THE MALTESE SENTENCING REGIME
IN RELATION TO DRUG TRAFFICKING
OFFENCES
BY
Stephanie Shaw

A Thesis Submitted in Partial Fulfilment of the Degree
of Doctor of Laws (LL.D.)
Faculty of Laws, University of Malta
May 2013
University of Malta
L-Università ta’ Malta

University of Malta Library – Electronic Theses & Dissertations (ETD) Repository

The copyright of this thesis/dissertation belongs to the author. The author’s rights in respect of this work are as defined by the Copyright Act (Chapter 415) of the Laws of Malta or as modified by any successive legislation.

Users may access this full-text thesis/dissertation and can make use of the information contained in accordance with the Copyright Act provided that the author must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the prior permission of the copyright holder.
Declaration of Authorship

I, Stephanie Shaw, declare that this thesis entitled ‘The Maltese Sentencing Regime in relation to Drug Trafficking Offences’ and the work presented in it is my own.

I confirm that:

- The Word Count of the thesis is __________.
- This work was done in partial fulfilment for the degree of Doctor of Laws (LL.D.) at the Faculty of Laws of the University of Malta.
- Where any part of this thesis has previously been submitted for a degree or any other qualifications at this University or any other institution, this has been clearly stated.
- Where I have consulted the published works of others, this is always clearly attributed.
- Where I have quoted from the works of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work.
- I have acknowledged all sources used for the purpose of this work.
- I have not commissioned this work, whether in whole or in part, to a third party and that this work is my own work.
- I have read the University of Malta’s guidelines on plagiarism.

Signed:

Date:
ABSTRACT

The Maltese drug trafficking sentencing regime is frequently criticised by the media and legal practitioners alike. Although cases of inconsistencies do exist, many commentators often fail to account for the numerous sentencing factors weighing on the final sentence. The aim of this study is to identify the existing elements and their individual significance in view of punishment, with the ultimate view to developing a more coherent outlook towards the sentencing process.

The first Chapter provides a succinct background to the study by delving into the Maltese law on the offence of drug trafficking. Firstly, it examines the international laws relating to drugs, whilst subsequently analysing the different offences and punishments found in the Maltese drug laws.

Chapter Two discusses the unique pre-trial role of the Attorney General, with special emphasis on his power to direct trial before the appropriate Court. The effects of this decision are observed in detail, with particular attention on the human rights issues that tend to surface. The second part of the Chapter deals with the procedural and administrative factors affecting sentencing, namely the guilty plea and the cooperation of the accused with the authorities.

Chapter Three further examines the regime by pinpointing the legal factors to be accounted for by the adjudicator, which, by reason of their mandatory nature, severely restrict the discretion of the Courts. Similarly, Chapter Four analyses certain personal and legal factors affecting punishment, yet the considerations mentioned therein are merely discretionary.

Consequently, the final Chapter evaluates the notion of inconsistency and accordingly pinpoints to methods that seek its elimination, largely through an extensive comparative approach. The study concludes with a solution for Malta, which aims towards the realisation of a more coherent approach to sentencing.

Keywords: Drug Trafficking; Attorney General; Sentencing; Judicial Discretion; Criminal Procedure.
DEDICATION

To my parents:
For years of immeasurable support.
# TABLE OF CONTENTS

ABSTRACT ........................................................................................................... 3

DEDICATION ......................................................................................................... 4

TABLE OF STATUTES .......................................................................................... 8

TABLE OF JUDGMENTS ....................................................................................... 11

ACKNOWLEDGEMENTS ....................................................................................... 17

LIST OF ABBREVIATIONS .................................................................................... 18

INTRODUCTION ..................................................................................................... 20

1 MALTESE LAW ON DRUG TRAFFICKING ..................................................... 23
   1.1 Sources of the Maltese drug regime ............................................................. 23
      1.1.1 The UN Conventions on drugs .............................................................. 23
      1.1.2 Initiatives of the European Union ......................................................... 26
      1.1.3 Maltese drug legislation ........................................................................ 27
   1.2 Drug trafficking offences ............................................................................ 28
      1.2.1 ‘Dealing’ .............................................................................................. 28
      1.2.2 Aggravated Possession ........................................................................ 36
      1.2.3 Other Trafficking Offences ................................................................... 38
   1.3 Criticisms of broadly defined offences ..................................................... 41
   1.4 Drug trafficking penalties ........................................................................... 43
      1.4.1 Mandatory imprisonment and the imposition of a fine ......................... 43
      1.4.2 Forfeiture of criminal assets ................................................................. 44
   1.5 Concluding observations ............................................................................ 48

2 PRE-TRIAL AND PROCEDURAL ISSUES AFFECTING
   SENTENCING OUTCOMES ............................................................................ 49
   2.1 The pre-trial role of the Attorney General ............................................... 49
      2.1.1 Contingent punishment ........................................................................ 50
      2.1.2 Making the decision ............................................................................ 51
2.1.3 Remedies and procedural safeguards ........................................ 53
2.1.4 Human rights violations ......................................................... 56
2.1.5 Recent developments ............................................................. 64

2.2 Factors that promote the effective administration of the criminal justice process ................................................................. 64
  2.2.1 Aiding the Police ................................................................. 65
  2.2.2 The guilty plea ................................................................. 67

2.3 Concluding observations .......................................................... 71

3 MANDATORY SENTENCING CONSIDERATIONS .................. 73
  3.1 Structuring sentencing discretion ............................................... 73
  3.2 Mandatory punishment: no room for manoeuvre ...................... 74
    3.2.1 Mandatory sentence parameters .................................... 74
    3.2.2 Inapplicability of the ‘escape clause’ and the non-custodial measures ................................................................. 75
  3.3 Statutory factors having effect on sentencing ......................... 76
    3.3.1 Aggravating and mitigating factors in the Criminal Code .... 77
    3.3.2 Aggravating and mitigating factors in the drug laws .......... 80

3.4 Concluding observations .......................................................... 85

4 DISCRETIONARY SENTENCING CONSIDERATIONS .......... 87
  4.1 Judicial self-regulation .......................................................... 87
    4.1.1 Sources of judicial self-regulation .................................... 87
    4.1.2 Discretionary aggravation and mitigation ........................... 89
  4.2 Legal discretionary factors .................................................... 91
    4.2.1 Valuation ........................................................................ 91
    4.2.2 Role of the accused ......................................................... 94
    4.2.3 Length of the offence ...................................................... 97
  4.3 Personal discretionary factors ................................................ 98
    4.3.1 Previous conduct of the accused ..................................... 98
    4.3.2 Age of the accused ......................................................... 99
    4.3.3 Drug addict .................................................................... 100
    4.3.4 Clemency of the jury ....................................................... 103
5 TOWARDS A CONSISTENT APPROACH TO SENTENCING 105

5.1 Achieving consistency ......................................................... 105
  5.1.1 Sentencing policy .......................................................... 106
  5.1.2 Classification of drugs ..................................................... 108
  5.1.3 Sentencing guidelines ...................................................... 111
  5.1.4 Sentencing information systems ....................................... 117

5.2 A solution for Malta ............................................................ 119
  5.2.1 The AG’s discretion to direct trial .................................... 120
  5.2.2 Dealing with minor offences of trafficking .......................... 121
  5.2.3 Voluntary guidance ......................................................... 122
  5.2.4 Sentencing advisory body ............................................... 125
  5.2.5 Strengthening of ancillary measures .................................. 127

5.3 Concluding observations ...................................................... 128

CONCLUSION ............................................................................ 129

BIBLIOGRAPHY ........................................................................ 132
TABLE OF STATUTES

Maltese Legislation

Laws of Malta

- Constitution of Malta
- Criminal Code, Chapter 9 of the Laws of Malta
- Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta
- Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta
- Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta
- Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta

Subsidiary Legislation

- Freezing Orders (Execution in the European Union) Regulations, Subsidiary Legislation 13/09
- Confiscation Orders (Execution in the European Union) Regulations, Subsidiary Legislation 15/09

Acts of Parliament

- Act XVI of 2006, Criminal Code (Amendment) Act
- Bill No 97 of 2011, Various Laws (Criminal Matters) (Amendment) Act 2011
EU Legislation

- Council Regulation (EC) 111/2005 laying down rules for the monitoring of trade between the Community and third countries in drug precursors OJ L22/1

Foreign Legislation

United Kingdom

- Crime and Disorder Act 1998
- Criminal Justice Act 2003
- Criminal Justice and Public Order Act 1994
- Drugs Act 2005
- Misuse of Drugs Act 1971
- Proceeds of Crime Act 2002

Australia

- Queensland Drugs Misuse Act 1986
- Sentencing Act 1999 (Vic)

International Conventions

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)
- The 1961 United Nations Single Convention on Drugs
- The 1971 United Nations Convention on Psychotropic Substances
• The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
### TABLE OF JUDGMENTS

#### Maltese Judgments

- Adrian Marmara u Eugenio Camenzuli vs. L-Avukat Generali, Civil Court First Hall, 6 November 2012
- Claudio Porsenna vs. L-Avukat Generali, Civil Court First Hall, 6 April 2011
- Claudio Porsenna vs. L-Avukat Generali, Constitutional Court, 16 March 2012
- Corunato sive Coronato Muscat vs. Il-Kummissarju tal-Pulizija, Civil Court First Hall, 26 January 2007
- Godfrey Ellul vs. L-Avukat Generali, Civil Court First Hall, 16 May 2006
- Godfrey Ellul vs. L-Avukat Generali, Constitutional Court, 27 April 2006
- II-Pulizija vs. AB, Court of Criminal Appeal, 24 February 2010
- II-Pulizija vs. Addie Magri, Court of Criminal Appeal, 12 January 2011
- II-Pulizija vs. Andre Falzon u Sean Farrugia, Court of Magistrates, 9 November 2012
- II-Pulizija vs. Anthony Frendo, Court of Criminal Appeal, 10 April 2008
- II-Pulizija vs. Brian Caruana, Court of Magistrates, 10 September 2001
- II-Pulizija vs. Carmel Spiteri, Court of Criminal Appeal, 2 September 1999
- II-Pulizija vs. Charles Muscat, Court of Magistrates, 25 January 2002
- II-Pulizija vs. Doreen Bugeja, Court of Magistrates, 30 April 2013
- II-Pulizija vs. Emmanuel Testa, Court of Criminal Appeal, 17 July 2002
- II-Pulizija vs. Ersilia sive Alison Gauci, Court of Criminal Appeal, 6 July 2007
- II-Pulizija vs. Isabelle Brincat, Court of Criminal Appeal, 14 March 2013
- II-Pulizija vs. Jason Mallia, Court of Criminal Appeal, 2 September 1999
- II-Pulizija vs. Jeffery Savage, Court of Magistrates, 15 October 2012
- II-Pulizija vs. Jonathan Mifsud, Court of Criminal Appeal, 27 October 2010
- II-Pulizija vs. Josef Abela, Court of Criminal Appeal, 17 September 2008
• Il-Pulizija vs. Joseph Cutajar, Court of Magistrates, 12 November 2009
• Il-Pulizija vs. Joseph Lebrun, Civil Court First Hall, 27 June 2006
• Il-Pulizija vs. Lawrence sive Lorry Sant, Court of Criminal Appeal, 14 August 1991
• Il-Pulizija vs. Lorraine Vella, Court of Criminal Appeal, 9 May 2012
• Il-Pulizija vs. Marco Camilleri, Court of Criminal Appeal 26 January 2011
• Il-Pulizija vs. Mark Mifsud, Court of Magistrates, 26 September 2002
• Il-Pulizija vs. Mateo Carlos Frias, Court of Criminal Appeal, 19 January 2012
• Il-Pulizija vs. Michael Portelli, Court of Magistrates, 15 June 2012
• Il-Pulizija vs. Michael Portelli, Court of Criminal Appeal, 29 April 2013
• Il-Pulizija vs. Michael Zahra, Court of Criminal Appeal, 14 May 2009
• Il-Pulizija vs. Miriam Sant, Court of Criminal Appeal, 26 January 1998
• Il-Pulizija vs. Mohammed Ben Hassen Trabelsi, Court of Criminal Appeal, 17 February 1997
• Il-Pulizija vs. Russell Bugeja, Court of Criminal Appeal, 5 May 2008
• Il-Pulizija vs. Simon Bonett, Court of Magistrates, 7 August 2002
• Il-Pulizija vs. Simon Bonett, Court of Criminal Appeal, 9 April 2003
• Il-Pulizija vs. Stephen Abela, Court of Appeal, 8 August 2005
• Il-Pulizija vs. Steven Zahra, Court of Criminal Appeal, 26 May 1998
• Ir-Repubblika ta’ Malta vs. Abdulsalam Salem Ben Ahmed, Court of Criminal Appeal, 11 October 2012
• Ir-Repubblika ta’ Malta vs. Alex Mallia, Court of Criminal Appeal, 16 June 2008
• Ir-Repubblika ta’ Malta vs. Antoine Debattista, Court of Criminal Appeal, 12 January 2006
• Ir-Repubblika ta’ Malta vs. Antonio Barbara, Court of Criminal Appeal, 17 January 2008
• Ir-Repubblika ta’ Malta vs. Claudio Porsenna, Criminal Court, 26 September 2012
• Ir-Repubblika ta’ Malta vs. Clayton Galea, Court of Criminal Appeal, 2 September 2010
• Ir-Repubblika ta’ Malta vs. Corunato sive Coronato Muscat, Court of Criminal Appeal, 23 January 2001
• Ir-Repubblika ta’ Malta vs. Darren Charles Desira, Criminal Court, 27 November 2012
• Ir-Repubblika ta’ Malta vs. Emmanuel Grech et, Constitutional Court, 27 September 1990
• Ir-Repubblika ta’ Malta vs. Godfrey Ellul, Court of Criminal Appeal, 2 September 2010
• Ir-Repubblika ta’ Malta vs. Gordi Felice, Criminal Court, 10 October 2011
• Ir-Repubblika ta’ Malta vs. John Grima, Criminal Court, 15 November 2012
• Ir-Repubblika ta’ Malta vs. John Sultana, Criminal Court, 15 July 2004
• Ir-Repubblika ta’ Malta vs. Jose Edgar Pena, Court of Criminal Appeal, 5 December 2012
• Ir-Repubblika ta’ Malta vs. Joseph Borg u John Sultana, Court of Criminal Appeal, 3 February 2004
• Ir-Repubblika ta’ Malta vs. Joseph Zerafa et, Criminal Court, 28 January 2010
• Ir-Repubblika ta’ Malta vs. Mario Camilleri, Court of Criminal Appeal, 23 January 2001
• Ir-Repubblika ta’ Malta vs. Mohamed Mohamed Abusetta, Criminal Court, 4 December 2003
• Ir-Repubblika ta’ Malta vs. Nicholas Azzopardi, Criminal Court, 24 February 1997
• Ir-Repubblika ta’ Malta vs. Noaman Emhemmed Ramadan El-Arnauti, Court of Criminal Appeal, 22 May 2003
• Ir-Repubblika ta’ Malta vs. Stanley Chircop, Criminal Court, 11 January 2008
• Ir-Repubblika ta’ Malta vs. Sugeidy Margarita Novas Castillo, Criminal Court, 28 September 2011
• John Camilleri vs. L-Avukat Generali, Constitutional Court, 12 February 2010
• Joseph Grech et vs. Il-Ministru Responsabbli mill-Familja u s-Solidarjeta’ Socjali et, Civil Court First Hall, 15 February 2006
• Nazzareno Abela vs. Kummissarju tal-Pulizija, Civil Court First Hall, 25 September 2003
• Paul Muscat u Maria Muscat vs. Il-Kummissarju tal-Pulizija u L-Avukat Generali, First Hall Civil Court, 12 October 2012
• The Police vs. Gisela Feuz, Court of Criminal Appeal, 9 January 1998
• The Republic of Malta vs. Ahmed Ben Taher, Court of Criminal Appeal, 6 October 2003
• The Republic of Malta vs. Daniel Alexander Holmes, Criminal Court, 24 November 2011
• The Republic of Malta vs. Mike Diala, Criminal Court, 18 October 2010
• The Republic of Malta vs. Mike Diala, Court of Criminal Appeal 5 July 2012
• The Republic of Malta vs. Steven John Caddick, Court of Criminal Appeal, 6 March 2003
• The Republic of Malta vs. Steven John Lewis Marsden, Criminal Court, 7 January 2009

Foreign Judgments

Australia

• Markarian v The Queen (2005) 215 ALR 213
• R v Oliver (1980) 7 A Crim R 174

Canada

• R v Christiansen [1973] 13 CCC 504
**England**

- R v Aramah [1982] 4 Cr App R (S) 407
- R v Aranguren [1995] 16 Cr App R 211
- R v Auton [2011] EWCA Crim 76
- R v Brewster [1998] 1 Cr App R 220
- R v Delgado [1984] 1 WLR 89
- R v Dempsey [1986] 82 Cr App R 291
- R v Hollington [1985] 82 Cr App R 281
- R v Maginnis [1987] 1 AC 303
- R v Millberry [2003] 1 Cr App R 396
- R v Murphy [1837] 173 ER 502
- R v Sharon Elizabeth Costen [1989] 11 Cr App R (S) 182
- R v Warren and Beeley [1996] 1 Cr App R (S) 233

**Ireland**

- Cecil Walsh v The Director of Assets Recovery Agency [2005] NICA 6

**USA**

- Harris v United States (2002) 536 US 545

**European Court of Human Rights Judgments**

- Abdulaziz, Cabales and Balkandali v the United Kingdom App no 9214/80 (ECtHR, 28 May 1985)
• Camilleri v Malta App no 42931/10 (ECtHR, 27 May 2013)
• Delcourt v Belgium App no 2689/65 (ECtHR, 17 January 1970)
• Eckle v Germany App no 8130/78 (ECtHR, 15 July 1982)
• Foti and Others v Italy App no 7604/76 (ECtHR, 10 December 1982)
• G v France App no 15312/89 (ECtHR, 27 September 1995)
• Imbrioscia v Switzerland App no 13972/88 (ECtHR, 24 November 1993)
• Le Compte, Van Leuven and De Meyere v Belgium (1981) App no 6878/75 (ECtHR, 23 June 1981)
• Spadea and Scalabrino v Italy App no 12868/87 (ECtHR, 28 September 1995)
• Stubbings v The United Kingdom App no 22083/93 (ECtHR, 22 October 1996)
• Welch v The United Kingdom App no 17440/90 (ECtHR, 9 February 1995)
ACKNOWLEDGEMENTS

I would like to thank all those who have assisted me in writing this thesis. I am particularly indebted to my supervisor Dr. Aaron Bugeja M.A. Law, LL.D. (Melit.), for his patience in reviewing my work and for his invaluable suggestions, comments, and guidance during the course of my research.

I would also like to express my gratitude to Dr. Stefano Filletti, B.A., LL.D., LL.M. (IMLI), M.Jur (Oxon) for his assistance and continued interest towards my research.
LIST OF ABBREVIATIONS

- AC  Appeal Cases
- AG  Attorney General
- App  Appeal
- App no  Application number
- art/arts  article/articles
- ch/chs  chapter/chapters
- Cr  Criminal
- Cr App R  Criminal Appeal Reports
- Crim LR  The Criminal Law Review
- CUP  Cambridge University Press
- DDO  Dangerous Drugs Ordinance
- EC  European Communities
- ECHR  European Convention on Human Rights
- ECtHR  European Court of Human Rights
- ed/s  editor/s
- edn  edition
- EMCDDA  European Monitoring Centre for Drugs and Drug Addiction
- ER  English Reports
- et seq  et sequentia
- EU  European Union
- EWCA  England and Wales Court of Appeal
- g  grams
- ie  that is
- JIRS  Judicial Information Research System
- JOLS  Journal of Law and Society
- MDA  Misuse of Drugs Act
- MKPO  Medical and Kindred Professions Ordinance
- NCB  Non-Conviction Based Confiscation
- NI  Northern Ireland
INTRODUCTION

The contentious nature of sentencing practice is attributable to the difficulty of reconciling two fundamental, yet conflicting principles: capturing consistency in punishment whilst simultaneously acknowledging the individual idiosyncrasies of the crime and the offender. In the recent decades, the sentencing process has become more complex since the rationales of punishment are no longer restricted to the conventional aims of retribution, and have therefore developed to recognise the importance of rehabilitation. In this regard, the adjudicator owes his duties not only to the general public but also to the offender, by balancing legal tradition, contemporary notions of offender restoration, and public opinion. These general sentencing issues find themselves at the basis of the drug trafficking regime, therefore identifying a rather complex foundation for the punishment of trafficking offences.

Drug trafficking is a transnational crime that visualises an intricate process, divided into several stages, starting from the production of the drug until the very moment that the proceeds of the crime are invested or laundered. In order to sufficiently criminalise the entirety of the process, International Law provides for a broad definition for drug trafficking in order to encapsulate the various activities and phases of the drug crime. It is important to note that personal use does not form part of the definition of drug trafficking, and consequently falls outside the scope of this thesis.

The principal strategy in the war against drugs is to annihilate consumption by targeting the supply sector through the imposition of severe mandatory prison sentences on drug traffickers. The harsh lengthy penalties emphasise the degree of seriousness that is attributed to the trafficking offence. Various justifications for such treatment have been forwarded over the years. The Maltese Courts tend to stress on the element of degradation and grief that drugs impinge onto society, often with fatal consequences. Certain commentators in favour of the harsh outlook towards drug trafficking refer to the substantial gains generated, where ‘profits may exceed those of robbing
banks’. Nonetheless, as the world struggles to survive in the hopeless war against drugs, the international legal forums continue to introduce new strategies aiming at reducing consumption. Significantly, recent efforts have sought to attack the financial basis of the drug operation by relying on the mechanism of confiscation of criminal assets.

A striking characteristic of the Maltese drug-sentencing regime is undoubtedly the broad discretion vested in the Courts when meting out punishment. This is a consequence of the broadly defined drugs offences and the wide mandatory sentence parameters found in the drug laws. It follows that the determination of guilt takes place within the context of considerable judicial discretion.

Within the wide parameters of sentencing discretion, the adjudicator is faced with the heterogeneous nature of a drug trafficking offence, which normally contemplates a myriad of factors influencing sentencing decisions. The sources of these sentencing elements are various, ranging from those having a statutory form to those recognised in jurisprudence. Consequently, these factors vary the offender’s culpability, as well as the degree of harm of the offence. These variables influence the sentencing exercise and ultimately shape the final sentence to be fixed in view of punishment. Therefore, the appreciation of the said elements is essential in the light of the notion of proportionality and justice.

Locally, sentencing is an extremely controversial issue. Public perception of domestic sentencing practice is sometimes based on personal experience, yet many a time public opinion is predisposed by the media. Certainly, media coverage centers on the note-worthy or notorious cases, often without taking certain significant procedural and legal principles into consideration. These outwardly tedious elements are of disinterest to the public, and hence tend to go unreported. Accordingly, it is against this unfortunate backdrop that perception of leniency or extreme severity of sentencing decisions is molded. Sentencing practice of trafficking offences is perceived to be sufficiently and appropriately unforgiving in the opinion of some. On the other hand, many view

---

1 *R v Aramah* [1982] 4 Cr App R (S) 407.
the treatment of drug trafficking offenders to be unnecessarily ‘draconian’ in certain circumstances, usually when a ‘softer’ drug is concerned or when the offender is a drug mule or a drug addict, or in comparison to crimes that are perceived to be more serious by the public.
1 MALTESE LAW ON DRUG TRAFFICKING

In 1987, an attempt was made by the Canadian Sentencing Commission to define ‘sentencing’, whereby it pronounced that ‘Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.’ With this premise in mind, it follows that punishment is the direct corollary of an act that is criminalised by virtue of the law. On this note, it is firstly pertinent to examine the substantive law pertaining to drug trafficking.

1.1 Sources of the Maltese drug regime

Prior to delving into the national legal framework, it is apt to examine the measures taken at an international and European level by way of background. The offence of drug trafficking is intrinsically linked to the concept of transnational organised crime, as often this offence takes on a multi-national character. Certainly, an effective and efficient response to the drug problem requires regulation and cooperation on an international level. In fact, the Maltese drug laws operate contemporaneously with international legislation, hence establishing strong links between the legal system of Malta, with that of the EU, the UN, and consequently between States.

1.1.1 The UN Conventions on drugs

In the international field, there is no legislation that regulates the sentencing of drug offences. Rather, the relevant international laws on drugs deal with the identification of specified substances, and provide the legal mechanism necessary that aims at controlling and limiting the cultivation, production, supply, use, and possession of illicit drugs for therapeutic reasons.

---

The domestic drug legislation is undoubtedly the product of the treaty obligations established by way of the three UN Conventions which focus upon drug trafficking, namely the 1961 UN Single Convention on Narcotic Drugs, the 1971 UN Convention on Psychotropic Substances, and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Although the Conventions are not directly effective in nature, obligations nonetheless emanate, which must be complied with by the signatory States. On this premise, international politics dictate that it is very difficult for the signatory States to deviate from the treaty obligations, in view of the various political, economic, or legal repercussions. This notion further strengthens the significance of the three UN Conventions within the sphere of illicit drug trafficking.5

1.1.1.1 The 1961 and 1971 UN Conventions

The 1961 UN Single Convention on Narcotic Drugs6 replaced all prior forms of International drug legislation,7 and provides for the control of certain specified drugs, such as cannabis and cocaine. The Convention itself categorises such drugs into four different schedules, in accordance with their respective level of harm, which consequently dictates the degree of control applicable to each schedule. Similarly, the 1971 UN Convention on Psychotropic Substances8 classifies certain drugs into four different schedules. Yet, unlike the 1961 Single Convention, this law deals with drugs having psychoactive effects, such as LSD and amphetamines.

