Punishment

PART I

Theories of Punishment under the Maltese legal system Punishment can be described as the loss of a right, most notably the loss of libertythough of course, there are other forms of punishment which do not entail the loss of liberty.

Why is there criminal law?

In principle, criminal law is there to reduce crime and to punish the commission of offences.

Thus, the justification for inflicting punishment is two-fold;

1) the reduction of crime

2) the promotion of respect for criminal law

The end results that punishment seeks to achieve are;

1) deterrence

2) inflicting a punishment according to what is fair and just

Traditionally, there are two trends of thought:

(a) the Retributive theory

(b) the Utilitarian theory

(a) The Retributive Theory:

This theory comes from Roman law and even then, it had earlier roots. It is popularly known as the 'eye for an eye, tooth for a tooth' theory. Such a system believes that first of all, punishment is justified to vindicate society for the harm caused to it. Secondly, it is essential to punish a wrong-doer so as to be fair with the law-abiding. Thirdly, it believes in proportionality between punishment and the gravity of the offence perpetrated.

b) The Utilitarian Theory:

This theory is based on the overriding objective that crime has to be prevented at all costs for the benefit of the common good. This is achieved by:

(i) Policing

(ii) Deterrence

(iii) Reform

(i) Policing- It is generally agreed that prevention is best achieved by effective policing (having an effective police force).

(ii) Deterrence- This simply means discouraging people from committing crime.

aterIt is sometimes further sub-divided in three categories:

- Individual: Deterring the individual from committing that crime again.

- General: Deter similar like-minded people from committing such act.

- Long-Term: Educating people not to commit crimes.

(iii) Reform- From this, a new principle evolved- reformative justice. This is in fact the form of justice that we apply in our criminal law. The starting point is that society as a whole will benefit more from the rehabilitation of the offender than from the punishment of the offender. Thus, if the system is going to punish an offender, that punishment should be used to reform the prisoner. That's why our prison is referred to as a 'correctional facility'. As a consequence, our law (and our Courts) has moved away from the traditional forms of punishment such as interdiction, fine (multa) or imprisonment. Instead, it has introduced alternative non-custodial forms of punishment such as the suspended system and probation orders. The embodiment of this theory can be seen in 'Il-Pulizija vs. Francis Bonnici'1 and 'Il-Pulizija vs. George Zammit'2 where the Courts (in both cases) essentially held that it is not right to punish an individual without assisting or reforming the offender for his re-integration in society and in certain circumstances, alternative modes of punishment are necessary to discipline an offender and to give such an offender a second chance.

PART II

Offences can be either crimes or contraventions. In the majority of cases, the Criminal Code itself specifies whether an offence is a crime or a contravention. However, if the Code itself does not specify, then a good indication would be to look at the punishment.

The same applies for offences found in other pieces of legislation other than the Criminal Code (ex: the VAT Act and the Press Act).

Article 7 of the Criminal Code specifies which forms of punishment can be given for crimes and contraventions:

The punishments that may be awarded for crimes are:

(a) imprisonment;

(b) solitary confinement;

(c) interdiction;

(d) fine (multa).

The punishments that may be awarded for contraventions are -

(a) detention;

(b) fine (ammenda);

(c) reprimand or admonition.

We shall now look at each of the punishments under our Code:

Imprisonment: Article 8

The duration of the punishment of imprisonment is set by law for each particular offence. Very often, the law grants a bracket within which the punishment for an offence must fit. It is then in the hands of the Court to determine the specific punishment taking into account of the particular circumstances of the case.

Solitary Confinement: Article 9

This punishment has the effect of keeping the person sentenced to imprisonment continuously shut up in an appointed place within the prison, without permitting any other person (except those employed at the prison or who have a special authorization) to have access to him. No term of solitary confinement may exceed ten continous day, and from one term of solitary confinement to another, there must be at least an interval of two months (subject to certain exceptions). Solitary confinement may be awarded to an offender strictly in those cases established by law. Furthermore, before awarding this punishment, the Court shall make sure that the offender is medically fit to undergo such punishment.

Detention: Article 12

This is different from imprisonment- here the Court orders that a person be detained in prison for a period not exceeding two months. The difference is that for all means and purposes, such person shall not be deemed to have been imprisonment (i.e. it will not be listed on his criminal record etc).

