convention is divided into 12 Chapters, all catering for every aspect which could possible arise, be it procedural or substantive.

The key instrument establishes various notions which are of paramount importance in combatting GBV&DV at an international level. Owing to its transnational nature, States which become party to the Convention are required to implement the same notions it establishes. One of the most prominent components in this regard is Article 3 of the Convention, whereby it establishes a set of definitions which must, as previously stated, be implemented into domestic law of the respective State. For instance,

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1 Article 5 of the Convention

2 Grans Lisa, *Human Rights Law Review* (March 2018, Vol. 18(1), p.133-155).

3 Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, <<https://www.refworld.org/docid/548165c94.html>> (Accessed 28 June 2019)

4 *Ibid*

5 Ministry for European Affairs Equality, *Gender-Based Violence & Domestic Violence Strategy Plan & Action Plan: Vision 2020*, p. 2

Article 2 of Malta's Chapter 581<sup>6</sup>, entitled the "Gender-Based and Domestic Violence Act", includes excerpts from the Article 3 of the Convention; such as the definitions of "domestic violence", "gender", "gender-based violence" and "victim". Other definitions such as "violence against women" and "women" are not included in the interpretation provision of Chapter 581, but are nonetheless included in the Act's schedule, which recites the convention itself.

Apart from substantial and procedural matters, the convention also establishes what is known as '*The Group of Experts on Action against Violence against Women and Domestic Violence*' (herein after referred to as "**GREVIO**"). Such entity is established as a monitoring mechanism under Chapter IX, whereby further references are made to GREVIO under Articles 66 to 70 and 79. The aim of GREVIO is to draw up and publish reports evaluating legislative and other measures taken by the parties to give effects to the provisions of the Convention<sup>7</sup>.

## 2. The Maltese Position

### 2.1. The (Repealed) Domestic Violence Act

As may be seen from the very brief introduction regarding the Istanbul Convention, the European Council had created a whole new regime for the sole purpose of combatting GBV&DV, to which the Maltese legislation had to adjust itself. Nonetheless, prior to the Istanbul Convention, Malta had already implemented the Domestic Violence Act in 2005. The latter Act shared various similarities with the current Chapter 581, however it is evident that it lacked stability of enforcement and widespread recognition of certain notions; including the offence of gender-based violence itself, which seemed unbeknownst to the 2005 Act. Despite being repealed by Act XIII of 2018, it nonetheless set various standards for the law on domestic violence in our legal system.

### 2.2. Recent Local Statistics

In a parliamentary sitting on the 2<sup>nd</sup> of April 2019<sup>8</sup>, the Hon. MP Claudette Buttigieg requested from the Hon. Michael Falzon information as to how

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6 Chapter 581, Laws of Malta, Gender-Based Violence & Domestic Violence.

7 Council of Europe, *Istanbul Convention about Monitoring: GREVIO* (Accessed 28 June 2019) <<https://www.coe.int/en/web/istanbul-convention/grevio>>

8 Sitting No.: 214 (2<sup>nd</sup> April 2019).

many cases of domestic violence have been reported from 2010 to 2018, more specifically domestic violence on women, men, children and the elderly. It transpired that there was a substantial exponential increase in recent years as opposed to the early years posed by the statistics provided, with psychological harm reigning the statistics<sup>9</sup>. In 2018, a total of 1,546 were reported, whereby out of such 1,546 victims, 1,182 were female victims. However, despite the number of victims totaling to a number of 1,546 in 2018, only 1,341 cases proceeded to court. Thus, one may question what happened with the remaining 205 victims (vis-à-vis unreported court cases).

On this end, the relevance of Bill 84 of 2019 becomes seemingly relevant. Recently, it was proposed that the amendments which may prospectively take place would “*give the police an automatic obligation to institute proceedings against a suspect — without the need for a complaint to be made by the victim*”<sup>10</sup>. It is evident, therefore, that despite the enactment of Chapter 581 in 2018, the legislator acknowledged the discrepancy of enforcement measures which was also considered an issue with the now-repealed Domestic Violence Act.

### 2.3. An Analysis of Bill 84 of 2019

Although some may perceive Bill 84 of 2019 as simply an act to amend the Criminal Code and the Gender-Based Violence and Domestic Violence Act, the paragraph included in the last page of the Bill concerning objects and reasons of the act goes a step beyond the mere amendments and asserts an important proposition. It states:

***“The objects and reasons of this Bill are to amend the Criminal Code and the Gender-Based Violence and Domestic Violence Act to strengthen dispositions related to gender-based violence and domestic violence, and ensure representation of persons with disability on the Gender-Based Violence and Domestic violence Commission.”***

The amendments which are proposed are two-fold: substantive & procedural. In regard to the Criminal Code’s substantive provisions, the

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<sup>9</sup> For a more detailed account, the statistics provided may be accessed online at <<https://parliament.mt/media/99978/03202.pdf>>.