A classification system is therefore established within the international context. The ultimate aim is that of controlling all the specified drugs in accordance with

---

5 Rudi Fortson, Misuse of Drugs and Drug Trafficking Offences (6th edn, Sweet & Maxwell 2010) 41.
6 520 U.N.T.S. 151.
7 Jelsma (n 4).
8 1019 U.N.T.S. 175.
a classification approach based on their therapeutic value, level of risk in terms of abuse, and health threats.9

1.1.1.2 The 1988 UN Convention

The 1961 and the 1971 Conventions nonetheless fell short, notwithstanding their enactment. They both failed to explicitly prohibit the drugs mentioned therein, as they simply sought to limit and control the supply and production of such drugs.10 In fact, the penal provisions established in the two aforementioned Conventions are contingent on the ‘constitutional principles’ of the State in question.11

This deficit was addressed by virtue of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,12 and complemented the earlier Conventions by providing for measures that aimed to prohibit the illicit trafficking of drugs. More importantly, the Convention strengthened the signatory States’ obligations under the previous Conventions to criminalise all offences of illicit trafficking.

Cooperation towards a proper legislative framework was the ultimate aim of the 1988 Convention, as established in Article 2, paragraph 1, which holds for the ‘cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension’. Therefore, the Convention requires the signatory States to provide the proper legislative basis to establish various acts of drug trafficking as criminal offences.

The improvement and enhancement of international cooperation is specified as a primary aim in Article 3 of the 1988 Convention. The goal however is not without limitation. In fact, it does not extend to offences of possession, purchase

---


10 Jelsma (n 4).

11 See for instance, 1971 UN Convention (n 8), art 22, para 1, subpara a.

and cultivation for personal consumption purposes. Furthermore, certain obligations, for instance confiscation, extradition and mutual legal assistance are limited to those serious offences having an international impact.

1.1.1.3 Flexibility of the UN Conventions

Substantial latitude is granted by the UN Conventions in the manner in which the States are to deal with drug offences. This autonomy is represented in the ability of the States to adopt their own approach vis-à-vis drug classification. Moreover, although the States are obliged to criminalise drug trafficking, the UN Conventions do not impose any sentencing guidelines by which each State has to adhere to. This follows that the method of sentencing is left entirely at the hands of the individual State.

Flexibility in the UN Conventions is further enhanced as they allow for certain reservations with respect to the offences of possession, purchase, or cultivation for exclusive use purposes. Therefore, the establishment of such offences as being punishable offences is only subject to the ‘constitutional principles and the basic concepts’ of the legal system of a state. Consequently, this enables the signatory State to arbitrarily establish the degree of criminality with respect to personal consumption. Nonetheless, the illegality and punishment of trafficking of an illicit drug remains an absolute principle under the 1988 Convention, and hence cannot be evaded under the notion of constitutionality of a particular State.

1.1.2 Initiatives of the European Union

Likewise, action taken at EU level also plays an important role in shaping domestic legislation. The EU is increasingly becoming a driving force in the

13 1988 UN Convention (n 12), art 5.
14 ibid, art 6.
15 ibid, art 7.
16 Fortson (n 5) 41.
17 1988 UN Convention (n 12), art 3, para 2.
cooperation and mutual assistance in the realm of drug trafficking. The EU Drugs Strategy, recently revised, is an important legislative basis that guides the scope of national drug legislation.\footnote{Council Recommendation of 29 December 2012 on the EU Drugs Strategy (2013-2020) [2012] OJ 402/1.} The Drugs Strategy comprises two policy areas, namely demand and supply reduction, in conjunction with three ‘cross-cutting themes’ emphasising the notions of ‘coordination, international cooperation, and research, information, monitoring, and evaluation’\.footnote{ibid, para 11.}

The notions of mutual assistance and cooperation in the criminal sphere are reinforced by means of legislative mechanisms seeking to facilitate the investigation and prosecution of various crimes, such as money laundering and fraud. The EU continues to seek closer harmonisation in the criminal field, with respect to crimes having cross-border impact, such as its extended work in the sphere of mutual recognition and enforcement of orders to freeze and confiscate criminal assets.

Keeping the international context in mind, an analysis of the relevant Maltese laws shall follow.

\subsection*{1.1.3 Maltese drug legislation}

At a national level, the Maltese legal system identifies two principal laws that seek to control and prohibit two different types of substances. On one hand, the Dangerous Drugs Ordinance regulates narcotic drugs,\footnote{Dangerous Drugs Ordinance (DDO), Chapter 101 of the Laws of Malta.} whereas the Medical and Kindred Professions Ordinance deals with psychotropic substances.\footnote{Medical and Kindred Professions Ordinance (MKPO), Chapter 31 of the Laws of Malta.} The segregation of these two groups of drugs into two different pieces of legislation mimics that of the UN Convention on Narcotic Drugs and the UN Convention on Psychotropic Substances.
1.2 Drug trafficking offences

The intricacy of the sentencing regime of drug trafficking is attributable to the multifaceted nature of the offence, which usually encapsulates various other antisocial acts, such as conspiracy, money laundering, and violence. Accordingly, a drug trafficking charge is rarely ever straightforward. In fact, the law provides for an expansive range of trafficking offences. For the sake of intelligibility however, the definition of the trafficking offences, each attracting the maximum punishment of life imprisonment, shall be divided into three categories: ‘dealing’, aggravated possession, and the various other trafficking offences.

1.2.1 ‘Dealing’

The term ‘dealing’, defined in Article 22(1B) of the DDO, captures the broad definition established in the 1988 UN Convention. ‘Dealing’ includes the production, manufacture, cultivation, importation (when such is not for the exclusive use of the offender), exportation, distribution, administration, and supply of an illicit drug. In addition, the offer to carry out any of the aforementioned acts, as well as the giving of information that is to lead to the purchase of a drug, is placed on the same plane as the abovementioned offences.

Maltese law fails to define these individual offences. Rather, one may refer to the Commentary to the 1988 UN Convention, which attempts to provide a coherent depiction of the numerous offences. The Commentary also cross-refers to the 1961 UN Convention, which in turn defines some of the activities listed above. In addition, reference may be made to foreign law and jurisprudence in order to attain a greater understanding of the aforementioned

---

22 International Conference on Drug Abuse and Illicit Trafficking, Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control (Vienna, 1987) ch I, s A, para 223.
23 Any reference made to the provisions of the DDO shall be construed as a reference to the analogous provisions under the MKPO, unless the author explicitly states the contrary.
24 UN, Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN 1999).
offences. The foregoing sub-sections shall delve into the character of some of the offences captured within the definition of the term ‘dealing’.

1.2.1.1 Production and Manufacture

The act of ‘dealing’ encapsulates the process that precedes the occurrence of a transfer, namely the process relating to the creation of the drug. The UN Conventions provide for two operations through which a drug may be obtained: ‘manufacture’ and ‘production’. The offences of ‘manufacture’ and ‘production’ are both defined in the 1961 UN Convention. Although the two terms are usually used synonymously, they must be kept distinct from one another, as the definition of the term ‘manufacture’ explicitly excludes the process relating to ‘production’. Accordingly, ‘manufacture’ includes all types of processes by which drugs may be created, as well as the process of refining and transformation of drugs.

On the other hand, ‘production’ is defined as ‘the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained’. Hence, ‘production’ applies particularly to the specific procedure used to obtain a substance from the opium poppy, cannabis plant, or coca bush. In fact, this definition would cover the activity of ‘stripping cannabis leaves from the stalk’. The process that precedes production shall be discussed in the forthcoming sub-section.

1.2.1.2 Cultivation

Cultivation refers to the process of creating specified substances, or rather, plants. In this respect, the DDO, similarly to the 1961 UN Convention defines

\[\text{References made to the DDO under this section of the Chapter shall not be construed as including any reference to the MKPO.}\]

\[\text{1961 UN Convention (n 6), art 1, para 1, ss (i).}\]
‘cultivation’ with a direct reference to raw and prepared opium, coca leaves, and cannabis plant.\textsuperscript{29}

There has been plenty of discussion within the Maltese legislative sphere concerning the offence of cultivation, as Maltese law does not differentiate between cultivation for exclusive use and cultivation with the intent to traffic for the purposes of punishment. In this regard, critics stipulate that the definition of ‘dealing’ should be qualified, in order to exclude the offence of cultivation of a drug for exclusive use purposes.

The recent case \textit{The Republic of Malta vs. Alexander Holmes}\textsuperscript{30} re-ignited this contentious debate. The defendant was sentenced to ten years and six months imprisonment, in addition to a fine, for cultivating the Cannabis plants, amounting to 1,063g in dry weight, in his Gozo apartment. Whilst the defence submitted that the drug was intended for the accused’s exclusive use, in order to ‘satisfy his addiction’\textsuperscript{31} the prosecution maintained that the accused intended on distributing the product cultivated.\textsuperscript{32} Regardless of whether the accused did actually have the intent to traffic the drug, the need to differentiate between the two intents for the purposes of cultivation has been reiterated.

During a parliamentary session,\textsuperscript{33} the Hon. Silvio Parnis cited the 1988 Convention when asking the Minister whether such ‘lacuna’ was to be corrected any time soon. The UN Convention, ratified by Malta in February 2006, clearly acknowledges the distinction between the offence of cultivation for personal consumption and for trafficking. This distinction is evident in Article 3(2), which explicitly holds for ‘cultivation (...) for personal consumption’. To the above question, the then Minister of Justice, Dialogue and the Family, the Hon. Chris Said, replied that the 1988 Convention does not impose an obligation upon the signatory States to differentiate between the two offences of cultivation.

\textsuperscript{29} DDO (n 20), arts 3-8.
\textsuperscript{30} Criminal Court, 24 November 2012.
\textsuperscript{31} Ibid 15.
\textsuperscript{32} Ibid 16.
\textsuperscript{33} Sitting no 458, 20 March 2012.
This standpoint is reflected in Adrian Marmara u Eugenio Camenzuli vs. L-Avukat Generali, in which the two plaintiffs argued that although the UN Convention was ratified by Malta, the domestic law on drugs was not properly amended in order to reflect its content. Hence, in line with the Convention, the Court ought to interpret ‘cultivation’ as excluding cultivation for personal use. In the judgment, the Hon. Judge Silvio Meli delved deeply into the notion of legal certainty, and subsequently held that the definition in the law is not ambiguous, since ‘[dan] jservi biex bi kjarezza rari jekwipara dawn iz-zewg azzjonijiet flimkien’. Therefore, the purpose of the law not to distinguish between the two offences is apparent, since it provides for ‘l-kundanna morali u statutorja bla tlaqlieq’.

Similarly to the Holmes decision, the above Marmara judgment gave rise to plenty of debate in the media. The main argument spearheading the discussion is anchored on the notion of sentence disparity. It has been tirelessly reported that where the accused is guilty of cultivation of a drug, yet without the intent to traffic or without proof of that intent, he is liable to ‘draconian sentences associated with international drug trafficking’.

The UK Runciman Report acknowledges the ambiguity surrounding this issue. In its analysis of the 1961 and 1971 UN Conventions, the Report observes the distinction between trafficking offences and the offences of possession, purchase, or cultivation for personal use. In addition, the Report recognises that the 1988 Convention holds that sanctions ought to be given to reflect the seriousness of the offence of trafficking, and are to include ‘imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation’. According to the Report, the loophole is concealed since there is no similar provision imposing such punitive measures on offences of personal

34 Civil Court First Hall, 6 November 2012.
37 Ibid, para 3.
38 Runciman (n 26).
39 1988 UN Convention (n 12), art 3, para 4(a).
consumption. Rather, the 1961 UN Convention grants the States the discretion to possibly replace penal sanctions with civil or administrative measures when the offence of cultivation is committed for personal use purposes.

In the UK, in comparison to Malta, cultivation for exclusive use is a separate and distinct offence to cultivation with the intent to supply. Although the law itself does not differentiate between the two, the distinction emanates from case law. This is further exposed by virtue of the recent implementation of the Definitive Sentencing Guideline on drug offences, which has provided a statutory definitive basis for this dissimilar treatment. The Guideline establishes a less severe punishment than that found in case law, which ranges from the discharge of the accused to a ‘medium level community order’, when the offender cultivates cannabis solely for his own use.

1.2.1.3 Importation and exportation

The manufacture or production of a drug is followed by its transportation to the relevant market where it is to be distributed and subsequently supplied. The terms ‘import’ and ‘export’ are defined in article 12 of the DDO. ‘Import’ is defined as the act of bringing or causing to be brought into Malta, drugs by means of air, water, or otherwise. ‘Export’ on the other hand, is given the reverse definition.

The law prohibits both the importation and exportation of drugs to and from Malta, unless the consignor or consignee is in possession of a valid and subsisting export or import certificate, as per articles 13 and 14 of the DDO. Furthermore, the law in article 15A(1) provides for the general prohibition in relation to the importation and exportation of drugs into or from Malta. The said provision has a wide-ranging scope, as it incorporates the participation of other

---

40 Runciman (n 26).
41 1961 UN Convention (n 6), art 36, para 4.
42 R v Auton [2011] EWCA Crim 76.
43 SGC, Drug Offences, Definitive Guideline [2012].
44 ibid 20.
45 DDO (n 20), art 13 and 14.
persons who do not directly transport the drug into or from Malta, as well as any acts of a preparatory nature relating to the offence.\textsuperscript{46}

Within the definition of ‘dealing’, article 22(1B) includes the offence of exportation of a drug and the importation of a drug when such importation is not for the exclusive use of the offender. Therefore, it is evident that with respect to ‘dealing’, the law limits the offence of importation to that which is not for personal use. In other words, in the event that a person is apprehended for the importation of a drug for his exclusive use, such act does not fall within the definition of ‘dealing’ as per article 22(1B) and consequently does not attract the penalty of imprisonment for life.

\textbf{1.2.1.4 Distribution}

The \textit{Shorter Oxford English Dictionary} defines ‘distribution’ as ‘to deal out, bestow in portion or shares among many, to allot or apportion his share to each’. A similar interpretation was given in the Canadian judgment of \textit{R v Christiansen},\textsuperscript{47} where the Court concluded that ‘distribution’ ought to be interpreted in accordance with its ordinary meaning, and therefore should not apply where the drug has been given to only one person.

The Commentary on the 1988 UN Convention makes a similar allusion. However, the Commentary stipulates that the term better colludes with the concept of ‘distributorship’, which denotes the commercial movement of goods within the supply chain that encompasses a transfer between the manufacturer or importer, to the wholesaler or retailer.

\textbf{1.2.1.5 Supply}

The offence of supply is wide-ranging, tending to overlap with other offences. In fact, the UK Misuse of Drugs Act 1971 states that ‘supply’ ought to include

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{46} ibid, art 15A(1).
\item \textsuperscript{47} [1973] 13 CCC 504.
\end{itemize}
\end{footnotesize}
‘distributing’.\textsuperscript{48} As frequently done by the UK Courts, reference ought to be made to the \textit{Shorter Oxford English Dictionary} where, for instance in \textit{R v Delgado},\textsuperscript{49} the Court stated that although various definitions are found therein, they all identify a common factor: ‘that in the word supply is inherent in the furnishing or providing of something which is wanted’.

Similarly to Maltese law, the MDA does not define the term ‘supply’, other than stipulating that supply includes distribution. The approach taken in Western Australia is similar, where the preferred approach has been not to provide a definition, and hence retaining its comprehensive interpretation.\textsuperscript{50}

In contrast to the three abovementioned jurisdictions, the Queensland Drugs Misuse Act\textsuperscript{51} provides a specific definition of ‘supply’, which includes giving, distributing, selling, administering, and transporting. Needless to say, each of these terms is broad in its own right.

Indeed, the definition of the term ‘supply’ has proved problematic over the past few decades since Courts in various jurisdictions have struggled to find an appropriate definition.\textsuperscript{52} Very often, difficulties are faced when attempting to define ‘supply’ in terms of the notions of ownership or possession. This will be further examined in Section 1.2.2.

\textbf{1.2.1.6 Precursor trafficking}

Drug precursors are those chemicals used in the production and manufacture of illicit drugs. Nevertheless, such chemicals are legal in nature, used in the production of licit substances, such as pharmaceuticals and cosmetics. In view of the licit nature of these chemicals, their complete prohibition is not possible. Notwithstanding, the law does seek to control and criminalise the illegal use of these chemicals.

\textsuperscript{48} Misuse of Drugs Act 1971 (MDA), s 37(1).
\textsuperscript{49} [1984] 1 WLR 89.
\textsuperscript{50} Peter Alcorn, Peter Zahra, and Robert Arden, \textit{Drug Law in the Code States} (Federation Press 1993) 14-17.
\textsuperscript{51} [1986], s 4.
\textsuperscript{52} Keith Bovey, ‘Misuse of Drugs: News from Abroad’ [2002] Crim L B 57, 4-5.
The 1988 Convention monitors the illegal use of such substances by imposing on the Parties the obligation of implementing appropriate measures to control and prevent such occurrence.\textsuperscript{53} The UN Convention provides two tables in the Annex to the Convention, listing the various licit chemicals that may be used for illegal purposes.

Moreover, at EU level, one identifies two legal instruments that aim to prevent the diversion of precursors, which aim at controlling the trade in such substances between the EU member states themselves, as well as on the international plane. The Regulation on drug precursors provides for a set of harmonised rules that monitor the legitimate intra-community trade of the substances in question.\textsuperscript{54} Furthermore, this supervision is extended to the trade between the EU and third countries.\textsuperscript{55}

On a domestic level, the offence of trafficking in precursors is found within the definition of ‘dealing’.\textsuperscript{56} Hence, it follows that in terms of punishment, the offence of trafficking in a substance that is objectively licit in nature, is treated equally to that of dealing in a dangerous drug. However, there is the added requirement that necessitates the knowledge or the suspicion of the accused that such substance would be used in or for the production of a drug.\textsuperscript{57}

1.2.1.7 Other ‘dealing’ offences

Similarly, article 22(1E) embraces the acts of manufacture, transportation, or distribution of equipment or materials to be used in relation to the cultivation, production, or manufacture of a drug, as falling within the ambit of the definition of ‘dealing’.\textsuperscript{58} However, once again, the law requires the knowledge of accused as to the purpose of such manufacture, transportation, or distribution.

\textsuperscript{53} 1988 UN Convention (n 12), art 12.
\textsuperscript{56} DDO (n 20), art 22(1D)(a).
\textsuperscript{57} ibid.
\textsuperscript{58} ibid, art 22(1E).
1.2.2 Aggravated Possession

Aggravated possession is treated equally to ‘dealing’ in terms of punishment, yet punished more severely than simple possession. According to article 22(2), aggravated possession subsists when the amount of drugs found dictates that they were not for the exclusive use of the offender. The law does not establish any benchmarks indicating the amount that is to dictate aggravated possession. Rather, one may refer to jurisprudence, which unmasks the elements that pinpoint non-exclusive use. This position imitates the one evident in the 1988 Convention, which criminalises the possession of a drug with the intent to traffic,\(^{59}\) where article 3(3) of the Convention provides that this intention may be ‘inferred from objective factual circumstances’.

In the recent judgment of *Il-Pulizija vs. Jeffrey Savage*,\(^ {60}\) the accused was found with 595 ecstasy pills, which the Court concluded were not for his exclusive use. Whilst citing previous case law, the Court established the various factors that ought to be considered by the adjudicator. Firstly, the Court cited the case *Il-Pulizija vs. Jason Mallia*,\(^ {61}\) wherein the Court held that the intent to deal in the drug does not need to be proved by the prosecution, rather ‘Il-ligi tirrikjedi (...) li jigu pruvati cirkostanzi li jissodisfaw lill-Qorti sal-grad tal-konvinciment morali “li dak il-pussess ma kienx ghall-uzu esklussiv tal-hati”’. In this regard, the Court in *Savage* opined that ‘Meta l-ammont tad-droga jkun pjuttost sostanzjali, din tista’ tkun cirkostanza li wahedha tkun bizzejjed biex tissodisfa lill-Qorti li dak il-pussess ma kienx ghall-uzu esklussiv tal-hati.’\(^ {62}\)

In this respect, the Court in *Il-Pulizija vs. Brian Caruana*,\(^ {63}\) recognised the difficulty of establishing a ‘hard and fast rule’ that indicates whether possession is either simple or aggravated, due to the particular factors of each case.

---

\(^{59}\) 1988 UN Convention (n 12), art 3(1)(a)(iii).
\(^{60}\) Court of Magistrates, 15 October 2012.
\(^{61}\) Court of Criminal Appeal, 2 September 1999.
\(^{62}\) *Il-Pulizija vs. Carmel Spiteri*, Court of Criminal Appeal, 2 September 1999.
\(^{63}\) Court of Magistrates, 10 September 2001.
In Savage, the Court made reference to the recent judgment of *Il-Pulizija vs. Jonathan Mifsud*,\(^64\) which further cites the significant case of *Il-Pulizija vs. Mohammed Ben Hassen Trabelsi*,\(^65\) which holds that the burden of proving whether possession is aggravated or not falls on the prosecution. However, in accordance with article 26(1) of the DDO, if the quantity in question is not such that normally identifies exclusive use, then the burden of proof falls upon the offender to prove, at least upon the balance of probabilities, that the said drug was for his exclusive use.\(^66\)

Moreover, other elements may indicate non-exclusive use. In *Ir-Repubblika ta’ Malta vs. Godfrey Ellul*,\(^67\) the Court opined that the preparation of drugs into sachets indicated the intent to ‘deal’ in that drug, and hence that ‘dik id-droga mhux qieghda hemm biex tibqa’ hemm u konsmata minn nies jew minn persuna li nstabet ghandha’.\(^68\)

UK law is arguably more ambiguous, as section 5(3) of the MDA prohibits the possession of a controlled drug with the intent to supply. Unlike the Maltese scenario, the prosecution must actually prove the intent to supply in order for the trafficking offence to subsist. However, since the MDA does not make reference to ‘amount’ in section 5(3), the quantity the accused has in his possession need not necessarily be voluminous.

As stated in the previous section of this Chapter, in view of the absence of a precise definition of the term ‘supply’ in the MDA, problems with the offence of possession with the intent to supply may arise in various scenarios. Notably, cases involving persons who are perceived as custodians of a drug have been the subject of great debate over the years. For instance, in the case of *R v Maginnis*,\(^69\) the House of Lords succinctly stated that supply ‘connotes more than the mere transfer of physical control (…). No one would ordinarily say that to hand over something to a mere custodian was to supply him with it’. The

\(^{64}\) Court of Criminal Appeal, 27 October 2010.
\(^{65}\) Court of Criminal Appeal, 17 February 1997.
\(^{66}\) ibid.
\(^{67}\) Court of Criminal Appeal, 2 September 2010.
\(^{68}\) ibid 22.
\(^{69}\) [1987] 1 AC 303.
additional element that pertains to the act of ‘supplying’ is that of ‘enabling the recipient to apply the thing handed over for purposes for which he desires or has the duty to apply it’. Hence, in the case *R v Dempsey*,\(^{70}\) where the accused gave another person his drugs for safekeeping while he used the lavatory to inject himself, Lord Lane CJ made reference to the definition in the *Shorter Oxford English Dictionary*, which holds that the act of supply should benefit the recipient. On this premise, the Court enunciated that there was no supply of drugs within the context of section 5(3) since the case identified a mere deposit of a drug for its eventual return.

In contrast to the above *Dempsey* case, in *R v Delgado*,\(^{71}\) the accused who was the ‘custodian’ of the drug in question had the intent to return the said drugs to the depositor. Here, the Court was of the opinion that such act constituted the offence of supply since the depositor ‘has no legal right to require the drugs to be handed back to him. Indeed it is the duty of the custodian not to hand them back or to destroy them or to deliver them to a police officer’.\(^{72}\)

Undoubtedly, the UK approach to possession is more tedious than the Maltese position. In addition, one identifies the added burden attached to the interpretation of ‘supply’, as seen in the previous section of this Chapter. The position stipulated for in the Maltese drug laws is simpler since a person is charged with the offence of aggravated possession when caught with a certain amount of drugs, regardless of whether he was merely a ‘custodian’ or a ‘guardian’ of the drug.

1.2.3 Other Trafficking Offences

The DDO, in articles 22(2)(a)(i) and 22(2)(b)(i), places certain other drug-related offences under the same blanket as dealing and aggravated possession. These specified offences shall be analysed hereunder.

\(^{70}\)[1986] 82 Cr App R 291.
\(^{71}\)[1984] 1 WLR 89.
\(^{72}\) *Maginnis* (n 69) (Lord Keith).
1.2.3.1 Conspiracy

The provisions of the DDO criminalise the act of any person who together with another one or more individuals, whether in Malta or outside of Malta, conspires to sell or deal in a drug in Malta, or who promotes, constitutes, organises, or finances the conspiracy in question.\(^\text{73}\) The intricacies associated with the crime of conspiracy, coupled with the complex nature of drug trafficking offences, represent a rather arduous undertaking for both the Courts and the jury in establishing the guilt or innocence of the accused.

With respect to conspiracy, article 48A of the Criminal Code\(^\text{74}\) attributes the punishment laid down for the completed offence, however with a reduction of one or two degrees. Interestingly, the offence of conspiracy of drug trafficking is not afforded the same benefit, as it is punished in the same manner as the completed offence. This ensues from article 22(2)(i)(a) of the DDO, which provides for a mandatory minimum and maximum punishment with respect to all drug trafficking offences (hence, including conspiracy).

For the crime of conspiracy to subsist, certain elements of the offence ought to be proved to the satisfaction of the Court. Primarily, the DDO holds for the participation of two or more persons in order for the offence to subsist. The second requisite refers to the moment of completion of the offence, which is defined in article 22(1A) of the DDO. Conspiracy surfaces as from the moment where a mode of action is agreed upon between the parties. The definition of the time of completion is synonymous with the definition in article 48A(2) of the Criminal Code.\(^\text{75}\)

In *The Republic of Malta vs. Steven John Caddick et*,\(^\text{76}\) the Court stated that mere intention to commit the crime of conspiracy is not enough to prove the offence. Hence, it is required that ‘the persons taking part in the conspiracy should have devised and agreed upon the means, whatever they are, for acting,

\(^\text{73}\) DDO (n 20), art 22(1)(f).
\(^\text{74}\) Chapter 9 of the Laws of Malta.
\(^\text{75}\) ‘The conspiracy referred to in sub-article (1) shall subsist from the moment in which any mode of action whatsoever is planned or agreed upon between such persons’.
\(^\text{76}\) Court of Criminal Appeal, 6 March 2003.
and it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design’.