Interdiction: Article 10

When a person is interdicted, he is disqualified from doing certain acts, such as entering into public contracts or holding certain public offices.

Interdiction can be either general or special. General interdiction disqualifies a person from any public office or employment whereas special interdiction disqualifies the person from holding a particular public office or employment, or from the exercise of a particular profession art, trade, or right.

Interdiction can be either permanent or temporary- in the latter case, the period cannot be longer than 5 years.

An interdiction order may at any time by discontinued by an order of the same Court upon an application being made by the person sentenced upon good grounds being shown.

If an interdicted person infringes the obligations of the order, he is liable to a fine (multa) or imprisonment not exceeding three months.

Fine (multa) and fine (ammenda): Articles 11 & 13

The distinction is simply monetary.

A fine (multa) has a minimum of €23.29 and a maximum of €1,164.69.

A fine (ammenda) has a minimum of €6.99 and a maximum of €58.234.

If a person fails to pay a fine (multa), then the punishment shall be converted into a term of imprisonment calculated as one day for every €11.65. However, such term of imprisonment shall in no case exceed six months in the case of a fine (multa) and one month in the case of a fine (ammenda).

If a person fails to pay a fine (ammenda), then the punishment shall be converted into a term of detention calculated as one day for every €11.65.

Note that the law may specify higher fines for certain offences. But when the law says that an offence can be punished by a fine (multa) without expressly stating a higher amount, then the Court has to abide with this maximum.

Reprimand (ċanfira) and admonition (twiddiba): Article 15

The reprimand or admonition shall be made in open court by the judge or magistrate who tried the offence.

The Degrees of Punishment:

The ascent or descent of punishment is dealt with in Article 31 of the Criminal Code. There are essentially fourteen degrees of punishment. When increasing or decreasing a degree, this is to be done from the maximum punishment. Thus, for example, the punishment for rape is of imprisonment for a term between three years and nine years. If there is an aggravation and the punishment is to be increased by one degree then this is to be added to the maximum (i.e. the degree of 5-9 years imprisonment)- thus the bracket of punishment would become 6-12 years imprisonment. The same would apply with regards to mitigations

PART III

Recidivism:

Should a recidivist be given a harsher punishment?

There are two schools of thought:

- Carminiani, Pessina and others believe that a recidivist, should not be given a harsher punishment because the fact that he has served his sentence means that the effect of that sentence has been wiped out. Therefore, an accused person should only be given punishment commensurate with the crime committed.

- Carrara, Impallomeni and others argue that recidivism is an aggravated circumstance because it shows that the offender has displayed a more evil disposition and it would seem that that the first punishment did not deter him from committing a second offence.

What is the interplay between Articles 49 and 50?

Article 49 makes it clear that any person who commits an offence after having been already sentenced for a previous offence shall be considered to be a recidivist. However the question is: 'is any form of recidivism, irrespective of the time lapse fit to have an increase in punishment?'

Whereas Article 49 says unequivocally that a person will always remain a recidivist even if the second offence was committed years after the first, Article 50 provides certain criteria where recidivism may lead to an aggravation of punishment. It provides certain time-limits within which there can be an aggravation, and even in these circumstances, the increase in punishment (by one degree) shall not be automatic but it shall be up to the Court to decide on the merits of the case. This is a very good rule as it allows a certain degree of flexibility on the adjudicator to make a value judgement of the particular scenario.

The time limit is of 10 years for all those sentences of imprisonment exceeding 5 years, and 5 years for all other sentences of imprisonment. Regarding contraventions, the time limit is of 3 months.

These time-limits start running as soon as the person serves his sentence. If part of the time of the sentence has been forgiven (ex: the prisoner has been given some form of amnesty), then the time-limit will start running from the day that the prisoner is set free.

An exception to the general rule of recidivism found in Article 49 is found in Article 52.

This provides that when a person commits an involuntary offence after having committed a voluntary offence (or vice versa), he shall not be considered to be a recidivist. Also, a committing a contravention after a crime (or vice versa) shall not be a cause for recidivism. This ultimately leads to the conclusion that both offences have to be of the same nature (but not necessarily the same offence!!).