<sup>10</sup> Scicluna Luke, *Increase in fines to perpetrators of domestic violence proposed*, (Times of Malta, 26<sup>th</sup> June 2019) [Accessed 28 June 2019 <[https://timesofmalta.com/articles/view/increase-in-fines-to-perpetrators-of-domestic-violence-proposed716937?fbclid=IwAR3SwpiVSCuJw6iUy-jFnos4ZCC87YSpCaS\\_mCbTHWIMf0U6OoT7icWDvK3k](https://timesofmalta.com/articles/view/increase-in-fines-to-perpetrators-of-domestic-violence-proposed716937?fbclid=IwAR3SwpiVSCuJw6iUy-jFnos4ZCC87YSpCaS_mCbTHWIMf0U6OoT7icWDvK3k)>

proposed amendments principally deal with provisions on Non-consensual disclosure of private sexual photographs and films<sup>11</sup>, Restraining Orders<sup>12</sup>, Temporary Protection Orders<sup>13</sup>.

Meanwhile, the bill addresses the GBV&DV Act's interpretation provision (Article 2) in regards to the definition of "gender", whereby it is proposed that the words "*with a person being either a male, female*" are simply to be removed, the main reason being the proposed reference made to "*with a person of any sex*". Finally, in virtue of the 'objects and reasons' of the bill, it is proposed that one of the members on the GBV&DV Commission shall be a person with a disability, so as to ensure representation of persons with disability. Other procedural (or rather, administrative) proposed amendments in terms of the Criminal Code include the amendment to Article 646 in regards of the examination of witnesses to take place in Court and viva voce, and an amendment of Article 18 which is also purely trivial.

### 2.3.1. Bill 84 of 2019 - Article 540A

As mentioned earlier in this paper, one of the most notable amendments proposed by Bill 84 is the substitution of Article 540A<sup>14</sup>, which "*give the police an automatic obligation to institute proceedings against a suspect, without the need for a complaint to be made by the victim*"<sup>15</sup>. It must be noted that Bill 84 is not merely amending Article 540A, but substituting it, which is perhaps a statement showing the explicit changes made in favour of preventing GBV&DV. The reasons behind such changes may vary, but juxtaposing the current Article 540A with the proposed substitution inevitably materialises that the current section of the law does not cater enough for instances of GBV&DV in terms of protecting the alleged victim and prosecuting the alleged offender.

Whilst the present Article 540A nonetheless accommodates certain necessities in this regard of GBV&DV, the proposed 'substitution' delves into more detail. In fact, perhaps the most illustrious proviso proposed would be that under Article 540A(1), referred to earlier — whereby a "*Police officer not below the rank of inspector (...) immediately initiate an investigation, during which investigation there shall be heard, amongst*

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11 Article 208E, Criminal Code (Chap. 9), Laws of Malta.

12 Article 382A, Criminal Code (Chap. 9), Laws of Malta.

13 Article 540A, Criminal Code (Chap. 9), Laws of Malta.

14 Duty of Police on receipt of report, information of complaint.

15 Scicluna Luke, Times of Malta

*others, the alleged offender*". Although this proviso may seem as the mere epitome in terms of preventing, prosecuting, protecting and integrated policies; it may require further endeavours from the Executive Police in adhering to such duty. It is not unknown that victims of GBV&DV are often intimidated "*by the system that seeks to protect them*", as was pointed out recently by Dr. Lara Dimitrijevic<sup>16</sup>, Director for Women's Rights Foundation.

The proposed proviso to Article 540A(2) then puts more pressure on the Executive Police. Article 540(2) itself remained the same<sup>17</sup>, whereby it speaks of the application to be made by the Executive Police to a Magistrate requesting the issue of a temporary protection order, where it is apparent that any person is at a serious risk. The proviso thus includes a twelve-hour timeframe from the conclusion of the said assessment within which the Executive Police must apply to a Magistrate. It must be noted that the proviso speaks of 'assessment' whilst Article 540(2) speaks of 'investigation'.