Since proof of conspiracy ‘will generally be inferential’, 77 the offence of conspiracy may be proved by means of direct and/or circumstantial evidence. 78 In this respect, the requisite mens rea is proved by way of inferences drawn from ‘direct testimony, secret recordings or confessions’ for instance. 79 At times, the circumstantial and/or direct evidence identifying a conspiracy may be lacking, hence this makes proving the offence to be quite taxing. For instance, in the judgment of Ir-Repubblika ta’ Malta vs. Clayton Galea, 80 the Court of Appeal overturned the decision of the First Court, which found the accused guilty of conspiracy, on the grounds that the prosecution failed to prove the offence of conspiracy beyond reasonable doubt. In this case, the Court declared that the evidence detected no sign of agreement between the parties, and neither did the evidence identify any means with which the agreement could be carried out.

Nevertheless, it is significant to consider the converse argument. Therefore, evidence exposing the commission of a trafficking offence will not necessarily prove the prior existence of a conspiracy. As stated in the Caddick case, this reasoning stems from the fact that if ‘two or more persons (…) contemporaneously decide to deal in drugs’ does not automatically point at a previous arrangement between the said persons.

1.2.3.2 Money Laundering

One principal characteristic of organised crime is the substantial profit generated from the execution of illicit activity. 81 Accordingly, there is an intrinsic link between organised crime and money laundering, as the production of enormous profits gives rise to the need to give such gains a legitimate façade.

---

78 The Republic of Malta vs. Steven John Lewis Marsden, Criminal Court, 7 January 2009.
80 Court of Criminal Appeal, 2 September 2010.
In fact, it has been stated that in the absence of ‘sophisticated’ laundering mechanisms, the large profits may be indicative of their illegitimate origins.

The offence of money laundering was initially developed in attempt to fight drug trafficking, yet its application now extends to other areas of organised crime. Originally, international drug policy aimed at limiting the supply of drugs, with the hope that this would ultimately lead to the reduction in drug consumption. However, the socio-economic problems faced at domestic level rendered this feat difficult. Owing to this deficiency, attention was re-directed toward the proceeds of the crime, as it was thought that targeting the financial facet of the operation would lead to its destabilisation. The led to the creation of two legal tools: the criminalisation of money laundering and the confiscation of criminal profits. The latter concept shall be discussed later on in this Chapter.

Money laundering is penalised under the Prevention of Money Laundering Act. Nonetheless, the drug laws make special provision for this offence, wherein the maximum punishment of imprisonment for life is prescribed. Therefore, in the event that a person who in any manner deals with money, property, or proceeds that are in any way obtained from a drug offence, with the scope to conceal or convert such in attempt to hide their illicit origin, would be guilty of money laundering. In addition, upon conviction, the offender’s assets would automatically be liable to forfeiture.

1.3 Criticisms of broadly defined offences

The subsistence of the broad definition of drug trafficking is often tinged with criticism. The crux of this debate is undoubtedly the ‘exaggerated’ amount of discretion at the judiciary’s disposal, which is not navigated through the

---

82 ibid 8.
83 ibid.
84 Chapter 373 of the Laws of Malta.
85 DDO (n 20), art 22(1C).
86 ibid, art 22(2)(a)(i).
87 Text to ch 1, s 1.4.2.
88 Court of Criminal Appeal, 16 June 2008.
application of guidance that identifies the different levels of severity of each offence.

An example of such criticism is highly evident in the case *Ir-Repubblika ta’ Malta vs. Alex Mallia*,\(^9\) wherein the accused was sentenced to imprisonment for a period of nine years for being in possession of a voluminous amount of drugs. The defence pleaded with the Court to distinguish between ‘dealing’ and aggravated possession in terms of severity, as it was argued that from an objective perspective the former is considered to be more serious. Whilst holding that both offences are of equal severity, the Court held that the only difference rested on the fact that with respect to ‘dealing’ the drug has already exchanged hands, whereas in the second scenario it has not yet reached this point.\(^9\)

There are various arguments put forward in favour and against broadly defined offences. Ashworth identifies that the advantage of a wide offence pinpoints to the limited use of technical argumentation in Court, as well as reduced problems with interpretation, which are usually associated with rigid legal provisions and definitions.\(^9\) In addition, its existence also increases the incidence of a guilty plea, hence decreasing the burden on the Courts. On the other hand, the wide character of an offence may ‘fail to mark all the distinctions which might socially be regarded as relevant to a fair appraisal of the nature and degree of a person’s wrongdoing’.\(^9\)

The subsistence of the broad definition attributed to the offence of drug trafficking gives rise to various difficulties when contemplating offence severity. In the absence of statutory indicators, the likelihood of inconsistency increases as there is reduced control over the manner in which the Court perceives the numerous factors of the case, and hence ‘less assurance for the defendant that due consideration will be given to each factor’.\(^9\) In this regard, Chapters Three

---

\(^9\) ibid.
\(^9\) ibid 9.
\(^9\) ibid 9.
\(^9\) ibid 9.
\(^9\) ibid 9.
\(^9\) ibid 9.
and Four shall examine the significance of the aggravating and mitigating circumstances in the determination of offence seriousness, and their consequent impact on the final sentence.

1.4 Drug trafficking penalties

Maltese law perceives extremely severe sentencing parameters for trafficking crimes, where the maximum sentence of imprisonment for life is set forth.94 The penalties in relation to the offences against the DDO are dealt with in article 22(2). At the outset, it is evident that the law segregates drug offences into two categories for the purposes of punishment. Firstly, the law identifies the drug trafficking offences, which are punished more severely since they attract the maximum sentence of imprisonment for life. In contrast to this, the law holds for a less severe penalty for the offence of simple possession of a drug and all other offences against the Ordinance. The following section shall examine the punishment of trafficking offences.

1.4.1 Mandatory imprisonment and the imposition of a fine

The punishment to be meted out is contingent upon the forum. Therefore, the penalty depends on whether the offender is tried before the Criminal Court, or alternatively before the Court of Magistrates in its Criminal Jurisdiction. Notwithstanding whether the accused is tried before the Criminal Court or the Court of Magistrates, Maltese law provides for the mandatory imposition of an incarceration sentence and a pecuniary penalty. The far-reaching nature and effects of the punishments contemplated under article 22(2) of the DDO shall be examined in Chapter Two. Firstly, however, a brief portrayal of the penalties perceived under the drug laws shall be provided hereunder.

1.4.1.1 Criminal Court

When an individual is convicted by the Criminal Court for offences of ‘dealing’ in a dangerous drug, aggravated possession, or for any of the specified

94 DDO (n 20), art 22(2)(a)(i) and 22(2)(b)(i).
offences, then the Court is to sentence the convicted person to imprisonment for life. This notwithstanding, the Court contemplates an exception to life imprisonment when considering certain criteria when meting out the sentence. The proviso to article 22(2)(a)(i) gives the Court the option to sentence the convicted individual to imprisonment for a term of four to thirty years, together with a fine of not less than €2,329.37 and not more than €116,467.67, after evaluating the quantity and nature of the drug, the previous conduct of the convicted person, as well as any other circumstances of the offence in question. This reduction in punishment may also be considered by the Court in the situation of lack of unanimity in the verdict of the jury.

1.4.1.2 Court of Magistrates

Article 22(2)(b)(i) delves into the punishments which are established on conviction by the Court of Magistrates. When a person has been found guilty of an offence of trafficking before the Court of Magistrates, then that person shall be subject to imprisonment for a term of not less than six months but not exceeding ten years, together with a fine of not less than €465.87, but not more than €11,646.87.

1.4.2 Forfeiture of criminal assets

The Criminal Code provides for the general provision relating to the forfeiture of the corpus delicti, which comes into application as a natural consequence of conviction, together with any other punishment to be meted out. However, the drug laws contemplate a unique forfeiture procedure for trafficking offences, which strives to forfeit in favour of the Government all the moneys, movable and immovable property of the convicted person, even if such are situated overseas, or if the immovables have been transferred to third parties. If the proceeds generated from the illicit activity are unidentifiable or has since been dissipated,

95 Art 22(a)(i) specifies the offences under art 4, art 8(c), art 22(1)(f), art 22 (1C), (ID), and (IE). 
96 DDO (n 20), art 22(2)(a)(i). 
97 ibid, art 22(2)(b)(i). 
98 Criminal Code (n 74), art 23. 
99 DDO (n 20), art 22(3A)(d).
the Court has the power to order the forfeiture of property corresponding to the value of the proceeds, or to subject the convicted offender to a fine that is equivalent to the value of the proceeds.\textsuperscript{100} Moreover, the Court is also empowered to order the forfeiture of immovable property, vessels, or vehicles that are connected to the offence in question.\textsuperscript{101} For instance, in the judgment \textit{Ir-Repubblika ta’ Malta vs. John Sultana},\textsuperscript{102} the Court ordered the forfeiture of the vehicle used to transport the drugs from Italy to Malta, in accordance with 22(2)(3A)(a) of the DDO.

\textbf{1.4.2.1 Dura lex, sed lex}

As previously stated, forfeiture is an automatic outcome of the guilty verdict against the accused. Therefore, when the prosecution requests forfeiture, the Court has no option but to accede to it. In \textit{Il-Pulizija vs. Simon Bonett},\textsuperscript{103} the Court of Magistrates, after taking into account the various mitigating considerations of the case, decided not to grant the request of the prosecution. Upon appeal,\textsuperscript{104} the prosecution argued that confiscation is ‘tacitly required’ by virtue of the law, which states that ‘the court shall (...) order the forfeiture’ at the request of the prosecution.\textsuperscript{105} The Court of Appeal ruled in favour of the prosecution, stating that the law is clear in providing for mandatory forfeiture upon request, since ‘L-idejn il-Qrati huma marbutin b’din id-dispozzjoni tassattiva.’ The Court even went so far as to criticise the rigidity the law, yet ultimately resigning itself to it, by stating that this is a case of ‘dura lex, sed lex’.

\textbf{1.4.2.2 Forfeiture without distinction}

When forfeiture is ordered under article 22(3A)(d), the order is made over ‘all moneys or other movable property, and of the entire immovable property’ of the convicted person. Article 22(3A)(d) does not allow the Courts to distinguish

\begin{footnotes}
\item[100] ibid, art 22(3C),
\item[101] ibid, art 22(3A)(a) and (c).
\item[102] Criminal Court, 15 July 2004.
\item[103] Court of Magistrates, 7 August 2002.
\item[104] Court of Criminal Appeal, 9 April 2003.
\item[105] DDO (n 20), art 22(3A) (emphasis added).
\end{footnotes}
between property acquired before or after the commission of the crime. Rather, the Court has stated that ‘ubi lex non distinguit, ne nos distingueremus’.106

The convicted offender, however, does have a remedy under article 22C of the DDO. In this respect, the person convicted or the third party mentioned in the order, may file an action before the Civil Court, First Hall, to prove that the proceeds or property in question are superfluous to the offence. The burden of proof falls onto the applicant, and since the proceedings are to take place before a court of civil jurisdiction, the standard of proof is on the balance of probabilities. It is important to note that this remedy is limited to the order for forfeiture made under article 22(3A)(d).107

In this regard, in the recent judgment of Paul Muscat u Maria Muscat vs. Il-Kummissarju tal-Pulizija et,108 the Court rejected the plaintiff’s pleas for relinquishment of certain forfeited property, on the basis that the action was filed in relation to immovable property used by the plaintiff to store the drugs that had been forfeited under article 22(3A)(a). Hence, such property falls outside the scope of article 22C.

1.4.2.3 Motivation behind the order

An issue that has frequently been debated, both domestically and internationally, is the nature of the order. Is the rationale of the order punitive in terms of the law? Or is it preventative or reparative in nature?

On this note, in the ECtHR judgment of Welch v The United Kingdom,109 the applicant complained that the confiscation measure taken against him violated his rights under Article 7 of the Convention. As a result, the ECtHR had to determine whether the confiscation order was considered to be a ‘penalty’ within the context of the Convention. The Court established that although the measure has preventative features, it concluded that such aims ‘are consistent

106 Il-Pulizija vs. Simon Bonett (n 103) 4.
108 Civil Court First Hall, 12 October 2012.
109 App no 17440/90 (ECtHR, 9 February 1995).
with a punitive purpose and may be seen as constituent elements of the very notion of punishment'.

Under Maltese law, the confiscation order is perceived as being punitive, as it is only to be applied in the event of conviction. In fact, the Courts have frequently stated that the order ‘taghmel parti mill-piena’. It is interesting to observe that, unlike certain other jurisdictions Maltese law does not allow for non-conviction based orders for confiscation, which provides for the forfeiture of assets in the absence of a guilty verdict. Comparatively, UK law provides for non-conviction based orders, by virtue of the Proceeds of Crime Act 2002. The effects of the orders made following conviction and that following an acquittal are different in essence. With regard to the latter scenario, the Irish Court of Appeal in *Cecil Walsh v The Director of Assets Recovery Agency* declared that the non-conviction based procedure was civil in character, which identifies the aim of restitution rather than that of punishment. Following research on the procedure of non-conviction based confiscation, the UK declared that its law is preventative in nature as it seeks to attack the ‘Mr.Bigs’ in the sphere of organised crime. On the other hand, the Swedish respondent to the research survey stated that its law, which does not allow for confiscation without conviction, is purely punitive in nature. On the basis of the study, the author observed that ‘where confiscation is conviction based, it is seen as punitive’.

The notion of confiscation of criminal proceeds is extremely significant in the context of organised crime and drug trafficking. Due to the multi-national character of organised crime, cooperation and mutual assistance is of paramount importance in the attempt to undermine these illicit activities. The EU has recognised the low rate of recovery of criminal proceeds within the European context and the inadequacy of the current confiscation provisions.

---

110 ibid, para 30.
111 Corunato sive Coronato Muscat vs. Il-Kummissarju tal-Pulizija, Civil Court First Hall, 26 January 2007.
In 2006 alone, it was estimated that £18 billion was generated in the UK through organised crime. Yet, the UK Government recovered the modest sum of £125 million. The thrust towards a more consolidated approach comes by way of an EU Commission Directive Proposal, which aims to achieve the creation of common rules on non-confiscation based orders, in certain limited situations (such as in the event of illness, death, or flight of the accused). The proposed provisions highlight the importance of a deterrent approach vis-à-vis organised crime and confiscation of assets, where ultimately the aim shouldn’t merely be the punishment of the suspect, but it should look at the broader picture that attacks the drug organisation as a whole.

1.5 Concluding observations

After having examined the background to the Maltese drug sentencing system, which is comprised of wide offences and broad mandatory parameters of punishment, one can foresee with a certain degree of conviction that sentencing is not a simple undertaking. This notwithstanding, the sentencing exercise recognises a significant process that precedes the prosecution of the offence. This preliminary procedure, together with other pre-trial considerations, which are to be examined in the following Chapter, reveal particular effects that greatly influence the final sentence.

117 ibid, art 5.
2  PRE-TRIAL AND PROCEDURAL ISSUES AFFECTING

SENTENCING OUTCOMES

2.1 The pre-trial role of the Attorney General

The functions of the Attorney General (AG) during the criminal process are broad and encompass various stages of the criminal action, ranging from the investigation stage to the pre-trial phase, including the trial itself where he performs the role of Prosecutor before the Criminal Court. However, in the performance of these functions, the AG is nonetheless independent and distinct from any individual or authority.\(^\text{118}\) Accordingly, it is evident that the character of the AG morphs according to the stage of the process of the criminal action. For the purposes of this Chapter, the pre-trial role of the AG shall be examined.

The general powers of the AG during the pre-trial stage are found in articles 430 \textit{et seq} of the Criminal Code. As article 431(1) states, the functions of the AG are to commence upon receipt of the record of the inquiry by the Court of Magistrates. In this regard, upon the cessation of the inquiry stage, the Court may proceed in one of three ways, as outlined in the case \textit{Il-Pulizija vs. Lawrence sive Lorry Sant}.\(^\text{119}\) Indeed, it may pronounce that there are sufficient reasons for a person to be tried by the Criminal Court, wherein such case, the records of the proceedings are transferred to the AG, who is given one month to file the bill of indictment.\(^\text{120}\) Within this period, the AG is to determine whether there are sufficient grounds for the accused to be proceeded with before the Criminal Court.\(^\text{121}\) If the AG decides in the negative, then he may order the accused’s discharge.\(^\text{122}\) Alternatively, if the AG deems the offence to fall within the competence of the Court of Magistrates as a Court of Criminal

\(^{118}\) Constitution of Malta, art 91(3).
\(^{119}\) Court of Criminal Appeal, 14 August 1991.
\(^{120}\) Criminal Code (n 74), art 432(1).
\(^{121}\) ibid, art 433(1).
\(^{122}\) ibid.
Judicature, then he shall transmit the record of the inquiry back to the said Court, which in turn shall decide on the charge of the offence. 123

With respect to trafficking offences, the procedure undertaken is slightly different. Upon the conclusion of the police investigation and before the suspect is charged with the offence, the AG must determine whether the case is to be tried before the Court of Magistrates or the Criminal Court. 124 Therefore, this decision is taken at a pre-trial juncture, and hence before the criminal proceedings are initiated.

According to article 31 of the DDO, the AG’s decision to direct trial to the particular Court is not final, since the AG is granted the additional power to change the direction of trial. Therefore, if the AG has directed the case to be tried by the Criminal Court, he may at any time prior to or after filing the bill of indictment, yet before the jury has been impanelled, direct the case to be heard before the Court of Magistrates, once he has obtained the accused’s consent. The AG is not obliged to give reasons for his decision to re-direct trial. It is important to note that the law does not allow the converse situation, as the AG may not issue counter orders that are prejudicial to the accused.

2.1.1 Contingent punishment

As examined in Chapter One, the punishment is largely contingent upon the Court that presides the case. Consequently, it is very clear as to why the accused may feel aggrieved by the AG’s decision to direct trial to the Criminal Court. Even in the best-case scenario, where the Criminal Court decides to apply the favourable proviso providing for the minimum punishment of four years imprisonment, it is nonetheless considerably higher than the minimum sentence that may be meted out by the Court of Magistrates, which is that of six months. Arguably, by virtue of this discretionary power, the AG is able to implicitly dictate the parameters of punishment to be meted out.

123 ibid, art 433(5).
124 DDO (n 20), art 22(2).
2.1.2 Making the decision

2.1.2.1 Criteria of decision

In practice, the AG’s office has established its own set of guidelines in the interest of structuring the decision-making process. The criteria are similar to those embraced by the Courts when sentencing in accordance with considerations relating to the seriousness of the offence, as declared in *Ir-Repubblika ta’ Malta vs. Emmanuele Grech et al.*\(^\text{125}\) The Constitutional Court held that the factors of offence severity held in the proviso to article 22(2)(a)(i) of the DDO\(^\text{126}\) ought to guide the AG’s discretion when choosing the appropriate forum for trial.

Although the AG does avail himself of these factors in practice, the considerations established in article 22(2)(a)(i) pertain exclusively to the Courts. Therefore, the crux of the matter undoubtedly lies in the absence of a concrete set of rules that are specifically applicable to the AG. Furthermore, to rub salt into the wound, the AG does not provide reasons for his final decision and ultimately the drug laws make no provision for judicial review. Incidentally, this nebulous discretionary exercise calls for a situation of uncertainty, whether existing doubts indicating bias or error are warranted or not.

The Courts have also commented upon this lack of transparency. The Constitutional Court in the case *John Camilleri vs. L-Avukat Generali*\(^\text{127}\) critically opined that ‘hu awspikabbli li, biex ikun hemm aktar trasparenza u aktar ‘fairness’, jigu stabbiliti kriterji cari li l-Avukat Generali ghandu jsegwi meta jidddeciedi quddiem liema Qorti jibghat akkuzat biex jinstema’ l-kaz tieghu’.

The prosecution often argues that the compilation of an exhaustive list of criteria would prove difficult, considering that circumstances vary on a case-by-case basis. This affirms the indispensability of the AG’s decision-making power, since it upholds a system that ensures discretionary individualisation, rather

\(^{125}\) Constitutional Court, 27 September 1990.

\(^{126}\) Text to ch 1, s 1.4.1.1.

\(^{127}\) Constitutional Court, 12 February 2010.
than pigeonholing. On this note, the Constitutional Court, in the aforementioned *Grech* case,\(^{128}\) stated that although it is pragmatic to avoid assigning discretionary powers to a non-judicial body, it is extremely difficult to circumvent subjectivity in decision-making, due to the complexities of modern society.\(^{129}\) Nevertheless, this argument should not detract from the fact that the decision ‘la ssir quddiem tribunal, la ssir fil-pubbliku, la hemm garantiti d-dritt tad-difiza, u l-anqas hemm l-\*audi alteram partem\*.\(^{130}\)

2.1.2.2 Nature and effects of decision

While the AG’s decision does not have any bearing on whether the accused is pronounced guilty or innocent, his preliminary decision ultimately pre-conditions the punishment to be given in the event of a guilty verdict. In the *Grech* case,\(^{131}\) the appellant argued that the law gives the AG the power to determine the punishment, which task in principle should solely lie with the Courts of Justice, by stating, ‘ma ghandu ebda gustifikazzjoni legali u hi ndhil u intervent serju f’poter li hu biss tal-Qorti’.\(^{132}\) The Constitutional Court held that in exercising this discretion, the AG is exercising a quasi-judicial power, which must be carried out in accordance with the rules of natural justice. By virtue of the Constitution,\(^{133}\) in the exercise of his functions, the AG is independent, and such independence is ‘komparabbli ma’ dik ta’ l-indipendenza ta’ l-Imhallfin’.

Conversely, in *John Camilleri vs. L-Avukat Generali*,\(^{134}\) the Constitutional Court held that although the power of the AG to direct the trial to the appropriate Court is one that emanates from the law, does not mean that the AG is acting as a Judge. Accordingly, the AG does not make any ‘prejudgment’ calls, nor does he have any authority over the final verdict.\(^{135}\)

\(^{128}\) *Ir-Repubblika ta’ Malta vs. Emmanuel Grech* (n 125).

\(^{129}\) Ibid 206.

\(^{130}\) *Godfrey Ellul vs. L-Avukat Generali*, Constitutional Court, 27 April 2006.

\(^{131}\) *Ir-Repubblika ta’ Malta vs. Emmanuel Grech* (n 125).

\(^{132}\) Ibid 192-3.

\(^{133}\) Constitution of Malta, art 91(3).

\(^{134}\) *John Camilleri vs. L-Avukat Generali* (n.).

\(^{135}\) Ibid 35.
It has been stated that the ‘arbitrary’ discretion of the AG harvests the effects of inconsistency in sentencing. In *Ir-Repubblika ta’ Malta vs. Antonio Barbara*, the Court of Appeal recognised the possibility of disparity in the event that two persons having committed the same or similar offences are charged before Courts of different competence. Notwithstanding this acknowledgment, the Court stated that this problem must be addressed by the legislature, as the Courts have no other option but the apply the law as it exists.

2.1.3 Remedies and procedural safeguards

2.1.3.1 Judicial Review under 469A of the COCP

It has been frequently stated that the AG’s decision is ‘insindikabbli’. In the past, the Courts have had the opportunity to examine the reviewability of the AG’s decision. For instance, in the case *Il-Pulizija vs. Joseph Lebrun*, the Court went so far as to state that it is an administrative or quasi-judicial decision, hinting that ‘I’d-decizjoni tal-Avukat Generali tista’, f’kazijiet kongruwi, tkun soggetta ghall-‘review’ fit-termini ta’ l-artikolu 469A.’ However, this ambiguous statement alone highlights the elusive nature of the decision.

Recently, its scope for reviewability has been addressed in the judgment *Claudio Porsenna vs. L-Avukat Generali*. In these proceedings, the appellant opted for an extraordinary remedy, by applying for redress before the Civil Court, First Hall, where he argued that his rights under the Convention and the Constitution of Malta had been violated. Upon appeal from the decision of the First Court, the Constitutional Court found that article 22(2) of the DDO does not infringe any of the substantive rights cited by the appellant, since it

---

137 Court of Criminal Appeal, 17 January 2008.
138 *ibid* 7.
139 *Godfrey Ellul vs. L-Avukat Generali* (n 130) 5.
140 Civil Court First Hall, 27 June 2006.
141 *ibid* 8.
142 Constitutional Court, 16 March 2012.
observed that an alternative remedy does in fact subsist. In the event of a complaint regarding the exercise of this discretion, there is an available remedy before the ordinary courts, which have general competence to review administrative acts. As a consequence, the Court stated that:

L-Avukat Generali jkun irid [...] jispjega u jiggustifika d-decizjoni li jkun ha, u mbaghad sta ghall-qorti, jekk dak l-ezercizzju ta' diskrezzjoni jigi attakkat, li tara li d-decizjoni tkun koerenti ma' decizjonijiet precedenti u li ma tkunx saret diskriminazzjoni; altrimenti, d-decizjoni tista' tkun ultra vires.\(^{143}\)

The remedy, which calls for the review of administrative acts, is found in article 469A of the Code of Organisation and Civil Procedure.\(^{144}\) The Court is therefore paving a new path for individuals looking for an alternative method for the review of the AG’s decision, which was previously regarded as being final. Although this procedural safeguard has always existed, to date it has not been availed of in terms of article 22(2).

\subsection*{2.1.3.2 The non-applicability of article 21}

The procedural safeguard identified in article 21 of the Criminal Code is an exceptional provision that allows the Court to deviate from the minimum statutory punishment on the basis of ‘special and exceptional’ reasons that justify the application of a reduced and more appropriate punishment.

Despite its subsistence in the Criminal Code, article 22(9) of the DDO excludes the application of article 21 with respect to drug trafficking offences. Article 22(9) was implemented into the drug laws in 1994, by virtue of article 11 of Act VI. In this regard, subject to one exception,\(^{145}\) the Court is prohibited from going below the minimum prescribed by law, even if the circumstances call for such reduction.