Article 53

The Suspended Sentence:

Articles 28A – 28I of the Criminal Code deal with suspended sentences.

A suspended sentence is a sentence a conviction. The accused is thus found guilty and what is being suspended is not the sentence but the execution of the sentence, i.e. the accused does not physically go to jail, but on paper, the accused shall be deemed to have been convicted and imprisoned.

Thus, all the rules of conviction would apply and the sentence will go down on the person's criminal record, which means that for instance, he may not apply for any Government employment because even though physically he has never been to prison, officially he has been convicted and imprisoned.

Article 28A provides that a sentence of more than 2 years imprisonment cannot be suspended.

Notionally, in order to arrive at a suspended sentence, there are three stage first a decision as to whether the accused is to be convicted or not, secondly a decision as to what punishment is to be awarded and thirdly (if such punishment does not exceed 2 years), a decision on whether the accused merits to be afforded an alternative mode of punishment.

How are these 2 years calculated?

This term should not be interpreted as the maximum to which an offence is liable, but rather the punishment that the Court has awarded in that particular case. It is important that the three-stage approach mentioned above is followed, and the magistrate cannot work in reverse.

What is actually being suspended in a suspended sentence?

The execution of the imprisonment is suspended. For all other means and purposes, it's as if the convicted person is really in jail. That's what the criminal record will say. The Court gives an 'operational period' within which the person must adhere strictly with the conditions imposed by law. The operational period has a minimum of one year and a maximum of four years. Thus, an example of a suspended sentence would be a sentence of imprisonment of 1year, eight months suspended for three years.

In an operational period where the suspended sentence is in excess of 6 months, the Court can also make a supervision, i.e. appoint a supervisor and the person would have to adhere to the orders of the supervisors- otherwise, the suspension would be lifted. Since in a suspended sentence, the punishment is already known, if the offender breaches any condition imposed upon him by the Court, then the suspension will cease to have effect and the original punishment becomes officially executable and the person goes to prison. This is different from a probation order where one does not know beforehand what the punishment is going to be.

What are the situations when a suspended sentence will not / cannot be given?

1) When the Court is of the opinion that the accused should go to prison. The suspension order is discretionary- it is not a right.

2) A suspended sentence cannot be given for imprisonment awarded for the failure to pay a fine

3) When the person is already serving a sentence of imprisonment.

4) When the person sentenced is a recidivist in terms of Article 50

5) When the offence has been committed during a period of probation or conditional discharge.

What happens if you commit an offence during the operational period?

First, the Court will remove the suspension in respect of the first offence. Secondly, the person will also be punished for the second offence.

If however, the second offence is of an involuntary nature whilst the first offence was of a serious nature, then the removal of suspensions vis-à-vis the first offence is not absolute. Instead, the Court may either leave things as they are or extend the operational period for a period not exceeding 4 years from the date of the variation (i.e. the date of the second offence).

If a person has committed an offence during the operational period, is he a recidivist? And does the aggravation of recidivism apply?

Under Article 49, the offender is a recidivist because he has already been convicted. Regarding the aggravation, one has to look at the time-frames set out in Article 50. Furthermore, when speaking of recidivism in respect of a suspended sentence, it must also be shown that at some point, the judgement has been rendered executable. Thus, there would be no aggravation in the punishment given for the second offence when the first sentence was not executed.

How does a Court deal with a breach of a condition of the operational period?

The Court will summon the person, hear evidence and then decide. The lifting of the suspension is not automatic. Under Article 28H, in addition to the suspended sentence and supervisor, the Court can also make an order for the payment of compensation (ex:

Conditional and Unconditional Discharge

According to Article 22 of the Probation Act, when a court has convicted a person of an offence but is of the opinion, regard being had to the nature of the offence and the character of the offender, that it is not fit that s/he be sent to prison, the court may discharge the offender absolutely or discharge the offender subject to a condition that s/he does not commit a further offence during the period specified in the order. Such period (i.e. the operative period) may not be of more than three years, starting from the date of the order. If another offence is committed in this operative period, then the offender would be punished for both the original offence as well as the new one. As in the case of probation, but unlike the suspended sentence, one would therefore not know beforehand what the punishment for the original offence would be. Before making the discharge, the Court should explain to the accused that he will be so liable for the original offence if he relapses during the operative period.