Article 540A(3)'s first proposed proviso may then appear to give some sort of leeway to the Judiciary, by a margin of two extra hours. Furthermore, a protectionist caveat is introduced in Bill 84, which requires the designated agency to provide sheltered accommodation to the alleged victim, according to Article 19(3)(d) of the GBV&DV Act. These provisos are conditions of Article 540A(3), which reads as follow:

*"Before deciding whether to issue the temporary protection order, the Magistrate may require the police officer, the professional, or the person making the report or complaint giving the information, to confirm on oath the information supplied by him and the temporary protection order shall be issued **once the Magistrate is satisfied that sufficient grounds for the issuing of the order exist.**"*

Although so far, it seems that only minimal amendments and drastic additions are proposed to Article 540A of the Criminal Code, as of Article 540A(5) thereon (provided that Article 540A(4) remained the same), a multitude of amendments and additions have been made, demonstrating the current desideratum for a legislative intervention. The most notable change from Article 540A(5) thereon appears to be the substitution of

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<sup>16</sup> Cachia Carmen, *Nisa li jirrapportaw qegħdin ikunu intimidati mill-pulizija*, (INewsMalta, 25<sup>th</sup> June 2019) (Accessed 5<sup>th</sup> July 2019) <<http://www.inewsmalta.com/article.php?ID=81892&fbclid=IwAROMJxC7j-bNFYFu-2jEjgEVQYU8GmSvYKgzch8elvdLSk3WW5pPzh4LMPs>>

<sup>17</sup> With the only exception being that the current section speaks of assessment, whilst the Bill's Article 540(2) speaks of investigation.



Article 540A(6), which is now divided into 540A(6)(a) and (b), owing its nature to the pillar of ‘protecting’.

The difference between the current section in force and the proposed section is that a temporary protection order shall remain in force not until the alleged offender is arraigned, but (a) up to a maximum of thirty days from the issue of the temporary protection order; or (b) until the first sitting against the alleged offender — whichever is the earliest, provided that *“the Police shall institute proceedings against the alleged offender by not later than thirty days from the issue of the temporary protection order”*.

However, the current Article 540A(6) also contains the fact that such temporary protection order *“may be **revoked or extended** for further periods on good cause being shown by the Executive Police or by the injured party”*, and it is further provided under the current Article 540A(8) that *“the temporary protection order shall lapse upon the issue of a protection order under Article 412C”*. By means of the tendered provisions, Article 540A(7) and (8) provide more autonomy to the temporary protection order under these circumstances of GBV&DV. In fact, Article 540A(7) would reflect the current second part of Article 540A(6), whilst Article 540A(8) would introduce a list whereupon such temporary protection order would lapse (as opposed to the current Article 540A(8)). The circumstances are somewhat amalgamated from the current law to under one proposed provision, and such circumstances where a temporary protection order would lapse are:

- (a) *the determination that no criminal proceedings shall be instituted against the alleged offender; or*
- (b) *the lapse of thirty days from the issue of a temporary protection order; or*
- (c) *the hearing of the first sitting against the alleged offender;  
or*
- (d) *the issue of a protection order under article 412C*

*Provided that in the case of paragraph (a), the Executive Police shall immediately inform the Magistrate of this decision, and request the revocation of the temporary protection order.*

### 3. Conclusion

As stated as earlier in the title of this paper, the proposed Bill 84 of 2019 may serve as a testimony to the work, research and evolution of the law on GBV&DV throughout the past year since the enactment of Chapter 581<sup>18</sup> as well as since the ratification of the Istanbul Convention in 2014. An attestation to this statement is easily evident in the aforementioned ‘**Objects & Reasons**’ of the Bill itself. Although it is quite obvious that by means of one Bill the law will not be ‘complete’, it is the symbolisation of what the Bill itself represents which invariably allows a State to secure measures which owe their existence to their four pillars of the convention.

Apart from the concerned Bill, other measures have been taken by the State, such as the ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which secures and grants the rights to all women who suffered from any form of discrimination. Such ratification took place earlier this year<sup>19</sup>, just in time before the Consultation Meeting held by the Government entitled “*Lejn Qafas għall-Integrazzjoni tal-Ugwaljanza bejn il-Ġeneri*”<sup>20</sup>, which ended on the 8<sup>th</sup> of April 2019.

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19 *Malta ratifies protocol to elimination of discrimination against women convention*, (Times of Malta, March 15<sup>th</sup> 2019) [Accessed 5<sup>th</sup> July 2019] <<https://timesofmalta.com/articles/view/malta-ratifies-protocol-to-elimination-of-discrimination-against-women704709>>

20 More information may be obtained from <[https://meae.gov.mt/mt/Public\\_Consultations/MEAE/Pages/Consultations/Lejn-Qafas-għall-Integrazzjoni-tal-Ugwaljanza-bejn-il-Ġeneri.aspx?fbclid=IwARIIJ-V20POSRhjBmaG3eBODiIkkrZ19Xhn8SxLaEu0dkO5WFhn\\_cYGPTlc](https://meae.gov.mt/mt/Public_Consultations/MEAE/Pages/Consultations/Lejn-Qafas-għall-Integrazzjoni-tal-Ugwaljanza-bejn-il-Ġeneri.aspx?fbclid=IwARIIJ-V20POSRhjBmaG3eBODiIkkrZ19Xhn8SxLaEu0dkO5WFhn_cYGPTlc)>



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6. Parliamentary Sitting No.: 214 (2<sup>nd</sup> April 2019).

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