\(^{143}\) ibid 25.
\(^{144}\) Chapter 12 of the Laws of Malta.
\(^{145}\) Text to ch 3, s 3.3.2.2.
The essence of article 22(9) was challenged in the case *Godfrey Ellul vs. L-Avukat Generali*, where the appellant pleaded that the First Court was mistaken when citing the case *Ir-Repubblika ta’ Malta vs. Emmanuel Grech et al.* in justifying the constitutionality of the AG’s discretion.

In the *Grech* case, which took place prior to 1994, the Constitutional Court found that the AG’s decision does not influence punishment, as the simple fact that the case is brought before the Criminal Court does not necessarily lead to a lengthy prison sentence. Rather, if it appears to the Court that the AG has acted arbitrarily when exercising his discretion, then the Court may apply article 21 of the Criminal Code. In fact, in the case *Ir-Repubblika ta’ Malta vs. Stanley Chircop*, the appellant stated that it was article 21 of the Criminal Code that ‘saved the constitutionality’ of article 22(2) of the DDO.

It follows, however, that this no longer stands following the enactment of article 22(9), which provides for the exclusion of article 21. Therefore, *how can one uphold the constitutionality of article 22(2), which was previously solely justified upon the subsistence of article 21, when the law now proscribes the application of the latter?*

In his dissenting opinion to the judgment of *Camilleri v Malta*, Judge Lawrence Quintano stated that in practice, notwithstanding the existence of article 22(9), the Courts may still go below the prescribed minimum. In fact, he continued to opine that the Court of Magistrates often goes below the minimum after taking into account various considerations, such as the quantity of drugs, the filing of an early guilty plea, as well as the cooperation of the accused with the authorities.

---

146 Civil Court First Hall, 16 May 2006.
147 *Ir-Repubblika ta’ Malta vs. Emmanuel Grech* (n 125).
148 *Godfrey Ellul vs. L-Avukat Generali* (n 130) 7-8.
149 *Ir-Repubblika ta’ Malta vs. Emmanuel Grech* (n 125) 209.
150 Criminal Court, 11 January 2008.
151 Emphasis added.
152 App no 42931/10 (ECtHR, 27 May 2013).
153 Text to ch 3, s 3.4.
In this respect, Judge Quintano declared that:

In my view, there is nothing to stop the Criminal Court from going below the minimum of four years if the evidence reveals circumstances identical to those which may apply before the Court of Magistrates.\(^{154}\)

Upon scrutiny of Maltese jurisprudence, it is apparent that the Court of Magistrates does go below the statutory minimum after taking into consideration particular statutory factors that reduce the parameters of punishment.\(^{155}\) Although in theory this should extend to cases tried before the Criminal Courts, the extent of its application in practice remains unclear.

2.1.4 Human rights violations

Whereas the essence of the AG’s discretion has been attacked on more than one occasion, the trend of the Courts has always been to defend its constitutionality, albeit whilst simultaneously acknowledging its controversial nature. In spite of this, the European Court of Human Rights (ECtHR) has recently delivered a favourable decision regarding the impact of the discretionary power upon individual rights.\(^{156}\) Prior to examining the aforementioned judgment, the frequently cited violations of the European Convention of Human Rights (ECHR)\(^{157}\) shall be analysed, with reference to relevant jurisprudence.

2.1.4.1 Article 6

Over the past two decades, various appeals and constitutional references have been filed on the basis of Article 6 of the ECHR, which is enshrined in article 39 of the Constitution of Malta. Article 6 holds for the right to a fair trial in view of a criminal charge brought against an individual. It holds that the trial should be held in public and decided upon within reasonable time, by an independent and

\(^{154}\) Camilleri (n 152) Dissenting opinion of Judge Lawrence Quintano, para 14.

\(^{155}\) Text to ch 3, s.s 3.4.

\(^{156}\) Camilleri (n 152).

impartial tribunal. In addition, the notion of innocence until guilt is pronounced is enshrined in Article 6(2). Article 6(3) sets out minimum rights to be afforded to the accused, in line with the concept of the right to a fair trial. The ECtHR has declared that a wide interpretation ought to be given to the right to a fair hearing.\(^{158}\)

2.1.4.1.1 Application of article 6 to pre-trial proceedings

The Maltese Superior Courts have on more than one occasion rejected an application filed on grounds of Article 6,\(^{159}\) as it has stated that the term ‘decision’ refers to a process that follows the moment a person is charged and subsequently condemned before an independent tribunal.

Nonetheless, upon examination of the case law of the ECtHR, it is evident that this argument is flawed. In fact, in the case of *Imbrioscia v Switzerland*,\(^{160}\) the ECtHR stipulated that ‘the primary purpose of Article 6 (…) is to ensure a fair trial by a ‘tribunal’ competent to determine ‘any criminal charge’, but it does not follow that (it) has no application to pre-trial proceedings’. Rather, the wording of Article 6, with particular reference to paragraph 3, indicates that the pre-trial process is also part and parcel of the protections afforded by virtue of the ECHR. The minimum rights afforded to the suspect during the pre-trial proceedings by means of Article 6(3), such as the right to legal assistance,\(^ {161}\) illustrate the broad scope of this Article, taking into consideration that ‘the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them’.\(^ {162}\)

The ECtHR in *Foti and Others v Italy*,\(^{163}\) held that ‘charge’ may ‘take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect’.\(^ {164}\) In addition, the

\(^{158}\) Delcourt v Belgium App no 2689/65 (ECtHR, 17 January 1970).
\(^{159}\) Porsenna vs. L-Avukat Generali (n 142).
\(^{160}\) App no 13972/88 (ECtHR, 24 November 1993).
\(^{161}\) Art 6, para 3, sub-section c.
\(^{162}\) Imbrioscia (n 160) para 36.
\(^{163}\) App no 7604/76 (ECtHR, 10 December 1982).
\(^{164}\) ibid, para 54.
moment when a person is ‘charged’ was examined in the case *Eckle v Germany*,\(^{165}\) wherein the ECtHR opined that it may precede the date of initial Court proceedings, ‘such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened’\(^{166}\).

2.1.4.1.2 Access to court

The right to a fair hearing ‘presupposes’ the right to judicial proceedings.\(^{167}\) The Court in *Le Compte, Van Leuven and De Meyere v Belgium*\(^ {168}\) held that Article 6(1) does not afford the right of access to a Court in each stage of the process. Rather, efficiency calls for ‘the prior intervention of administrative or professional bodies and *a fortiori*, of judicial bodies which do not satisfy the said requirements (of Article 6) in every respect’.\(^ {169}\) However, the procedure envisioned at national level must comply with one of the two following systems:

> [E]ither the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, paragraph 1.

Moreover, van Dijk states that ‘the penalty may be determined by an administrative body, e.g. (...) the public prosecutor (...), provided that from this decision appeal lies to a court with full jurisdiction’.\(^ {170}\)

In this respect, in view of the ambiguity surrounding the reviewability of the AG’s decision, the application of the abovementioned principles to the decision-making exercise of the AG may seem rather problematic.

---

\(^{165}\) App no 8130/78 (ECtHR, 15 July 1982).

\(^{166}\) Ibid, para 73.


\(^{168}\) App no 6878/75 (ECtHR, 23 June 1981)

\(^{169}\) Ibid, para 51.

\(^{170}\) Van Dijk (n 167) 568.
2.1.4.1.3 Presumption of innocence

The concept of the presumption of innocence, which is established in Article 6(2) of the ECHR, is relevant to article 22(2), whereby the AG determines the parameters of punishment to be meted out in the event of conviction even though guilt has not yet been declared. It may be argued that punishment is being indirectly imposed upon the accused, preceding the commencement of trial, by an entity that does not form part of the judiciary. The problematic nature of this reality is that during trial certain factors indicating a lesser degree of culpability may materialise. Consequently, the quantification of these factors in terms of punishment would be impossible due to the imposition of the statutory minimum. Ultimately, the mandatory imposition of the minimum penalty may not seem just in light of this degree of guilt.

2.1.4.2 Article 7

2.1.4.2.1 Nullum crimen sine lege, nulla poena sine lege

Two principles emanate from Article 7 of the ECHR. Firstly, one can only be convicted of an offence that existed at the time of commission. This principle is based upon the maxim *nullum crimen sine lege*. Furthermore, the second arm of the legal maxim, *nulla poena sine lege*, dictates that the penalty envisaged in respect of the crime committed cannot be heavier than that applicable at the time of the offence. In other words, Article 7 ensures that only the law can define a criminal offence and provide for the relative penalty. In this respect, in *G v France*[^171^], the Court laid down that the law must be both foreseeable and accessible, hence prohibiting conviction based on an unknown legal premise.

2.1.4.2.2 Camilleri v Malta

Article 22(2) has recently been the subject of the ECtHR’s scrutiny. The applicant in the case *Camilleri v Malta*[^172^], recently delivered on the 22 January

[^171^]: App no 15312/89 (ECtHR, 27 September 1995).
[^172^]: *Camilleri* (n 152).
2013, argued that the provision of the law fails to satisfy the requisite of foreseeability as required by Article 7, as well as infringing his individual right to a fair trial under Article 6 of the ECHR.

Upon examination of article 22(2) of the DDO, the ECtHR opined that the law was unambiguous in so far as what constituted the criminal offence. The Court also found that the law was clear with respect to the punishment in view of the crime in question, as it visibly provided for two possible punishments. Nevertheless, the ECtHR noted that it was impossible for the applicant to discern which punishment bracket would be applicable to his case, prior to being officially charged.

To illustrate his argument, the applicant made reference to two separate trials of two co-offenders in his application to the ECtHR. In this case, one offender was tried before the Court of Magistrates and sentenced to fifteen months imprisonment, whereas the other person was sentenced to twenty years imprisonment before the Criminal Court, which sentence was later reduced to nine years.\(^\text{173}\)

With this in mind, the Court observed that decisions of the Maltese Courts ‘were at times unpredictable’. This leads to uncertainty as to the applicable punishment ‘even if (the accused) had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor’s discretion to determine the trial court’.\(^\text{174}\) Furthermore, the ECtHR criticised the lack of statutory-based criteria in the decision-making exercise, by stating that ‘The law (does) not provide for any guidance on what would amount to a more serious offence or a less serious one based on enumerated factors and criteria.’\(^\text{175}\) The ECtHR further elucidated that:

> An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same

\(^\text{173}\) *Ir-Repubblika ta’ Malta vs. Godfrey Ellul* (n 67).
\(^\text{174}\) *Camilleri* (n 152) para 43.
\(^\text{175}\) ibid.
offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards.

On the basis of such abovementioned considerations, the Court found that Article 7 of the ECHR had been violated.

Curiously, however, the case was decided solely on the basis of Article 7 of the Convention, as the Court opined that it was not also necessary to examine whether Article 6 had been violated. In his partly dissenting opinion, Judge Kalaydjieva expressed his ‘regret’ in consideration of the majority’s view not to examine the possible infringement of Article 6, since the complaints reveal questions regarding the equality of the parties to the criminal proceedings, hence extending beyond the scope of Article 7. Judge Kalaydjieva also pointed out the possible violation of the Courts’ independence, due to ‘the statutory privilege of one of those parties (…) to interfere with the court’s competence to determine the outcome of the proceedings’. 176

Interesting to consider is Judge Quintano’s partly dissenting opinion, as he provided a different perspective, undoubtedly attributable to his practical understanding of the domestic law. Judge Quintano disagreed with the ‘lack of foreseeability’ argument, as the ability to foresee punishment is facilitated through the examination of the quantity of drugs, by seeking the advice of legal counsel, and by examining the jurisprudence on the matter.

Judge Quintano opined that case law at the time when the applicant was charged with the offence of possession of 953 ecstasy pills—which case law was readily accessible—indicated that proceedings would be taken before the Criminal Court. In fact, he stated that ‘Any lawyer practising in the field of drugs offences would have indicated that such a quantity of ecstasy pills would lead to a penalty of between four years and life imprisonment.’ 177

In response to the ECtHR’s statement as to the lack of precision of the law, the dissenting Judge held that case law uncovers the criteria taken into account by

176 ibid, Dissenting Opinion of Judge Kalaydjieva, para 4.
177 ibid, Dissenting Opinion of Judge Quintano, para 5.
the AG when making a decision, for instance the quantity, the filing of an early guilty plea, and the cooperation with the authorities. Rarely does case law identify the AG’s decision to direct the case before the Court of Magistrates when a substantial amount of drugs was involved.

2.1.4.3 Article 14

Article 14 protects from discrimination the rights established in the ECHR on the basis of any ground.\(^\text{178}\) The nature of this article is quite complex, as it represents a close relationship between the concept of discrimination and the rights and freedoms protected under the Convention. The Court clarified the character of Article 14 in *Abdulaziz, Cabales and Balkandali v the United Kingdom*,\(^\text{179}\) by stating that it does not have an ‘independent existence’ from the substantive Convention provisions, ‘since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions’.

The essence of the claim of discrimination lies in the distinctive consequences of the AG’s decision. In effect, this claim has been raised in the situation of two supposedly equal cases, which have been treated differently in terms of the application of article 22(2). In order for such claim to succeed, the ECtHR has held that there is a violation when, ‘without objective and reasonable justification, persons in ‘relevantly’ similar situations are treated differently’,\(^\text{180}\) and that ‘other persons in an analogous or relevantly similar situation enjoy preferential treatment’ when ‘there is no reasonable or objective justification for this distinction’.\(^\text{181}\)

Upon analysis of Maltese jurisprudence, one identifies cases where individuals have been charged before Courts of different jurisdictions in relation to the same drug offence, hence attracting very dissimilar penalties and subsequently inviting the claim for discriminatory treatment under Article 14 of the ECHR. In

---

\(^{178}\) Emphasis added.

\(^{179}\) *App no 9214/80 (ECHR, 28 May 1985)* para 71.

\(^{180}\) *Spadea and Scalabrino v Italy* App no 12868/87 (ECHR, 28 September 1995).

\(^{181}\) *Stubbings v The United Kingdom* App no 22083/93 (ECHR, 22 October 1996).
the case of *Godfrey Ellul vs. L-Avukat Generali*,\(^{182}\) the convicted appellant stated that the decision of the AG infringed Article 14 of the ECHR, as he was tried before the Criminal Court, whereas his co-accused was heard before the Court of Magistrates and was awarded a lesser punishment. This notwithstanding, the Constitutional Court stated that although they were faced with the same charges, does not *ipso facto* place them in an equal and analogous situation.

Similarly, in *Claudio Porsenna vs. L-Avukat Generali*,\(^{183}\) the appellant was investigated by the Police following a tip given by another person, ‘AB’, who was charged with trafficking in a dangerous drug. Both persons were involved in the same drug operation. Although initially the AG ordered for AB’s case to be heard before the Criminal Court, he later issued a counter-order by virtue of article 31 of the DDO. Consequently, Porsenna was tried before the Criminal Court, which ultimately resulted in a punishment of eight years imprisonment,\(^{184}\) whereas AB was sentenced to imprisonment for a period of six months before the Court of Magistrates, which was increased to one year upon appeal.\(^{185}\)

The Court rejected the claim of discrimination under Article 14 on the basis of the accessory nature of the said article, which envisages a discriminatory act vis-à-vis one or more of the rights established under the Convention. The Court had already stated earlier on in the judgment that the AG’s discretion did not fall foul of Article 6 of the Convention. Since the appellant did not invoke any other substantive provision of the said Convention in his application, the Constitutional Court could not accept the claim under Article 14.

The accuracy of this argument, which forms the basis of the Court’s rejection, is questionable, as the ECtHR has on various occasions pronounced that although Article 14 is not entirely autonomous, its application ‘does not require the simultaneous violation of one of the Convention’s rights or freedoms’.\(^ {186}\)

---

182 *Godfrey Ellul vs. L-Avukat Generali* (n 130).
183 *Porsenna vs. L-Avukat Generali* (n 142).
184 *Ir-Repubblika ta’ Malta vs. Porsenna*, Criminal Court, 26 September 2012.
185 *Il-Pulizija vs. AB*, Court of Criminal Appeal, 24 February 2010.
186 Van Dijk (n 167) 1029.
2.1.5 Recent developments

The recent presentation of Bill 97 of 2011 in Parliament,\(^{187}\) which seeks to amend various provisions of the Criminal Code and other criminal related laws, seems to give increased discretionary powers to the AG during the pre-trial stage. The relevant amendments deal with first-time possessors of drugs, where the AG is given the discretionary power to decide whether to prosecute an offender or to alternatively issue a one-off formal warning *in lieu* of criminal proceedings, on the basis of certain grounds.\(^{188}\)

Although this amendment is not entirely relevant for the purposes of this study, this proposal emphasises the importance given to the office of the AG by Parliament. In this case, although the discretionary powers of the AG are being increased, the legislator is evidently intent on regulating such discretion, by providing for grounds upon which the decision should be made.\(^{189}\)

2.2 Factors that promote the effective administration of the criminal justice process

The guilty plea and the accused's cooperation with the law enforcement authorities are two mitigating elements that are weighed by the Courts when meting out punishment. The isolation of these two factors from the sentencing factors examined in Chapters Three and Four lies on the fact that unlike the latter, which are traditional sentencing considerations dealing with the circumstances of the offence or offender, these factors exist simply to promote the proper administration of the criminal process.

These legal incentives reward the offender in his effort to reduce the costs and burdens associated with trial.\(^{190}\) In fact, when examining the reduction principle with respect to a guilty admission, the English Sentencing Guidelines Council

---

188 ibid, clause 80.
(SGC) holds that it ‘derives from the need for the effective administration of justice and not as an aspect of mitigation’. As stated in *Markarian v The Queen*, the ‘non-sentencing purpose’ of these mitigating factors ‘is demonstrated by the fact that offenders are ordinarily entitled to additional mitigation for any remorse or contrition demonstrated with the plea or assistance’. The High Court of Australia rejected the view that mitigation should not be applied in view of a guilty plea that does not identify genuine remorse. Rather, by stressing the importance of the element of public interest, Kirby J. described the guilty plea mitigation as a ‘purely utilitarian consideration’.

### 2.2.1 Aiding the Police

Article 29 of the DDO provides for mitigation when the accused has aided the police in the apprehension of the persons who had supplied him the drug. The defence frequently avails itself of this mitigating factor, which provides for the extremely beneficial diminution in punishment by one or two degrees, as well as a reduction of one-third or one-half with respect to any pecuniary penalty.

The Court highlighted the scope of article 29 in *Ir-Repubblika ta’ Malta vs. Joseph Borg and John Sultana*, which essentially is ‘(biex) ihajjar persuni li jkunu akkwistaw xi medicina perikoluza biex jghinu lill-Pulizija jaqbdru l-persuna jew persuni li jkunu pprovdew dik il-medicina perikoluza.’ Furthermore, by virtue of a Report presented in Parliament in 2006, the Social Affairs Committee pronounced that the motivation behind this provision is ‘li tiinqabad il-huta l-kbira li jkun qieghed imexxi ammonti kbar ta’ droga’. Nonetheless, the Court emphasised that the mitigation should not be too great, since this may impinge upon the principle of deterrence.

Article 29 envisages two possibilities wherein the accused may be able to benefit from the reduction. Firstly, when the prosecution, in the records of the

---

192 (2005) 215 ALR 213, [74].
194 Court of Criminal Appeal, 3 February 2004.
195 Social Affairs Committee, ‘Report on the proposed amendments to the DDO’ [2006].
proceedings, declare that the accused has aided them in apprehending the person or persons who had supplied him the drug, or alternatively, in the absence of such declaration, the accused must prove to the satisfaction of the Court that he has so aided the police.

In order to benefit from the diminution in terms of article 29, it is not enough for the accused to simply mention the supplier’s name. It must actually follow that the police are able to apprehend that person by virtue of such information. The definition is narrowed even further in *Ir-Repubblika ta’ Malta vs. Godfrey Ellul*,196 where the Court of Appeal stated that the entitlement to the mitigation is lost if:


The importance of upholding a restricted interpretation was reiterated by the Court in *Ir-Repubblika ta’ Malta vs. Abdulsalam Salem Ben Ahmed*.197 The defence argued that article 29 should be given a wider interpretation since it is possible that the police might not react efficiently to the information provided, and hence such information, although valid, would not lead to the apprehension of the person. Nevertheless, the Court of Appeal rejected this argument stating that the ultimate objective of the reduction is the arrest of the drug supplier.

In the event that the assistance does not lead to a reduction by way of article 29, the nature and extent of the cooperation of the accused is nonetheless a discretionary factor that is taken into account by the Court in consideration of punishment.198 For instance, in the case *Ir-Repubblika ta’ Malta vs. Jose Edgar Pena*,199 the Court held that article 29 is aimed solely towards the apprehension of the supplier of the drug and not the person who intends on purchasing it. This notwithstanding, the Court stated that if expected buyer is

---

196 *Ir-Repubblika ta’ Malta vs. Godfrey Ellul* (n 67).
197 Court of Criminal Appeal, 11 October 2012.
198 *Ir-Repubblika ta’ Malta vs. Joseph Borg u John Sultana* (n 194) 10-11.
199 Court of Criminal Appeal, 5 December 2012.
arrested due to the cooperation of the courier, then this would be accounted for
to the benefit of the accused when calculating punishment, even though such
cooperation does not fall strictly within the parameters of Article 29.

This subjective evaluation was also evident in *Ir-Repubblika ta’ Malta vs. Antoine Debattista.* In this case, not only did the accused cooperate with the police by providing them with the requisite information, but he also went further by participating in a controlled delivery, which ultimately led to the supplier’s arrest. The Court stated that although such physical participation was not required as per article 29, the Court opined that ‘dan ma jfissirx li ma jistax ikun hemm cirkostanzi ohra li jkunu jirrikjedu li l-Qorti tagthirom attenzjoni u piz partikolari.’ Nevertheless, the Court clarified that with respect to sentencing ‘l-margini li fihom hija tista` ticcaqlaq (...) huma limitati’.

Another interesting consideration was elucidated upon in the *Pena* judgment, wherein the Court opined that there is no legal irregularity when a person suspect is informed regarding the beneficial article 29 of the DDO, prior to giving the authorities the requisite assistance, since ‘Kien il-legislatur stess li (...) ried jaghti forma ta’ promessa jew twebbil ta’ vantagg bl-iskop li jinqabdu t-traffikanti tad-droga.’

### 2.2.2 The guilty plea

#### 2.2.2.1 Maltese discretionary rule

Maltese law provides for the general rule, found in article 492(1) of the Criminal Code, which holds that where the accused has been charged with an offence attracting the punishment of life imprisonment, and subsequently pleads guilty to the offence before the empanelment of the jury, then the judge may impose a sentence of imprisonment for a term of eighteen to thirty years.

---

200 Court of Criminal Appeal, 12 January 2006.
201 *Ir-Repubblika ta’ Malta vs. Jose Edgar Pena* (n 199) 12.
The application of this provision is entirely discretionary. As stated in the judgment *Ir-Repubblika ta’ Malta vs. Joseph Borg u John Sultana*, article 492(1) ‘ma jorbot idejn il-Qorti b’ebda mod’.

This notwithstanding, the law does not establish any rules or guidelines as to its application. Instead, the Courts make reference to jurisprudence, which in turn frequently cites English law and case law to guide their discretion. Therefore, it is firstly pertinent to provide a succinct legal background to the English treatment of the guilty plea.

### 2.2.2.2 English treatment of the guilty plea

Prior to the enactment of the statutory mandatory reduction of punishment in the event of a guilty plea, the English Courts relied on precedent to justify the mitigation in punishment. Nevertheless, the need for a statutory basis for this reduction was observed. In 1994, the Government took up such recommendation by virtue of section 48 of the Criminal Justice and Public Order Act. The latter-mentioned section of the law is presently found in the Criminal Justice Act, which holds for the requirement that not only obliges the Court to consider the stage at which the accused has lodged his guilty plea, but also requires the Court to take into the account the circumstances in which the admission was given. However, the law does not provide any guidance in terms of the approach that ought to be utilised by the Courts. In order to aid the Court with this particularly arduous task, in 2004 the Sentencing Guidelines Council established a set of guidelines that seek to regulate the discretion of the Court, as the law had been repeatedly criticised for being ‘remarkably allusive’.

### 2.2.2.3 Stage and circumstances in which the guilty plea is lodged

Admittedly, the impact of the admission on the final sentence depends greatly upon the particular stage it is lodged. In this regard, the English SGC has

---

202 *Ir-Repubblika ta’ Malta vs. Joseph Borg u John Sultana* (n 194) 8.
204 Criminal Justice Act 2003, s 144.
established a ‘sliding scale’ depicting three possible stages wherein a guilty plea may be established: the first reasonable opportunity, after the trial date is set, and after the trial has begun. By virtue of the Guideline, a discount of up to one-third is awarded when the offender pleads guilty at the earliest stage possible, whilst only benefitting from mitigation of a maximum of one-tenth for a late guilty plea.

The Guideline provides examples of instances that may signify where a guilty admission is lodged at ‘the first reasonable opportunity’ in order to ensure consistency in sentencing.207 In addition, the Guideline also gives appreciation to the scenario where the accused has not yet lodged a guilty plea if his legal adviser has not been provided with enough information as to the charge.208

It follows that the accused is to benefit from the greatest reduction when there is an early guilty admission. Nevertheless, the determination of the ‘earliest opportunity’ may prove to be a challenging feat. The fact that the accused person has not lodged a guilty admission at the point when he was charged is not in itself conclusive.209 Rather, the Sentencing Guideline, as well as various commentaries and foreign jurisprudence make reference to the term ‘the earliest reasonable opportunity’, which varies according to the particular circumstances of each case.210

2.2.2.4 Maltese principles as established in jurisprudence

Although Maltese law does not explicitly lay down a time-line to this effect, the adjudicator does make a distinction between the various stages wherein a guilty plea may be indicated. In addition, the Court does take into account the circumstances in which the plea is lodged. Therefore, the Court will not necessarily award a significant reduction if such discount is unjust in the circumstances, for instance if the accused has been caught red-handed and consequently has no other choice but to admit his guilt. As held in the case Ir-
Repubblika ta’ Malta vs. Mario Camilleri,\(^\text{211}\) a reduction in punishment following an early admission of guilt is not ‘bilfors jew dejjem, jew b’xi forma ta’ dritt jew awtomatikament tissarraf f’riduzzjoni fil-piena’.