If the discharge was given in respect of a crime, then in order for the discharge to be breached, another crime must be committed, and committing a contravention during the operative period shall not be considered to constitute a breach of this nature. The same goes in the case of a discharge for a contravention. This point was clearly explained in ‘Il-Pulizija vs. Carmelo Barbara’.

An absolute discharge means that the despite the conviction, the Court deems it fit to let the offender go without imposing any fine, or restrictions on future conduct. For this reason, an absolute discharge is extremely lenient and is an option which is very rarely used by the Courts. The Court would normally resort to an unconditional discharge in the case of crimes where it does not wish to give a more substantial punishment - given that in crimes, the Court cannot give a reprimand or admonition. In a 1971 British judgement, 'R v. O'Toole', the court gave an unconditional discharge to an ambulance driver who collided with another vehicle whilst answering a 999 call. In this case, the circumstances of the commission of the offence showed little (if any) blame on the part of the convicted, and therefore the court saw it fit to grant such a sentence.

The conditional discharge is much more frequently used. In a conditional discharge, the only condition imposed on an offender is that he does not commit another offence during the period of the conditional discharge. No other condition can be imposed, because if other conditions are imposed, then one would be moving closer towards the realms of a probation order.

Probation Orders

Probation is the release of a convicted offender back into society under the supervision of a Court-appointed probation officer. For all means and purposes, a probation is not considered as a conviction and this has a number of important repercussions for the person involved, including most importantly the fact that the offender's criminal record remains clean, thus not hindering drastically one's employability. When a probation order is made, the court will place the offender under the supervision of a probation officer for a period specified by the court in the order which may not be less than one year but not more than three years.

However, the Court is not free to decide when to make a probation order at its discretion, but is limited by Article 7(2) of the Probation Act which says that in order for a probation order to be made, the offender must have been found guilty of an offence which is not punishable only by a fine and which is punishable with imprisonment not exceeding seven years.

The aim of probation is to impose a certain degree of control over the offender by placing him/her under the supervision of a probation officer. Hopefully, a bond of mutual respect develops between the two, and in this regards, the probation officer has a difficult task of trying to befriend and help the offender as much reasonably possible, whilst at the same time, abiding by the law and not get too personally involved as that could compromise the officer's duties and obligations. The offender is obliged to duly report to the probation officer and to receive visits at home during the operative period.

The probation service is responsible for informing and educating the offender regarding the orders of the court and expectations regarding the offenders' compliance with the rules and regulations of probation. Probation officers are required to report any breach in the probation conditions, including for instance if they have reason to believe that the offender is not respecting a restraining order, not attending a drug/alcohol rehabilitation program, or if s/he is/has been involved in some form of criminal activity.

Before making a probation order, the Court is to explain to the offender the effect of the order, including the consequences of failing to comply with the requirements that are imposed in the order. Moreover, the

Court should explain to the offender that it has the power to review the order either on the application of the offender himself or of the probation officer. Depending on the circumstances, the court may also include requirements in the probation order that the offender is to undergo treatment to cure a drug or alcohol dependency, or treatment for a mental condition, if the offender declares that s/he is willing to comply with such requirements. Before making the order, the Court shall, unless the offender is less than 14 years of age, ask the offender whether s/he is willing to comply with the requirements thereof, and if not, then the court will not grant a probation order and will instead give an alternative punishment.

A probation order may be amended or even cancelled. If at any time during the probation period, it appears to the court that the probationer has failed to comply with any of the requirements of the order, the court may summon the probationer to appear before it in court. If the offender is found guilty of having committed an illegal act during the probation order, the offender will be judged for the first one as well as for the new offence. However, the order is not only breached by the committing of another offence but may also be breached by failure to comply with the conditions of the order, even if these are not per se illegal.

In 'Il-Pulizija vs. Kevin Schembri u Karsten Fenech', the Court stressed the fact that a probation order should be taken seriously, irrespective of the age of the probationer, and when one breaches the conditions of the probation order, then this should be considered as serious enough to lead to the cancellation of the order and sentencing of the probationer according to law.