The Court in the latter-mentioned case, when citing the landmark judgments Ir-Repubblika ta’ Malta vs. Nicholas Azzopardi\(^\text{212}\) and Il-Pulizija vs. Emmanuel Testa,\(^\text{213}\) put forward certain judicial-guiding factors. These judgments cite the rules found under English law, making particular reference to Blackstone’s Criminal Practice, and expressly hold that ‘hija taqbel mal-principji espressi f’dana l-bran u qed tagmilhom taghha’. The 2001 edition of Blackstone, cited in the abovementioned Testa judgment, acknowledges the principle of mitigation in punishment by virtue of a guilty admission, notwithstanding that the ‘appropriate discount’ has never been fixed. The judgment then proceeds to quote Blackstone by providing for a sequence of English landmark decisions, identifying the different elements dictating reduction in punishment when a guilty admission is lodged.

Significantly, in the Testa judgment, the Court makes reference to the landmark decision of R v Sharon Elizabeth Costen,\(^\text{214}\) wherein the Court of Appeal established a non-exhaustive list that points at the inapplicability of the reduction. Notably, the benefit of mitigation may be lost if it is in the interest of the public to mete out a lengthy sentence, as well as when the accused is caught in flagrante delicto or in the case of a ‘tactical plea’.

Nevertheless, as correctly pointed out by the defence in Ir-Repubblika ta’ Malta vs. Joseph Zerafa et,\(^\text{215}\) the principles established in the recent English Guilty Plea Guideline deviate slightly from the dictum found in Costen. In fact, the defence cited the more recent 2006 edition of Blackstone, which makes explicit reference to the Guideline, in order to emphasise this argument. The English SGC provides that the ‘sliding scale’ also applies to the situation where

\(^{211}\) Court of Criminal Appeal, 23 January 2001.  
\(^{212}\) Criminal Court, 24 February 1997.  
\(^{213}\) Court of Criminal Appeal, 17 July 2002.  
\(^{214}\) [1989] 11 Cr App R (S) 182.  
\(^{215}\) Criminal Court, 28 January 2010.
the accused is caught ‘red-handed’. Therefore, even in the situation where a person’s guilt is unquestionable or inevitable by reason of being caught *in flagrante delicto*, the Guideline now provides that ‘credit should not be withheld or reduced on these grounds alone’.

However, it is important to note that although the presumption is that the adjudicator shall apply the recommended discount, departures from the reductions provided for in the Guideline are allowed on certain grounds. For instance, the Court may decide to withhold a reduction in the scenario where the prosecution’s case is overwhelming,\(^2\) and hence without the need to rely on the guilty admission of the accused. In addition, the withholding of the recommended discount is also justifiable in the circumstances where ‘the not guilty plea was entered and maintained for tactical reasons’,\(^3\) which reflects the principles established in case law. For instance, in *R v Hollington*,\(^4\) the Court opined that ‘Occasionally the discount may be refused or reduced for other reasons, such as where the accused has delayed his plea in an attempt to secure a tactical advantage.’

Hence, in applying the principles enunciated in English law to the abovementioned *Zerafa* case, the Court concluded that since the accused parties waited until the eleventh hour to lodge a guilty plea this amounted to a ‘tactical plea’. The Criminal Court nonetheless took account of the guilty admission, since the plea was lodged prior to empanelling the jury. However, by reason of the abovementioned considerations, the extent of its appreciation as regards punishment was minimal.

### 2.3 Concluding observations

The sentencing implications that ensue as a result of the pre-trial and procedural considerations are extensive in scope. In spite of the voluminous commentary on the role of the AG, as well as the recent Parliamentary

---

\(^2\) Guilty Plea Guideline (n 205) s E.

\(^3\) Ibid, 5.

\(^4\) [1985] 82 Cr App R 281.
proposals, the precise juridical character of this figure remains rather elusive. In the exercise of his quasi-judicial functions, the AG has traditionally been identified as a Chief-Magistrate, which is somewhat discordant vis-à-vis his duties as State Prosecutor, tending to conflict with the principle of separation of powers and the concept of equality of arms. This is especially true with respect to drug offences and his discretionary power to direct trial, which, as it stands today, remains non-reviewable in nature, yielding far-reaching sentencing consequences for the accused in question. In addition, although the sentencing factors relating to the assistance to the police and the guilty plea do not specifically relate to the offence committed or the personal circumstances of the offender, the law gives such considerations appropriate and adequate appreciation in attempt to facilitate and expedite the criminal process. As a result, the assessment of these factors, together with the considerations to be examined in Chapters Three and Four, considerably impact the final punishment imposed.
3 MANDATORY SENTENCING CONSIDERATIONS

3.1 Structuring sentencing discretion

In a system where rules and principles are firmly established, with no room for possible manoeuvre, the adjudicator may not be in a position to appraise the various unique elements of a particular case. In fact, Hawkins holds that ‘systems of formal rules, for all their appearance of precision and specificity, work in only imprecise ways’.

Ashworth agrees with this line of reasoning, stating that ‘different combinations of facts present themselves, and rules may prove too rigid and too crude to yield sensible decisions’. Moreover, a discussion between Lord Alverstone CJ and the judges of the Queen’s Bench regarding the topic of sentencing disparity led to the pronouncement that ‘Any attempt to mete out punishment to offenders in the same class of crime at a rigidly uniform rate could result only in the frequent perpetration of injustice’.

Hence, these arguments emphasise the importance of the subsistence of judicial discretion in sentencing.

Nevertheless, various commentators have negatively commented upon the concept of judicial discretion, with the principal view that discretion is the primary reason leading to the concept of injustice. The notion of justice identifies a system that ascertains certain controls and limitations over the judge or magistrate in sentencing. It follows that although discretion is an important concept in view of the very attainment of justice, structuring that discretion is equally as important.

The Maltese drug-sentencing regime is largely unstructured, as within the broad confines of the mandatory parameters of punishment, the adjudicator is not provided with much legal guidance. Nevertheless, one may identify certain

\[\text{References}\]

220 Ashworth, Sentencing and Criminal Justice (n 206) 41.
223 Lorraine Gelsthorpe and Nicola Padfield, Exercising Discretion, Decision-making in the Criminal Justice System and Beyond (Cullompton, Willan 2003).
statutory principles that seek to structure this broad discretion. In this respect, the law strives to achieve consistency by establishing mandatory sentences, and by providing for statutory aggravating and mitigating factors, which are found both in the drug laws and the Criminal Code. In addition, guidance has been provided by virtue of certain self-regulating judicial principles. The latter method of structuring discretion, however, shall be analysed in Chapter Four.

3.2 Mandatory punishment: no room for manoeuvre

3.2.1 Mandatory sentence parameters

The discretion of the Courts may be restricted through the legal imposition of a mandatory sentence. Commentators often negatively perceive the raison-d’être of mandatory penalties, with the favoured method being that of adopting a range of punishment in accordance with guidance produced by the Court itself.

Michael Tonry’s disdain is evident in his criticism of mandatory sentencing:

[M]andatory penalty laws shift power from judges to prosecutors, met with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh.

In fact, Tonry continues to opine that the greatest injustice is evident in view of the severe mandatory penalties for minor offences such as trafficking in small quantities of drugs.

Certainly, the greatest limitation to the Maltese Courts’ discretion comes by way of the imposition of a mandatory custodial minimum sentence for trafficking offences, as examined in Chapter One. The principal qualm is undoubtedly that the mandatory penalties ‘generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency’. In fact, practitioners, as well as members of the judiciary in

---

224 Easton (n 190).
226 Ibid.
delivering judgment, have highlighted this issue with explicit reference to drug trafficking cases, which very often reveal particular and distinctive elements.228

3.2.2 Inapplicability of the ‘escape clause’ and the non-custodial measures

When addressing the issue of mandatory penalties, Ashworth argues that the practical scenario might paint a different picture. He states that judicial discretion may be exercised notwithstanding the imposition of a statutory minimum, due to the existence of ‘escape clauses’, which allow the judge to go below the prescribed sentence if such mandatory penalty is ‘unjust in all the circumstances’.229

Within the Maltese context, the ‘escape clauses’ mentioned by Ashworth are found in the Criminal Code, as well as other criminal laws. However, the drug laws exceptionally preclude the judge from going below the prescribed minimum, which further illustrates the stringent mandatory nature of the parameters of punishment provided in article 22(2).

As analysed in the previous Chapter, article 21 of the Criminal Code permits the Court to go below the statutory minimum if there are legitimate reasons justifying this departure. Consequently, in the punishment of drug trafficking offences, article 22(9) of the DDO excludes the application of this provision, even if the circumstances call for such reduction.230

In addition, article 22(9) also precludes the application of article 28A and the provisions of the Probation Act. The former provision regulates the institute of the suspended sentence. Within the ambit of drug offences, the Courts frequently avail themselves of these non-custodial methods of punishment. However, the alternative methods of punishment are solely meted out in view of offences committed under the provisions of article 22(2)(a)(ii) and (b)(ii), hence

---

228 Text to n 337, in ch 4.
230 Text to ch 2, s 2.1.3.2.
charges of simple possession for instance, which often involve persons with 
substance abuse problems. In such circumstances, these sentencing methods 
seem appropriate. The same cannot be said with respect to trafficking offences, 
where the law makes no distinction between the drug-user trafficker and the 
non-user trafficker.\textsuperscript{231}

The law is very clear when prohibiting the application of the abovementioned 
provisions. In fact, the Court is always consistent in its interpretation of article 
22(9), where it has repeatedly stated that 'il-Qrati f’kazijiet bhal dawn huma 
marbutin u trid bil-fors tinghata piena karcerarja’.\textsuperscript{232} As a result, by reason of 
this statutory imposition, the discretion of the Court is severely curtailed when 
metering out punishment.

\textbf{3.3 Statutory factors having effect on sentencing}

The application of aggravating and mitigating factors is of significant importance 
in sentencing practice. Lord Bingham CJ opined that, ‘the seriousness of the 
offence can vary almost infinitely from case to case’, and therefore ‘whether a 
custodial sentence is required, and if so the length of such sentence, is heavily 
dependent on the aggravating and mitigating features’.\textsuperscript{233}

The 1988 UN Convention provides for a non-exhaustive list factors that 
increase the seriousness of the offence,\textsuperscript{234} including the offender’s prior 
convictions, the victimisation and use of minors, amongst others. Although the 
Signatories are not obliged to take these factors into account, their stipulation 
serves as a guide to the national Courts as to what is to aggravate punishment.

The factors established in the 1988 Convention are implemented in Maltese 
legislation. Some of these factors are general sentencing principles found in the 
Criminal Code. However, the drug laws also provide for additional aggravating 
and mitigating factors, which are unique to drug offences. Maltese law

\textsuperscript{231} Text to ch 4, s 4.3.3.  
\textsuperscript{232} Il-Pulizija vs. Stephen Abela, Court of Appeal, 8 August 2005, 13.  
\textsuperscript{233} R v Brewster [1998] 1 Cr App R 220.  
\textsuperscript{234} 1988 UN Convention (n 12), art 3(5).
prescribes the relevant weight to be given by the adjudicator in view of the mitigation or aggravation, hence attributing uniformity and consistency to their application.

3.3.1 Aggravating and mitigating factors in the Criminal Code

3.3.1.1 Previous convictions

The existence of one or more prior convictions may aggravate punishment for one of two reasons. 235 On one hand, previous convictions may be quantified in terms of punishment for preventative purposes. Fletcher holds that the consideration of prior convictions ‘reflects a theory of social protection rather than a doctrine of deserved punishment. The rule of thumb is that recidivists are more dangerous and that society will be better served if the recidivists are isolated for longer terms’. 236 On the other hand, the prior record may be accounted for in order to gauge the degree of punishment against the offender’s culpability. 237 The culpability approach, advocated by Andrew von Hirsch, is justified since the accused who has repeated ‘the offense following (...) conviction may be regarded as more culpable since (he) persisted in the behaviour after having been forcefully censured for it through his prior punishment’. 238

Under Maltese law, an increase in punishment by one degree is contemplated when the offender in question is a recidivist. 239 The aggravation applies to all criminal offences, and hence does not uniquely apply to drug crimes. Article 49 of the Criminal Code defines a recidivist as a person who commits another offence following conviction for the commission of any offence.

235 Martin Wasik, ‘Desert and the Role of Previous Convictions’ in Andrew von Hirsch and Andrew Ashworth (eds), Principled Sentencing (Edinburgh, EUP 1992) 234.
236 George P Fletcher, Rethinking Criminal Law (Boston, Little, Brown 1978) 466.
237 ibid.
239 Criminal Code (n 74), art 50.
The principles of recidivism were enunciated in the case *Il-Pulizija vs. Steven Zahra*, wherein the Court of Appeal stated that recidivism is merely a personal factor, independent from the objective substance of the previous and present offence. Therefore, ‘l-awment fil-piena ghandu rapport biss mal-personalita’ tal-hati u jsib ir-raguni tieghu fil-persistenza tal-hati fuq delikwenza’.

In this regard, recidivism is an autonomous charge, separate and distinct from all other charges. In fact, article 49 and article 50 of the Criminal Code establish certain requirements, which are completely independent of the current offence that ought to be proved by the prosecution. Firstly, the accused must have been convicted and sentenced by a definitive judgment prior to committing the present offence. Also, in contrast to various other jurisdictions, the present offence need not be equal or connected to the prior offence committed.

With respect to the latter requirement, unlike Maltese law, UK law allows the Courts to have regard to the nature and the relevance of the conviction with the current offence. Parallel to this line of thought, von Hirsch notes that the importance of previous convictions may decrease if these are ‘sufficiently dissimilar’ to the present offence. Although this approach may be construed as equitable, problems defining the term ‘similar’ may arise. Comparatively, the Maltese scenario eliminates all forms of uncertainty and arbitrariness when establishing an increase on ground of recidivism.

In addition, Maltese law sets a specified prescriptive period with respect to the charge of recidivism, which is the lapse of ten years from the date of expiration of sentence or discharge where the punishment exceeds five years, or within five years in all other instances. Similarly to that stated in the previous paragraph, this stipulated time period removes any possible situation of doubt. In the UK, the Court is given the discretion to decide whether to apply an aggravation in view of the ‘staleness’ of a previous conviction. The

---

240 Court of Criminal Appeal, 26 May 1998.
241 Criminal Justice Act 2003, s 143(2).
242 Von Hirsch, *Doing Justice* (n 238) 86.
243 Criminal Code (n 74), art 50.
244 Wasik (n 235) 237.
imposition of a limitation is endorsed by various authors, whereby it is agreed that it is unjust for a person to endure his prior convictions for an indefinite period of time.\textsuperscript{246} Similarly to the case of Malta, various US criminal guidelines establish a period of ten years with respect to the ‘decay’ of previous convictions.\textsuperscript{247}

3.3.1.2 Continuous offence

The Courts have illustrated the character of a continuous offence as being a\textit{ fictio juris}, created by the legislator with the aim of imposing one single punishment, rather than punishing the commission of various criminal acts separately.\textsuperscript{248} A continuous offence is committed when the offender commits several acts, even if committed at different times, which constitute violations of the same provision of the law and in connection with the same design. In terms of punishment, these acts shall be deemed to be one single offence. Article 18 of the Criminal Code provides for the general rule that increases punishment by one or two degrees when the accused has committed a continuous offence.

The level of increase essentially remains in the hands of the Court, as pronounced in \textit{Ir-Repubblika ta’ Malta vs. Corunato sive Coronato Muscat et}.\textsuperscript{249} In addition, the Court opined that more often than not, the trafficking offence is not an isolated one. Hence, this provision seeks to justly punish those offenders who continuously violate the law in order to make a dishonest living.

The application of this aggravating factor is examined in the case \textit{The Republic of Malta vs. Mike Diala},\textsuperscript{250} wherein the accused had been trafficking one to three capsules of cocaine a week, for a period of eight months. The Criminal Court applied the increase in punishment in order to reflect the continuity of the offence. It is important to note that the element of continuity impacts the level of

\textsuperscript{245} Criminal Justice Act 2003, s 143(2)(b).
\textsuperscript{246} Ashworth, \textit{Sentencing and Criminal Justice} (n 206) 212.
\textsuperscript{247} See, for instance, the Minnesota Sentencing Guidelines and Commentary (2012) s 2.B.2, sub s 3(b).
\textsuperscript{248} \textit{Ir-Repubblika ta’ Malta vs. Mario Camilleri} (n 211).
\textsuperscript{249} Court of Criminal Appeal, 23 January 2001.
\textsuperscript{250} Court of Criminal Appeal, 5 July 2012.
seriousness of the offence. In fact, the prosecution stated that the element of continuity was one of the factors that led to the AG’s decision to direct trial before the Criminal Court.

3.3.2 Aggravating and mitigating factors in the drug laws

3.3.2.1 Vulnerable persons

The second proviso to article 22(2) of the DDO provides for an increase in punishment by one degree when the target of the trafficking offence is a vulnerable person. Firstly, the law envisages an increase when the offender targets premises that are occupied or frequented by such persons. Secondly, the law provides for the situation where the offender directly pursues persons who are vulnerable.

3.3.2.1.1 Premises frequented by vulnerable persons

The location of the offence is of utmost importance for sentencing purposes. The second proviso to article 22(2) increases the punishment by one degree when the offence is committed in or within 100 meters from a school, youth club or centre, or any other place where young people habitually meet.

By virtue of this provision, the legislator seeks to provide young persons with a certain degree of protection. A recent judgment that demonstrates its very significance is *Il-Pulizija vs. Michael Portelli*,²⁵¹ wherein the offender was apprehended in the possession of a quantity of drugs just as he parked his car in front of a school. In this case, the Court did not only consider the simple fact that the car was parked within 100 meters of a school. It also took cognisance of the ‘strategic’ time of the offence—two o’clock in the afternoon—which signified the time when students will be leaving school.²⁵² On appeal,²⁵³ the Court added that the increase in punishment does not merely occur when the accused has

---

²⁵¹ Court of Magistrates, 15 June 2012.
²⁵² ibid 8.
dealt in a drug within 100 meters of a school, yet also for simply being in possession of a quantity of drugs that indicates non-exclusive use.

Unfortunately, the Courts often encounter interpretational problems with such proviso. For example, in the case *Il-Pulizija vs. Addie Magri*, the prosecution argued that the First Court was incorrect in deciding that the bar in question was one that was not commonly frequented by youths, stating that it was visited by persons of all ages. In this respect, the prosecution stated that the law does not require that the premises be ‘aimed’ towards youths. The Court of Appeal nevertheless rejected this point, significantly narrowing the dimension of the outwardly wide proviso. Hence, the law is not all encompassing in its scope, as it does not necessarily capture within its definition those places where youths happen to frequent together with other people of all ages, as is a Church or a town square for instance.

3.3.2.1.2  Pursuit of vulnerable persons

Maltese law establishes an increase in punishment when the offence of sale, supply, administration of a drug, or the offer to commit such acts, is directed at a minor, a woman with child, or a person undergoing rehabilitation treatment, who for the purposes of the law are considered ‘vulnerable’. The targeting of these individuals would lead to an increase in punishment, since the perceived level of harm is intensified when considering the effects such pursuit would have on these victims in particular.

The Court in *Il-Pulizija vs. Anthony Frendo* aggravated the parameters of punishment since the accused had pursued a drug addict. The accused was charged with trafficking in a drug within the close proximity of the Detox Centre. The Court rejected the appellant’s plea, which held that the premises should not be recognised as a place commonly frequented by youths in terms of the law, by declaring that due to the very nature of the Detox Centre, it continually attracts the presence of drug addicts, which in the majority of cases are youths.

---

254 Court of Criminal Appeal, 12 January 2011.
255 Court of Criminal Appeal, 10 April 2008.
Moreover, the Court opined that the offender’s culpability is even more prominent since these youths are extremely vulnerable and more susceptible to purchasing the drugs.

3.3.2.1.3 Other considerations

In providing for an aggravation in punishment by reason of location, the proviso does not make any reference to time or other circumstances that may be relevant to the offence. In this regard, it is pertinent to refer to section 4A of the UK Drugs Act, which increases the seriousness of the offence when the act is committed in, or within the close proximity of school premises at any time when the school is attended by persons under the age of 18, or one hour before or after the start and termination of the school day. Therefore, in contrast to Maltese law, the aggravation of the offence by reason of location is narrowed down considerably, merely capturing the relevant school hours of the day.

This notwithstanding, under UK law, the aggravation on the basis of location applies solely to school premises. The practical redundancy\(^{256}\) of such provision is evident in regard to the exclusion of places where other vulnerable persons meet, such as prisons.\(^{257}\) The Government stated that this significant omission is attributable to ‘practical difficulties in arriving at a comprehensive list of places where young people might congregate and to which the offence might apply’.\(^{258}\)

In this regard, the English Sentencing Advisory Panel has advised the Sentencing Council to widen the provision so as to include all premises that tend to locate vulnerable persons.\(^{259}\)

Under both Maltese and UK law, those aggravating circumstances not included within the law are simply discretionary factors that the adjudicator must consider when deciding upon the sentence. It is significant to note that upon the codification of English Drug Guideline in 2012,\(^{260}\) the ‘targeting of any premises

---
\(^{256}\) Transform, *Response to the Drugs Bill 2005* [2005].
\(^{257}\) Fortson (n 5).
\(^{260}\) Drug Offences Guideline (n 43).
intended to locate vulnerable individuals or supply to such individuals and/or supply to those under eighteen’ is a factor that the judiciary must take into consideration for the purposes of sentencing.

3.3.2.2 Drug sharing

The concept of drug sharing was introduced by virtue of Act XVI of 2006, which implemented a proviso to Article 22(9) of the DDO. This amendment was introduced in the light of the common situation where the accused is charged with aggravated possession, yet in reality the drug is not entirely for his personal use but rather to be shared with other persons. In this situation, the commercial and profit-inducing motivation associated with trafficking is lacking.

3.3.2.2.1 Development of the concept of ‘sharing’

Prior to the amendments, the distinction between the two offences was manifested both locally and at European level. The European Commission highlighted the importance of differentiating between the two offences in 2001, when proposing for a Council framework decision laying down minimum provisions regarding illicit drug trafficking. By virtue of the inclusion of the words ‘for profit’ within the definition of illicit trafficking, the framework decision thereby excluded from its scope those persons who supply without a commercial incentive.

In Malta, the amendment to the drug laws ensued following a Report presented by the Social Affairs Committee in 2006, which addressed the discrepancy between the law and the practical realities of the situation. The Report cited the landmark case *The Police vs. Gisela Feuz*, which initiated the progressive movement towards the distinction between the offence of sharing and drug

---

261 ibid, s 3, para 1.  
263 Social Affairs Committee (n 195).  
264 Court of Criminal Appeal, 9 January 1998.
trafficking. The accused in this case was found with a quantity of drugs when travelling to Malta and subsequently charged with importation with the intent to traffic, as prior to the enactment of Articles 22(1F) and (1G) of the DDO, any quantity of drug imported from abroad was equivalent to ‘trafficking’. However, the reality of the situation was that the accused intended to share the drug with her partner. Regardless, as a result of the mandatory minimum sentence, the accused was sentenced to six months imprisonment for drug trafficking in accordance with Article 22(2)(b)(i).

3.3.2.2.2 The exception to article 22(9)

The proviso abovementioned allows for the application of article 21 of the Criminal Code, the imposition of a suspended sentence, or a probation order, ‘if the court is of the opinion that the offender intended to consume the drug on the spot with others’. The law further requires that an offender may only avail himself once of the beneficial proviso to article 22(9).265

Although this exception may seem to be a potential defence for the offender, it is rather limited in scope. In fact, jurisprudence identifies the strict interpretation given by the Courts. In the case of Il-Pulizija v. Russell Bugeja266 the Court held that the accused possessing the drug must use it together with other persons, at the same time and in the same place. The Court emphasised that these two particular elements, ‘li jissottolineaw l-element ta’ komunanza’, must subsist contemporaneously.

This often proves to be a difficult and narrow test to uphold, as was evidently the case in Il-Pulizija vs. Marco Camilleri.267 The defendant was caught with a quantity of drugs that did not identify exclusive use. However, he testified that he had purchased the ecstasy for himself and on behalf of his friend. The Court specified that this was not enough to constitute ‘sharing’ in terms of the proviso. Moreover, although the accused purchased the drugs without the intention of

265 DDO (n 20), art 22(9) second proviso.
266 Court of Criminal Appeal, 5 May 2008.
267 Court of Criminal Appeal, 26 January 2011.
reselling them-by simply passing the drugs on to his friend-the Court opined that this nonetheless constitutes trafficking since the Maltese definition does not require a profit-making motive.

The mitigation in punishment may only be accounted for following a thorough examination of the circumstances of the case, including the quantity and type of drug, the character and any previous convictions of the accused. In this respect, the Court, in the recent judgment *Il-Pulizija vs. Andre Falzon et*, considered that the quantity in question (684g of cannabis, amounting to approximately 3500 doses) was extremely relevant in establishing the requisite intent for ‘sharing’. In addition, in *Il-Pulizija vs. Lorraine Vella*, the Court ascertained that the offence was not one of ‘sharing’, principally after taking into account the drug paraphernalia found at the home of the accused, which were associated with supply and distribution.

### 3.4 Concluding observations

It is worth noting that although the law in article 22(2) establishes a mandatory minimum punishment, which cannot be reduced by way of article 21 of the Criminal Code, or replaced through the imposition of a probation order or suspended sentence, the final sentence may identify a penalty that has been given below the statutory minimum. This ensues because the adjudicator is bound to reduce the parameters of the punishment in accordance with the mandatory mitigating factors. By way of example, in *Il-Pulizija vs. Isabelle Brincat*, the Court of Magistrates sentenced the accused to the minimum punishment available, which is that of six months imprisonment. However, on appeal, the Court of Criminal Appeal decided to apply article 29 in view of her full cooperation with the Police. The Court, in applying the reduction of two degrees to the minimum punishment of six months, mitigated the sentence to that of one month imprisonment.

---

268 DDO (n 20), art 22(9) second proviso.
269 Court of Magistrates 9 November 2012.
270 Court of Criminal Appeal, 9 May 2012.
271 Court of Criminal Appeal, 14 March 2013.
The significance of the sentencing considerations that have been examined in this Chapter lies in their statutory nature. Furthermore, the stipulation of the relevant weight to be given to the aggravating and mitigating factors when quantifying punishment undoubtedly limits judicial discretion and further strengthens predictability in sentencing. This is to be examined in contrast to the UK system, which rarely provides for guidance as to the manner such statutory factors impact the final sentence.272 Undoubtedly, these mandatory factors, together with the discretionary elements to be discussed in the next Chapter, form an essential part of the sentencing exercise and its final outcome.

272 Andrew Ashworth, ‘Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing’ in Julian Roberts (ed), Mitigation and Aggravation at Sentencing (CUP 2011) 22.
4 DISCRETIONARY SENTENCING

CONSIDERATIONS

4.1 Judicial self-regulation

The constant tension between the importance of judicial discretion and the concept of structure in sentencing has long been the subject of legal debate. Upon examination of sentencing law and practice in various jurisdictions, one may note that legal systems tend to favour one over the other. For instance, the English and American sentencing regimes adopt a highly regulated sentencing system, where one observes a gradual suppression of judicial discretion. In contrast, the Irish system, similar to the Maltese regime, identifies an ‘unstructured sentencing system’ where judicial discretion is favoured over a method of codified guidance.

Chapter Three examined the various statutory factors having significant impact upon the final sentence, where one such instance is that of mandatory maximum penalties. Beneath such façade, sentencing remains largely unguided. As a result, the Courts have wide discretionary powers at their disposal, in the context of a fundamentally legislative vacuum.

4.1.1 Sources of judicial self-regulation

This reality identifies the importance of judicial self-regulation, which attempts to inject consistency into sentencing practice. To this end, the Court seeks to regulate itself by applying certain principles when meting out the sentence. These frequently applied principles are found in the law and in jurisprudence. In contrast to the aggravating and mitigating factors examined in Chapter Three, these considerations are not prescriptive, hence promoting maximum flexibility in terms of their application.

273 O’Malley (n 193) 53.
4.1.1.1 Statutory discretionary factors affecting sentencing

When the accused is facing charges before the Criminal Court, the drug laws envisage an exception to the maximum penalty after analysing the circumstances of the case.\(^{275}\) Punishment may be reduced from life imprisonment to a period ranging from four to thirty years upon the consideration of a non-exhaustive list of factors: namely, the age and the previous conduct of the accused, as well as the quantity of the drug, and the nature and quantity of the equipment or materials used in the offence. Moreover, the Criminal Code incorporates certain general aggravating and mitigating provisions, whose application is also discretionary.

It has been stated that maintaining a non-exhaustive list of sentencing factors in the statutes is relevant in order to achieve flexibility in sentencing and to allow the Courts to consider other significant factors on a case-by-case basis.\(^{276}\) Since the law does not provide any guidance as to how the factors mentioned therein should weighed in terms of punishment, jurisprudence is instrumental in order to be able to gauge their individual strength and application.

4.1.1.2 Factors established in jurisprudence

It follows that in practice, jurisprudence has recognised various other factors, over and above those mentioned in the law. For instance, in *Ir-Repubblika ta’ Malta vs. Claudio Porsenna*,\(^{277}\) the Court provided for the cooperation of the accused with the police, the length of time of the trafficking offence, and the role of the accused in the offence, amongst others. Ultimately, these judicially established factors attempt to capture a coherent approach vis-à-vis the multifarious character of a trafficking offence.

The level of guidance of Maltese jurisprudence is less formal than that of England. Common Law embraces the notion of judicial precedent, whereby the

\(^{275}\) DDO (n 20), art 22(2)(a)(i)(aa).


\(^{277}\) *Ir-Repubblika ta’ Malta vs. Claudio Porsenna* (n 184).
case law produced is capable of binding the Courts of lower jurisdiction. This phenomenon demands that the adjudicator is to produce detailed judgments, illustrating the various reasons forming the basis of the decision.\(^{278}\) In doing so, the Court is obliged to mention any aggravating and mitigating factors that have been applied to the sentence.\(^{279}\) In contrast to this, Maltese sentencing law abides by the Continental school of thought, and thus does not impose a statutory obligation upon the Courts to provide detailed reasons for their decision; rather, reference is merely to be made to the statutory provisions forming the basis of the sentence.\(^{280}\)

In the UK, the Court of Appeal is given the statutory function to issue guideline judgments.\(^{281}\) The advantage of adopting this approach is that such guidelines are ‘prescribed by judges for judges’.\(^{282}\) The creation of guideline judgments is intended to ‘assist the judge to arrive at the current sentence. They do not purport to arrive at the correct sentence. Doing so is the task of the trial judge’.\(^{283}\) The Continental influences on the Maltese sentencing system impinge upon the Courts’ capacity to promulgate guidelines through their decisions. Nonetheless, the Courts do attribute authoritative value to jurisprudence, especially since they strive to achieve some form of consistency. To this end, the Maltese adjudicator consults jurisprudence and takes into account previously contemplated principles and sentence tariffs meted out by the other Courts in similar situations.

4.1.2 Discretionary aggravation and mitigation

In contrast to the factors examined in Chapter Three, the weight to be given to those mentioned hereunder is entirely discretionary. One may refer to the English treatment of aggravating and mitigating factors, where guidance as to their application is lacking. Several authors criticise this ‘laissez-faire attitude’,
referring to the state of affairs as ‘regrettable’.\footnote{Roberts, ‘Aggravating and Mitigating Factors at Sentencing’ (n 191).} When commenting upon this dearth, Julian Roberts observes that the Courts undertake an ‘intuitive’ approach,\footnote{ibid.} which consequently leads to divergence in the judicial response to the said factors, and ultimately sentence disparity.\footnote{ibid.}

It has been stated that ‘Mitigating and aggravating factors do not represent different sides of the same coin.’\footnote{Jessica Jacobson and Mike Hough, \textit{Mitigation: The Role of Personal Factors in Sentencing} (Prison Reform Trust 2007).} Aggravating factors are usually those considerations that are connected with the character of the offence. In fact, only a very few aggravating factors are associated with the personal circumstances of the offender (for instance, prior conduct). The same cannot be said with respect to mitigating factors, which are usually personal in nature, connected with the offender rather than the offence.

It follows that the sentencing factors may be legal or personal in nature. Legal factors seek to quantify punishment in terms of offence seriousness and offender culpability. Contrastingly, personal considerations are unrelated to the offence, as they pertain to the personal circumstances of the offender. The application of personal factors necessarily entails a substantial amount of discretion, since it ‘involves responding to the characteristics, circumstances and life history of the individual, which potentially brings into play (a) number of variables to be weighed by the adjudicator’.\footnote{Julian Roberts, Mike Hough, Jessica Jacobson, and Nick Moon, ‘Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis’ [2009] Crim LR 771-82.}

Interesting to note is that personal mitigation is given little to no importance when the offence is particularly serious, since ‘the gravity of the offence is merely regarded as an aggravating factor which automatically extinguishes mitigation to the point where the sentence reflects the ceiling for that offence’.\footnote{ibid.} Inversely, where the offence is minor severity, the Court often makes allowance

for the reformative elements of punishment, rather than solely considering those of a deterrent nature.\textsuperscript{290}

It is important to note that the grouping of the factors into the following two categories is an arbitrary attempt at achieving some form of precision. In fact, there is a tendency for the categories to overlap and intersect.

### 4.2 Legal discretionary factors

#### 4.2.1 Valuation

The severe sentences prescribed for drug trafficking may be justified on the basis of the substantial financial gains.\textsuperscript{291} Although the value of the drug may act as an indicator of the seriousness of the offence, it is essential for the Courts to consider other indicative elements. In the words of Fortson, ‘In cases of acquisitive crime, the seriousness of the offence can often be expressed in monetary terms (…). But, in drug cases, the issue is more complex.’\textsuperscript{292}

Several characteristics make up the value of the drug. Although the law itself merely provides for the consideration of the ‘quantity’ of the drug in the proviso to article 22(2)(a)(i), the amount is simply one of the many elements that generate the value. Simply taking ‘quantity’ into consideration without weighing the other factors would result in an inadequate estimation of the gravity of the offence in terms of punishment.

#### 4.2.1.1 Considerations of value

Accordingly, although quantity increases the severity of the offence and the culpability of the offender, it should not be assessed in isolation. Purity is also a significant indicator in this regard. In fact, it has been asserted that the element of purity ‘reflects the closeness of the offender to the source of the drug (i.e. the

\textsuperscript{290} Easton (n 190) 93.  
\textsuperscript{291} Aramah (n 1).  
\textsuperscript{292} Fortson (n 5) 893.
purer the drug the closer the offender to the source). Furthermore, purity may be considered separately from the *mens rea* of the offender, hence measured exclusively in terms of the drugs' damaging effects. For instance, in *R v Afzal,* the accused believed that he was importing heroin of a higher level of purity, when in fact it was of an extremely low purity level. The Court of Appeal decided that mitigation was necessary in order to reflect the *actus reus,* which ultimately envisaged less harmful consequences.

The relevance of certain factors pertinent to valuation relate to the form of the substance. A drug may assume different forms, for example tablets, powder, squares, etc. In *R v Aranguren,* the Court established four elements that ought to make up the street value of a powdered substance, namely the drug’s weight, purity, average purity at street-level, and average street-level price. Case law dealing with countable drugs, such as pills, identifies quantity and purity as being two important factors for value assessment.

**4.2.1.2 Analysis of the drug**

Article 22E(2) of the DDO provides for the procedure pertaining to the nomination of an expert. The forensic expert is employed to analyse the ‘exact’ quantity of the drug in issue, including its nature, type, and form. This notwithstanding, jurisprudence has maintained that an expert’s services are not always required. Although the Court did agree with the appointment of the expert in *Ir-Repubblika ta’ Malta vs. Gordi Felice,* it emphasised that the determination of the abovementioned characteristics does not require any special skill or competence.

In the *Felice* case the Court held that valuation could only be established with reference to the price of such drugs on the illegal market. In this respect, it is satisfactory for a police officer to establish the monetary value, as the street-
level price is determined in accordance with data collected by the Police in the course of their investigations, as well as with the help of the intelligence services. In this regard, the Malta National Drug Report declared that data collection is merely limited to one source, the Police, who collect such data once yearly.\footnote{EMCDAA, National Report to the EMCDAA: Malta [2007].} Hence, the reliability of such data is uncertain, particularly after taking into account the constant fluctuation of market considerations and monetary values. In point of fact, the Court in the Felice judgment opined that the determined price is neither absolute, nor does it identify mathematical precision.

4.2.1.3 The English treatment of drug valuation

In contrast to the Maltese system, the English assessment of ‘quantity’ indicating offence severity is not discretionary, undoubtedly impinging some form of structure on the valuation process. The English Drug Guideline establishes four categories indicative of harm, which are calculated on quantity. Category one provides the quantity that is to denote the highest level of harm, where for instance the indicative quantity for cocaine is 5kg. In comparison, a person who has trafficked a mere 5g of cocaine would be placed into category four.

The element of purity forms part of a non-exhaustive list of discretionary factors that are taken into account by the Courts. Therefore, although it may seem that the adjudicator has the simple duty of merely placing the quantity into the correct category of the Guideline, it must also make an independent appreciation of the purity of the drug, which may either increase or decrease the harm of the offence. In addition, it is relevant to note that the drug is not given a monetary value, as the Guideline only takes into consideration drug quantity and purity. This further eliminates any risk of arbitrary assessment on the basis of the speculative features of market value stipulations.
4.2.2 Role of the accused

Drug offenders are rarely ever in a comparable situation, as they often take on distinctive roles within a drug operation. In this regard, the Court has stated that the comparison of the participants’ diverse roles is fruitless feat.299

It is significant to refer to the English Drug Guideline, 300 which identifies culpability in terms of the degree of the accused’s participation, thus whether he played a ‘leading’, ‘significant’, or ‘lesser’ role. According to the Guideline, the ‘leading’ role reveals responsibilities associated with commercial-scale organisation, close connection with the source, and income of a substantial value. Playing a ‘significant’ part in the offence signifies the identification of a managerial role or the knowledge as to the mechanisms of the operation, as well as possessing a financial incentive. Lastly, the role attracting the least culpability is when the offender performs a limited role within the operation, often engaged through exploitation and pressure, having no control or influence over the operational setup.301

4.2.2.1 Leading role

A person holding a leading role within a drug operation is often penalised more severely than the other participants. In Ir-Repubblika ta’ Malta vs. Claudio Porsenna,302 the defendant pleaded that there was a discrepancy in punishment between himself and his co-accused, AB, who was tried before the Court of Magistrates, 303 and was punished to one year imprisonment, in contrast to his seven years. The AG justified this dissimilar treatment on the role that each played within the drug operation. Therefore, the AG’s decision to try the other offender before the Court of Magistrates stemmed from the fact that the co-accused was merely a ‘drug mule’, whereas the defendant was ‘il-mohh ewlieni’. On this basis, the AG could not consider the offenders ‘fl-istess keffa’.

299 Ir-Repubblika ta’ Malta vs. Darren Charles Desira, Criminal Court, 27 November 2012.
300 Drug Offences Guideline (n 43).
301 ibid.
302 Ir-Repubblika ta’ Malta vs. Porsenna (n 184).
303 Il-Pulizija vs. AB (n 185).
The Court of Appeal proceeded to reject the applicant’s pleas, in agreement with the AG’s treatment of the two offenders.

4.2.2.2 The problem with couriers and ‘drug mules’

The role of the courier within the drug operation may differ from case to case. Hence, culpability may vary according to the significance of the circumstances surrounding the courier, notably the level of his involvement in the whole operation, the financial gain promised, as well as the existence of any threats.

Admittedly, it is necessary to distinguish between a simple courier and a ‘drug mule’. The latter may be defined as a person who imports drugs into a country under the influence of coercion or other type of pressure, and ultimately ought to be distinguished from a courier, who carries the drug voluntarily, often with a financial incentive.304 ‘Drug mule’ represents a ‘sub-class’ of persons usually originating from an underdeveloped country, exploited into committing the crime by dangerous criminals for a small financial gain.305

Often, the masterminds of the whole drug operation engage the services of vulnerable persons, or ‘soft targets’,306 in their quest to export drugs. Due to the riskiness of the operation, they are viewed as ‘expendable’ to the drug supplier.307 Therefore, the need to differentiate between such type of offenders and those who have freely acquiesced to the trafficking of drugs is of ultimate importance in the attainment of justice.

On a similar note, the defence in Ir-Repubblika ta’ Malta vs. Darren Charles Desira308 alleged that the accused played a minimum role in the whole operation and was taken advantage of by the mastermind. The accused was entrusted to travel overseas to pass on the money required to purchase the

306 Smith and Gowland (n 304).
307 Fortson (n 5).
308 Ir-Repubblika ta’ Malta vs. Darren Charles Desira (n 299).
drugs. Although the accused’s task did indeed unmask the mastermind’s intention to escape the risk surrounding this precarious transaction, the Court elucidated upon the fact that the accused was to receive a substantial gain from this arrangement. In addition, he played a participating role in various other aspects of the operation. The Court decided that his role was definitely not a passive one, as it had appeared to be initially, since his function was instrumental to the completion of the plan. Consequently, he was to be considered an accomplice to the whole crime, not merely part of it.\(^{309}\)

The circumstances of a drug mule represent the legal dilemma of having to strike a balance between culpability and deterrence. Since deterrence is an important sentencing policy element, these role-related factors indicating low offender culpability are of secondary importance. In fact, the Maltese Courts retain their strict approach towards drug mules or low-level couriers on the basis of the concept of deterrence. For instance, in *Ir-Repubblika ta’ Malta vs. Sugeidy Margarita Novas Castillo*,\(^{310}\) the Court sentenced a pregnant woman from Ecuador, who was twenty-one at the time of the offence, to imprisonment for a period of fourteen years and six months. In passing judgment the Court did take into consideration elements of vulnerability and exploitation, however it placed more importance on the severity of the drug importation charge.

### 4.2.2.3 Coercion

The previous section made allusion to the elements of coercion and influence. In this regard, it is significant to mention that Maltese law exempts a person from criminal responsibility when there is a defect in the will of the person caused by an irresistible external force, by virtue of article 33(b) of the Criminal Code. When accepting this line of defence in *Il-Pulizija vs. Ersilia sive Alison Gauci*,\(^{311}\) the Court succinctly explained that this provision could only be invoked when the accused is faced with absolutely no alternative in view of the threat. Upon examination of the evidence, elements of pressure and coercion

\(^{309}\) Emphasis added.
\(^{310}\) Criminal Court, 28 September 2011.
\(^{311}\) Court of Criminal Appeal, 6 July 2007.
were evident through physical acts of abuse and mental manipulation. On this basis, the Court of Criminal Appeal revoked the punishment awarded by the Court of Magistrates.

On the other hand, various attempts at invoking article 33(b) were not as successful. For instance, following a careful analysis of the evidence, the Court in *Il-Pulizija vs. Jeffrey Savage*\(^\text{312}\) concluded that the defendant’s pleas alleging coercion due to fear and intimidation indicated a feeble attempt at escaping punishment. Similarly, in *Il-Pulizija vs. AB*,\(^\text{313}\) the Court held that coercion did not subsist as the defendant voluntarily sought out contact with the supplier in order to actively participate in the offence.

4.2.3 Length of the offence

The Court has repeatedly reiterated that the quantity alone cannot determine the degree of the offender’s culpability. It may be the case that the accused is apprehended whilst in possession of a relatively small amount of drugs. Notwithstanding, substantial proof may exist indicating that he has been trafficking in drugs for a period of time before the arrest.

To illustrate this point, reference is to be made to *The Republic of Malta vs. Mike Diala*.\(^\text{314}\) As already examined in the previous Chapter when speaking of the element of continuity as an aggravating circumstance, the accused was apprehended with three capsules containing 30.88g of cocaine in total. However, the Court also accounted for the amounts trafficked for a period of eight months prior the arrest.

Upon appeal,\(^\text{315}\) the appellant cited various judgments of the Criminal Courts that imposed lesser sentences with respect to larger quantities of drugs. The Court of Appeal rejected this plea, pointing out that the ‘appellant had already dealt in a larger amount of cocaine than was found by the Police’, and hence

---

\(^{312}\) *Il-Pulizija vs. Jeffrey Savage* (n 60).

\(^{313}\) *Il-Pulizija vs. AB* (n 185).

\(^{314}\) Criminal Court, 18 October 2010.

\(^{315}\) *The Republic of Malta vs. Mike Diala* (n 250).
any reference to the ‘relatively small’ quantity of drugs found on the accused was superfluous.

4.3 Personal discretionary factors

4.3.1 Previous conduct of the accused

Notwithstanding the statutory provision relating to recidivism, the Court makes an independent evaluation of the accused’s prior conduct. In *Il-Pulizija vs. Miriam Sant*,\(^{316}\) the Court stated that in proving the charge of recidivism, the prosecution must exhibit the best evidence possible, by means of authentic copies of previous judgments convicting the accused. Nonetheless, in *Il-Pulizija vs. Josef Abela*,\(^ {317}\) the Court recognised that in the absence of the best evidence, it would still be duty-bound to consider the prior conduct of the accused, which emanates clearly from the police conduct sheet.

It follows that the police conduct sheet is a significant indication as to the personal character and lifestyle of the accused. Whether the conduct sheet is clean or voluminous, it is undeniably a useful indicator to the Court to determine the appropriate sentence in the circumstances. In line with the theory of deterrence, this allusion to previous conduct does indeed justify an increase in sentence. For instance, in *Il-Pulizija vs. Mateo Carlos Frias*,\(^ {318}\) the Court took into account the accused’s prior conduct and his various drug related convictions overseas. Similarly, in *Il-Pulizija vs. Michael Portelli*,\(^ {319}\) the Court opined that the accused’s illustrious previous charges and convictions revealed that the he had previously been given various opportunities for reform, in the form of non-custodial sentences, yet he failed to embrace them.

Nevertheless, previous conduct should not be viewed in an entirely negative light, as it may sometimes be a beneficial mitigating factor upon which the

\(^{316}\) Court of Criminal Appeal, 26 January 1998.
\(^{317}\) Court of Criminal Appeal, 17 September 2008.
\(^{318}\) Court of Criminal Appeal, 19 January 2012.
\(^{319}\) *Il-Pulizija vs. Michael Portelli* (n 253).
defence may rely. Pursuant to the theory of restorative justice, here one is speaking of the concept of reform, in contrast to the abovementioned theory of retribution when dealing with a persistent offender. Mitigation on the basis of previous good conduct is justified on the theory of proportionality, which holds for a more lenient approach when the ‘offence (...) can be interpreted as an isolated lapse, recognising human frailty and yet showing respect for the offender as a rational individual, capable of responding to the censure inherent in the sentence imposed’. ³²⁰ Yet, undoubtedly, as the number of prior convictions increase, reasons for justifying mitigation on these grounds decrease.

Nevertheless, although one expects a first-time offender to be treated more leniently than a persistent one, when considering the severity of the trafficking offence, mitigation on the basis of the ‘human frailty’ proposition does not hold strong and cannot possibly be viewed as a ‘mere lapse’. ³²¹ Although Maltese jurisprudence identifies that the Courts always take this factor into account when passing judgment, the extent of the deduction depends upon the severity of the offence in question. Thus, as the perception of severity increases, the chances of a high degree of mitigation are reduced exponentially.

4.3.2 Age of the accused

The age of the offender can act as a catalyst towards a lenient sentencing approach. However, on other occasions, one’s age can indeed lead to the assumption of a harsher attitude. Similarly to the factor relating to prior conduct, the age is given more importance when the offence committed is not high on the scale of severity.

In *Ir-Repubblika ta’ Malta vs. Antonio Barbara*, ³²² the Court of Appeal reformed the judgment of the First Court, by imposing a more appropriate fourteen year sentence, in lieu of eighteen years, on the accused who was

³²⁰ Ashworth, *Sentencing and Criminal Justice* (n 206) 170.
³²¹ Ibid 190.
³²² *Ir-Repubblika ta’ Malta vs. Antonio Barbara* (n 137).
twenty years of age when the offence was committed. The Court opined that the relatively young age of the accused was definitely a factor that ought to have been given more consideration by the First Court. The Court of Appeal contemplated the reformatory aspect of punishment, which would be frustrated if the period of imprisonment is lengthy. The Court emphasised that whilst it was not condemning the meting out of long sentences, it recognised that in situations as the present case, when taking into account the age and personal circumstances of the accused, ‘din il-Qorti hi tal-fehma li l-iskop korrettiv tal-piena kellu jinghata aktar importanza milli effettivament inghata, b’mod ghalhekk li l-piena (...) kienet ftit “on the high side”’. In contrast, a less compassionate attitude was adopted in the recent judgment of *Ir-Repubblika ta’ Malta vs. Darren Charles Desira*. The Criminal Court opined that the accused, who was twenty-six years old, was not a minor in view of the law and at that age one would expect that such individual would possess some life-experience.

The issue of age is not only raised vis-à-vis young persons. One may refer to the judgment of *Ir-Repubblika ta’ Malta vs. John Grima*, wherein the sixty-six year old accused was sentenced to fifteen years in prison for the importation of drugs. The defence pleaded with the Court to take into consideration the physical health of the accused and the fact that he was elderly. In its rejection of such pleas, the Court stated that one would expect his maturity to have led to an increased understanding as to the seriousness of the offence. Therefore, ‘dan messu serva ta’ deterrent u zgur m’ghandhux iservi ghal xi mitigazzjoni fil-piena’.

### 4.3.3 Drug addict

#### 4.3.3.1 The extent of leniency

The defence often makes reference to the offender’s personal addiction with the hope of obtaining sympathy from the Court. Jurisprudence has identified that

---

323 *Ir-Repubblika ta’ Malta vs. Darren Charles Desira* (n 299).
324 Criminal Court, 15 November 2012.
the Court is willing to consider the element of addiction in certain circumstances. However, this appreciation takes place when the quantity of drugs trafficked is small, indicating that he committed the offence with the intent to fund his habit, rather than to make a commercial profit.

Nevertheless, due to the severity of trafficking offences, the Court has been rather tentative to recognise this factor as a basis for mitigation. For instance, the Court of Criminal Appeal in *Il-Pulizija vs. Joseph Cutajar*, 325 acknowledged the unfortunate reality of lengthy proceedings, wherein such time the accused may have managed to battle his drug addiction. Nevertheless, the Court stated that:

[F]’dawn il-kawzi mhux il-vizzju tad-droga ikun qed jigi punit, imma r-reat ta’ spaccar ta’ droga lil terzi bil-konsegwenzi serjissimi li dan ovvjament ikun gab mieghu. Hu dwar dan ir-reat li l-appellant ikun irid jaghmel il-kontijiet mas-socjeta.326

Further, in *Il-Pulizija vs. Michael Portelli*,327 the Court did not credit the accused for his efforts to overcome his problems, even though the accused decided not to opt for bail in order to try to reform himself. The Court emphasised that due to the seriousness of the offence, the accused cannot benefit from any mitigation even if he merely committed the offence to finance his drug addiction.

However, in the recent judgment of *Il-Pulizija vs. Doreen Bugeja*,328 the Court made a slight concession. The Court imposed a three and a half year prison sentence, after reducing the period of nine months to reflect the time the accused spent undergoing treatment for substance abuse. This approach mimics that taken in certain previous judgments, and hence further identifies the manner with which the Court handles this personal factor.

325 Court of Magistrates, 12 November 2009.
326 ibid (emphasis added).
327 *Il-Pulizija vs. Michael Portelli* (n 251).
328 Court of Magistrates, 30 April 2013.
3.4.1.1 Treatment order

As examined above, the Courts are not particularly more lenient vis-à-vis drug users. Nevertheless, statutory distinction between the two is observed with reference to article 22(10) of the DDO, which affords the defendant a slight reduction of not more than one-third in punishment. Article 22(10) was invoked by the Court in *Ir-Repubblika ta’ Malta vs. Stanley Chircop*,\(^{329}\) wherein the Criminal Court awarded the least sentence available, and hence that of four years. Subsequently, the Court applied a treatment order and a reduction of one-third, resulting in a total of thirty-five months imprisonment.

For such treatment order to be invoked, the Court must primarily be satisfied that the accused is in need of treatment and that such person actually agrees to submit himself to rehabilitation. In addition, the accused must obtain authorisation in writing from the Minister of Health stipulating that he may be treated in prison. Once such conditions are satisfied, the Court when passing its sentence may order that the treatment is given in prison for a period of time that is not to exceed the prison sentence. In the judgment itself, the Court is also bound to state the original punishment that would have been awarded in the absence of the order. This is relevant as in the scenario that the order is revoked the original punishment shall be applicable.\(^{330}\) The order may be revoked in the scenario that the convicted person refuses or renders treatment difficult or ineffective while in prison, where treatment is no longer appropriate,\(^{331}\) or where the individual himself decides to apply to Court for revocation.\(^{332}\) Upon expiration or remission of punishment, the order automatically ceases to have effect.\(^{333}\)

The practical application of this article was discussed in *Ir-Repubblika ta’ Malta vs. Alex Mallia*,\(^{334}\) wherein the convicted appellant held that although the fact of addiction is not to result in a great mitigation, the Court should

\(^{329}\) *Ir-Repubblika ta’ Malta vs. Stanley Chircop* (n 150).
\(^{330}\) *Criminal Code* (n 74), art 22(11).
\(^{331}\) ibid, art 22(13).
\(^{332}\) ibid, art 22(12).
\(^{333}\) ibid, art 22(14)(c).
\(^{334}\) *Ir-Repubblika ta’ Malta vs. Alex Mallia* (n 88).
nonetheless take it into consideration when calculating the sentence. Consequently, the Court of Appeal held that it is under no obligation to make a distinction between persons who traffic to finance their addiction and those who traffic solely for lucrative ends. It went on to state that the law itself makes such a differentiation, by virtue of article 22(10) of the DDO. In this case the defence made absolutely no reference to the application of this article. Therefore, the Court opined that in the absence of any reference made, any pleas concerning a differentiation in treatment were redundant.

4.3.4 Clemency of the jury

The Criminal Code allows the Court to grant mercy to the accused upon the recommendation of any member of the jury. The relevant provision in this respect is article 484, which holds that the juror must provide the reasons for his recommendation for mercy. The Court is under no strict obligation to take up such recommendation, as the law states that the Court ‘may take into consideration any such recommendation’. 335 This is done either through the application of the law, or alternatively by communicating the said recommendation to the President of Malta by virtue of a Report. 336

A recommendation to this effect was made in *Ir-Repubblika ta’ Malta vs. Stanley Chircop*. 337 Although the jury found the defendant guilty, they simultaneously urged for clemency on the basis of the lengthy pre-trial proceedings and the considerable progress made by the accused in rebuilding his life.

The Court considered that even though the acceptance of the recommendation is entirely discretionary, it could not ignore the fact that it was made by every single member of the jury and based on legitimate reasons. In spite of its acceptance, the Court held that the extent to which it is to apply the reduction is not up to the Court, but rather it is a matter of law. The difficulty faced by the

335 Emphasis added.
336 Criminal Code (n 74), art 484.
337 *Ir-Repubblika ta’ Malta vs. Stanley Chircop* (n 150).
Court was principally the existence of article 22(9), which has been examined in Chapters One and Two. In succinct, did article 22(9) also limit the Court’s discretion in applying article 484, and hence proscribing it from going below the four-year minimum?

The Court opined that since the law provides for a broad range of punishment, ‘Hemm ‘margin’ wiesa’ hafna li fih il-Qorti tista’ timxi bi hniena u hekk tkun laqgħet ir-rakkomandazzjoni magħmula mill-gurati.’ In addition, the Court stipulated that the raison-d’être of article 484 is not to provide the Courts with more discretion, ‘izda biex il-qorti timxi bi hniena meta tigi biex taghti piena li hija fis-setgħa taghha li taghti’. On this basis, the Court pronounced that the least sentence that it could mete out was the statutory minimum, and hence that of four years imprisonment.

4.4 Concluding observations

The discretionary principles established at law and in jurisprudence have helped the Court structure its sentencing discretion, whilst concurrently meting out punishment according to the unique circumstances of a case. Nevertheless, since the abovementioned factors are simply discretionary, this leads to judicial variability in the manner that they are applied and quantified. The evident difficulty with individualised sentencing is that although it encourages the imposition of the most appropriate punishment, the adjudicator may be tempted to pursue his individual sentencing preferences. While the former is encouraged, the latter scenario is highly questionable. In attempt to provide a solution to the problem of inconsistency, the next Chapter shall identify certain key principles that further aim towards structuring the moral judgment of the individual adjudicator, and shall ultimately proceed to make various recommendations to this end.

338 Howard Parker, Maggie Sumner and Graham Jarvis, Unmasking the Magistrates (Open University Press 1989).
339 Ashworth, Sentencing and Penal Policy (n 3) 68-9.
5 TOWARDS A CONSISTENT APPROACH TO SENTENCING

5.1 Achieving consistency

The principle of consistency is a fundamental cornerstone of sentencing practice. It dictates that whilst like cases ought to be treated alike, different cases ought to be treated differently. Regrettably, inconsistency and disparity are two elements frequently raised in the local media. Usually, such claims are advanced when commenting on selected cases representing similar facts, whose outcomes are different from one another or discordant with previous practice. Although such selective assessments should be perceived tentatively, they shouldn’t be dismissed with a pinch of salt.

While the notions of inconsistency and disparity tend to be used interchangeably, one must take note of a slight distinction. ‘Inconsistency’ identifies inequality in the sentencing outcomes of similar cases, where such dissimilarity is justified on certain grounds. The concept of ‘disparity’, on the other hand, identifies ‘incongruity between particular decisions’ when this is not justifiable on any grounds. On this note, Feldman opined that disparity arises when discretion is not restricted solely to ‘the relevant idiosyncrasies’ of a particular case.

Other legal jurisdictions attempt to reduce inconsistency and disparity by embracing a multitude of techniques. The first part of this Chapter shall identify these consistency-driven methods. Consequently, this analysis shall bring to light the deficiencies of the Maltese sentencing regime, which will ultimately

---

340 O’Malley (n 193).
342 O’Malley (n 193).
form the basis of the recommendations specified in the second section of the Chapter.

5.1.1 Sentencing policy

5.1.1.1 Sentencing rationales in view of consistency

In a system that does not formulate sufficient guidance, it becomes the mission of the individual judge to establish the relevant policy that is to underlie the judgment, often leading to sentencing that ‘will be to some extent idiosyncratic and may not always be well thought out’. 344 Under Maltese law one does not find a primary sentencing rationale upon which the adjudicator is to base a decision. Rather, it remains ambiguous as to which principles govern the current Maltese sentencing policy. In this respect, the legislator has made no attempt to reconcile or prioritise the numerous rationales. As a result, in the absence of a single sentencing policy, the Courts can legitimately consider various sentencing aims. Thus, when dealing with comparable cases, the adjudicator may justify inconsistent outcomes on this basis.

The adoption of a single sentencing aim in relation to drug offences would undoubtedly lead to more consistency in sentencing outcomes. For instance, the Swedish approach establishes a primary rationale, which is based on desert or proportionality, 345 and subsequently declares that other rationales are to take priority in specific cases. 346 This logical approach mirrors the recommendation of the Council of Europe, which holds that the legislator ‘should endeavour to declare the rationales for sentencing’. In the scenario of conflicting rationales, priorities amongst these aims should be established. 347 This method

---

345 Tappi Lappi-Seppala, ‘Sentencing and Punishment in Finland’ in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (OUP 2001).
undoubtedly balances the conflicting notions of rule of law and flexibility in sentencing.\textsuperscript{348}

Similarly, sentencing rationales are given a statutory basis under English law. Section 142 of the Criminal Justice Act, applies the following sentencing aims to offenders aged eighteen or over: desert, deterrence, reform and rehabilitation, public protection, and reparation.\textsuperscript{349} This section has been described as pinpointing ‘the worst of ‘pick-and-mix’ sentencing’, which when read alone breeds inconsistency.\textsuperscript{350} However, section 143 goes on to provide for the principle of proportionality as the basis for punishment. Proportionality also forms the foundation of the sentencing guidelines issued by the SC, where ‘no sentence should be more severe than is justified by the seriousness of the offence’.\textsuperscript{351}

5.1.1.2 Sentencing rationales and drug trafficking

The harsh penalties associated with drug trafficking are often underpinned by the theory of deterrence. In fact, Ashworth speaks of drug offences as being the prime example of having deterrence as a basis for punishment, by opining that ‘it is necessary, in order to achieve a high level of general prevention for such offences, to impose penalties which are more severe than the proportionate sentence would be’.\textsuperscript{352}

Deterrence dictates that punishment should be significant enough so as to deter other persons from committing that offence. Hence, ‘increasing penalty levels by a certain amount will result in a decline in offending’.\textsuperscript{353} However, it has been stated that ‘it is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not’.\textsuperscript{354}

\textsuperscript{348} Ashworth, Sentencing and Criminal Justice (n 206) 77.
\textsuperscript{349} ibid 78.
\textsuperscript{350} ibid 77.
\textsuperscript{351} SGC, Overarching Principles: Seriousness (2009).
\textsuperscript{352} Ashworth, Sentencing and Criminal Justice (n 206) 80.
\textsuperscript{353} Home Office, Crime, Justice and Protecting the Public (1990) para 2.8.
\textsuperscript{354} ibid.
The Maltese regime identifies that the adjudicator adopts deterrence as a basis for calculating punishment. Although this rationale is not statutorily stipulated, case law determines its utilisation. When speaking about mitigation in punishment, the Court of Appeal stated that ‘Il-pieni ma jistghux ikunu miti zzejjed b’mod li ma jservux ta’ deterrent biex tigi protetta s-socjeta’. (…) Barra minn hekk il-pieni ghandhom ukoll skop ta’ deterrent generali u din il-Qorti trid turi li ‘crime does not pay’.355

As examined in the previous Chapter, the Court is often willing to take the aspect of rehabilitation into account, in conjunction with the concept of deterrence, particularly when a person has trafficked a small quantity of drugs to finance his own addiction. Yet, this leeway is rather limited, as the Courts tend to emphasise the importance of deterrence in the light of drug trafficking. A landmark judgment in this respect is Il-Pulizija vs. Charles Muscat,356 wherein the Courts sought to strike a balance between ‘l-interess ta’ l-appellant u tar-riforma tieghu bhala cittadin mal-aspett punitiv u ta’ deterrent ghalih u ghall-persuni ohra li mbarkaw jew behsiebhom jimbarkaw fuq attivita tant nociva ghas-socjeta’. In addition, the judgment of Il-Pulizija vs. Mark Mifsud357 highlighted that deterrence prevailed over the rationale of rehabilitation in the punishment of serious crimes.

In so far as deterrent sentencing is concerned, a few considerations should be noted. As David A Thomas opines, punishment that allows for little to no weight for mitigating factors may be justified on the basis of deterrence. However, deterrence can in no way justify an excessive penalty. Thus, punishment should not be disproportionate.358

5.1.2 Classification of drugs

Certain jurisdictions determine offence severity on the basis of the drug trafficked. Others provide a classification system yet withhold the distinction

355 Repubblika ta’ Malta vs. Joseph Borg u John Sultana (n 194) 9.
357 Court of Magistrates, 26 September 2002.
358 David A Thomas, Principles of Sentencing (Heinemann 1979).
between drugs when it comes to drug trafficking. Lastly, various regimes deny classification all together, preferring not to punish an offender in accordance with the type of drug trafficked.\(^359\)

One may detect an apparent omission in Maltese law: the type of drug is not a factor that increases or mitigates punishment. In spite of the segregation of narcotics and psychotropic substances in the Maltese drug laws, the law does not distinguish between the different drugs, those considered to be softer or harder, in view of punishment.

Jurisprudence uncovers the equivocal approach of the Courts in this respect. This conclusion is drawn owing to the Courts’ inconsistent attitude in regard to drug classification and sentencing. Notwithstanding, it is clear that the general tendency of the Courts is not to differentiate between drugs in terms of punishment. For instance, in *Ir-Repubblika ta’ Malta vs. Mohamed Mohamed Abusetta*,\(^360\) the Court pronounced that the penalty indicated for a drug offence applies to all types of drugs. When dealing with cannabis, the Court opined that since it is criminalised equally to all other drugs, then it ought to benefit from the same penal treatment. This line of thought is reproduced in *Ir-Repubblika ta’ Malta vs. Noaman Emhemmed Ramadan El-Arnauti*,\(^361\) where the Criminal Court simply declared that Maltese Law only regulates for one class of drugs.

Interestingly, the Court adopted a slightly different attitude when heroin was involved. In *Il-Pulizija vs. Charles Muscat*,\(^362\) the Court held that ‘l-ewwel Qorti bir-ragun kellha tqis ukoll (...) il-fatt tal-gravita’ tar-reati in dizamina u l-hsara li dawn jikagunaw lill-membri ohra tas-socjeta’ specjalment trattandosi ta’ ‘hard drug’ eroina’. This rationale is evident in various other judgments,\(^363\) thus identifying that the Courts tend to appreciate the harmful effects of ‘hard’ drugs when contemplating punishment.

\(^360\) Criminal Court, 4 December 2003.
\(^361\) Court of Criminal Appeal, 22 May 2003.
\(^362\) *Il-Pulizija vs. Charles Muscat* (n 356).
\(^363\) The Republic of Malta vs. Ahmed Ben Taher, Court of Criminal Appeal, 6 October 2003.
5.1.2.1 The UK approach to classification

The UK ‘ABC’ classification system attempts ‘to control particular drugs according to their comparative harmfulness either to individuals or to society at large when they were misused’.

The Advisory Council on the Misuse of Drugs is assigned with the function of reviewing the drug situation in the UK, including the assessment and revision of the drug classes. The decision regarding the placement of a drug into a particular class is taken on the basis of various grounds, such as scientific facts, expert opinion, and political perceptions. The significance of this supervisory task is attributable to the mercurial character of the drug realm. In fact, time has witnessed various changes in the classification of certain substances, as well as certain additions into the classes of drugs.

5.1.2.2 Manner of classification under the Misuse of Drugs Act 1971

The MDA establishes a classification system, where punishment is determined in accordance with the relevant class of the drug. Class A drugs are considered to be the most harmful and envisage the highest penalties. On the other hand, Class C drugs include those substances that are perceived to be the least harmful, and hence attract the lowest punishments.

A 1979 Report on the classification system states that it ‘exists solely to determine which scale of penalties shall be applicable to (...) individual drugs’. In this respect, the English Drug Guideline indicates the punishment attributable to the particular drug offence in accordance with the class of the drug trafficked. For instance, in the scenario that the accused is convicted of having supplied a Class A drug, he may face a punishment of 12 to 16 years imprisonment. Whereas, for the same offence, together with the same facts and circumstances, the accused may be awarded a term of imprisonment ranging from 7 to 10 years for supplying a Class B drug.

---

364 Science and Technology Committee, Drug Classification: Making a Hash of it? (HC 2005-06, 1031).
365 MDA, s 1(2).
366 Drug Classification: Making a Hash of it? (n 364).
367 Runciman (n 26) 40.
368 Drug Offences Guideline (n 43)
5.1.2.3 Not as easy as ‘ABC’

Certain authors positively comment upon the UK system of classification when speaking of structuring sentencing discretion.\textsuperscript{369} This is not disputed, as the meting out of punishment on the basis of established categories of substances will undoubtedly lead to increased uniformity. Nevertheless, other commentators have described the classification system as being ‘antiquated and (reflecting) the prejudice and misconceptions of an era in which drugs were placed in arbitrary categories with notable, often illogical, consequences’.\textsuperscript{370}

While it is not contested that the classification method does indeed pose structure on an arguably arbitrary ambit of the law, the problem with classification as an indication of punishment is that it may be difficult to justify a lesser sentence on the basis of the type of drug in question. In the light of prevention and reduction of drug use, it is easy to understand the legal imposition of a higher penalty for being in possession a particularly harmful and addictive drug. In this scenario the law is trying to protect the person from harming himself, by taking into consideration the harmful effects of a particular drug, and consequently hoping to limit and deter its use. Notwithstanding, it is difficult to comprehend the imposition of a less severe penalty on a drug trafficker solely because he has trafficked a less harmful drug. Usually, the motive of the trafficker is to yield some profit from the illicit activity, regardless of the intrinsic harm of the particular substance. In line with Maltese sentencing practice, it is in the author’s opinion that drug traffickers placed in similar circumstances should be penalised in the same manner, irrespective of whether they have trafficked a softer or harder drug. It is important to note that this argument does not extend to the offence of simple possession of a drug.

5.1.3 Sentencing guidelines

The essence of the guideline approach is to direct the adjudicator into reflecting upon various factors that stem from the offence in order to gauge the level of seriousness, and subsequently to locate the appropriate range of punishment in

\textsuperscript{369} Ashworth, Sentencing and Criminal Justice (n 3) 97.
\textsuperscript{370} Drug Classification: Making a Hash of it? (n 364) Ev 2, Q114.
accordance with those factors. Prior to the creation of a guideline approach, the process envisions the creation of an independent body, which is tasked with carrying out empirical research, consultation, and interviews, with the final aim of drafting a guidance system.

The features of a guideline approach differ from one jurisdiction to another, as will be examined hereunder. Some regimes adopt a strict system of guidance, providing for the application of a mandatory range in punishment, whereas others embrace a more flexible approach that allows the Courts a fair amount of discretion.

5.1.3.1 United States

During the 1970s and the 1980s, various US jurisdictions adopted a guideline style to punishment, typically by means of a two-dimensional grid as will be examined hereunder. This was an immediate response to the apparent festering of inconsistency in sentencing, ‘including racial disparities, unwarranted variation in sentencing and a lack of proportionality’. 371

The guidelines adopted by the various US jurisdictions differ in form and practice, as well as the extent of their apparent rigidity. Reference is to be made to the Minnesota guideline system, which has proved to be successful in the achievement of consistency. 372 Minnesota establishes a ‘Sentencing Guidelines Grid’, which on one hand categorises an offence into eleven different levels of seriousness, and on the other establishes a six-point seriousness scale pinpointing the level of the accused’s criminal past. The presumptive sentence is given when the Judge connects the category of the offence with the level of the criminal past, unless he choses to depart therefrom, upon giving reasons for his decision.

As stated previously, the recipe for guidance differs in terms of flexibility and degree of compliance as from one State to the next. In fact, some States, such as Virginia, have adopted a voluntary guideline system. In spite of the non-binding nature of the guidelines promulgated in the said States, the outcome of such technique has actually marked an increase in consistency.\textsuperscript{373}

In contrast to the Minnesota and Virginia experiences, the general reaction to the US Federal Sentencing Guidelines, enacted in 1987, has been negative.\textsuperscript{374} The rigidity of the system was highly criticised by the judiciary, wherein the Guidelines seemed to ‘(undermine) the very art of judging which they think is the core of their craft’, and also ‘erred in the direction of heightening disparity by suppressing individualized criteria crucial to any test of meaningful uniformity’.\textsuperscript{375} The stringency of the Federal guideline system gave way to a scenario where ‘an otherwise somewhat mechanical sentencing process became mad pseudo-mathematical science’.\textsuperscript{376} The rigidity of the scheme is attributable to the limited factors upon which judges may depart, since the adjudicator is only permitted to do so when ‘there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines’.\textsuperscript{377}

Although the mandatory guidelines ‘have generated considerable consistency, even to the point of uniformity (…), they have done so at a cost’.\textsuperscript{378} The Courts are restricted in their ability to take in account the various circumstances of the offender, with the result that the system has unwittingly transferred the power to federal prosecutors. In fact, in this respect, the guidelines have been regarded

\textsuperscript{376} ibid.
\textsuperscript{378} O’Malley (n 193).
as ‘a prosecutor’s paradise’.\textsuperscript{379} The evident inflexibility resulted in the resolute evasion of the strict parameters of the guidelines through the use of plea-bargaining.\textsuperscript{380} This shift in power has also been identified in the Minnesota sentencing experience, where, in spite of the initial consistently in sentencing patterns, one observes the return of inequitable sentences.\textsuperscript{381}

The future of the federal guidelines is uncertain following the Supreme Court judgement \textit{United States v Booker},\textsuperscript{382} which pronounced the guidelines unconstitutional since they permit the Judge to consider other aggravating and mitigating factors when exceeding the given sentencing range, without requiring that they be properly proved to the jury. Since the decision stipulated that the guidelines must be simply treated as advisory, post-\textit{Booker}, the Federal Courts are not required to abide by the fixed punishment stipulated within the guidelines.\textsuperscript{383}

\subsection*{5.1.3.2 England and Wales}

Before the advent of sentencing guidelines in England and Wales, guideline judgments were instrumental to structuring sentencing discretion. A guideline judgment reveals the various offshoots of a particular offence, the aggravating and mitigating factors, and the suggested penalty range or starting point. In 1982, \textit{R v Aramah}\textsuperscript{384} was the first guideline judgment to be delivered, which provides guidance on drug offences.

Subsequently, major reform to the English sentencing regime came about upon the enactment of the Crime and Disorder Act, whereby the Sentencing Advisory Panel (SAP) was established. The SAP was given the function to draft and consult on guidelines for certain offences, and to forward the said guidelines to

\textsuperscript{382} United States v Freddie J Booker (2005) 543 US 220.
\textsuperscript{384} Aramah (n 1).
the Court of Appeal. In turn, the Court of Appeal retained the prerogative to amend, accept, or reject such proposals. Eventually, the Court of Appeal would issue guideline judgments based on the Panels’ proposals.

Substantial development in the regime was brought about by virtue of the promulgation of the Criminal Justice Act, which created the SGC. The latter entity receives the draft guidelines issued by the SAP, and subsequently creates its own guidelines to be released for public consultation. The process leading up to the creation of the Guideline is noteworthy, since it identifies the great efforts of the SGC in achieving a comprehensive guidance document. The result of this process is the creation of a definitive guideline, issued by the SGC (now ‘Sentencing Council’).

In 2012, the Sentencing Council (SC) issued a Definitive Guideline on drug offences, particularly dealing with importation and exportation, supply, production, use of premises, and possession. The Guideline encapsulates principles established in previous case law, namely those found in R v Aramah. One must note that the general principles established in the statutes and case law are still applicable, retaining their status as precedents notwithstanding the promulgation of guidelines.

The Guideline dictates the various steps to be taken by the Courts when assessing punishment. The first step in the process is that of determining the offence category, which is established in accordance with ‘quantity’, where the highest is category 1 and the least is category 4. During this initial step, the Court must also establish the offender’s culpability, by determining whether he played a ‘leading’, ‘significant’, or ‘lesser’ role. Following this, the Court must identify the penalty ‘starting point’ that is established in the relevant offence category, in accordance with the level of culpability. ‘Starting points’ illustrate the position within a range, where the adjudicator must begin to calculate the penalty. Once this starting point is noted, the court should then consider the aggravating and mitigating factors, as well as make any reductions in view of a

---

385 Drug Offences Guideline (n 43).
386 Aramah (n 1).
guilty plea, thus being able to adjust the penalty within the range provided in the particular category.

One may argue that the guideline system adopted by the SC is similar to the US method of linking offence seriousness with the relevant penalty. On this note, the Court of Appeal insisted that the system is not a ‘simplistic tick-box exercise’, since ‘departures are possible’. Therefore, the Court of Appeal is emphasising that the Court may exercise its discretion if the situation calls for it.

The Court of Appeal has acknowledged that the Guideline has not been entirely ground breaking, as it tends to simply formalise previous sentencing practice. The most significant change pinpoints at reduced sentences for drug mules, since the Guideline would now dictate that the accused falls into the ‘lesser role’ category, hence attracting a much-reduced sentence. However, research illustrates that the starting point is only mitigated vis-à-vis those drug mules falling within the forth category, hence those who have trafficked a very small quantity of drugs. The starting point established for those playing a lessor role within a large-scale operation is in line with previous case law. Consequently, the following ever-present philosophical problem remains unsolved: in the case where a drug mule transports a pre-packed package, without being aware of the quantity of the drugs concealed, his fate may point at a lenient starting point if the quantity is small, or it may envisage a severe starting point if it is substantial. Yet, in both cases the level of culpability remains the same, notwithstanding the quantity of drugs transported. In the author’s opinion, this is a predicament that no guideline or statutory rule would be able to solve. The solution to this problem is simply a matter of judicial discretion.

---

387 Guilty Plea Guideline (n 205).
388 Drug Offences Guideline (n 43) 2.
389 Smith and Gowland (n 304) 391 (emphasis added).
392 Smith and Gowland (n 304) 396.
5.1.4 Sentencing information systems

It has been stated that ‘While promoting the image of judicial independence, (Sentencing Information Systems) strive for consistency.’ Thomas O’Malley defines a Sentencing Information System (SIS) as a ‘systematic collection of data on the sentences passed by the criminal courts’. This system provides judges and other individuals with information, statistics, and patterns relating to past sentences awarded for particular offences, hence placing the ‘offender into a larger context’. This is merely a guide to the judge, as the information provided is not binding by any means. Accordingly, herein lies the difference between SISs and sentencing guidelines, as otherwise ‘the normative effects’ of the two systems are the same.

It is pertinent to examine the New South Wales (NSW) system of sentencing information, which has been extensively documented over the years. Originally known as the Sentencing Information System, the Judicial Information Research System (JIRS) provides access to statistical data, sentencing information, recent law, and publications, to mention a few. The courts make use of the system to inquire into the general sentencing pattern for a particular offence, whereby the system would produce a graph revealing the range of penalties that have been meted out for that crime. The adjudicator may then proceed to include offence ‘variables’, such as the guilty plea or prior record considerations. Ultimately, the system will filter the results and produce a refined set of statistics, according to the chosen criteria.

The Court of Appeal recognised the purpose of the JIRS as being that which guides the adjudicator’s discretion, rather than attempting to usurp it, when opining that there is ‘an enormous difference between recognising and giving

393 Katja Franko Aas, Sentencing in the Age of Information: From Faust to Macintosh (Routledge 2005) 32.
394 O’Malley (n 193) 66.
397 Franko Aas (n 393) 32.
weight to the general pattern as a manifestation of the collective wisdom of sentencing judges on the one hand, and on the other hand, forcing sentencing into a strait-jacket of computerisation.\textsuperscript{399}

Although the usefulness of statistical information is certainly apparent, Potas identifies the ‘Achilles’ heel’ of sentencing statistics:

\begin{quote}
[\textit{E}ach case depends upon its own particular circumstances and neither a record of statistical outcomes of past decisions nor a schedule of prior decisions can reliably dictate to a sentencing court the appropriate sentence that should be imposed in a particular case. Once this limitation is appreciated the value of sentencing statistics assumes its proper place.\textsuperscript{400}
\end{quote}

In Malta, members of the judiciary and the public have complete access to a judgment database, which gathers all the decisions of the Courts of Malta from 1944 until the present.\textsuperscript{401} Research within this database is facilitated by means of a ‘keyword’ search engine, which displays a list of significant keywords. With respect to drug offences, one could enter the following keywords for instance, ‘drug’; ‘quantity’; ‘Chapter 101’. This will limit the search to the most relevant judgments in line with the entered keywords. However, although the members of the judiciary have electronic access to the judgments of the other Courts, it is by no means comparable to the abovementioned NSW SIS, where offences may be narrowed down considerably through the use of specific factors.

Interestingly, a significant feature of Maltese criminal procedure is the criminal inquiry, wherein the Inquiring Magistrate is given the task to collect and preserve all evidence of the crime and subsequently proceed to forward the compiled evidence to the AG by virtue of the \textit{procès-verbal}. In this regard, the Inquiring Magistrate does not retain the final report, and since the Inquiring Magistrates work individually, they do not share information amongst themselves. Regrettably, this yields a situation of misplaced judicial data. Professor Kevin Aquilina has recently opined that the creation of a judicial

\begin{footnotesize}
\begin{itemize}
\item[399] \textit{R v Oliver} (1980) 7 A Crim R 174.
\item[400] Potas (n 398).
\item[401] Ministry for Justice, Dialogue, and the Family
\end{itemize}
\end{footnotesize}
database, which is to provide ‘up to date information’, is indispensable in view of increased efficiency and intelligibility during the inquiry process.402

5.2 A solution for Malta

Undeniably, the essence of sentencing is not stagnant. The passage of time has observed its gradual development in response to the numerous existing socio-political factors. Accordingly, this is what gives the sentencing exercise its contentious character. Moreover, the broad offences and parameters of punishment, as well as the evident dearth in information on past and current sentencing practice, further reinforce our system’s enigmatic reputation.

It is for these reasons that extensive reform has long been on the legislature’s voluminous agenda, albeit that not much progress has been detected over the past years. In fact, the wave of reform witnessed in other jurisdictions towards a more structured manner of sentencing has not been replicated in Malta. Nevertheless, this lapse should not put a damper on morale, since this represents an opportunity for Malta to learn from foreign experience of sentencing reform. In spite of this, it is important to note that although comparisons with other jurisdictions are indispensable to the proper analysis of sentencing issues, reform must be tailored in accordance with the unique features of the Maltese regime.

The following sections shall attempt to unmask the various deficiencies of the Maltese system, and consequently make the relevant recommendations towards a more structured, predictable, and non-discriminatory modus operandi.

---

402 Kevin Aquilina, ‘Fighting Corruption in Malta and at European Union Level’ (Corruption in the EU Conference, Malta, May 2013).
5.2.1 The AG’s discretion to direct trial

First and foremost, there is the pressing need to address the controversial pre-trial power of the AG. As observed in Chapter Two, the AG’s ability to direct trial to the appropriate Court unwittingly imposes the jurisdictional parameters of potential punishment on the accused, when the said person has not yet been pronounced guilty by a Court of law. In this respect, it is suggested that this litigious power be adequately debunked in the two following ways.

Firstly, the author believes that there is no need to do away with the AG’s discretionary power. Its retention is actually of utmost significance as it attempts to streamline cases in accordance with the notion of severity at a prosecutorial level. However, the crux of the issue is not the discretionary decision per se, yet it is the manner in which it is carried out and brought into effect. The lack of transparency of the exercise is unfortunate and rather questionable in the light of the manner in which it affects public perception of the justice system.

Although the AG’s office has established its own method for structuring this unfettered pre-trial task, it stands to reason that no individual is infallible. All persons are susceptible to error and subjective interpretation, which when produced by the Courts, is public and reviewable in nature. Yet in this unique case, the AG makes his decision based on unspecified considerations, since they are neither made in public, nor are they eventually made accessible to the public through publication. To add fuel to the fire, the reviewability of the decision as it stands today, remains ambiguous. In contemporary society, which relies so forcefully on human rights law and principles, it is extremely difficult to fathom the subsistence of the arbitrary nature of the pre-trial decision.

In this respect therefore, it is submitted that the law should be amended in order to reflect a more transparent approach. It would be prudent for the law to qualify the discretion of the AG by stipulating a set of legally defined grounds that are to form the basis of the decision. In this manner, the potentiality for claims regarding the ‘arbitrary’ nature of the decision would be eliminated. Further, grievances regarding the lack of legal certainty, especially following the recent
ECtHR decision of *Camilleri v Malta*, would also be dispelled, as the suspect would reasonably be expected to know before which Court he is to be tried.

The criteria in question should be based on the prima facie notions of offence severity and offender culpability. Therefore, at this stage in the process, the elements of quantity, value, purity, and the role of the offender in the crime would be considered. In addition, it would also be wise if the law were to require that the AG is to stipulate in writing the reasons upon which he made his ultimate decision, further promoting the element of transparency.

Reform should also aim to tackle the far-reaching effects of the decision that commonly instigate claims of unequal treatment. In this respect, the subsistence of the two different mandatory minimums at the two instances should be abolished. An interesting solution was stipulated for during a parliamentary sitting of the Seventh Legislature, yet unfortunately no attempt was made to legislate upon it. The Hon. Joseph Brincat opined that although the different maximum penalties at both instances are to be kept intact in order to justly prosecute in accordance with the offence’s relative severity, it is pertinent that the law establishes a common minimum penalty, which is to apply to both the inferior and superior Courts. This would ensure that persons who have been aggrieved by the pre-trial decision of the AG would nonetheless be safeguarded by a single applicable minimum. In this regard, the minimum penalty to be meted out by the Criminal Court in the event of conviction is equivalent to that of the Court of Magistrates, that is, six months imprisonment, together with a fine ranging from €465.87 to €11,646.87. Therefore, the ‘constitutionality’ of the AG’s decision and its arguably ‘pre-judgmental’ nature would no longer be called into question since the superior Courts would not bound by a statutory minimum that is fundamentally different to that of the lower Courts.

5.2.2 *Dealing with minor offences of trafficking*

---

Recently, numerous proposals have been made pushing for the creation of a Drug Court in Malta. In fact, the movement towards the creation of a separate Court that is to deal exclusively with drug offences has been identified over the past year. However, as it stands today, changes have only been implemented at a peripheral, ‘cosmetic’ level. Therefore, the actual modus operandi of the illusory Maltese Drug Court is still unknown. In the author’s view, the establishment of a Drug Court is undoubtedly vital in order to strengthen the efficiency of the Maltese judicial system, which is presently inundated with drug cases, many of which are minor in nature dealing with charges of simple possession or petty trafficking. It is therefore put forward that the adequate forum for the prosecution of these minor trafficking offences, which are currently tried before the Court of Magistrates, is that of a specialised Drug Court. This would enable the Courts to properly deal with less serious trafficking cases, which more often than not involve persons who have committed the offence in order to finance their own addiction. In this way, the specialised Court would be well equipped to deal with the accused in the appropriate manner. Hence, whilst punishing the individual according to the traditional principle of deterrence, it would also provide the befitting reformatory treatment and supervision. However, in furtherance to the recommendations made in section 5.2.1 above, the prosecution of serious drug trafficking cases should remain within the ambit of the Criminal Court in order not to detract from the perceived gravity that attaches to crimes of this nature.

5.2.3 Voluntary guidance

Beyond the wide parameters of drug offences and their penalties, there is no statutory guidance indicating the appropriate punishment to be given in view of the circumstances of a particular case. Although jurisprudence does possess a certain degree of authoritative value and can indeed serve as guidance to the Courts, due to the very existence of judicial variability, it cannot be said to be sufficient so as to adequately guarantee consistency.

Consequently, in view of the giant abyss that symbolises judicial guidance in Malta, it is recommended that a guidance system be adopted. In this respect, unlike the rigid US approach or the English mandatory guideline system, the suggested method for Malta is entirely voluntary in nature. The reason for adopting a voluntary approach over a mandatory rigid one is very simple, since although the need for consistency in sentencing is essential, it should not come at the cost of justice. In fact, it is vital to be aware that amendments envisaged in attempt to reduce inconsistency often increase the chances of unjust punishment in individual circumstances. Tonry appropriately holds that in this respect, ‘the cure may be worse than the ailment’. 405

Following research conducted by Hunt and Connelly, it is observed that advisory systems provide the necessary flexibility to detract from a situation of rigidity and uniformity, which normally arise due to presumptive systems of guidance. 406 It has been stated that the advantage of having a voluntary system over a mandatory one lies in the fact that ‘where a presumptive guideline system requires a particular finding, a voluntary approach simply encourages it’. 407 In addition, although the trend seems to point at the preference of mandatory guidance, research has shown that jurisdictions providing for a voluntary guideline system, such as Virginia and Delaware in the US, envisage high compliance rates, rivalling those of the strict mandatory ones.

It is submitted that a solution for Malta lies in the middle of the spectrum, through the promulgation of a guidelines document, which would be accessible to both the judiciary and the public. It would strive to achieve three separate yet complementary aims. Firstly, it would be compiled to aid the judiciary into meting out the appropriate sentence by guiding to appraise the various existing factors of the drug offence. Also, guidance is essential in view of public perception and confidence, which can only be achieved through proper

405 Tonry, Sentencing Matters (n 255).
education as to the notion of sentencing and its dynamic nature. Lastly, this voluntary guideline approach would promote a streamlined method of sentencing, since it will determine the current sentencing trends in accordance with the relevant factors.

The voluntary Guideline would seek to ascertain the appropriate punishment after accounting for the diverse elements of the offence. This is to be established in accordance with the following steps:

i. The first stage would be to pinpoint the severity of the offence. The Guideline would aid the Court into establishing seriousness with regard to the correlative factors of quantity, purity, and value. It would provide the indicative amounts of the said elements, which would be based upon current data, trends, and expert findings;

ii. Secondly, the various levels of offender culpability would be distinguished. The English drug Guideline shall serve as an adequate example for the classification of culpability, which is based on the role played in the trafficking offence;

iii. At this juncture, the Guideline shall indicate the recommended range of punishment corresponding with the two above elements. However, unlike the presumptive English Guideline, the indicated punishment is merely a suggestion;

iv. The following step would guide the Courts into applying the statutory aggravating or mitigating factors to the recommended punishment, and hence reducing or increasing the penalty according to the statutory weighting of the particular factor; and

v. Lastly, the Guideline shall provide the various personal circumstances of the offender, such as vulnerability and age, which may have a bearing on mitigating punishment. In addition, the Guideline would also non-exhaustively list the non-personal factors, for instance the
prior conduct and the extent of his co-operation with the authorities. These considerations shall be accounted for in terms of the adjudicator's own moral judgment.

It is important to note that when ratifying a voluntary guideline approach, in contrast to a mandatory one, it is not possible for the convicted person to appeal from a decision on the basis of the Guideline due to its non-binding and non-statutory nature.

### 5.2.4 Sentencing advisory body

It is important to be aware that there is a step in the process that precedes the creation of the Guideline. In this respect, a guidance system would entail the creation of an entity that would aim at improving consistency and predictability, increasing public knowledge and awareness, and adopting an informed approach towards policy development.

To this end, it is pertinent to mention the system adopted in Victoria, Australia, which is certainly worth taking note of. The Victoria Sentencing Advisory Council (SAC) was created in 2004 by virtue of theSentencing Act in order to bridge the gap between society, the Courts, and the legislator. The SAC is not afforded the power to create guidelines, but it is given the function to advise the Court of Appeal when the latter is delivering a guideline judgment. However, over the years it has become evident that the main efforts of the SAC are focused upon statistical research, with the aim of informing the Courts on current sentencing matters and practices. In this regard, the SAC produces statistical publications (the ‘Sentencing Snapshots’ series) and extensive reports on various issues. For instance, the SAC has published a report on sentencing for the offence of cannabis trafficking. This report illustrates the

---

408 Sentencing Act 1999 (Vic), s 108B.
offence and the penalties involved, statistics regarding age and gender, and the sentencing outcomes, amongst others. The SAC is given the statutory function to gauge public opinion, with the aim of producing publications on various areas affecting public attitudes towards sentencing.\textsuperscript{411} In succinct, this Advisory body has worked extremely hard to inform and enlighten both the Courts and the public on sentencing matters, leading to increased public knowledge, as well as well-informed Court judgments.

The creation of a similar statutory body in Malta would definitely lead to increased understanding of the sentencing process. Unlike the Victoria SAC, the Maltese Sentencing Advisory Body (SAB) would be given the function to provide guidance to the Courts, by creating the aforementioned loosely structured voluntary guidelines. In addition, it would be given the task of gathering and collating the information and the data necessary for the proper monitoring of sentencing practice, which is to aid the process of policy planning. Lastly, the SAB would have the duty to engage the public in the process, through widespread consultation and education regarding sentencing practice.

In Malta, there is a pressing need for increased efficiency and development in the manner judgments are reported, collated, and computerised. The necessity for empirical research and statistical data is also particularly essential in view of the quest to develop a more centralised and coherent approach to sentencing. It is only after reliable data on the current sentencing regime is collected that guidance may be satisfactorily drawn up.

The information gathered through the tasks of the Maltese SAB would serve as a foundation for the drafting of voluntary guidelines. In the event that a guideline system does not ensue, it is strongly suggested that a SAB be nonetheless established, since it would undoubtedly play a leading role towards proper public education on sentencing matters. Apart from promoting community awareness, the body’s work and research would also encourage consistency, as the Court meting out punishment would be informed of the current practice of

\textsuperscript{411} Sentencing Act 1999, s 108C(1)(d).
the other Courts in similar circumstances. Therefore, supposing the process does not lead to the creation of a written guideline approach, it is beyond question that the SAB’s research would nevertheless be instrumental to the Court in structuring its discretion.

5.2.5 Strengthening of ancillary measures

The ancillary measures are also crucial to the suppression of drug supply and demand, as seen in Chapter One. The Runciman Report fittingly states that:

The life-blood of drug trafficking is cash flow, and the aim of the confiscation legislation (...) is, by extracting tainted property from offenders, to prevent their reinvestment in further drug trafficking or other forms of criminal activity.\footnote{Runciman (n 26) para 44.}

It is strongly put forward that deterrence can be further reinforced through the strengthening of the confiscation measures. Although the Maltese rules regarding forfeiture of criminal assets are adequate and in conformity with European and international regulation, this is all redundant unless the proper practical and procedural framework is put into place. In this respect, the law must seek to strengthen the practical mechanisms of tracing criminal assets and those rules regulating the proper management of property once recovered. The evident dearth in data regarding the Maltese system for confiscation is also worrying, as it is difficult to gauge the level of efficiency of the current practices for asset confiscation. In addition, the creation of the legal framework providing for non-conviction based forfeiture of criminal assets may yield a higher degree of crime prevention, as it has been described ‘as being the most effective method of depriving criminals of their wealth’,\footnote{Gowitzke (n 113).} since the criminal character of proceeds is proved in a simpler manner before the Civil Courts, by virtue of the balance of probabilities. In this respect, it is important not to underestimate the element of deterrence that is attached to these ancillary measures. In this respect, UK Judge Michael Hopmeir recently stated that his experience on the

\footnote{Runciman (n 26) para 44.}
\footnote{Gowitzke (n 113).}
bench has revealed that the potential loss of assets is more likely to perturb defendants over the foreseeable lengthy sentence.\textsuperscript{414}

5.3 Concluding observations

This Chapter has exposed the numerous approaches that aspire towards consistency in sentencing practice. By virtue of such examination, recommendations have been advanced in the interest of the same objective. As a consequence, one may reflect upon three principal observations that stem from this broad analysis. Primarily, the pursuit of consistency, albeit crucial in furtherance of efficiency and predictability, should not trump the other vital objectives of the sentencing exercise, namely justice and proportionality. Secondly, each sentencing system is unique. Thus, attempts at reform should be specifically tailored according to the individual features of the distinctive Maltese regime. Lastly, it is vital to digest the fact that reform does not occur overnight. Rather, it is a process, which envisages several preparatory steps, encapsulating broad activities relating to research, inquiry, and consultation.

\textsuperscript{414} ERA and OLAF Conference, ‘Making the Fight Against Corruption in the EU More Effective’ (Malta, 17 May 2013).
CONCLUSION

In retrospect, the definition of ‘sentencing’ stipulated for in Chapter One may seem rather superficial, as it merely skims the surface of this intricate exercise. Undeniably, the unadorned definition fails to capture the diverse factors that gnaw at this dynamic process. In the words of Roberts and Cole, sentencing practice is criticised by many, but understood by a very few.\footnote{Julian Roberts and David Code (eds), Making Sense of Sentencing (University of Toronto Press 1999) 3.} In fact, the attempt to make sense of this complex exercise may prove to be cumbersome given the fluctuating and conflicting features of sentencing practice. In this respect, the contemporary necessity of having to strike a balance between the distinct notions of proportionality, deterrence, and restoration, illustrate the broad scope of the sentencing exercise. In fact, through the previous examination of the multifaceted nature of the drug trafficking offence, its punishment is an aspect of sentencing that particularly exposes this complex endeavour. Furthermore, the intricacy of the system is further enhanced since Maltese law assigns wide parameters of punishment to an already broadly defined aspect of criminal law.

Evidently, the outcome of this phenomenon is the subsistence of broad judicial discretion. In the face of wide discretionary authority, the Maltese adjudicator is to appraise a multitude of considerations; some that may be mandatory or discretionary in nature, others that are legal or personal. Although modern attempts at reform progress from an indeterminate approach to a more structured and determinate one, the Maltese system has retained a largely individualised blue-print. This should not be exclusively perceived in a negative light. On the contrary, the beauty of our system lies in its ability to individually appreciate the countless features pertaining to the offence and the offender. This appreciation also extends to the serious offence of drug trafficking, even though the Courts tend to devalue its scope for mitigation since here punishment is anchored on the aim of deterrence.
The complexity of sentencing is further unmasked when evaluating certain practices affecting punishment that have not been discussed in this study, as their examination falls beyond the pertinent analysis of the drug trafficking sentencing regime. In this regard, decisions pertaining to punishment are additionally witnessed in alternative settings to that of the courtroom, for instance, the outcome of the sentence-bargaining exercise between the prosecution and the defence. Similar to the AG’s pre-trial decision-making power, this procedure remains fundamentally undefined and unsupervised.

It follows that calls for reform take place within the context of a sentencing system that favours wide judicial discretionary power over a rigid statutory guideline regime. Whilst the latter is dismissed with an element of disapproval, it is noteworthy that the former does not always exhibit the desired outcome in the light of justice. Arguably, judicial guidance is necessary in the field of drug trafficking more than any other criminal offence, as the crime is rarely ever clear-cut. Voluntary guidance sufficiently aids in the proper understanding of the numerous existing factors, which is important not only for consistency in practice, but also in the attainment of justice in punishment. In addition, the adequate punishment of a trafficking offence necessitates the meting out of lengthy and harsh penalties. Nevertheless, deterrence can be further achieved through novel concepts aspiring to undermine demand and supply. Hence, the urgent need to strengthen the workability of the confiscation procedure is once more reiterated.

The unreliable information dished out by the media does not do the perception of the criminal justice system any favours. In this regard, public education is key. The collation and publication of information and statistics is of utmost importance in the attainment of public awareness and confidence. The dearth in such material is disappointing, as it severely stunts the vital development of society.

Ultimately, in a modern society that reflects a prominent and forceful human rights culture, it is often difficult to find justification for wide discretionary power. In this respect therefore, the subsistence of discretion in sentencing practice,
albeit necessary in the light of individualisation of punishment, may often infringe basic principles of natural justice and human rights. The recent two decades, which reveal an influx of constitutional cases attacking the broad arbitrary power of the AG, pinpoint at a discriminatory state of affairs. In fact, the ECtHR judgment of Camilleri v Malta substantiates this precise fact, as it recently ruled against the Maltese government for retaining a provision of the law that underpins and reinforces the very essence of the Maltese drug-sentencing regime. Throughout the recent years, it is beyond question that our sentencing system has harvested vast expectation for reform; nonetheless, it has been deficient in its fruition. This further emphasises the necessity to stop resisting attempts at reform, as change is undeniably of utmost importance in the proper recognition of the ever-developing socio-economic trends, which make a particularly prominent appearance in the mercurial and dynamic context of drug trafficking.
BIBLIOGRAPHY

Books


Ashworth A, Sentencing and Penal Policy (OUP 1983)


-- Sentencing and Criminal Justice (5th edn, CUP 2010)

-- ‘Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing’ in Roberts J V (ed), Mitigation and Aggravation at Sentencing (CUP 2011)


Easton S, Sentencing and Punishment: the Quest for Justice (3rd Edn, OUP 2012)


Fletcher G P, Rethinking Criminal Law (Boston, Little, Brown 1978)


Gelsthorpe L and Padfield N, *Exercising Discretion, Decision-making in the Criminal Justice System and Beyond* (Cullompton, Willan 2003)


--- *The Uses of Discretion* (Oxford, Claredon 1992)

Hogarth J, *Sentencing as a Human Process* (University of Toronto Press 1971)


Lappi-Seppala T, ‘Sentencing and Punishment in Finland’ in Tonry M and Frase R (eds), *Sentencing and Sanctions in Western Countries* (OUP 2001)


Thomas D, *Principles of Sentencing* (Heinemann 1979)


**Conferences**

ERA and OLAF, ‘Making the Fight Against Corruption in the EU More Effective’ (Malta, 17 May 2013)

**Conference Papers**

Aquilina K, ‘Fighting Corruption in Malta and at European Union Level’ (Corruption in the EU Conference, Malta, May 2013)

**Encyclopaedias**

Archbold: Criminal Pleading, Evidence, and Practice 2013 (61st edn, Sweet and Maxwell 2012)

Blackstone’s Criminal Practice 2013 (OUP 2012)

**Guidelines**


-- *Overarching Principles: Seriousness* [2009]


**Journals**


Ball C, ‘A significant Move Towards Restorative Justice, or a Recipe for Unintended Consequences?’ [2000] Crim LR 211


Loveless J, ‘When is a courier not a ‘mule’?’ [2012] J Crim L 444


Ormerod D, ‘Drug Sentencing Guideline’ [2012] Crim LR 4, 244


Newspapers


**Parliamentary Debates**

Parliamentary Debates of the Seventh Legislature 19 January 1994

Parliamentary Debates of the Tenth Legislature 5 July 2004

Parliamentary Debates of the Tenth Legislature 12 October 2004

Parliamentary Debates of the Eleventh Legislature 2 December 2011

Parliamentary Debates of the Eleventh Legislature 20 March 2012

Parliamentary Debates of the Eleventh Legislature 12 June 2012

Parliamentary Debates of the Eleventh Legislature 19 June 2012

Parliamentary Debates of the Eleventh Legislature 20 June 2012

Parliamentary Debates of the Eleventh Legislature 25 June 2012

**Reports**


-- ‘Proceeds of organised crime: ensuring that ‘crime does not pay’’ (Communication) COM (2008) 766 final


Council of Europe, Recommendation of the Committee of Ministers to Member States Concerning Consistency in Sentencing (1993) R (92)


EMCDAA, National Report to the EMCDAA: Malta [2007]

Home Office, Crime, Justice and Protecting the Public (1990)

-- Report of the Royal Commission on Criminal Justice (Cmd 2263, 1993)

International Conference on Drug Abuse and Illicit Trafficking, Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control (Vienna, 1987)


-- ‘Mitigation: The Role of Personal Factors in Sentencing’ (Prison Reform Trust 2007)

Parliamentary Under-Secretary of State for the Home Department, Hansard [2005]
Science and Technology Committee, *Drug Classification: Making a Hash of it?* (HC 2005-06, 1031)

Social Affairs Committee, ‘Report on the proposed amendments to the Dangerous Drugs Ordinance’ [2006]


Transform, *Response to the Drugs Bill 2005* [2005]

**Theses**


**Websites**


COPYRIGHT RELEASE FORM

NAME AND SURNAME: ____________________________________________

THESIS/DISSERTATION/RESEARCH ____________________________________

PROJECT ________________________________________________________

TITLE: __________________________________________________________

_______________________________________________________________

YEAR OF PRESENTATION: _________________________________________

DECLARATION:
I, the undersigned, hereby authorise the Faculty Officer of the Faculty of Laws and his or her staff, the Faculty of Laws Librarian and his or her staff and academic members of staff of the Faculty of Laws to make photocopies or electronic copies of my thesis/dissertation/research project or parts thereof for educational and study purposes and to make my thesis available for inspection and lending at the Faculty of Laws Library. I agree that in such cases I would not be entitled to receive any form of remuneration and that the final version of the hardbound and electronic copies of the theses submitted for examination become the property of the University.

-------------------------------------
Student’s Signature

-------------------------------------
Date